No. 10-____

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

HOLLIS DESHAUN KING,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY

JOSHUA D. FARLEY*
BRYAN D. MORROW
ASSISTANT ATTORNEYS GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342
JOSHUA.FARLEY@AG.KY.GOV

COUNSEL FOR PETITIONER
COMMONWEALTH OF KENTUCKY

** COUNSEL OF RECORD*

Blank Page

QUESTIONS PRESENTED

Police officers entered an apartment building in hot pursuit of a person who sold crack cocaine to an undercover informant. They heard a door slam, but were not certain which of two apartments the trafficker fled into. A strong odor of marijuana emanated from one of the doors, which prompted the officers to believe the trafficker had fled into that apartment. The officers knocked on the door. They then heard noises which indicated that physical evidence was being destroyed. The officers entered the apartment and found large quantities of drugs. The Kentucky Supreme Court held that this evidence should have been suppressed, ruling that (1) the exigent circumstances exception to the warrant requirement did not apply because the officers created the exigency by knocking on the door, and (2) the hot pursuit exception to the warrant requirement did not apply because the suspect was not aware he was being pursued. The two questions presented are:

1. When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?

2. Does the hot pursuit exception to the warrant requirement apply only if the government can prove that the suspect was aware he was being pursued?

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

State Cases

TABLE OF AUTHORITIES
(Continued)

Page

Constitutional Provisions:

TABLE OF AUTHORITIES
(Continued)

Page

Other Sources:

Appendix

PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of *certiorari* to review the judgment of the Kentucky Supreme Court in this case.

OPINIONS BELOW

The Supreme Court of Kentucky's opinion is reported as *King v. Commonwealth*, 302 S.W.3d 649 (Ky. 2010). Petitioner's Appendix ("App.") 34a-50a. The Court of Appeals' decision is unreported, however it can be found at *King v. Commonwealth*, 2008 WL 697629 (Ky.App. 2008); App. 12a-33a. The Fayette Circuit Court Finding of Fact and Conclusions of Law from the suppression hearing can be found in Petitioner's Appendix. App. 1a-11a.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky entered the judgment from which relief is sought on January 21, 2010. App. 34a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution

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.

STATEMENT OF THE CASE

A. Facts

On October 15, 2005, the Lexington Police conducted an undercover "buy-bust" operation, in which undercover informants purchased narcotics from felony drug traffickers. During this operation one such felon, after selling the undercover informant crack cocaine, began moving at a fast pace back to his apartment.

An undercover officer radioed to waiting patrol cars that the felon was fleeing from the scene at a fast pace and that they should quickly move in and apprehend him. Uniformed officers, waiting nearby, immediately exited their cruisers and quickly proceeded to the apartment building breeze-way that the fleeing felon had entered.

Upon entering the breeze-way, the officers heard a door slam at the far end of the hall. There were only two doors into which the felon could have fled. The officers encountered the scent of burning marijuana, which became stronger as they approached the apartment doorway on the left of the hallway. Due to the strength of the odor at the door's threshold, the officers reasoned that the left rear door was the door that had recently been slammed. The officers reasoned that the opening of the left rear door which allowed the fleeing felon entry, also allowed the scent of burning marijuana to escape the apartment. The officers therefore believed that the fleeing felon had entered the apartment door on the left.

However, out of an abundance of caution, not knowing specifically which door the felon entered, the police officers knocked loudly on the left door and announced themselves three times.

After no response, the officers heard things inside the apartment being moved around. Based upon their training and experience, the officers recognized the sounds coming from the apartment to be consistent with the sounds of destruction of physical evidence. Believing that they were in hot pursuit of a fleeing felon, that the felon had recently entered the left apartment, and that the felon was now destroying physical evidence of his crime of trafficking, the police officers entered the apartment.

In an attempt to locate the fleeing suspect, the officers immediately conducted a protective sweep of the apartment. However, the suspect could not be located. After completing the protective sweep, the officers noticed in plain view several large quantities of both marijuana and cocaine. At this point the officers placed the occupants of the apartment under arrest. Respondent was one of the occupants in the apartment who was arrested.

B. Procedural History

1. Fayette Circuit Court

A Fayette County Grand Jury indicted Respondent on November 21, 2005, and charged him with first-degree trafficking in a controlled substance, trafficking in marijuana, and being a second-degree persistent felony offender. Respondent moved to suppress the evidence discovered after the warrantless entry. After a suppression hearing, the Fayette Circuit Court denied respondent's motion to suppress.

The circuit court held that the smell of burning marijuana coming from the apartment door provided the probable cause for the officers to continue their investigation. The court went on to state that the investigation was properly conducted by initially knocking on the door, announcing police presence, and awaiting a response or consensual entry. The circuit court held that no response from the apartment, coupled with noises indicative of destruction of evidence, particularly narcotics due to the smell, constituted exigent circumstances justifying warrantless entry into the apartment. App. 9-10a.

Respondent entered a conditional guilty plea, reserving his right to appeal the circuit court's denial of his motion to suppress. Respondent pled guilty to trafficking in a controlled substance; possession of marijuana; and persistent felony offender in the second degree. Respondent received an eleven-year sentence.

2. Kentucky Court of Appeals

Respondent appealed the circuit court's denial of his suppression motion to the Kentucky Court of Appeals. On March 14, 2008, the Kentucky Court of Appeals affirmed the circuit court's denial of his motion to suppress. App. 12a.

