No. 12-140

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY,

PETITIONER

v.

HOLLIS DESHAUN KING,

RESPONDENT

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Will this Court reverse both its own determination that the police in this case sought a consent-based encounter with the occupants of King's apartment and the lower courts' repeated factual finding that "the police were not in pursuit of a fleeing suspect" in order to decide a question about the hot pursuit exception that is not applicable here and has not divided any of the federal Courts of Appeal or intermediate state appellate courts?

2. Should this Court revisit a conclusion that it and every Kentucky court have made in the Commonwealth's favor, *e.g.* that the exigent circumstances exception applies to the jailable offense of marijuana possession, in order to articulate for a third time a legal rule that no lower state or federal court has ignored or misapplied in the past ten years?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

Other Sources

COUNTER STATEMENT OF THE CASE

1. **Respondent accepts this Court's recitation of facts.** Police officers set up a controlled buy of crack cocaine outside an apartment complex. Officer Gibbons watched the deal take place, and he radioed three uniformed officers to arrest the suspect. The uniformed officers ran to the breezeway of the apartment that the suspect entered. The officers heard a door shut and they detected a very strong odor of burnt marijuana. The officers noticed two apartments at the end of the breezeway, but they did not know which apartment the suspect had entered. Gibbons radioed that the suspect ran into the apartment on the right, but the uniformed officers did not hear this because they had already left their vehicles. The uniformed officers smelled marijuana smoke emanating from the apartment on the left so they approached the door of that apartment. Officer Cobb testified that the uniformed officers banged on the left door "as loud as they could" and announced, "This is the police" or "Police, police, police." As soon as the officers "started banging," they "could hear people inside moving," and "it sounded as though things were being moved inside the apartment." These noises led the officers to believe that evidence was about to be destroyed. The officers announced that they "were going to make entry inside the apartment," and Cobb kicked in the door. King and two other people were inside. The officers found marijuana and power cocaine in plain view, and a subsequent search revealed crack cocaine, cash, and drug paraphernalia. Eventually, the police entered the apartment across the hall and found the suspected drug dealer, who was the initial target of their investigation. *Kentucky v. King*, 131 S.Ct. 1849, 1854-55 (2011).

2. Respondent accepts this Court's recitation of the procedural history of this case. See *King*, 131S.Ct. at 1855. This Court held that the "conduct of the police prior to their entry into the apartment was entirely lawful. They did not violate the Fourth Amendment or threaten to do so. In such a situation, the exigent circumstances rule applies." *Id.* at 1854. This Court further concluded that "[a]ny question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court," and it remanded the case "for further proceedings not inconsistent with this opinion." *Id.* at 1863-64.

3. **On remand, the Kentucky Supreme Court reiterated that the "police were not in hot pursuit of a fleeing suspect," and it held that the Commonwealth failed to satisfy its burden of proving a genuine exigency.** The Kentucky Supreme Court reasoned that "the Commonwealth failed to meet its burden of demonstrating exigent circumstances justifying a warrantless entry" because "Cobb never articulated the specific sounds he heard which led him to believe that evidence was about to be destroyed. In fact, the sounds as described at the suppression hearing were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door." Pet. 87a-88a. The court explained that: "No exigency is created simply because there is probable cause to believe that a serious crime has been committed." *Id.* The court vacated King's judgment of conviction and remanded the case to the trial court "for proceedings consistent with [its] opinion." *Id.* at 88a-89a.

4. As of this filing date, this case remains pending in the Fayette Circuit Court. The Kentucky Supreme Court transferred jurisdiction of this case to the Fayette Circuit Court. Respondent has repeatedly urged that court, since June of this year, to obey the directive of the Kentucky Supreme Court, act on this case, and dismiss the indictment with prejudice. As of this filing date, however, the Fayette Circuit Court has refused to do anything other than take this case under advisement. This case remains pending, apparently indefinitely, and in legal limbo in state court.

REASONS FOR DENYING THE WRIT

The Commonwealth asks this Court to resolve legal issues that are not presented by this case. At the urging of both the Commonwealth and the United States, and based on the express finding of the trial court, this Court held that the police sought a consent-based encounter with the occupants of King's apartment before they entered to prevent the destruction of evidence. There is no need for this Court to reverse itself. This is not a hot pursuit case. Moreover, this Court routinely considers a suspect's awareness of an officer's presence or pursuit when deciding exigent circumstances cases. The Commonwealth's argument that a "suspect's subjective knowledge...has no place in Fourth Amendment interpretation" ignores this Court's case law.

Likewise, there is no need for this Court to revisit its threshold determination that "the exigent circumstances rule applies" to the facts of this case. The dispute in this case has never centered on whether the offense of marijuana possession was sufficiently serious to justify the warrantless entry of King's apartment. No Kentucky court has ever said otherwise. This Court has twice previously articulated the "jailable" versus "nonjailable" distinction that the Commonwealth now urges, and no lower court has ignored or misapplied that distinction in the past ten years. Further guidance from this Court is not needed.

