No. 09-1272

In The Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

HOLLIS DESHAUN KING,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

REPLY BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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Lawful police action cannot impermissibly create exigent circumstances. Under a lawfulness test, a reviewing court determines whether, prior to the exigency, the police violated the Fourth Amendment by, for example, unlawfully entering a home or coercing an occupant to permit police entry. When, as occurred here, police have not been granted consent, but behave lawfully at all times leading up to the existence of an exigency, police cannot impermissibly create the exigency upon which they rely for warrantless entry. Contrary to Respondent's contention, that is precisely what occurred in this case. For those reasons, the Kentucky Supreme Court's decision must be reversed. Its test – which looks to whether the exigency was foreseeable or to the officer's subjective motivations – disturbs the balance this Court has created between the privacy interests granted by the Fourth Amendment and the need for law enforcement to effectively carry out their duties. It is unworkable, rewards illegal actions, and conflicts with bedrock Fourth Amendment principles.

Respondent devotes much of his brief to his contention that no exigency existed here. This Court did not grant *certiorari* to review that issue, and does not typically decide issues not decided by the court below. However, if this Court chooses to address the issue, there is ample evidence supporting the conclusion of the Fayette County Circuit Court and Kentucky Court of Appeals that exigent circumstances existed in this case.

I. POLICE DO NOT IMPERMISSIBLY CREATE EXIGENT CIRCUMSTANCES WHEN THEY ACT LAWFULLY AT ALL TIMES

A. A Simple Lawfulness Test Properly Balances Fourth Amendment Privacy Concerns and Public Safety Concerns

Police officers do not impermissibly create exigent circumstances when they behave lawfully prior to the existence of the exigency. As discussed in the Commonwealth's opening brief on the merits, as well as in the Solicitor General's amicus brief in support of the petitioner, there can be no suppression of lawfully obtained evidence without a clear showing of prior unlawful behavior by police. Comm. Br. at 12-13, 34-36; U.S. Br. at 6, 11-13.

A reviewing court employing a lawfulness test to determine whether police have impermissibly created an exigency, first must determine whether an exigency and probable cause exist. Once it does so, the reviewing court looks to the lawfulness of the officer's prior actions to determine whether they behaved in a prohibited manner that would necessitate the suppression of evidence seized during a warrantless search under the exclusionary rule. See *Herring v. United States,* 555 U.S. 135, 129 S.Ct. 695, 702 (2009). For example, the reviewing court might find that, prior to the exigency arising, the officers unlawfully seized a residence's occupant, coerced the occupant to consent to their entry, or unlawfully entered the residence and began searching it. If the officers did none of those things, they did not impermissibly

"create" the exigency. Lawful police action cannot impermissibly create exigent circumstances and is necessarily reasonable under the Fourth Amendment.

Therefore, the proper test for determining when police "impermissibly" create exigent circumstances is the simple, one-step inquiry adopted by the Second Circuit: did the police act in a lawful manner? *United States v. MacDonald*, 916 F.2d 766, 772 (2nd Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1119 (1991). This test properly balances the competing needs of the privacy interests at stake with the needs of law enforcement while remaining within the confines of well-established Fourth Amendment analysis. This simple question of whether police acted lawfully provides a clear and precise guidepost for officers and courts alike when determining whether police impermissibly created exigent circumstances.

Respondent agrees with the Commonwealth on this point and makes no attempt to defend the test set forth by the Kentucky Supreme Court. The test proposed by Respondent is that "police impermissibly create exigent circumstances when, as here, they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." Resp. Br. at 23-24. He explains that officers "may not rely on the fruits of coercive conduct in order to justify their decision to forego a warrant." *Id*. at 23. Respondent's test amounts to nothing more than a lawfulness test.

Failing to acknowledge that he sets forth the same lawfulness test as the Commonwealth, Respondent contends that the Commonwealth would have this Court adopt a test that "contains no identifiable limit on police activity and [that] stretches the exigent circumstances exception too far." *Id*. at 26. That claim wholly misses the point of a lawfulness test. Contrary to Respondent's contentions that a lawfulness test "preclude[s] any real review" of police action, the Commonwealth's proposed test *invites* review beyond a determination that exigent circumstances existed, and therefore warrantless entry was reasonable. *Id*.[1] A lawfulness test requires that none of the officers' actions prior to the existence of exigent circumstances were unlawful in a manner that would