The Kentucky Court of Appeals held that the exigent circumstances exception to the warrant requirement was not applicable, because the police had created the exigency by knocking on the apartment door. Nonetheless, the Court of Appeals held that the entry was valid under the "good faith" exception since the officers did not take any deliberate action to evade the warrant requirement. App. 21-24a. The Court of Appeals did not specifically address the hot pursuit exception, but noted that it could not "be concluded as a matter of law that it was unreasonable for the police to have believed that the suspect knew of their presence and that they had to take immediate action to prevent the destruction of evidence." App. 21a. The Court of Appeals stated,

> Therefore, because the police were pursuing a suspected felony crack cocaine dealer following a "buy-bust" operation to a particular apartment building door and believing that the suspect was about to destroy evidence of a serious crime, we conclude that the warrantless entry into King's apartment was valid.

App. 24a.

3. Kentucky Supreme Court

Respondent sought discretionary review of the Kentucky Court of Appeals' decision to the Kentucky Supreme Court, which was granted. On January 21, 2010, the Kentucky Supreme Court, issued a published decision reversing and remanding the case to the trial court, overruling the circuit court's denial of the motion to suppress evidence found after warrantless entry. App. 34a.

The Kentucky Supreme Court ruled that neither the hot pursuit nor exigent circumstances exception was applicable.

As to hot pursuit, the Kentucky Supreme Court stated that the exception did not apply because the suspect was unaware that the police were pursuing him. App. 40-41a. The court reasoned that "[a]n important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued." App. 40a. (citation omitted). Based upon this reasoning the court held that since there was no direct evidence that the suspected drug trafficker knew that the police were in pursuit of him, the police were not in hot pursuit. App. 41a.

As to exigent circumstances, the Kentucky Supreme Court held that by knocking on the door and announcing their presence the police officers created the resulting exigency of destruction of evidence, and, therefore, the police could not rely on this exigency to effect warrantless entry. App. 47a.

In reaching this conclusion, the Kentucky Supreme Court acknowledged that, in some sense, exigent circumstances justifying warrantless entry are always

created by the police. App. 44a. The court concluded, nonetheless, that in certain circumstances police may not create the exigent circumstances that would otherwise justify a warrantless entry. App. 43a.

The Kentucky Supreme Court recognized that the federal circuits and states have adopted differing tests for determining when police impermissibly create the exigent circumstances relied upon for warrantless entry. After discussing the differences in the tests for the Second, Third, Fifth, Sixth, and Eighth Circuits, and the Arkansas Supreme Court, the Kentucky Supreme Court crafted their own test. App. 44a-46a.

The court grafted one part of the Fifth Circuit's test for police-created exigencies with one part from the Arkansas Supreme Court's test, to create a hybrid two-part test for Kentucky.

> First, courts must determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement." [*United States v.*] *Gould*, 364 F.3d 578, 590 [(5th Cir. 2004)]. If so, then police cannot rely on the resulting exigency. Second, where police have not acted in bad faith, courts must determine "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." *Mann* [*v. State*, 161 S.W.3d 826] at 834 [(Ark. 2004).]. If so, then the exigent circumstances cannot justify the warrantless entry.

App. 45a-46a.

The Kentucky Supreme Court applied this new test to the facts of Respondent's case and determined that the officers did not act deliberately with the bad faith intent to avoid the warrant requirement. However, under the second part of its new test the court determined that the resulting exigent circumstances, the destruction of physical evidence, was a reasonably foreseeable result of knocking on a door and announcing police presence after having smelled burning marijuana emanating from the apartment door. App. 46a-47a.[1]

REASONS FOR GRANTING THE WRIT

The Kentucky Supreme Court's ruling in this case exacerbates the division among the lower courts on two fundamental Fourth Amendment issues and further complicates proper police investigation. This ruling unduly limits proper police conduct by holding that police can impermissibly create exigent circumstances by knocking on a person's door and that police must prove that a fleeing suspect knew of their activity before they will be considered to have been in hot pursuit. Currently a deep split exists among the circuits regarding the proper test to determine when police impermissibly create exigent circumstances and the Kentucky Supreme Court's hot pursuit determination is opposite reasonably

[1]The Kentucky Supreme Court's decision in Respondent's case, also overruled the Kentucky Court of Appeals decision in his co-defendant's case. See *Washington v. Commonwealth*, 231 S.W.3d 762 (Ky.App. 2007).

objective Fourth Amendment determinations. Given the abiding and increasing uncertainty in these areas of law, and because these issues are likely to reoccur in significant numbers, this Court should grant *certiorari* to review the lower court's decision and clarify the proper tests to be employed.

I. This Court Should Grant Certiorari to Resolve the Conflict Over Whether, and When, the Exigent Circumstances Exception to the Warrant Requirement Applies When Police "Create" the Exigency.

This Court has carved out exceptions to the Fourth Amendment's warrant requirement,[2] but has never determined whether police can create the exigent circumstances then used to justify a warrantless entry under those exceptions. As a consequence, the lower courts have been debating the issue for over forty years, resulting in a dramatic split among the circuits and an improper narrowing of the exceptions.

All of the circuits find that in certain circumstances the exigent circumstances exception does not apply when police create the exigency. However, their tests for determining when this occurs are as varied as the circuits themselves.

The Kentucky Supreme Court acknowledged this

---

[2]See *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Payton v. New York*, 445 U.S. 573 (1980); *Michigan v. Tyler*, 436 U.S. 499 (1978); *United States v. Santana*, 427 U.S. 38 (1976); *Warden v. Hayden*, 387 U.S. 294 (1967); *Schmerber v. California*, 384 U.S. 757 (1966).

division among the circuits, as have published dissenting opinions from the Third and Second Circuits. App. 44a-45a; *United States v. Coles*, 437 F.3d 361, 371-373 (3rd Cir. 2006);*United States v. MacDonald*, 916 F.2d 766, 773-777 (2nd Cir. 1990) (en banc), *cert. denied,* 498 U.S. 1119 (1991). See also 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 (2008) (discussing the circuit split). These varied tests are outcome-dispositive. Had this case been litigated in the First, Second, Sixth, Seventh, Ninth, Tenth, Eleventh, or D.C. Circuits, the Commonwealth would have prevailed.

