No. 12-140

# 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: (1) is the hot pursuit exception to the warrant requirement contingent on a subjective determination of pursuit; and (2) what constitutes a serious offense for purposes of dispensing with the warrant requirement. 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.

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.

In opposition to the offense classification 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 the four tests enumerated in the petition. Four starkly different tests are employed by the lower courts in an attempt to address when an offense is considered serious enough to dispense with the warrant requirement, which has resulted in confusion and arbitrary rulings. 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 Hot Pursuit Exception.

### A. Hot Pursuit and Consensual Encounter Are Not Mutually Exclusive.

Respondent's claim that both hot pursuit and consensual encounter cannot coexist tests logic and threatens proper Fourth Amendment analysis. Resp. at 5-9. A finding by this Court that hot pursuit exists in this case does not, as Respondent claims, "repudiate all of the reasoning that undergirds its prior holding." Resp. at 6. Rather, a finding of hot pursuit, would properly align Fourth Amendment analysis and further support this Court's finding that the officers were seeking a consensual encounter.

Hot pursuit does not cease to exist, simply because a consensual encounter is sought. A "hot" pursuit may become "cold" after an extended break in pursuit; however a brief break in pursuit does not render pursuit any less "hot." See *United States v. Robertson*, 305 F.3d 164 (3rd Cir. 2002). Here, after losing sight of the fleeing felon, officers prudently sought a consensual encounter to further the pursuit, rather than immediately entering homes without a warrant. Had the fleeing felon answered his door in response to the officers' knock and announce, there is no doubt that he would have been immediately arrested, hot pursuit would have been found, and warrantless entry would have been permissible. This is the reasonable outcome. Officers should be permitted to seek consensual encounters in the midst of hot pursuit to locate the fleeing felon, otherwise police duties will be severely and unreasonably restrained.[1]

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[1]Respondent once again attempts to convince this Court that these officers simply abandoned a fleeing drug trafficker to investigate someone in possession of marijuana. 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/burning marijuana, such that their chase would cease

### B. Respondent Agrees With Petitioner: The Kentucky Supreme Court Erred in Not Applying a Totality of the Circumstances Test.

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 10-20. 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 19-23. As set forth in the petition, courts have consistently upheld objective tests over subjective ones. *Ibid*.

The Kentucky Supreme Court relied heavily on their 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.App. 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. Logically the "key" to any "lock" is the main means of releasing it. Thus, Kentucky

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and a new investigation into another offense would begin. Resp. at 7. The more logical result is that the officers would equate the scent of burning/burnt marijuana to the location of the fleeing felon. 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; and (2) the officers testified that they believed the crack cocaine dealer whom they had been pursuing had fled into Respondent's apartment. Pet. App. at 9a-10a, 24a, 27a; Pet. App. at 3a-4a,14a, 18a-19a, 21a-22a, 25a, 27a, 36a-37a.

has made subjective knowledge of pursuit the determinative factor in finding hot pursuit existed. To claim otherwise is illogical.

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. Respondent's arguments to the contrary are without merit. Resp. at 10.

### C. The Lower Courts are Irreconcilably Split on the Issue of Hot Pursuit, Resulting in Directly Contradictory Results

Respondent urges this Court to deny *certiorari* because a true conflict does not exist among the lower courts. Resp. at 14-22. This simply is not true. As Respondent asserts, the proper test for hot pursuit is based on the "totality of the circumstances," and many lower courts properly apply a "totality of the circumstances" test; however a growing contingent of lower courts now assert that the determinative factor in hot pursuit cases is whether or not the suspect had knowledge of pursuit. See *United States v. Baldacchino*, 762 F.2d 170, 177 (1st Cir. 1985) ("Baldacchino had been on the move since the plane crash...[was] well aware that [his] smuggling enterprise had been discovered and that [he was] being pursued....") (emphasis added); *United States v. George*, 883 F.2d 1407, 1414-1415 (9th Cir. 1989) (". . . we cannot conclude on the record before us that the officers reasonably believed that Appellant either knew or was in substantial danger of learning of his imminent capture"); *Thomas v. State*, 658 S.E.2d 796, 801 (Ga.App. 2008) ("Hot pursuit need not involve a high speed chase; the key is that the defendant is aware he is being pursued by the police . . ."); *State v. Nichols*, 484 S.E.2d 507, 508 (Ga.App. 1997) (". . . the key to "hot pursuit" is that the defendant is aware he is being pursued by the police . . ."); *State v. Dugan*, 276 P.3d 819, 829-830 (Kan.Ct.App. 2012) ("The evidence fails to support a chase or some concerted

effort on Dugan's part to evade an arrest begun in a public place. That is determinative..."); *King v. Commonwealth*, 302 S.W.3d 649, 653-654 (Ky. 2010) (overruled on other grounds by *Kentucky v. King*, – U.S. – , 131 S.Ct. 1849 (2011)); *King v. Commonwealth*, – S.W.3d –, 2012 WL 1450081, 3 (Ky. 2012).

