

No. 09-1272

Supreme Court, U.S.  
FILED

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*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 the United States*

**REPLY BRIEF FOR PETITIONER**

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## REPLY BRIEF FOR PETITIONER

In holding that the drugs discovered in the Respondent's apartment must be suppressed the Kentucky Supreme Court further deepened existing *conflicts on two important Fourth Amendment issues*: when does lawful police action impermissibly "create" exigent circumstances and does the hot pursuit exception to the warrant requirement only apply when it can be shown that the suspect was aware that he was being pursued. Respondent's brief in opposition fails to address the central issues presented in the petition and attempts to divert this Court's attention in an effort to evade review.

In opposition to the police-created exigency issue, Respondent contends that the different tests espoused by the lower courts essentially amount to the same standard. On the contrary, there are drastic differences between a test that asks whether an officer could have foreseen the exigency (Fourth and Eighth Circuits) and a test that asks whether an officer acted lawfully (Second Circuit). A test that asks whether an *officer delayed in obtaining a warrant* (First and Seventh Circuits) is dramatically different than a test that asks whether an officer purposefully attempted to evade the warrant requirement (Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits). Five starkly different tests are employed by the federal circuits in an attempt to address the police-created exigency issue.

On the hot pursuit issue, Respondent argues that all of the lower courts uniformly apply a "totality of the circumstances" test to determine if the hot pursuit exception is applicable. This argument is in substantial agreement with the argument set forth in the petition; however Respondent fails to acknowledge

that the Kentucky Supreme Court failed to employ a “totality of the circumstances” test and held that the *only* thing that mattered was whether the suspect was aware that he was being pursued, regardless of the surrounding circumstances. Respondent’s “vehicle” arguments also lack merit, this case is an ideal vehicle to address these two important issues. This Court’s review of both questions is warranted.

**I. *Certiorari* is Warranted to Address the Issue of Police-Created Exigencies**

**A. This Case Is An Ideal Vehicle For Resolving the Conflict Over “Police Created” Exigencies.**

Every federal court of appeals, and numerous state courts, have addressed whether police may conduct a warrantless search based on an exigency that arose in response to an officer’s lawful actions. As discussed below, these courts have adopted widely disparate tests whose differences are outcome-determinative. The time has come to resolve that conflict. This case is an excellent vehicle for doing so.

The fact pattern of this case — a knock and announce that prompts the apparent destruction of evidence — is a common one that aptly illustrates the problems created by the rule adopted by the Kentucky Supreme Court and several federal circuits. The officers took reasonable and lawful actions, knocking on the door of an apartment from which the smell of burnt marijuana emanated and announcing their presence. Upon hearing sounds indicating the destruction of the

evidence — which they thought included crack cocaine recently sold to an undercover confidential informant — they entered the apartment. The Kentucky Court held that the officers violated the Fourth Amendment when they did so because it was foreseeable that their lawful knock and announce would have prompted the unlawful destruction of the drugs they smelled. As explained in the Petition (at 25-28), that ruling improperly rewards illegal conduct and unduly bars routine and sensible law enforcement measures.

Respondent does not attempt to defend the police-created exigency rule adopted by the Kentucky Supreme Court. Instead, he contends that this Court should not address the issue because the Kentucky Supreme Court “assumed *arguendo*” that an exigency existed before holding that the search was unlawful because the officers created that assumed exigency. Respondent is mistaken.

This Court routinely grants *certiorari* to review legal issues that a lower court decided after assuming the existence of a predicate fact or legal conclusion. Just last term, in *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010), this Court granted *certiorari* to resolve whether there was a break-in-custody exception to the *Edwards v. Arizona*, 451 U.S. 477 (1981), rule. This Court reviewed a Maryland Court of Appeals decision which “held that ‘the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards*,’ and that, assuming, *arguendo*, a break-in-custody exception to *Edwards* existed, Shatzer’s release back into the general prison population between interrogations did not constitute a break in custody.” *Id.* at 1218. Likewise, in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010),

also from last term, this Court reviewed a Kentucky Supreme Court decision “[a]ssuming the truth of [Padilla’s] allegations,” and holding “that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a ‘collateral’ consequence of his conviction.” *Id.* at 1478.<sup>1</sup>