Circuits and state high courts have been addressing this issue since 1968, yet even as recently as 2008 have been creating new tests and muddying the waters of review. See *Niro v. United States*, 388 F.2d 535, 540 (1st Cir. 1968); *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008). The issue has sufficiently percolated among the lower courts, but to no avail. The divide among the circuits is further widening, and no uniform national rule will exist until this Court takes action.

This Court's intervention is all the more necessary because of the dangerous consequences of the test applied by several circuits and the Kentucky Supreme Court. In these jurisdictions, police are barred entry even when they act in good faith and are trying to prevent the destruction of evidence or physical harm. Such a rule necessarily rewards the illegal behavior of the home's occupants in their reaction to police presence. It would be a dangerous rule, in the absence of illegal police action, to hold that police can impermissibly

create the exigent circumstances that allow for their warrantless entry, thus prohibiting entry in times of dire need. This Court should not allow for a rule that creates a benefit for a home's occupants to destroy evidence, flee, or draw their weapons based upon an otherwise legal knock upon their door by police.

A. The Circuits and State High Courts Are Deeply Divided on the Issue.

There are currently five different tests being used by the United States Courts of Appeals to determine whether the police have impermissibly created the exigent circumstances relied upon for warrantless entry. This has resulted in an inconsistent application of Fourth Amendment protections and the exceptions applicable to those protections. The five different tests adopted and relied upon by the circuits are dramatic in their differences. These tests range from asking only whether the police acted lawfully to a results-oriented question of foreseeability. This division is easily seen when the separate tests and circuits are compared.

1. The First and Seventh Circuits: Unreasonable Delay in Obtaining a Warrant

The First and Seventh Circuits have adopted a test for determining when police impermissibly create exigent circumstances that looks at whether the police officers unreasonably or purposefully delayed obtaining a warrant. See *United States v. Rengifo*, 858 F.2d 800 (1st Cir. 1988). In *Rengifo* the court declared that it refused to find exigent circumstances where the

"circumstances [were] created by government officials who unreasonably and deliberately delay[ed] or avoid[ed] obtaining the warrant." *Id.*, at 804. See also *United States v. Samboy,* 433 F.3d 154 (1st Cir, 2005) *cert. denied,* 547 U.S. 1118 (2006) (following *Rengifo*); *Niro v. United States,* 388 F.2d 535, 540 (1st Cir. 1968) ("Government agents cannot 'delay' or 'avoid' obtaining a warrant . . .").

Similarly, the Seventh Circuit in *United States v. Berkwitt,* 619 F.2d 649, 654 (7th Cir. 1980) abrogated on other grounds by *Dowling v. United States,*473 U.S. 207 (1985), upheld a search because "[it] [did] not believe the exigency arose from the deliberate or unreasonable delay on the part of the agents. The record amply demonstrates the agents did not purposely wait for 'exigent circumstances' to arise to avoid the necessity of obtaining a warrant."). Accord *United States v. Paul,* 808 F.2d 645 (7th Cir. 1986); *United States v. Dowell,* 724 F.2d 599, 602 (7th Cir.1984) ("Moreover, this court maintains that law enforcement officials may not deliberately wait for exigent circumstances to arise and then exploit the exception to justify warrantless entry.").[3]

---

[3]See also *United States v. Beltran,* 917 F.2d 641, 643 (1st Cir. 1990) ("where police fully expect that they may have to enter a home . . . and when they have enough time and knowledge to secure a warrant, they must do so."); *United States v. Curzi,* 867 F.2d 36, 43 (1st Cir.1989)(police had two hours in which to obtain warrant and failure to do so prevented finding of exigent circumstances); accord, *Niro v. United States,* 388 F.2d 535, 540 (1st Cir.1968) (authorities cannot claim exigency "if the need for it has been brought about by deliberate and unreasonable delay").

2. The Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits: Unreasonable Delay in Obtaining a Warrant Coupled with Deliberate Conduct in an Attempt to Evade the Warrant Requirement

The Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits also use a test that asks whether there has been an unreasonable or purposeful delay in obtaining a warrant. These circuits, however, will not find that police have impermissibly created the resulting exigent circumstances without a finding of "deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement." *Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002) quoting *United States v. Campbell*, 261 F.3d 628, 633-34 (6th Cir. 2001).

Thus, for example, the Tenth Circuit held that the police officers' approach to a motel room in which they believed narcotics activities were occurring did not create exigent circumstances even if the exigency - destruction of evidence - was not unexpected. *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991). In the D.C. Circuit's words, "[a]s long as police measures are not deliberately designed to invent exigent circumstances, we will not second-guess their effectiveness." *United States v. Socey*, 846 F.2d 1439, 1449 (D.C. Cir. 1988) *cert. denied,* 488 U.S. 858 (1988); see also *United States v. VonWillie*, 59 F.3d 922, 926 (9th Cir.1995) ("This is not a case where the government purposely tried to circumvent the requirements of [the knock and announce statute]."); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991) (en banc), *cert. denied,*

502 U.S. 907 (1991).[4]

3. The Third and Fifth Circuits: Bad Faith and Unreasonable Police Action

The Fifth Circuit has developed its own two-part test, which the Third Circuit later adopted. The first part of the Fifth Circuit's two-part test asks whether police deliberately created the exigent circumstances with the bad faith intent of evading the warrant requirement. The court must then determine whether, "even if they did not do so [create the exigent circumstances] in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement." *United States. v. Gould,* 364 F.3d 578, 590 (5th Cir. 2004) *cert. denied*, 543 U.S. 955 (2004).