FIRST QUESTION PRESENTED

The Commonwealth raised the same question in its first petition for certiorari. Compare Commonwealth's Petition for Certiorari, *Kentucky v. King*, 2010 WL 162437, *ii ("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?"); with Pet. i ("Is the hot pursuit exception to the warrant requirement contingent on a subjective determination of pursuit?"). This Court denied review of this question then and it should do so now.

1. **This case continues to present a poor vehicle for answering the Commonwealth's first question presented.** This is not a hot pursuit case. The trial court, the Kentucky Supreme Court, and this Court have all concluded that the police did not enter King's apartment in pursuit of a fleeing suspect. The outcome here is not contingent upon the cocaine dealer's knowledge of his pursuit. The Commonwealth's first question presented is academic.

The Commonwealth's contention that the police lawfully entered King's apartment in hot pursuit cannot be reconciled with this Court's conclusion that the officers knocked on the door of King's apartment and awaited a "consensual entry." *King*, 131 S.Ct. at 1863; Pet. 9. The Commonwealth's hot pursuit question implies that this Court has misconstrued the record in this case and mischaracterized the nature of the officers' conduct before entering King's apartment. But see Commonwealth's Brief on the Merits, *Kentucky v. King*, 2010 WL 4624149, *12-16, *18-20, *23-24, *36 n. 13, *37 (The last time this Court considered this case, the

Commonwealth argued repeatedly that "the officers attempted to initiate a consensual encounter" with the occupants of King's apartment.); see also Brief for the United States as Amicus Curiae Supporting Petitioner, *Kentucky v. King*, 2010 WL 4735591, *6-7, *13, *17, *20-21, *23, *26 (The United States also repeatedly argued that the police "knocked on the door...and announced their presence in an effort to gain voluntary cooperation from the occupants, and waited for a response.") This Court accepted the consent-based encounter argument at the urging of the Commonwealth and the United States.

Now, the Commonwealth has reversed course and would apparently have this Court do the same. Answering the Commonwealth's first question presented requires this Court to repudiate all of the reasoning that undergirds its prior holding in order for it to now hold that that the police were justified in entering King's apartment under an alternative legal theory. There is no need for this Court to do so.

This Court explained that the officers in this case did not manufacture exigent circumstances because they did "no more than any private citizen might do." *King*, 131 S.Ct. at 1862. This Court reasoned that the police were lawfully present when they knocked on the door to King's apartment, that they had good reason to announce their presence loudly and to knock on the door with some force, and that the occupants remained free to refuse to open the door and to prevent the officers from entering the premises. *Id.* at 1861-62. The occupants could have chosen to "stand on their constitutional rights," this Court said. *Id.* at 1862. When the police

seek a consent-based encounter, occupants who respond by attempting to "destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue," this Court admonished. *Id.* at 1858, 1862.

An officer in pursuit of a suspect who has taken refuge inside a home would have done none of the things that this Court said the police in this case did. To put it mildly, officers in pursuit of a fleeing suspect conduct themselves differently than "any private citizen might." *Id.* at 1862. An officer in hot pursuit would not seek out or wait for consent to enter the premises. Doing so would be "senseless." *Wilson v. Arkansas*, 514 U.S. 917, 935-36 (1995); see also *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (when the police are in pursuit of a fleeing suspect they "need to act quickly"); *Warden v. Hayden*, 387 U.S. 294, 298-299 (1967) ("speed is essential" to prevent a fleeing suspect from arming himself or from escaping); *Ker v. California*, 374 U.S. 23, 40-41 (1963) (police in pursuit of a fleeing suspect are under no obligation to knock and announce their presence). Unlike a consensual police encounter, when the police are in pursuit of a suspect who has taken refuge inside a home the occupants are decidedly not at liberty to "stand on their constitutional rights." *King*, 131 S.Ct. at 1862.

Either the police were seeking a consensual encounter with the occupants of King's apartment or they were in hot pursuit of a fleeing felon. Either the occupants were free to "stand on their constitutional rights" or the police were justified in entering the apartment over the occupants' objection. All of these things cannot simultaneously be true.

This Court's factual recitation is supported by the record. See *King*, 131 S.Ct. at 1854-55. The Commonwealth's hot pursuit argument is not. The trial court specifically found that the police "knock[ed] on the door of the apartment unit and await[ed] the response or consensual entry." Pet. App. 9a. That finding is supported by the evidence adduced at the suppression hearing. The trial court explained:

> When asked directly to articulate the reasons which he thought justified the forced entry into Apt. 78 (apartment on the back left hall) by knocking down the door, Officer Cobb testified that he and the other officers thought that there was a crime occurring inside Apt. 78 based on the strong odor of marijuana being detected from under the door and, from the noise heard through the door, that its occupants were engaging in the destruction of evidence. ... Officer Cobb and the other officers thought that drugs were being destroyed inside Apt. 78 which justified knocking down the door to that unit.

Pet. App. 6a (emphasis in original). Likewise, in its initial review of this case, the Kentucky Supreme Court reiterated that two things motivated the officers' decision to enter King's apartment. The whereabouts of the cocaine dealer was not one of them:

> As the circuit court noted in its findings of fact, when asked to articulate the reasons which he thought justified the forced entry, Cobb testified that the officers thought (1) that a crime was occurring based on the strong odor of marijuana, and (2) that evidence was possibly being destroyed based on the sound of movement inside the apartment.