While superficially it appears that these prodigal courts properly apply a "totality of the circumstances" test to determine whether hot pursuit exists; substantively, each of these courts improperly places undue emphasis on a single determinative factor: subject knowledge of pursuit by the fleeing suspect. Exemplifying this reasoning, the Kansas Court of Appeals held that "[f]or Fourth Amendment purposes, then, 'hot pursuit' entails law enforcement officers chasing a suspect . . . in a manner that the suspect *actually had or reasonably should have identified them as government agents attempting to stop him or her*." *Dugan*, 276 P.3d at 829 (emphasis added). This same reasoning is echoed by the Georgia Court of Appeals in *Nichols* and *Thomas*, holding that the "*key to 'hot pursuit'* is that the defendant is aware he is being pursued by the police . . ." *Thomas*, 658 S.E.2d at 801 (emphasis added); *Nichols*, 484 S.E.2d at 508. This same reasoning was applied by both the First and Ninth Circuits in *Baldacchino* and *George*, where the courts emphasized that the most important factor to show hot pursuit existed was the suspects knowledge of pursuit. *Baldacchino*, 762 F.2d at 177; *George*, 883 F.2d at 1414-1415.

The Kentucky Supreme Court has strayed afield of proper Fourth Amendment analysis in falling in-line with these prodigal courts' reasoning that the "key" to hot pursuit is the subjective knowledge of the fleeing suspect. This reasoning stands in stark contrast to the vast majority of lower courts and proper Fourth Amendment objective reasoning. This Court should grant *certiorari* to provide guidance to bring this outliers back into the fold.

## II. *Certiorari* is Warranted to Address When an Offense is Serious Enough to Allow for Warrantless Entry.

Justice Kennedy asked the rhetorical question at the oral arguments in *King I*: "[W]hy isn't the evidence always being destroyed when the marijuana is being smoked? Isn't it being burnt up?" (Transcript, p. 16). The answer to that question is, "Yes, consumption is destruction." This necessarily implies that in a jurisdiction where possession of marijuana is a jailable offense that the consumption of marijuana in police presence provides both probable cause that the crime of possession is in progress, and the exigency that evidence is being destroyed; thus, allowing for warrantless entry.

Respondent agrees with the Commonwealth that jailable vs. non-jailable is the proper test under *Welsh v. Wisconsin*, 466 U.S. 740 (1984) and *Illinois v. McArthur*, 531 U.S. 326 (2001), but then fails to reconcile that with the Supreme Court of Kentucky's failure to find that exigent circumstances existed in this case where police officers made warrantless entry after smelling burnt/burning marijuana emanating from Respondent's apartment. Resp. at 23. In doing so, Respondent fails to recognize: (A) that a split in authority on this issue still exists; (B) that this case provides a proper threshold analysis for similar drug-type cases; and (C) that this Court has not applied *McArthur* to facts similar to this case.

### A. Cases, Commentaries, and Treatises All Agree That the Courts Are Split on This Issue.

Respondent claims that post *McArthur* "lower courts uniformly apply the jailable versus nonjailable test" Resp. at 25. This is not the case. Six years after *McArthur*, the Utah Supreme Court, held that under the Fourth Amendment "the detectable odor of burning marijuana is inadequate, standing alone, to support such a reasonable belief [that the destruction

of evidence is sufficiently certain]. The aroma of burning marijuana must be accompanied by some evidence that the suspects are disposing of the evidence, as opposed to casually consuming it . . . ." *State v. Duran*, 156 P.3d 795, 797 (Utah 2007). The *Duran* Court concluded that the police could not enter, without a warrant, solely on the premise that the defendant was "smokin' up the evidence." *Id.* at 798-799. The State relied on *McArthur*, *id.*, at 799, but the Court held that *McArthur* supported its decision despite smoking marijuana being a jailable offense, *id.*, at 798-799. As noted in Kentucky's Petition for Writ of *Certiorari*, post-*McArthur* courts have reached the opposite conclusion, i.e., that the odor of burning marijuana does constitute exigent circumstances. See *e.g.*, *Rideout v. State*, 122 P.3d 201, 208 (Wyo. 2005).