This circuit precludes police from justifying warrantless entry based on the existence of intentionally created exigencies and generally requires that exigent circumstances exist prior to when police knock and

---

[4]See also *United States v. Chambers*, 395 F.3d 563, 569 (6th Cir. 2005); *United States v. Ojeda*, 276 F.3d 486 (9th Cir. 2002); *United States v. Calhoun*, 542 F.2d 1094, 1102-03 (9th Cir.1976), *cert. denied*, 429 U.S. 1064 (1977); *United States v. Curran*, 498 F.2d 30, 34 (9th Cir.1974); *United States v. Castro*, 225 F.App'x 755, 758 (10th Cir. 2007) (unpublished opinion), citing *United States v. Bonitz*, 826 F.2d 954, 957 (10th Cir.1987) (exigent circumstances did not justify a warrantless search based on a claim that entry was required to ensure the officers' safety); *United States v. Flowers*, 336 F.3d 1222, 1230 (10th Cir. 2003); *United States v. Scroger*, 98 F.3d 1256, 1259 (10th Cir. 1996) *cert. denied,* 520 U.S. 1149 (1997); *United States v. Aquino*, 836 F.2d 1268, 1270 (10th Cir. 1988).

announce themselves at the door. *United States v. Richard*, 994 F.2d 244, 248-250 (5th Cir. 1993)(exigent circumstances do not withstand Fourth Amendment analysis when deliberately created). The Fifth Circuit focuses on the reasonableness and propriety of the officers' actions and investigative tactics leading up to a warrantless entry and will invalidate a warrantless entry if the officers' actions are considered unreasonable. See *Gould* at 590; *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001) *cert. denied,* 534 U.S. 861 (2001); *United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995) *cert. denied,* 516 U.S. 883 (1995); *United States v. Munoz-Guerra*, 788 F.2d 295, 298 (5th Cir. 1986). The Third Circuit recognized that the Second Circuit had adopted a test that is "hard to reconcile" with the Fifth Circuit's test, and that the two tests reflect "different inquiries." *United States v. Coles*, 437 F.3d 361, 369 (3rd Cir. 2006) (The Second Circuit's test is discussed in subsection I(A)(5), *infra.*). The court concluded that the Fifth Circuit's approach, which focused the Fourth Amendment inquiry on the reasonableness and propriety of the police actions preceding the warrantless entry was superior. *Id.,* at 367-370. The Third Circuit then adopted the Fifth Circuit's test in *Coles*. However, in adopting the Fifth Circuit's test, the Third Circuit combined the separate parts of the test. The Third Circuit looks to the reasonableness of the officers' investigative tactics that triggered the exigency to determine whether the police impermissibly manufactured the exigency through bad faith. *Id.,* at 370-372. Mere delay absent bad faith, when coupled with unreasonable police action, will be sufficient to give

rise to impermissibly created exigencies in the Third Circuit.

4. The Fourth and Eighth Circuits: Foreseeability of Results of Police Action Resulting in Exigent Circumstances

The Fourth and Eighth Circuits set forth yet another unique test for police-created exigencies. In *United States v. Mowatt*, 513 F.3d 395, 400-403 (4th Cir. 2008), the Fourth Circuit relied heavily on this Court's decision in *Johnson v. United States*, 333 U.S. 10 (1948), in holding that the officers created the exigent circumstances themselves - and therefore the exception did not apply - because the exigent results of the police officers' actions were reasonably foreseeable. See also *United States v. Collazo*, 732 F.2d 1200, 1204 (4th Cir.1984) *cert. denied sub nom.*, 469 U.S. 1105 (1985).

The Eighth Circuit adopted this test in *United States v. Duchi*, 906 F.2d 1278, 1284-85 (8th Cir.1990) *cert. denied,* 516 U.S. 852 (1995), ruling that the police impermissibly created the exigency at issue because the exigency was a reasonably foreseeable result of the officers' actions.

The Third, Fourth, Fifth, and Eighth Circuits' tests rely upon this Court's decision in *Johnson v. United States*, 333 U.S. 10 (1948). However, these circuits' reliance upon this Court's holding in *Johnson* is misplaced. This Court held in *Johnson* that the government had not established an exigency, not as these circuits rely, that the police officers impermissibly created the exigent circumstances that they relied upon

for entry. *Id.*, at 14-15. Johnson was decided in 1948, prior to this Court's decisions specifically setting forth the exigent circumstances exceptions.[5]

In *Johnson*, no exigency existed. There was no attempted flight or destruction of evidence, rather police simply arrested the defendant in an attempt to locate contraband. Police-created exigency cases should not be analyzed under the same lens as that applied in *Johnson*. Rather, in these cases, an exigency actually exists. *Johnson* would be applicable if the defendant (as occurred in the case at hand) had attempted to destroy evidence when the police knocked on her door, triggering warrantless entry. However, in *Johnson* the defendant calmly answered her door, with no contraband in plain sight. *Id.*, at 12.

5. The Second Circuit: Lawful Manner

The Second Circuit has adopted a rule that simply asks whether police acted in a lawful manner, without regard to the officers' subjective intentions. *United States v. MacDonald*, 916 F.2d 766, 772 (2nd Cir. 1990) (en banc), *cert. denied,* 498 U.S. 1119 (1991) ("when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances."). See also *United States v. Lopez*, 937 F.2d 716, 723-24 (2nd Cir. 1991) *cert. denied,* 525 U.S.

---

[5]See *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Payton v. New York*, 445 U.S. 573 (1980); *Michigan v. Tyler*, 436 U.S. 499 (1978); *United States v. Santana*, 427 U.S. 38 (1976); *Warden v. Hayden*, 387 U.S. 294 (1967); *Schmerber v. California*, 384 U.S. 757 (1966).