Pet. App. 36a; see also Pet. App. 40a (the Kentucky Supreme Court rejected the applicability of the hot pursuit exception in the section of its initial opinion titled: "The Police Were Not In Pursuit of a Fleeing Suspect."); Pet. App. 87a (on remand, the Kentucky Supreme Court reaffirmed its conclusion that the hot pursuit

exception did not apply because the "police were not in hot pursuit of a fleeing suspect").

Furthermore, the notion that the police entered King's apartment in pursuit of a fleeing suspect is betrayed by Officer Cobb's testimony that he had no idea which apartment the cocaine dealer entered:

> It was undisputed testimony that when Officer Cobb...and the other uniform officers entered the breezeway in question and started down the hall toward the back apartments that the officers did not know into which apartment the suspect which they were seeking...had entered. They had heard an apartment door shut, but they could not tell from which apartment the noise had come.

Pet. App. 5a; Pet. App. 36a ("Cobb...did not know which door he...heard close."). The Commonwealth's claim that the police "believed that the fleeing felon had entered the apartment door on the left" is both incorrect and inconsistent with this Court's opinion. Pet. 4; see *King*, 131 S.Ct. at 1854 ("the officers...did not know which apartment the suspect had entered.")

Of course, collectively, "the police" knew exactly where the cocaine dealer was. They knew that he was not inside King's apartment because Detective Gibbons saw the cocaine dealer enter the apartment across the hall. Pet. App. 3a; see *King*, 131S.Ct. at 1854 ("Gibbons had radioed that the suspect was running into the apartment on the right"). That knowledge is legally attributable to Officer Cobb and to the other officers on King's doorstep. See *United States v. Hensley*, 469 U.S. 221, 230-32 (1985) (articulating what lower courts characterize as the "collective knowledge doctrine"). The Commonwealth's hot pursuit question is not supported by the factual record in this case.

The hot pursuit question is also not presented by the Kentucky Supreme Court's ruling. Contrary to the Commonwealth's belief, the Kentucky Supreme Court has never held in this or in any other case that application of the hot pursuit exception is "contingent on" the suspect's knowledge of his pursuit or any other single fact. Pet. i, 10; see also Pet. 8 ("As to hot pursuit, the Kentucky Supreme Court reaffirmed that the exception did not apply because the suspect was unaware that the police were pursuing him"); Pet. 9 (the Kentucky Supreme Court held "that police must prove that a fleeing suspect knew of their hot pursuit"); Pet. 19 ("The Kentucky Supreme Court's holding that the suspect must know he is being pursued before the hot pursuit exception is applicable runs afoul of the Fourth Amendment"). What the Kentucky Supreme Court actually held was that the hot pursuit exception did not apply for several different reasons, including the fact that "there was no testimony that the police feared [that the suspect] would escape." Pet. App. 41a; accord *Minnesota v. Olson*, 495 U.S. 91, 100-1 (1990) (no hot pursuit exigency because, *inter alia*, the police surrounded the house, it was evident the suspect was going nowhere, and if he came out of the house he would have been promptly apprehended.") The Kentucky Supreme Court observed that "[a]n important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued," but it has never held that this element was dispositive. Pet. App. 40a.

If this Court is inclined to expound further on the hot pursuit doctrine, then it should wait for a case in which the police entered a home in pursuit of a fleeing suspect. This is not that case.

2. **This Court has already answered the Commonwealth's hot pursuit question.** This Court has always considered what a suspect knew when deciding whether exigent circumstances justified the officer's conduct, and it has flatly rejected the notion that some, but not all, of the facts are worthy of a lower court's consideration. The Commonwealth's argument that a suspect's knowledge of his pursuit "has no place in Fourth Amendment interpretation" is at odds with much of this Court's Fourth Amendment jurisprudence. Pet. 12-13.

This Court has consistently recognized that a suspect's awareness of an officer's presence is relevant to the exigent circumstances analysis. See e.g. *King*, 131 S.Ct. at 1857 ("Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police."); *Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006) (the fact that the occupants did not acknowledge the officers' presence, *inter alia*, suggested exigent circumstances justifying the warrantless entry); *United States v. Banks*, 540 U.S. 31, 38 (2003) (a suspect made aware of the police presence is likely to destroy evidence); *Richards v. Wisconsin*, 520 U.S. 385, 395 (1997) (a no-knock entry is justified when the occupant's awareness of the police presence will cause him to destroy evidence); *Santana*, 427 U.S. at 43 ("Once Santana saw the police, there was...a realistic expectation that any delay would result in destruction of evidence."); *United States v. Edwards*, 415 U.S. 800, 811 n. 2,

3 (1974) (destruction of evidence exigency did not justify seizing defendant's clothing because, *inter alia*, there was no proof that defendant was aware of incriminating evidence on his clothes) (Stewart, J., dissenting); *Vale v. Louisiana*, 399 U.S. 30, 32, 35 (1970) (noting that the suspect was aware of the police presence, but finding no exigent circumstances); *Hayden*, 387 U.S. at 298-99 (police acted reasonably even though the suspect did not know he was being pursued).