[1] Respondent's argument on pages 26 and 27 of his Brief in Opposition that a lawfulness test allows for a finding that exigent circumstances exist in all cases where officers hear "people moving around in response to their knocking," again wholly misses the point of a lawfulness test. As will be discussed, *infra*, the question before this Court is not whether exigent circumstances existed. The question before this Court is whether lawful police action can impermissibly create exigent circumstances and what test is proper for determining when that has occurred. A lawfulness test has no bearing on whether exigent circumstances exist that allow for a reasonable warrantless entry under the Fourth Amendment. This test only controls the reviewing court's determination regarding suppression of seized evidence after a reasonable warrantless entry based upon exigent circumstances and probable cause has occurred. This does not represent a "blanket rule" or an attempt to implicitly overrule *Richards v. Wisconsin*, 520 U.S. 385, 392 (1997). On the contrary, the Kentucky Supreme Court's foreseeability test attempts to render *Richards* unworkable. See U.S. Br. at 22.

necessitate suppression. And as Respondent admits, this is the usual and ordinary course of review for any challenged police action. *Id*. at 25; see, *e.g.*, *Williams v. United States*, 401 U.S. 646, 662 (1971); *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Thus, a lawfulness test properly allows a reviewing court to make determinations about police action that occurred prior to the existence of exigent circumstances based upon the lawfulness of those actions.

Respondent again misses the Commonwealth's point when he contends that the Commonwealth "would have this Court hold that the police may bang as loudly as possible on a person's door, at night, and *demand* entry, as long as the individual officer believed that his actions were 'lawful'." Resp. Br. at 30 (emphasis added). The Commonwealth does not contend that warrantless entry is lawful, merely because the officer believes it is. This would be an absurd result, invalidating all Fourth Amendment protections granted by the constitution. On the contrary, the test set forth by the Commonwealth calls for a reviewing *court* to make that lawfulness determination based upon well-established tests for coercion and seizure.

Respondent sets forth a lawfulness test as the proper test for a reviewing court to employ to determine when police action can impermissibly create exigent circumstances. As the Commonwealth has

repeatedly asserted, under such a test, lawful police action cannot impermissibly create exigent circumstances.

B. The Commonwealth Would Prevail Under a Lawfulness Test

The Commonwealth prevails under a lawfulness test. Given that there was no unlawful seizure, coercion, or otherwise unlawful police action prior to the existence of exigent circumstances and probable cause, the police in this case did not impermissibly create the exigent circumstances permitting their warrantless entry.

The officers had only a single interaction with Respondent prior to the existence of exigent circumstances, a knock and announce on his door. There is nothing unlawful about an officer knocking on a citizen's door, announcing his presence, and attempting to engage him in a consensual encounter. Since the officers' actions in knocking on Respondent's door and announcing their presence were lawful under the Fourth Amendment, the next step in a lawfulness analysis is whether, regardless of the facial lawfulness of police action, there exists an unlawful seizure or coercion.

Respondent's contention that he was unlawfully seized by the officers' knock and announce at his door is without support. Resp. Br. at 22-26. There is no evidence to indicate that the Respondent was unlawfully seized by officers who were standing *outside* his

apartment. There was no threatening police presence, display of weapons, physical touching, or use of language or tone of voice indicating that compliance with the officers' request might be compelled in this case. See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *Dunaway v. New York*, 442 U.S. 200, 207 (1979); *Mendenhall*, 446 U.S. at 554. This Court has clarified that for a "seizure" to have occurred, either the person must be physically subdued by a police officer or the person must submit to the officer's show of authority. See *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Neither occurred in this case. In fact, the officers made no show of authority at Respondent's door. Even had the officers made a show of authority and demanded that Respondent allow them entry as he contends occurred, Respondent never submitted to that show of authority. Rather, he ignored the officers' authority and chose to respond illegally. No unlawful seizure occurred here.