974 (1998) (following *MacDonald*).

In *MacDonald*, as here, there was an undercover narcotics sale. The officer in *MacDonald* returned, with other officers, to the apartment where he made the purchase. After knocking and announcing themselves, the officers heard sounds of shuffling feet and received a radio call from agents outside the building that occupants of the apartment were trying to escape. The officers forcibly entered the apartment, arrested several men and discovered large quantities of narcotics. 916 F.2d at 768. The Second Circuit upheld the warrantless entry, rejecting the contention that the entry was invalid because the officers created the exigency. The court explained that,

> Exigent circumstances are not to be disregarded simply because the suspects chose to respond to the agents' lawful conduct by attempting to escape, destroy evidence, or engage in any other unlawful activity. The fact that the suspects may reasonably be expected to behave illegally does not prevent law enforcement agents from acting lawfully to afford the suspects the opportunity to do so. Thus, assuming *arguendo* that there were no exigent circumstances before the knock, the agents' conduct did not impermissibly create the circumstances occurring thereafter.

Id., at 771.

In *MacDonald* the Second Circuit distinguished a prior holding by stating that *United States v. Segura*, 663 F.2d 411 (2nd Cir.1981), aff'd on other grounds, 468 U.S. 796 (1984) was decided based upon the principle

articulated in *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir.1980), that law enforcement agents may not create their own exigencies "through illegal conduct." *MacDonald* at 772. The court concluded by "hold[ing] that when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances. Law enforcement agents are required to be innocent but not naive." *Ibid.*

6. State High Courts are Also Irreconcilably Split

State court decisions across the nation also show a dramatic divide in the tests that they use to determine whether police impermissibly created exigent circumstances. States have both adopted the many circuit tests as well as created their own hybrid tests, such as the Kentucky Supreme Court did in this case.

For example, in *State v. Santana*, 568 A.2d 77 (N.H. 1991), the New Hampshire Supreme Court created a new test, combining the First and Fourth Circuits' tests, which examines the totality of the circumstances, in particular delay in obtaining a warrant and the foreseeability of the results of police actions. The Pennsylvania Supreme Court adopted a similar test in *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996). By contrast, in *People v. Aarness*, 150 P.3d 1271 (Colo. 2006), the Colorado Supreme Court set forth a test similar to the Second Circuit's test. The court stated in *Aarness* that it was not police action that created the exigent circumstances, but rather it was the suspects'

reactions that created them. *Id.*, at 1280.[6]

This variance continues to deepen the divide among the lower courts' application of Fourth Amendment protections.

7. The Varying Tests Employed by the Circuits and State High Courts Lead to Directly Contrary Results

These varying tests have created a situation in which directly contrary results are obtained in each court given identical facts. Depending on which circuit or state this case was litigated in, different results would be reached.

Under the test employed by the First and Seventh Circuits, the Commonwealth would have prevailed in this case because there was no unreasonable or purposeful delay in obtaining a search warrant. See *Rengifo* and *Berkwitt*, *supra*. Under the

---

[6]See also *People v. Daughhetee*, 211 Cal.Rptr. 633 (Cal.App. 1985)(setting forth a California rule that relies on an unreasonable delay in obtaining a warrant combined with an intentional effort on the part of police to create the exigent circumstances, similar to the Sixth Circuit's test); *People v. Wilson*, 408 N.E.2d 988 (Ill.App. 1980)(adopting a test similar to the Eighth Circuit's foreseeability test, with the inclusion of a determination concerning the reasonableness of police action and delay in obtaining a warrant); *Commonwealth v. Cataldo*, 868 N.E.2d 936 (Mass.App. Ct. 2007)(citing to other Massachutes cases setting forth a rule similar to the First Circuit's, based upon unreasonable delay in obtaining a warrant); *State v. Stanton*, 627 A.2d 674 (N.J. Super. 1993)(adopting a test similar to that of the Second Circuit, examining reasonable police investigative tactics, however the court recognized that lawful tactics were necessarily reasonable); *State v. Bender*, 724 N.W.2d 704 (Wis.App. 2006)(unpublished decision)(noting a circuit split and relying on a test similar to those of the Fifth and Third Circuits).

circumstances of the case at hand, police officers were in hot pursuit of a fleeing drug trafficker, who had just moments before completed an illegal transaction. The police believed that the suspect knew of their presence and was evading them to destroy evidence of his crimes. Therefore no time existed in which a search warrant could have been obtained, and so no unreasonable or purposeful delay existed.

The Commonwealth would have also prevailed under the test used by the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits. In addition to asking whether there was unreasonable delay in obtaining a search warrant, these circuits look for deliberate conduct in an effort to purposefully evade the warrant requirement. See *Ewolski*; *VonWillie*; *Carr*; and *Tobin*, *supra*. Here, police did not take any deliberate action in an effort to purposefully evade the warrant requirement. The officers had no time to obtain a warrant under the given circumstances.

The Commonwealth would have prevailed under the Second Circuit's test. There was no illegal action on the part of police officers during their encounter with the Respondent. The police, therefore, did not impermissibly create the exigency of destruction of physical evidence, and their warrantless entry was proper. See *MacDonald*, *supra*. The police were in a public place (an open apartment breeze-way) and lawfully knocked on the Respondent's door, just as any other member of the public could have done.

In contrast, the Respondent would have prevailed in the Fourth and Eighth Circuits. The test in these circuits looks to the foreseeability of police actions, just as the Kentucky Supreme Court did here. See *Mowatt*,

supra; *Duchi*, *supra*; App. 46a.