Hot pursuit is one of several species of recognized exigencies. It would be strange indeed for this Court to repudiate all of the aforementioned cases and hold that a suspect's awareness of the police plays no role in the exigent circumstances analysis at all, or that it is germane to some, but not all of the different types of exigencies. The fact that this Court plainly considers a suspect's knowledge with regard to the destruction of evidence exigency manifestly refutes the Commonwealth's broad contention that "[s]ubjective analysis has no place in Fourth Amendment interpretation," and its unsupported claim that "this Court has repeatedly held...that it does not look at...suspects' subjective intentions or thoughts," and its irrational fear that "police action [will be] placed in question in a wide variety of circumstances and a large number of cases" if courts are permitted to consider what a suspect knew. Pet. 12-13, 19, 24.

Likewise, this Court has consistently held that the reasonableness of any police action is never "contingent on" any single fact; it has already answered the Commonwealth's question presented, and it has done so repeatedly. See e.g. *Banks*, 540 U.S. at 36 ("[W]e have treated reasonableness as a function of the facts of cases

so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given case, and without inflating marginal ones."); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (the reasonableness of a warrantless search is not determined by bright line rules, but rather is measured "by examining the totality of the circumstances."); *Ker*, 374 U.S. at 33 (reasonableness is not susceptible to Procrustean application); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (there is no formula for determining reasonableness; each case must be judged on its own facts and circumstances). The Commonwealth's argument that courts can never consider the suspect's knowledge, *inter alia*, ignores the fact that this Court has "consistently eschewed bright-line rules" in the Fourth Amendment context. *Robinette*, 519 U.S. at 39.

Michigan v. Chesternut, 486 U.S. 567 (1988), a case concerning an "investigative pursuit" of a suspect and whether or not he was "seized," is particularly instructive. Both parties asked this Court to adopt different bright-line rules that would be applicable to all "investigatory pursuit" cases, and this Court refused noting that, "[b]oth petitioner and respondent, it seems to us, in their attempts to fashion a bright-line rule...have failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all of the circumstances surrounding the incident in each individual case." *Id.* at 572 (citation omitted).

Lastly, the Commonwealth's subjective-objective distinction ignores a fundamental tenant of Fourth Amendment jurisprudence. "Reasonableness" is never determined from the standpoint of a "particular individual's response to the actions of the police." *Id.* at 574. Rather, "[t]he test's objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Id.* "This 'reasonable person' standard...ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Id.* When a court considers whether a suspect is aware of an officer's pursuit, the question is never about what particular suspect knew, but rather whether a reasonable person in the suspect's position would understand he was being pursued. This Court's long-standing "reasonable person" approach answers the Commonwealth's argument that "investigation into the subjective viewpoint of suspects may encourage fabrication in hindsight in order to achieve the suppression of evidence obtained after a warrantless entry, and prove difficult for law enforcement to rebut." Pet. 23.

The Commonwealth's hot pursuit question invites this Court to declare that the hot pursuit exception does (or does not) apply based on a single criterion, *i.e.* the suspect's knowledge of the officers' presence. This Court should decline that invitation and adhere to its totality of the circumstances approach.

3. **All of the federal Courts of Appeal faithfully apply a totality of the circumstances analysis in hot pursuit cases.** Every federal Court of Appeals

understands that no single fact automatically governs whether the hot pursuit exception applies. Concomitantly, no court has held that any fact, including a suspect's knowledge of an officer's presence or pursuit, can never be considered as part of the totality of the circumstances. The "deep division" that the Commonwealth identifies does not exist. Pet. 13.

Two lines of cases are instructive. In *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (*en banc*), the D.C. Court of Appeals explained that "the numerous and varied street fact situations do not permit a comprehensive catalog" of when it is objectively reasonable to conclude that exigent circumstances are present. *Id.* at 392. The court then identified some of the factors that are relevant to the analysis, *e.g.* whether "a grave offense is involved," whether "the suspect is reasonably believed to be armed," whether there is "a clear showing of probable cause, including reasonably trustworthy information to believe that the suspect committed the crime involved," whether there is "strong reason to believe that the suspect is in the premises being entered," whether there is "a likelihood that the suspect will escape if not swiftly apprehended," etc. *Id.* at 392-93 (internal citation omitted.)

The First, Second, Sixth, Eighth, Ninth, and Eleventh Circuits have all either commented favorably, or expressly adopted, the so-called *Dorman* approach, and all have emphasized that the *Dorman* criteria are non-exhaustive. See *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980) ("the *Dorman* approach has value," but "it is not to be used...as a pass or fail checklist for determining exigency."); *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990) (adopting *Dorman* "not as an

exhaustive cannon, but as an illustrative sampling of the kinds of facts to be taken into account"); *United States v. Shye*, 492 F.2d 886, 891-92 (6th Cir. 1974); *Creighton v. Anderson*, 922 F.2d 443, 447-48 (8th Cir. 1990); *United States v. Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974); *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1977) (per curiam).