Nor could it plausibly be argued that the officers entered Respondent's apartment based on coerced consent. When a person is not seized or in custody, his consent is voluntary so long as it was not the result of coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). Contrary to Respondent's contentions, the officers here did not unlawfully "demand entry." The officers only knocked and announced their presence at Respondent's door. Even if Respondent's allegations of a "demand for entry" ring true, no consent for entry was given here. Respondent ignored the officers' attempts at a consensual encounter and chose to

pursue an unlawful action. Since there was no consent, the officers' actions at the Respondent's door cannot be determined to have been coercive. It would be a dangerous rule to determine that when officers lawfully attempt to gain consent, a reasonable person could be deemed coerced or seized because they choose to commit an unlawful act rather than consent. See, *e.g.*, *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

Since there was no unlawful entry and the officers did not unlawfully seize or coerce the Respondent into giving his consent for entry, the officers' lawful and reasonable actions in knocking and announcing their presence at Respondent's door, did not impermissibly create the exigency of destruction of evidence. In contending otherwise, Respondent mischaracterizes the underlying facts of this case in numerous ways. Resp. Br. at i, 1, 6, 12, 13, 17, 18, 23, 24, 30.

First, Respondent repeatedly asserts that the officers in this case demanded entry into his home. Resp. Br. at i, 1, 6, 12, 13, 17, 18, 23, 24, 30. He cites to a single sentence from the Circuit Court opinion, which used the phrase "knock and demand," for this assertion. See Pet. App. at 3a-4a. The body of the Circuit Court's opinion, however, fully supports that what occurred here was a knock and announce. The court's incidental use of the phrase "knock and demand" was merely a case of imprecision. If this were not the case the Circuit Court could not have found, as a matter of fact, and concluded as a matter

of law, that the officers properly continued their investigation "by initially knocking on the door of the apartment unit and awaiting the response or consensual entry." *Id*. at 9a. Entry demanded is not consensual.

Moreover, in their discussion of the facts of this case, as well as their application of the applicable law to those facts, both the Kentucky Court of Appeals (in the majority opinion as well as the dissent) and the Kentucky Supreme Court defined the officers' knock on Respondent's door as a "knock and announce," not a "knock and demand for entry." *Id*. at 14a, 19a, 25a, 27a, 36a, 43a, 46a, 47a. The Kentucky Supreme Court's finding that the officers did not act in bad faith in knocking on Respondent's door and announcing their presence also supports the conclusion that the Circuit Court did not intend to find that the officers "demanded entry." Testimony at the suppression hearing never raised the issue or premise that the officers demanded entry into Respondent's apartment, nor does the record present any evidence that the officers ever demanded entry into Respondent's apartment. See J.A. 22-23, 32, 41, 46. In fact, an officer testified at the suppression hearing that all that was said at Respondent's door was, "Police, police, police!" or "This is the police!" *Id*. at 21-24.

Given that both the Kentucky Court of Appeals and the Kentucky Supreme Court read the Circuit Court's use of the phrase "knock and demand" to be an imprecise statement of the facts in this case, and given that what actually occurred was a knock and

announce, this court should defer to that finding under the "two-court" rule. See *Exxon Co., U.S.A. v. Sofec, Inc*., 517 U.S. 830, 841 (1996) ("A court of law, such as this Court is, rather than a court for correction of errors of fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co*., 336 U.S. 271, 275 (1949))). As such, the finding here is that the officers knocked and announced their presence. There was no demand for entry or coercion.

Second, Respondent alleges that the officers in this case affected a warrantless entry "to prevent the destruction of evidence relating to a completed, nonviolent, misdemeanor offense." Resp. Br. at 28; See also Resp. Br. at 1, 8-10. Respondent's allegations ignore all of the surrounding circumstances leading up to the officers' knock and announce at his door. Respondent would have this Court ignore the officer's testimony at the suppression hearing where he clearly indicated that he believed that he was in hot pursuit of a fleeing felon – a crack cocaine dealer – and that the felon had entered Respondent's apartment. J.A. 21-24, 31-32, 38-40, 46-47, 54-57, 65-66. Respondent would also have this Court ignore the officer's testimony that he believed that the fleeing felon was aware of the police presence and was destroying crack cocaine, as well as marijuana. *Id*. at 24-25, 45-47. And Respondent would have this Court ignore the officer's testimony that immediately upon

entry into Respondent's apartment the police conducted a protective sweep of the premises in an attempt to locate the fleeing felon. *Id*. at 24-28, 63-65. All told, the officer's uncontroverted testimony amply supports the conclusion that the officers entered Respondent's apartment in an effort to prevent the destruction of evidence relating to the felony offense of trafficking in cocaine.