Under the test used by the Third and Fifth Circuits, the Respondent would have also prevailed. Under this test the court would have to determine whether the police acted in bad faith in knocking on the Respondent's door. See *Richard*, *supra*. The court would have to determine, based on the subjective intentions of the police officers, whether or not they purposefully knocked on the Respondent's door in an effort to create the exigent circumstances that allowed their entry. Under the reasonableness inquiry police officers actions in approaching a suspect's residence to conduct a knock and talk and further their investigation will be determined to be unreasonable unless the police had no notice of any illegal activity prior to approaching the residence. See *Jones*, 293 F.3d 716 at 721-722 and *Munoz-Guerra*, 788 F.2d 295 at 298. Even if the officers' actions were found to be in "good faith" under the first prong of the Fifth Circuits' test, their action of knocking on the Respondent's door, after having smelled burning marijuana, would be found unreasonable under the second prong of the Fifth Circuit's test and the Third Circuit's test.

In sum, when applying the facts of the case at hand to the differing tests used by each of the circuits it can be determined that the Commonwealth would have prevailed in eight circuits (the First, Second, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits) and the Respondent would have prevailed in four circuits

(the Third, Fourth, Fifth, and Eight Circuits).[7] Further, the results in each of these circuits would be reached for very different reasons. The patchwork of tests used by the varying circuits and state high courts, resulting in directly contradictory outcomes governing the application of the Fourth Amendment protections, should not be allowed to stand.

The current split among circuits has led to differing applications of Fourth Amendment protections and the exceptions thereto as can be easily seen when these tests are applied to the facts at hand. With so many different tests to determine when the exigent circumstances exception to the Fourth Amendment warrant requirement is impermissibly created, the lower courts cannot effectively enforce Constitutional protections or this Court's mandates. Only this Court can resolve this ongoing conflict among the circuits that continues to impact both police officers and citizens. A vacillating protection from unreasonable searches and seizures denies all people this fundamental Constitutional right. This imperfect application of the Fourth Amendment protections will continue to mire Constitutional law, until this Court addresses the issue.

This Court should grant certiorari to determine whether police can impermissibly create exigent circumstances and if so, to acknowledge and resolve the current conflict among the circuits, and set forth an effective and simple test, such as the test adopted by the

---

[7]The varying tests used by the states to determine when police impermissibly create exigent circumstances also result in directly contradictory results; however for brevity's sake those results will not be set forth here.

Second Circuit, to determine when police impermissibly create exigent circumstances.

B. The Kentucky Supreme Court Erroneously Construed the Fourth Amendment

The Kentucky Supreme Court's newly minted hybrid test for determining when police impermissibly create exigent circumstances erroneously construes the Fourth Amendment and the application of this Court's exceptions to its protections. The Kentucky Supreme Court adopted a two-part test that looks first at bad faith (as the Fifth Circuit does) and then at foreseeability (as the Fourth and Eighth Circuits do).

Fourth Amendment protections rely upon an objectively reasonable standard. *Michigan v. Fisher*, — U.S. —, 130 S.Ct. 546, 548 (2009). This is not a standard that inquires into subjective intentions, as do several of the circuits' tests. As is noted by the Second Circuit, speculation by the courts as to police intentions is often futile. *MacDonald*, at 772. This investigation into the bad faith subjective intentions of officers, may encourage police fabrication in hindsight in order to avoid the suppression of evidence obtained after a warrantless entry. Therefore, the first prong of the Kentucky Supreme Court's test (as well as the Fifth Circuit's test) is unusable.

The Kentucky Supreme Court did not find bad faith here and ruled for the Respondent based on its conclusion that the officers should have foreseen that, once they knocked on the door and announced their presence, the apartment's occupants would attempt to destroy evidence. App. 46a. That holding is untenable.

This prong is identical to the test employed by the Fourth and Eighth Circuits. This test relies on the foreseeability of police actions; however, illegal results of lawful police action are arguably foreseeable in most circumstances. Police are trained to expect illegal actions in response to their presence; therefore, a foreseeability test will nearly always condemn police action. A "foreseeability" test threatens to swallow the exigent circumstances exception to the warrant requirement. Moreover, it prevents officers from using commonplace, lawful police tactics such as knocking on doors and questioning suspects.

Even worse, this test rewards the illegal actions of a home's occupants in response to lawful police action. It is the actions of the home's occupants that give rise to the exigent circumstances, not the lawful actions of the officers who are attempting to engage them in conversation. The home's occupants have a choice to engage in a consensual encounter with police (either by speaking with the police and granting them consent or by refusing to speak with them and shutting the door) or to behave in an illegal manner (by destroying physical evidence, fleeing, or drawing their weapons). This Court should not reward illegal responses by preventing officers from responding to them. Such a test flies in the face of common sense and unduly restricts lawful police conduct. Police should not be restricted in their actions where a lawful citizen would not be.

For similar reasons, the test employed by the Third and Fifth Circuits is also erroneous. These circuits purport to assess the "reasonableness" of officers' actions, but in practice their rule holds that the exigent circumstances exception does not apply when exigent

circumstances only come into existence after police, with knowledge that a search warrant could be obtained, knock and announce.

Nor is the "unreasonable delay" test applied by multiple circuits satisfactory. This test places a heavy burden on police to immediately obtain a warrant once probable cause has arisen, even when other lawful courses seem preferable based on the circumstances and the officer's experience. It also means that evidence can be suppressed when a reviewing court, in hindsight, determines that probable cause existed prior to exigent circumstances arising, even though officers at the scene did not believe they had probable cause to obtain a warrant. No Fourth Amendment policy is supported by such an outcome.

In the final analysis, the proper test for determining when police have impermissibly created exigent circumstances would be similar to the test used by the Second Circuit. This test simply asks whether police action was lawful. See *MacDonald*, at 772. Such a test enables the courts to protect the sanctity of the home as described by the Fourth Amendment, while allowing lawful police action. A test of this nature would not reward illegal action on the part of a home's occupants by preventing warrantless entry when exigent circumstances arise.