In *United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973), the Third Circuit likewise commented that "emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized." *Id.* at 268. Like *Dorman*, the court then identified its own, non-exhaustive list of circumstances "which have seemed relevant to courts including: (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in narcotics traffic." *Id.* at 268-69 (internal citations omitted.) The Fifth Circuit follows *Rubin.* See *United States v. Richard*, 994 F.2d 244, 247-49 (5th Cir. 1993) (a district court may consider the factors set forth in *Rubin* for determining whether exigent circumstances exist).

The Fourth Circuit has favorably cited both *Dorman* and *Rubin*, and has utilized both sets of non-exhaustive criteria for determining whether, under the

totality of the circumstances, an exigency existed. See *Vance v. North Carolina*, 432 F.2d 984, 990-91 (4th Cir. 1970) (citing *Dorman*); and *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (citing *Rubin*).

The Seventh Circuit has held that although "some or all of the factors listed" in *Dorman* "may be relevant to a particular case, the limitless array of factual settings that may arise caution against a checklist-type analysis." Thus, "*Dorman* better serves as a guide to resolution of the underlying pragmatic question whether the exceedingly strong privacy interest in one's residence is outweighed by the risk that delay will engender injury, destruction of evidence, or escape." See *United States v. Acevedo*, 627 F.2d 68, 70 (7th Cir. 1980).

Likewise, the Tenth Circuit has instructed that when assessing whether the government has met its burden of proving that exigent circumstances exist, it will be "guided by the realities of the situation presented by the record." The court has cautioned that there "is no absolute test for determining whether exigent circumstances are present because such a determination ultimately depends on the unique facts of each controversy." *United States v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998).

None of the federal cases that the Commonwealth cites articulate a bright-line rule in exigent circumstances or hot pursuit cases. No one factor is ever required or not required by these courts to satisfy the hot pursuit exception. Pet. 13, 15. Consistent with this Court's totality of the circumstances approach, each of the federal cases that the Commonwealth's cites involve the consideration of several

different factors that either support or did not support the officers' warrantless entry. See *United States v. Baldacchino*, 762 F.2d 170, 177 (1st Cir. 1985) ("Considering the continuity of the investigation, the brevity of the time period between discovery of the crime and the arrests, the fact that Baldacchino and company were actively fleeing the police, and the likelihood that material evidence would be lost if apprehension were delayed, we find exigent circumstances sufficient to justify a warrantless entry"); *United States v. Crespo*, 834 F.2d 267, 270-71 (2d Cir. 1987) (identifying the *Dorman* factors as "useful guides," cautioning that "[t]he presence or absence of any one factor is not conclusive," and identifying an extensive set of facts that support the conclusion that exigent circumstances justified the warrantless entry); *United States v. Haynie*, 637 F.2d 227, 235-36 (4th Cir. 1980) (hot pursuit justified the officers' warrantless entry because there were four participants in a large-scale narcotics operation and only three were arrested, one remained at large; it would have taken an hour to procure a warrant for a man whose identity was unknown; the man was undoubtedly in the house; and one of the other occupants of the home was made aware of the officers' presence and had "became hysterical"); *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1988) ("a combination of hot pursuit, the immediate need to discover fleeing conspirators and the danger posited by the possibility of an armed fugitive remaining at large, late at night, in a rural area supplied sufficient exigent circumstances to justify [the officer's] opening of the luggage and his cursory search for identification"); *United States v. Bass*, 315 F.3d 561, 564 (6th Cir. 2002) (hot pursuit and a risk of danger to

the police or others justified the officers' warrantless entry where a neighbor informed the police that she saw a person later identified as defendant fire gunshots at two other people, and that the suspect had fled into a particular apartment only minutes before their arrival); *United States v. Ball*, 90 F.3d 260, 263 (8th Cir. 1996) (warrantless home entry was reasonable because it was reasonable for the police to infer that an armed cocaine dealer who ran into his house upon seeing the police was attempting to escape, that the escaping suspect might try to destroy or remove evidence in the house, and that the armed suspect presented a threat to the lives of the officers outside.); *United States v. George*, 883 F.2d 1407, 1414-15 (9th Cir. 1989) ("We do not need to delineate here every example of where a suspect's lack of knowledge of his imminent capture does not vitiate the asserted exigency. We need only point out that such situations occur less often than when a suspect in fact knows or is in substantial danger of learning of his imminent capture."); *Hearn v. Florida*, 410 F. App'x 268, 271 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S.Ct. 232 (2011) (in this habeas case, the state court reasonably could have concluded that the suspect was still armed and might flee, and thus the police were entitled to enter the property to search for the suspect).

As the non-exhaustive, multi-factor, fact-driven analysis employed by every federal Court of Appeals reflects, no single factor (including whether a fleeing felon knew that the police were pursuing him) is ever, automatically, dispositive.

This Court has already supplied all of the guidance needed to answer the Commonwealth's question. Lest there be any doubt, all of the federal Courts of

Appeal have provided identical guidance. Every federal circuit court recognizes that a suspect's knowledge of his or her pursuit is but one factor to consider, and that no one fact governs whether the hot pursuit exception applies or does not apply.

4. **The intermediate state appellate court decisions that the Commonwealth cites do not hold that a suspect's knowledge of his pursuit is determinative.** Not including the instant case, and not counting the New Hampshire case decided under that state's constitution, see *State v. Ricci*, 739 A.2d 404 (N.H. 1999), the Commonwealth finds six intermediate state appellate court decisions and argues that, in these jurisdictions, the suspect's knowledge of his dispute is (or is not) determinative for purposes of the hot pursuit analysis.