Respondent's reliance on *Welsh v. Wisconsin*, 466 U.S. 740 (1984), to support his argument that warrantless entry was not justified in this case is therefore misplaced. Resp. Br. at 28. This Court held that the officer's warrantless entry into the home in *Welsh* was not justified because the underlying offense was a civil, rather than criminal, offense with no imprisonment. *Welsh*, 466 U.S. at 754-755. Here, police officers were chasing a drug trafficker. Trafficking in cocaine is a felony in Kentucky. KRS 218A.1412. The police believed that the felony drug trafficker entered the Respondent's apartment. Therefore, there were much graver offenses to support warrantless entry than simply smoking marijuana as Respondent contends. Indeed, Respondent himself pled guilty to first-degree trafficking in a controlled substance, a Class C Felony in Kentucky. KRS 218A.1412. However, even if the officers believed that only marijuana consumption was taking place in Respondent's apartment, they would still have been entitled to enter the apartment upon hearing sounds indicating the destruction of the drug. Drug use is a far more serious offense than the traffic violation at issue in *Welsh*.

Respondent also cites to *Mincey v. Arizona*, 437 U.S. 385 (1978) and *United States v. Jeffers*, 342 U.S. 48 (1951) for the proposition that officers cannot claim an exigency if they could have guarded the door to prevent the destruction or removal of evidence. Resp. Br. at 28-29. This is inapplicable here. The officers here heard the destruction of evidence actually taking place after they knocked, whereas the evidence wasn't in the process of destruction in *Mincey* or *Jeffers*. See *Mincey*, 437 U.S. at 383; *Jeffers*, 342 U.S. at 52. Officers here did not have the opportunity to prevent the destruction of evidence by simply guarding the Respondent's door. The suspect was inside his apartment, unlike in *Mincey* and *Jeffers*, and the destruction had already begun.

Respondent's allegations of unlawful police action must come to naught. Under a lawfulness test, since there was no unlawful seizure or coercion in this case the officers' lawful actions in knocking on Respondent's door and announcing their presence did not impermissibly create the exigency of destruction of evidence. Once the exigency existed, coupled with probable cause, the officers' warrantless entry was reasonable under the Fourth Amendment. Therefore the Kentucky Supreme Court improperly suppressed the evidence seized during the warrantless search.

II. EXIGENT CIRCUMSTANCES EXISTED IN THIS CASE

A. This Court May Assume That Exigent Circumstances Existed In Order To Determine If The Police Impermissibly Created Them

In its opinion, the Kentucky Supreme Court never determined whether exigent circumstances existed. Rather, it "assume[d] for the purpose of argument that exigent circumstances existed, and proceed[ed] to the more important question of whether police created their own exigency." Pet. App. at 43a; *King v. Commonwealth*, 302 S.W.3d 649, 655 (Ky. 2010). Without any citation to authority whatsoever, Respondent claims that this Court may not make the same assumption.[2] Resp. Br. at 21. Indeed, Respondent spends a considerable portion of his brief arguing that exigent circumstances did not exist in the present case. That issue is not before this Court.

This Court did not grant *certiorari* to decide whether exigent circumstances existed. And as this Court has often noted, "[o]rdinarily, 'we do not decide in the first instance issues not decided below,'" *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 129 S.Ct. 788, 798 (2009) (quoting *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999)). Therefore, this Court need not address the existence

[2] Respondent does not give citation to any authority for this proposition.

of exigent circumstances, as the Kentucky Supreme Court did not directly do so below.

However, this Court can assume conclusions assumed by the lower courts. For instance, in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), "[t]he state trial court never decided whether there was consent to the entry because it deemed decision of that issue unnecessary in light of its finding that exigent circumstances justified the warrantless arrest." *Id*. at 743 n.1. The Wisconsin Court of Appeals reversed and remanded for a hearing on the issue of consent, but that decision was reversed by the Wisconsin Supreme Court, which reinstated the trial court's decision. *Ibid*. Therefore, for purposes of its decision, this Court "assume[d] that there was no valid consent to enter the petitioner's home." *Ibid*.[3] Thus, Respondent's bald assertion is completely indefensible. This Court may therefore make the same assumption that the Kentucky Supreme Court made – that exigent

[3] See also, *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc*., 550 U.S. 45, 64 (2007) (Court assumed "for argument's sake" applicability of a statute, but cautioned "we repeat that we do not decide this question"); *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").

circumstances exist in the present case – in order to reach the more important question of whether the police can impermissibly create their own exigency.