Holding otherwise would cause absurd results. A contrary rule would make myriad lower court rulings on federal law unreviewable by this Court, which would undermine this Court’s role as the final arbiter of federal law. See *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (“it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds”). Respondent does not dispute that the Kentucky Supreme Court’s decision is final under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975),

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<sup>1</sup>See also *Pennsylvania v. Mims*, 434 U.S. 106, 108 (1977) (per curiam), (assessing the stop and pat down of a vehicle’s passenger for weapons when the Pennsylvania Supreme Court “assume[d], arguendo, that the limited search for weapons was proper once the officer observed the bulge under respondent’s coat.”); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (assessing proposed exception to knock and announce rule in case where the Wisconsin Supreme Court “[a]ssum[ed]” the police “did not knock and announce prior to their entry”); *United States v. Place*, 462 U.S. 696, 700 (1983) (assessing whether officer’s search of personal luggage was valid under Terry in case where the court of appeals “assumed both that Terry principles could be applied . . . and that reasonable suspicion existed to justify the investigatory stop of Place”).

as one where “later review of the federal issue cannot be had, whatever the ultimate outcome of the case.” The important federal issue in this case concerning the Fourth Amendment police-created exigency doctrine is therefore properly before this Court and, for the reasons discussed below, merits this Court’s review.<sup>2</sup>

**B. Federal Circuits are Irreconcilably Split on the Issue of Police-Created Exigent Circumstances, Resulting in Directly Contradictory Results**

Respondent argues that this Court should deny

<sup>2</sup>Respondent’s lengthy digression on whether there were, in fact, exigent circumstances here is therefore irrelevant. See Resp. at 8-16. Respondent’s attempts to convince this Court that these officers simply abandoned a fleeing drug trafficker to investigate someone in possession of marijuana are illogical at best. It is absurd to trust that officers who believed that they were in hot pursuit of a fleeing felon would have their “attention diverted” by the detection of the odor of burnt marijuana, such that their chase would cease and a new investigation into a misdemeanor offense would begin. This argument is akin to officers ceasing chase of a felon to issue a traffic citation. Resp. at 3-4. To avoid any misconceptions Respondent may have created, however, it bears noting that: (1) the trial court and Kentucky Court of Appeals both explicitly found that exigent circumstances existed; (2) the officers testified that they believed the crack cocaine dealer whom they had been pursuing had fled into Respondent’s apartment; and (3) the officers testified that, based on their training and experience, the noises they heard after knocking and announcing were consistent with the destruction of physical evidence. Pet. App. at 9a-10a, 24a, 27a; Pet. App. at 3a-4a, 14a, 18a-19a, 21a-22a, 25a, 27a, 36a-37a; Pet. App. at 19a, 37a. The Kentucky Supreme Court’s assumption was therefore an eminently reasonable one.

the writ because the Petitioner has exaggerated the division among the Courts of Appeal regarding when police “create” an exigent circumstance. Resp. at 16. However, cases, commentaries, and treatises all agree that the courts are split on this issue<sup>3</sup>.

Many of the cases cited within the petition expressly acknowledged the existence of a conflict. See *United States v. Coles*, 437 F.3d 361, 371-373 (3rd Cir. 2006)(recognizing that the Second Circuit had adopted a test that was “hard to reconcile” with the Fifth Circuit’s test, and that the two tests reflect “different inquires.”); *United States v. MacDonald*, 916 F.2d 766, 771-773 (2nd Cir. 1990)(en banc), *cert. denied*, 498 U.S. 1119 (1991)(noting the difference in its test and the First Circuit’s test.); *United States v. Samboy*, 433 F.3d 154, 160 (1st Cir. 2005) *cert. denied*, 547 U.S. 1118 (2006)(specifically denouncing foreseeability as determinative of whether police created the exigent circumstances, and standing directly contrary to the Fourth and Eighth Circuit’s test.); *United States v. Campbell*, 261 F.3d 628, 633-635 (6th Cir. 2001)(directly addressing the difference between the Eighth Circuit’s foreseeability test and its own deliberate conduct test.); *United States v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 907 (1991)(taking notice of the circuit split and distinguishing its test as a deliberate conduct test