The Commonwealth cites two cases from the Georgia Court of Appeals. In *Thomas v. State*, 658 S.E.2d 796 (Ga. App. 2008), the court upheld the warrantless search of the defendant's home under the consent exception to the warrant requirement. *Id.* at 801. Any discussion of exigent circumstances was *dictum.* In *State v. Nichols*, 484 S.E.2d 507 (Ga. App. 1997), the court upheld the warrantless entry of the defendant's home for three reasons: "defendant (while still outside the house) looked right at the uniformed officer in his marked patrol car, ignored his orders to stop, and ran into the house." *Id.* at 508-09. The defendant's knowledge of his "pursuit" was only one criterion the court considered.

The Kansas Court of Appeals case is a model of the totality of the circumstances approach. Multiple factors informed the court's conclusion. At the

end of a lengthy opinion that mulled over numerous facts, the court held that even if the police were in "pursuit" of the defendant, "the facts do not outline the sort of immediacy and urgency that would excuse obtaining a warrant. Although probable cause had been well established, the offense was comparatively minor. Inside his home, [the defendant] posed no danger to the officers or others. He presented no realistic threat of escape." *State v. Dugan*, 276 P.3d 819, 835-36 (Kan. Ct. App. 2012). The same is true of the Commonwealth's Virginia Court of Appeals case. See *Commonwealth v. Talbert*, 478 S.E.2d 331, 334 (Va. App. 1996) (a suspect's knowledge of his pursuit is "not, as such, determinative.")

Neither the Louisiana Court of Appeals opinion nor the Pennsylvania Superior Court case even so much as mention the defendant's awareness of his pursuit as a factor worth considering or not considering as part of the hot pursuit analysis. In neither case did the court hold, as the Commonwealth contends, that "the suspect's subjective knowledge of police pursuit is not required to find hot pursuit." Pet. 15. The issue simply did not present itself in either case. *State v. Glass*, 431 So.2d 842 (La. Ct. App. 1983); *Commonwealth v. Montgomery*, 371 A.2d 885 (Pa. Super. 1977).

Respondent can identify no split at all among these state appellate court decisions. Each court either expressly employed a totality of the circumstances approach or, in its holding, demonstrated that multiple different facts informed its conclusion that the hot pursuit exigency did or did not exist. None of these cases are inapposite any of this Court's case law.

This is not a hot pursuit case. The lower courts are not divided over the Commonwealth's first question presented. This Court should decline review.

SECOND QUESTION PRESENTED

This Court has already answered the Commonwealth's second question presented. It has specifically held that the exigent circumstances rule applies to the facts of this case, and it has twice articulated the jailable versus nonjailable test that the Commonwealth urges. Lower courts obediently employ this test. This Court should not expend resources to say again what it has already said to lower courts that have uniformly gotten the message.

1. **This case presents a poor vehicle for answering the Commonwealth's second question presented.** No court has ever suggested that the underlying offense in this case was not sufficiently serious to justify the warrantless entry of King's apartment. To the contrary, the Kentucky Court of Appeals, the Kentucky Supreme Court, and this Court have all held that the exigent circumstances rule applies. The Commonwealth urges this Court to revisit rulings consistently made in its favor.

The exigent circumstances analysis involves a two part inquiry. A court must decide whether the exigency was created or manufactured by something that the police did. *King,* 131 S.Ct. at 1857. And, it must also decide whether the circumstances were genuinely exigent. *Brigham City*, 547 U.S. at 406. An "important factor to be considered when determining whether any exigency exists is

the gravity of the underlying offense for which the arrest is being made." *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984).

The debate in this case has never centered on whether the underlying offense of marijuana possession was sufficiently serious to justify the officers' warrantless entry into King's apartment. This Court easily and expressly resolved that threshold question in the Commonwealth's favor. This Court held that "the exigent circumstances rule applies" to the facts of this case, and it expounded on the usefulness of the rule in other drug cases. *King*, 131 S.Ct. 1854, 1857 ("Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police.")

Likewise, the Kentucky Supreme Court cited to *Welsh* and intimated that the police officers in this case had probable cause to believe that a "serious crime" had been committed. Pet. App. 88a. And, the Kentucky Court of Appeals held that the police lawfully entered King's apartment because "evidence of a serious crime" might be destroyed. Pet. App. 24a. No Kentucky Court has ever even hinted, in this case or in any other case, that marijuana possession is not sufficiently serious to justify an officers' warrantless entry. The Commonwealth's second question presented tilts at windmills.

2. **This Court has already done what the Commonwealth asks it to do.** Twice this Court has articulated the jailable versus nonjailable distinction that the

Commonwealth urges. See Pet. 38 ("This Court should adopt a bright-line test to determine if an offense is minor under *Welsh* and that line should be drawn between jailable and nonjailable offenses.") (internal citation omitted).