Most importantly for present purposes, the Kentucky Supreme Court and numerous other states and circuits have adopted tests that improperly reward illegal behavior and restrict lawful police action. Such a test is unworkable. This Court's intervention is needed to rectify this situation.

C. The Issue is a Reoccurring One of National Importance

As this Court has repeatedly recognized, there are well-established exceptions to the Fourth Amendment's warrant requirement that are necessary for police to effectively carry-out their duties. See *Payton v. New York*, 445 U.S. 573 (1980); *Welsh v. Wisconsin*, 466 U.S. 740 (1984). On a daily basis, police officers encounter situations in which Fourth Amendment protections are applicable. In most of these situations, the exceptions to the Fourth Amendment warrant requirement are inapplicable. However, in the majority of those cases which reach adjudication, one or more of those exceptions was relied upon by police in effecting seizure or arrest. If police are deemed to have impermissibly created the exigent circumstances upon which they rely for warrantless entry, police action is placed in question in a wide variety of circumstances and a large number of cases.

One of the most common police investigatory procedures is a "knock and talk," in which officers lawfully approach a person's home and engage them in conversation. As then-Justice Rehnquist pointed out in his dissent to this Court's decision in *Dunaway v. New York*, 442 U.S. 200, 222 (1979).

> There is obviously nothing in the Fourth Amendment that prohibits police from calling from their vehicle to a particular individual on the street and asking him to come over and talk with them; nor is there anything in the Fourth Amendment that prevents the police from

> knocking on the door of a person's house and when the person answers the door, inquiring whether he is willing to answer questions that they wish to put to him.

This police investigatory procedure is employed every time an officer approaches a home to speak with the occupants concerning a crime that has occurred. This lawful police action sometimes results in the creation of exigent circumstances - particularly when the police act based on a reasonable suspicion of wrongdoing. Yet under the decision below and the rules adopted by four circuits, the police are barred from acting in response to those exigencies. In those jurisdictions, an officer who hears evidence being destroyed or an individual being attacked - merely because the officer knocked on the door - violates the Fourth Amendment by entering the residence in response to that exigency. It is critical that this Court remove that senseless bar on the ability of the law enforcement community to protect the public.

II. This Court Should Grant Certiorari to Resolve the Conflict over Whether the Hot Pursuit Exception to the Warrant Requirement Applies Only If the Government Can Prove That the Suspect Was Aware He Was Being Pursued.

The touchstone of the Fourth Amendment is reasonableness. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Although a warrantless entry into one's home by police is presumptively unreasonable, "that presumption can be overcome." *Michigan v. Fisher*, — U.S. —, 130 S.Ct. 546, 548 (2009). "For example, 'the

exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.'" *Ibid.*, quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978).

One consistently recognized example of exigent circumstances is the "hot pursuit" of a suspect the police reasonably believe to be a fleeing felon. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990); *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984). Under that exception, the police are permitted to pursue the fleeing felon into a private residence in order to effect an arrest. *United States v. Santana*, 427 U.S. 38, 43 (1976). This exception is deeply rooted in our common law heritage. 4 W. Blackstone, *Commentaries on the Laws of England,* 292-93 (1775) ("Any private person (and *a fortiori* a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon . . . And they may justify breaking open doors upon following such felon . . .").

This Court has not, however, described the precise contours of this exception to the warrant requirement. As a consequence, lower courts are divided on when law enforcement can make a warrantless search in the course of hot pursuit. Resolution by this Court is needed.

A. State Courts Are Divided on this Issue.

In *Commonwealth v. Talbert*, 478 S.E.2d 331, 334 (Va.App. 1996), the defendant argued that in order "for a pursuit to be 'hot,' the suspect must be in flight, knowing that he is being pursued." The Virginia Court of Appeals disagreed. The court noted that "hot pursuit,"

as with other exigent circumstances inquiries, "relates to the circumstances governing the officer's conduct, to the situation as reasonably perceived by the officer, and must be assessed from the officer's perspective." *Ibid.* The Virginia court did not disregard actions of the suspect. Those actions were merely a part of the totality of the circumstances. *Ibid.* ("Elusive action by the suspect will bear on this assessment, but the suspect's awareness and perceptions are not, as such, determinative."). See also *State v. Ricci*, 739 A.2d 404, 406 (N.H. 1999) (following *Talbert*, but deciding case under state constitution).

The Geogia Court of Appeals and Kentucky Supreme Court, on the other hand, have taken a completely different approach. They look to the subjective viewpoint of the felon to determine "hot pursuit." The Georgia appellate court stated that "the key to 'hot pursuit' is that the defendant is aware he is being pursued by the police, and is therefore likely to disappear or destroy evidence of his wrongdoing if the officer takes the time to get a warrant." *State v. Nichols*, 484 S.E.2d 507, 508 (Ga.App. 1997). The Kentucky Supreme Court followed the holding of *Nichols* in determining that the police were not in hot pursuit of a fleeing suspect. App. 40a-41a ("An important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued."), citing *United States v. Santana*, 427 U.S. 38, 43 (1976). Accordingly, the Kentucky Supreme Court held that no hot pursuit existed in the present case because "there [was] no evidence that [Respondent] was aware of [the fact that uniformed officers were in pursuit of him]." App. 40a.

Under the two views discussed above, the Fourth

Amendment is applied differently simply based on geography. Kentucky and its border state, Virginia, are perfect examples. Had the Respondent in this case made the sale in Virginia, a Virginia court would have determined that he was a fleeing felon and that determination would have been made by looking at the viewpoint of a reasonable officer. Since the fleeing felon exigent circumstance would be applicable, the officers would have had the right to make a warrantless entry into Respondent's home.