<sup>3</sup>Respondent admits that a circuit split exists when he cites to *United States v. McGregor*, 31 F.3d 1067 (1994). Resp. at 20. Prior to this citation, Respondent claims that the Eleventh Circuit had not addressed a police-created exigency test and that the circuits were not divided. However, *McGregor* is itself an Eleventh Circuit police-created exigency case, where the dissent recognizes a split among the circuits. *Id.* at 1069, 1071-1073.

coupled with a delay in obtaining a warrant.); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004) *cert. denied*, 543 U.S. 955 (2004)(recognizing the circuit split and setting forth the difference between its test and the D.C. Circuit's test.); *United States v. Duchi*, 906 F.2d 1278, 1284-1286 (8th Cir. 1990) *cert. denied*, 516 U.S. 852 (1995)(acknowledging that the Fifth Circuit looks at the reasonableness of the officer's conduct and adopting instead a test that asks whether the exigency was foreseeable). The Kentucky Supreme Court, too, even acknowledged that a split existed in its opinion. Pet. App. at 44a-46a.

Other acknowledgments of this circuit split can be found in treatises, law reviews, and commentaries. Professor Charles Alan Wright described such a split in his treatise on Federal Practice and Procedure. 3A Fed. Prac. & Proc. Crim. § 678 n. 1 (4<sup>th</sup> ed.). Katherine Carmon and Amy Beller also both acknowledge and discuss the circuit split for determining when police impermissibly create exigent circumstances in their respective law review articles. See Katherine Carmon, *Don't Act Like You Smell Pot!(At Least Not in the Fourth Circuit): Police-Created Exigent Circumstances in Fourth Amendment Jurisprudence*, 87 N.C. L. Rev. 621 (2009); Amy Beller, *United States v. MacDonald: The Exigent Circumstances Exception and the Erosion of the Fourth Amendment*, 20 Hofstra L. Rev. 407 (1991). See also 15 A.L.R. 6<sup>th</sup> 515, §§ 25, 26; 39 Geo. L.J. Ann. Rev. Crim. Proc. 43, n. 163, n. 195 (2010) (comparing cases). As noted in the petition (at 10), and the Amicus Brief of Indiana (at 7-8), several additional articles also find that it is imperative that this Court rectify the current split. See Bryan M. Abramoske, *It*

*Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 Suffolk U.L. Rev. 561 (2008); Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent the Destruction of Evidence: The Need for a Rule*, 39 Hastings L.J. 283 (1988); Geoffrey C. Sonntag, *Probable Cause, Reasonable Suspicion, or Mere Speculation?: Holding Police to a Higher Standard in Destruction of Evidence Exigency Cases*, 42 Washburn L.J. 629 (2003). There can be no doubt, an irreconcilable circuit split exists that must be rectified by this Court.

Respondent also contends that each of the different tests adopted by the varying circuits essentially amounts to the same test, a reasonableness inquiry test. Resp. at 19-20. Respondent's contentions are meritless.

It has been noted that the Second Circuit "allows police officers more discretion in circumventing the Fourth Amendment's warrant requirement." 87 N.C. L. Rev. 621, 631 (2009). The Second Circuit's test for police-created exigency is an objective test. *Ibid.* Other circuits, like the Fifth Circuit, however, use a subjective test. *Id.*, at 635. The analyses used by the different courts lead to different results under similar fact patterns. "The different outcomes can be attributed to the type of analysis the circuit uses; the Fifth Circuit inquires into the officers' intentions while the Second Circuit only looks objectively at whether the officers' conduct was lawful." *Id.*, at 638. See also Abramoske at 578-585 (analyzing the different outcomes determined from each of the different tests,



i.e., “objective vs. “subjective.”).