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), this Court repeatedly instructed that "nonjailable" offenses are too "minor" to justify the warrantless entry of a person's home. *Id.* at 742, 745 n. 4, 746 n. 6, 754. This Court explained that the "jailable" versus "nonjailable" distinction was "the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest." *Id.* at 754. And, it noted that although the petitioner was eventually charged with a criminal misdemeanor under a recidivist sentencing scheme, the police were unaware of petitioner's criminal history when they entered his home and therefore "at the time of the arrest the police were acting as if they were investigating and arresting for a nonjailable traffic offense." *Id.* at 745 n. 6. The very first paragraph of the *Welsh* opinion provides: "Certiorari was granted in this case to decide...whether, and if so under what circumstances, the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for a nonjailable traffic offense." *Id.* at 742.

In *Illinois v. McArthur*, 531 U.S. 326, (2001), this Court held that the crimes of possessing drug paraphernalia and marijuana were sufficiently serious to justify temporarily preventing the defendant from entering his home while the police worked to obtain a search warrant because, *inter alia*, the "evidence at issue...was

of crimes that were 'jailable,' not 'nonjailable.'" *Id.* at 328-29, 336. Later, this Court reiterated: "We have explained above why we believe that the need to preserve evidence of a 'jailable' offense was sufficiently urgent or pressing to justify the restriction upon entry that the police imposed. We need not decide whether the circumstances before us would have justified a greater restriction for this type of offense or the same restriction were only a 'nonjailable' offense at issue." *Id.* at 336.

In Kentucky, the crime of marijuana possession is a "jailable" offense. That fact does not affect this Court's holding that the police did not manufacture exigent circumstances or the Kentucky Supreme Court's holding that the Commonwealth failed to prove that the circumstances were truly exigent.

The jailable versus nonjailable test that the Commonwealth asks this Court to adopt has been around for nearly thirty years. Answering the Commonwealth's second question presented will add nothing to this Court's jurisprudence and it will do nothing to change the outcome of this case.

3. **The lower courts uniformly apply the jailable versus nonjailable test.** Presumably, the Commonwealth has assiduously surveyed the legal landscape. It cites to no case decided within the past ten years where a state or federal court has ignored the jailable versus nonjailable distinction, and Respondent is aware of none.

The Commonwealth cites to a mere 15 cases (not including the instant case) and claims that they evince a "deep split among the lower courts regarding the proper test to determine what constitutes a serious offense for purposes of dispensing with the warrant requirement." Pet. 9. Three of those cases were

decided before *Welsh*. See *Vaillancourt v. Superior Court for Placer County*, 273 Cal.App.2d 791 (Cal. App. 3 Dist. 1969); *State v. Decker*, 580 P.2d 333 (Ariz. 1978); *State v. Dorson*, 615 P.2d 740 (Haw. 1980). Plainly, these courts can be forgiven for failing to apply a test that this Court had yet to adopt. Of the remaining cases that the Commonwealth cites, all but one was decided before *McArthur*. See *United States v. Cephas*, 254 F.3d 488 (4th Cir. 2001) (decided four months after *McArthur*). The Commonwealth fails to explain why those courts would not have reconsidered their prior decisions in light of *McArthur*.

The Commonwealth claims that Idaho, Washington, New Mexico, and Indiana employ a misdemeanor versus felony test to determine whether an offense is "minor" under *Welsh*. The Commonwealth is mistaken. Idaho has expressly repudiated a misdemeanor versus felony distinction. See *State v. Curl*, 869 P.2d 224, 226 (Idaho 1993) ("the distinction between felonies and misdemeanors is not the desired distinction"). The Washington case that the Commonwealth cites held that the exigent circumstances rule did not justify the officers' warrantless entry to arrest for the misdemeanor crime of use or possession of marijuana, and the court made clear that "[t]he result would be the same...if the officers believed a felony was being committed." *State v. Ramirez*, 746 P.2d 344, 349 n. 9 (Wash. 1987). The New Mexico case notes, in passing, that "in some circumstances" a court "could properly require a showing of a more substantial probability" of evidence destruction "when the suspected crime is a misdemeanor than when it is a felony." *State v. Wagoner*, 966 P.2d 176, 182 (N.M. Ct. App. 1998), *overruled on other*

grounds by State v. Wagoner, 24 P.3d 306, 308 (N.M. Ct. App. 2001). And, in the Indiana case, the court simply observed that the underlying offense was "a misdemeanor" before identifying a variety of other factors that supported its conclusion that exigent circumstances did not exist. See *Haley v. State*, 696 N.E.2d 98, 102-104 (Ct. App. Ind. 1998) (no exigent circumstances because, *inter alia,* the officers had no cause to believe that they were in danger; the occupants of the tent were not aware of the officers' presence; and there was no indication that any of the occupants would escape or leave).

The Commonwealth also claims that Idaho and Illinois employ a violent versus non-violent test to determine whether an offense is "minor." Again, the cases that the Commonwealth cites do not support that contention. In the Illinois case, the court concluded that exigent circumstances did not exist and, in *dictum*, it cited two cases that pre-dated *Welsh* and observed that some courts have considered it "useful" to consider the "gravity of the offense, particularly a crime of violence" in determining whether exigent circumstances exist. *State v. Day*, 519 N.E.2d 115, 116 (Ill. App. Ct. 1988). The Idaho case that the Commonwealth cites does indeed articulate a violent versus non-violent test. See *Curl*, 869 P.2d at 226-227. However, the Idaho Supreme Court repudiated *Curl* after this Court decided *McArthur*. See *State v. Fees*, 90 P.3d 306, 312-13 (Idaho 2004) ("Rather than drawing the line based upon the nature of the criminal conduct (i.e., violent versus nonviolent), the Supreme Court has drawn it based upon the nature of the penalty for that criminal conduct.")