Moreover, in another post-*McArthur* decision, the Supreme Court of South Dakota recognized an set forth the split on this issue. *State v. Hess*, 680 N.W.2d 314, 325-327 (S.D. 2004). The Court cited cases from Arizona, Colorado, Connecticut and Texas which held "that because the smell of burning marijuana is itself proof that evidence of criminal conduct is being destroyed, the detection of that smell establishes exigent circumstances." *Id.* at 325. The *Hess* Court also cited cases from Idaho, Indiana, Nebraska, New Mexico, North Dakota, Ohio and Washington which held that "the smell of burning marijuana does not evince a sufficiently grave offense to justify entering a residence without a warrant." *Ibid.* As the *Hess* Court noted, these courts relied "on the distinction between minor and serious offenses made by" this Court in *Welsh v. Wisconsin*, 466 U.S. 740 (1984). *Hess*, 680 N.W.2d at 325.[2] Because the police suspected Hess possessed methamphetamine,

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[2]Thus, it is of no moment that many of these cases cited by the Commonwealth pre-date *McArthur*. These cases are still controlling in their respective jurisdictions and continue to be recognized as such.

which is a felony, the warrantless entry was justifiable under *Welsh*. *Hess*, 680 N.W.2d at 326.

Other acknowledgments of this split can be found in treatises, law reviews, and commentaries. Professor William A. Schroeder, for example described the split in his article *Factoring the Seriousness into Fourth Amendment Equations - Warrantless Entries Into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439, 495-497 (1990), stating that "[s]ince *Welsh*...the classification process has continued to be rather arbitrary, freewheeling, and reflective of little more than the intuitive reactions of individual judges to particular crimes." Jeffrey Bellin also called upon this Court to rectify the myriad lower court interpretations stating that "the case law stands in a state of confusion." Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 Iowa L. Rev. 1, 17 (2011). Several additional articles also find that it is imperative that this Court rectify the current split. See Geoffrey C. Sonntag, *Probable Cause, Reasonable Suspicion, or Mere Speculation?*, 42 Washburn L.J. 629, 629-30 (2003). See also 3 Search & Seizure § 6.5 (4th ed.) and Andrew Eppich, *Wolf at the Door: Issues of Place and Race in the "Knock and Talk" Policing Technique*, 32 B.C. J.L. & Soc. Just. 119, 143 (2012). There can be no doubt, an irreconcilable split exists that must be rectified by this Court.

### B. This Case is an Excellent Vehicle for a Proper Threshold Analysis

The South Dakota Court's decision in *Hess* demonstrates the importance of this case as a vehicle to decide the issue in question. Marijuana-type cases are traditionally seen as one of the more base level of drug offenses. A decision from this Court under these facts will prevent further confusion about whether a smell-of-burning-methamphetamine case or a smell-of-burning-crack-cocaine case can be applied to a less serious, although still jailable drug offense. Failure of

this Court to weigh in on this issue now will simply leave "lower courts to make ad hoc, case-by-case assessments of offense severity." Bellin, *supra*, 25 (2011). See also Schroeder, *supra* (discussing the need of this Court to establish a bright-line rule in warrantless entry cases).

### C. This Court Has Not Applied *McArthur* to Facts Similar to This Case, Resulting in Arbitrary, Freewheeling Application By the Lower Courts.

Respondent also claims this case is a poor vehicle to decide the issue posed by the Commonwealth because no court has ruled "that marijuana possession is not sufficiently serious to justify an officers' warrantless entry" Resp. at 23. The Commonwealth's question, according to Respondent, does nothing more than "tilts at windmills" *Ibid*. This ingenious argument misses the point entirely. The Commonwealth's position is that possession of marijuana is a jailable offense in the Commonwealth of Kentucky. The burning of that marijuana creates an exigent circumstance, the destruction of that evidence. So the officers properly dispensed with the warrant requirement when they smelled the odor of burning/burnt marijuana coming from Appellant's apartment.

Respondent argues that this Court should not review this case because "[t]his Court has already done what the Commonwealth asks it to do" Resp. at 23. Specifically, Respondent claims this Court has twice "articulated the jailable versus nonjailable distinction the Commonwealth urges" Resp. at 23-24. On the contrary, "no United States Supreme Court case has ever directly upheld a warrantless search of a residence based solely on the need to prevent the destruction of evidence." Sonntag, *supra*, 629-630. See also 3 Search & Seizure § 6.5 (4th ed.) ("Given the curious analysis in *Vale*, it is to be hoped that it will not be the last word from the Court on this important issue."); Eppich, *supra*, 143 (agreeing with

Prof. LaFave's concern on *Vale* being the last word on this issue).

Because this Court has not weighed in on this issue, "the courts of appeals have been left to fashion their own criteria for determining under what circumstances a warrantless search of a residence is permissible." Sonntag, *supra*, 630. And "[t]he criteria developed by the courts of appeals have been far from consistent." *Ibid*. Thus, "this Court should remedy this situation by expounding clear rules under which police may make a warrantless entry into a residence to prevent the destruction of evidence." *Id.* at 631.

## CONCLUSION

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

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