Respondent, however, did not make the sale in Virginia. He made it in Kentucky where the courts determine "hot pursuit" from the subjective viewpoint of the fleeing felon. Here, the Commonwealth was unable to offer evidence of the Respondent's subjective point of view. Thus, the Kentucky Supreme Court determined that the police officers were not in hot pursuit.

This Court should grant certiorari to prevent divergent application of the hot pursuit exception to the warrant requirement across the many jurisdictions of the United States.

B. The Kentucky Supreme Court's Decision Conflicts with Precedents of this Court and Other Courts that Apply an Objective Standard for Assessing Reasonableness Under the Fourth Amendment.

The Kentucky Supreme Court's holding that the suspect must know he is being pursued before hot pursuit applies runs afoul of the Fourth Amendment's reasonableness standard, which this Court has repeatedly held to be an objective standard that does not

look at officers' or suspects' subjective intentions or thoughts. *Santana*, 427 U.S. at 43, relied upon by the Kentucky Supreme Court to support its holding, says nothing of the subjective intentions of the fleeing felon.

In the case closest on point, *Warden v. Hayden*, 387 U.S. 294 (1967), this Court rejected a Fourth Amendment challenge to a police entry into a residence where the police were informed that a suspect, wanted in connection with an armed robbery, had entered a residence less than five minutes before. Even though the suspect was unaware he was being pursued, the Court determined that the officers acted reasonably. *Id.* at 298-99.

Hayden did not specifically employ the term "hot pursuit." However, in *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984), this Court cited *Hayden* as a "hot pursuit" case. As the Virginia Court of Appeals put it, "[a]lthough Hayden was unaware that he was being pursued, the urgency of the timing and of the circumstances confronting the police constituted their entry into the house a 'hot pursuit.'" *Ibid.*[8] Similarly here, that the fleeing felon may not have realized he was being pursued is of no moment for Fourth Amendment purposes. Like the officers in *Hayden*, the officers here were in hot pursuit based on an objective determination from the reasonable officer's point of view.

An objective test as set forth in *Talbert* is also in

---

[8]See also *United States v. Bass*, 315 F.3d 561, 562-63 (6th Cir. 2002) (officers were in hot pursuit despite having arrived minutes after suspect fled the scene); *United States v. Haynie*, 637 F.2d 227, 235-36 (4th Cir. 1980) (officer entry into home was in hot pursuit of co-defendant who entered house "moments before" police arrived).

keeping with other aspects of the "hot pursuit" doctrine. For instance, whether the person being pursued is actually a felon is judged in terms of objective reasonableness. The First Circuit has held that "an officer who is looking for a fleeing suspect and has a reasoned basis to think that he has found the suspect is justified in pursuing the suspect into a house." *United States v. Soto-Beniquez*, 356 F.3d 1, 36 (1st Cir. 2004). See also *Ibid.*, citing *United States v. Lopez*, 989 F.2d 24, 27 (1st Cir. 1993) (holding that police were justified under the hot pursuit doctrine in following defendant into a house because he fit a general description of an armed assault suspect and ran from police when he was ordered to halt).

The objective test as set forth in *Talbert* is also in keeping with Fourth Amendment jurisprudence regarding exigent circumstances in general. For instance, this Court in *Brigham City* "clarified . . . that whether the officers' motivation for entering is to arrest suspects and gather evidence or to assist the injured is irrelevant so long as the circumstances objectively justify the action." *United States v. Huffman*, 461 F.3d 777, 782-783 (6th Cir. 2006), citing *Brigham City*, 547 U.S. at 404.

The Tenth Circuit has held that whether exigent circumstances exists is determined by "the facts from the viewpoint of prudent, cautious, and trained officers." *United States v. Porter*, 594 F.3d 1251, 1258 (10th Cir. 2010) (internal quotations omitted). See also *United States v. Scroger*, 98 F.3d 1256, 1259 (10th Cir. 1996) (same); *United States v. Erb*, 596 F.2d 412, 419 (10th Cir. 1979) (same). And the Tennessee Supreme Court

has described the test as follows: "The exigency of the circumstances is evaluated based upon the totality of the circumstances known to the governmental actor at the time of the entry." *State v. Meeks*, 262 S.W.3d 710, 723 (Tenn. 2008) (internal footnotes omitted). Various federal circuits have similar tests. See *e.g., United States v. Hogan*, 539 F.3d 916, 922 (8th Cir. 2008); *United States v. Klump*, 536 F.3d 113, 117 -118 (2nd Cir. 2008); *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008); *United States v. Atchley*, 474 F.3d 840, 850 (6th Cir. 2007); *United States v. Maldonado* 472 F.3d 388, 393 (5th Cir. 2006); *Estate of Smith v. Marasco*, 318 F.3d 497, 518 (3rd Cir. 2003).

The test employed by both the Georgia Court of Appeals and the Kentucky Supreme Court violate a main tenant of Fourth Amendment law – objective reasonableness. Both courts take the objective reasonableness test ordinarily used in Fourth Amendment analysis and replace it with a subjectively-based test that is grounded on the viewpoint of the accused. This test has no basis in our Fourth Amendment jurisprudence. Indeed when it comes to the Fourth Amendment, this Court has routinely stated that subjective intentions are irrelevant. *Whren v. United States*, 517 U.S. 806, 818 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Michigan v. Chesternut*, 486 U.S. 567, 575 n. 7 (1988)("the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted"). This rule should be equally applicable to

the subjective intentions of the fleeing felons.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY

JOSHUA D. FARLEY*
BRYAN D. MORROW
ASSISTANT ATTORNEYS GENERAL
(COUNSEL OF RECORD)
OFFICE OF THE ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342

*Counsel of Record

Blank Page