All of the other cases that the Commonwealth cites that post-date *Welsh* concern an alleged division among a handful of lower courts over whether the odor of burnt marijuana evinces per se exigent circumstances. However, in each case, the courts have identified factors in addition to the odor of marijuana to support the conclusion that exigent circumstances did or did not exist. These courts have not articulated any per se rule. More importantly, no court has held that a jailable marijuana offense was too "minor," or that a nonjailable marijuana offense was sufficiently "serious," for purposes of *Welsh* and *McArthur.* See *People v. Baker*, 813 P.2d 331, 333-34 (Colo. 1991) (the defendant "was aware that the officers detected the smell of marijuana" and he "prevented the officers from entering the residence. These facts, combined with the readily destructible nature of marijuana...provided the exigent circumstances justifying the warrantless entry"); *Mendez v. People*, 986 P.2d 275, 283 (Colo. 1999) (upholding a warrantless home search to preserve marijuana evidence and distinguishing *Welsh* on the ground that the possession of marijuana constitutes either a petty offense, a misdemeanor, or a felony); *United States v. Cephas*, 254 F.3d 488, 495-96 (4th Cir. 2001) (concluding that exigent circumstances existed because, *inter alia,* the defendant "was aware that a police officer was on his doorstep" and someone was "inside the apartment plying a 14 year-old girl with marijuana"); *United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991) ("Since the police had identified themselves before smelling the marijuana, an officer could reasonably conclude that the occupants of the room would attempt to dispose of the evidence before the police could return with a

warrant."); *State v. Kosman*, 892 P.2d 207, 211 (Ariz. Ct. App. 1st Div. 1995) (exigent circumstances existed because the police smelled burning marijuana and no one came to the door when the officer called out); *State v. Holland*, 744 A.2d 656, 661 (N.J. App. Div. 2000) (the circumstances were not exigent because the odor of burning marijuana establishes "probable cause to believe only that a disorderly persons offense was being committed."); *State v. Ackerman*, 499 N.W.2d 882 (N.D. 1993) (on the unique facts of this case, "the officers' testimony about the...feared destruction of evidence...is nothing more than speculation about possibilities ad does not demonstrate exigent circumstances") (internal citation to *Welsh* omitted).

Lastly, the Commonwealth complains that the Kentucky Supreme Court has "refused to acknowledge that burning marijuana was, in and of itself, an exigent circumstance." Pet. 30. But, it wisely stops short of undercutting its own argument by urging this Court to abandon the jailable versus nonjailable distinction and adopt a per se rule regarding exigencies and marijuana odors. Cf. *United States v. Karo*, 468 U.S. 705, 717 (1984) ("Those suspected of drug offenses are no less entitled to [the] protection [of the Warrant Clause] than those suspected of nondrug offenses.")

Moreover, the Commonwealth has specifically told this Court that the odor of marijuana did not evince an exigency per se. Justice Kennedy drew laughter from the gallery when he asked, "this may be a bit rudimentary, but can you tell me why isn't the evidence always being destroyed when the marijuana is being smoked? Isn't it being burnt up?" Oral Arg. Tr. 16. He then quickly suggested the answer,

observing that "the distinction is being destroyed as opposed to being consumed?" *Id.* at 16-17. Counsel for the Commonwealth responded: "Correct, that is – that is correct." *Id.* at 17.

The odor of marijuana wafted into the breezeway of King's apartment before the police arrived because the occupants had consumed marijuana sometime earlier that evening. Pet. App. 3a-4a. Nothing in the record suggests or supports the belief that the occupants attempted to destroy any additional marijuana that might hypothetically still exist by burning it after the officers' knocked and announced their presence. In some other case, the odor of burning drugs, which is detected for the first time after the police have made their presence known, may supply both the probable cause and exigent circumstances necessary to justify a warrantless entry. But, this is not that case. Here, the odor of burnt marijuana preceded the officers' arrival and the police did not detect any additional marijuana smell after they knocked on the door to King's apartment. Under those circumstances, the odor of burnt marijuana supplies the probable cause, but not the exigency, necessary to support a warrantless entry. The Commonwealth's attempt to revive an argument it has previously, and correctly, waived is unavailing.

Moreover, the outcome of this case has never depended on whether the odor of burnt marijuana simultaneously supplied both probable cause and exigent circumstances. The police believed that the occupants of King's apartment were destroying evidence because of what they heard, not what they smelled. See *King*,

131 S.Ct. at 1854 (the sound of people or things moving led the officers to believe that evidence was about to be destroyed).

This Court has already decided the Commonwealth's second question presented. The "deep split" that the Commonwealth perceives among the lower courts does not actually exist. Review by this Court is unnecessary.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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