There is a dramatic difference between a test that looks to foreseeability only (Fourth and Eighth Circuits) and a test that looks only to unreasonable delay (First and Seventh Circuits). Under a foreseeability test evidence is only suppressed if the resulting exigency was foreseeable, whereas regardless of whether any exigency was foreseeable, if it is determined in hindsight that a warrant could have been obtained prior to the exigency arising under the unreasonable delay test, evidence will be suppressed. Comparing the lawfulness test (Second Circuit) to any of the other tests easily highlights differences in outcome. Under the lawfulness test it is only asked whether the officers’ actions were lawful; however under the same circumstances if the officers’ were determined to have delayed in obtaining a warrant the evidence would be suppressed in the First and Seventh Circuits. Similarly if the same officers were determined to have behaved lawfully, but unreasonably any evidence would be suppressed under the Third and Fifth Circuits’ bad faith and unreasonable action test. Again, if an officer was determined to have purposefully evaded the warrant requirement evidence would be suppressed in the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits; however the officer’s actions could be determined to have been lawful or reasonable, or the resulting exigency unforeseeable, in which case the evidence would not have been suppressed in either the First, Seventh, Fourth, Eighth, or Second Circuits.

Simply put, applied to these common facts, it may have been foreseeable that the officers’ actions

would lead to the destruction of evidence; however there is no basis on which to believe that the officers acted in bad faith or unlawfully. The facts of this case illustrate the outcome determinative nature of the conflict. Under these common facts, the Petitioner certainly would have prevailed in the Sixth, Ninth, Tenth, Eleventh, D.C., and Second Circuits, since the officers' actions were at all times lawful (Second Circuit), and they took no direct action in an effort to purposefully evade the warrant requirement (Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits). It is also likely that the Petitioner would have prevailed in the First and Seventh Circuits, because there was arguably no unreasonable delay in obtaining a warrant. In contrast, Respondent would have prevailed in the Fourth and Eighth Circuits, because like the Kentucky Supreme Court, these circuits ask whether the exigency is foreseeable. Again Respondent may have prevailed in the Third and Fifth Circuits, because the officers smelled marijuana and believed that the suspect was fleeing prior to knocking and announcing themselves at the door. These circuits hold that there must be no evidence of criminal activity prior to an officer's knock and announce, otherwise the officer will be deemed to have created any exigency that arises.

Respondent's contention that a circuit split does not exist or is not so divisive as to create an urgent situation that this Court must now address is without merit. Only this Court can bring the needed uniformity to this area of the law, and ensure that whether evidence is suppressed under the Fourth Amendment does not depend on the state in which the conduct occurs.

## **II. *Certiorari* is Warranted to Address the Hot Pursuit Exception.**

Respondent's argument for using a "totality of the circumstances" test is contrary to the Kentucky Supreme Court's ruling in this case. Resp. at 5-7. Petitioner agrees that a "totality of the circumstances" test should have been employed in this case; however, Petitioner contends that the totality of the circumstances should be viewed from the objective viewpoint of a reasonable officer, not the subjective viewpoint of a fleeing felon. Pet. at 29-35. As set forth in the petition, courts have consistently upheld objective tests over subjective ones. Pet. at 31-35.

The Kentucky Supreme Court relied heavily on its determination that the drug dealer in this case was unaware of police pursuit, and therefore he could not escape or destroy evidence. Pet. App. at 40a-41a. The Kentucky Supreme Court went so far as to quote *State v. Nichols*, 484 S.E.2d 507, 508 (Ga. 1997), for the proposition that the "key" to hot pursuit is whether the defendant was aware he was being pursued. Id. at 40a. It is this strict reliance on the subjective knowledge of the fleeing suspect that is not in-line with a "totality of the circumstances" test, and which conflicts with this Court's precedents mandating that the Fourth Amendment be assessed through objective tests.

Had the Kentucky Supreme Court properly applied a "totality of the circumstances" test based on the objective viewpoint of a reasonable officer, hot pursuit would have been found in this case. Instead the Kentucky Supreme Court created a bright-line rule that the hot pursuit exception will never apply when it

cannot be shown that a suspect was aware that he was being pursued. This error presents a second independent basis for this Court's review.

### CONCLUSION

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

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