B. Exigent Circumstances Existed In This Case

Even if this Court were to address whether exigent circumstances existed in this case, it would find that they did. To determine whether exigent circumstances existed to permit a warrantless entry, the officers must have had a reasonable belief that evidence was or may be destroyed or removed before they could lawfully seize the evidence.[4] In order to determine if the officers' belief that evidence was being destroyed within the Respondent's apartment was reasonable, this Court looks at the totality of the circumstances. See *Michigan v. Fisher*, ___ U.S. ___, 130 S.Ct. 546, 548-549 (2009) (analyzing the totality of the circumstances to determine if exigent circumstances existed).

Respondent contends that *Johnson v. United States*, 333 U.S. 10 (1948) controls the outcome of this case. Resp. Br. at 11, 13-18. That case is easily

[4] The threshold standard for exigent circumstances is less than probable cause. For example, in *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court held that in order to conduct a no-knock entry during the execution of a search warrant, "the police must have a reasonable suspicion that knocking and announcing their presence" may result in "the destruction of evidence." *Id*. at 394.

distinguishable. *Johnson* was not an exigent circumstances case. In *Johnson*, when a police officer knocked on a hotel room door after smelling burning opium, the occupant did not attempt to flee or destroy evidence. See *Johnson*, 333 U.S. at 15 (noting that "[n]o suspect was fleeing or likely to take flight . . . [and] [n]o evidence or contraband was threatened with destruction or removal"). Instead, after a "slight delay," the occupant answered the door. *Id.* at 12. The problem with the search that followed was that the occupant's consent was not freely given. This Court concluded that police entry into the hotel room was "demanded under color of office," and that the occupant gave her consent "in submission to authority, rather than as an understanding and intentional waiver of a constitutional right." *Id.* at 13.

The circumstances here are altogether different. Here, after the police officers knocked on the door and announced their presence, 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. J.A. at 23-25, 40-43. 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. *Id*. at 24-25, 45-47. One of the officers specifically testified that due to the nature of crack

cocaine it can easily be destroyed, and he believed that it was being destroyed. *Id*. at 24.

Examining the totality of the circumstances it would be a reasonable belief that evidence was being destroyed within Respondent's apartment. It would be reasonable for the officers to believe that the fleeing felony crack cocaine trafficker had entered Respondent's apartment, given that he could have only entered one of two apartments and the strong scent of burning or burnt marijuana was emanating from Respondent's doorway; as if it was the door that had recently been quickly opened and slammed shut by the fleeing felon, allowing the scent of marijuana to escape and be blown down the apartment breezeway. In fact, this Court stated in *Johnson v. United States*, 333 U.S. 10 (1948), that the odor of drug use "might very well be found to be evidence of most persuasive character." It would be reasonable for the officers to believe that, based upon their training and experience, the noises of movement they heard from the opposite side of Respondent's door, without any other response, were consistent with the destruction of evidence, given that they reasonably believed that the fleeing felony crack cocaine trafficker had recently entered the apartment and that crack cocaine is by its nature easily destroyed.[5] This new circumstance

[5] Courts routinely acknowledge the ease with which drugs may be destroyed. See, *e.g.*, *United States v. Banks*, 540 U.S. 31, 40 (2003) (stating that "a prudent dealer will keep [his cocaine] near a commode or kitchen sink" in order "to get rid of it");

(Continued on following page)

solidified that belief. The officers' belief that exigent circumstances existed was eminently reasonable considering the totality of the surrounding circumstances. When coupled with the probable cause that a crime had been committed based upon the smell of marijuana, the officers' warrantless entry was reasonable under the Fourth Amendment.

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United States v. Garcia, 983 F.2d 1160, 1168 (1st Cir. 1993) (noting that cocaine could be "easily and quickly hidden or destroyed"); *United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991); *United States v. Nichols*, 344 F.3d 793, 798 (8th Cir. 2003) (same); *United States v. Dickerson*, 195 F.3d 1183, 1185-1187 (10th Cir. 1999) (recognizing that crack cocaine is easily disposed of "in the quantity alleged to have been distributed"). But see *United States v. Bates*, 84 F.3d 790, 796 (6th Cir. 1996) (exigent circumstances based on destruction of evidence not present because "it is unreasonable to think that fifteen kilograms of powdered cocaine could be quickly disposed of by flushing it down the toilet or dumping it down the sink drain.").

CONCLUSION

For the foregoing reasons, and those stated in the Petitioner's opening brief, the judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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