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

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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QUESTION PRESENTED

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

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

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OPINIONS BELOW

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

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky entered the judgment from which relief is sought on January 21, 2010. Pet. App. 34a-50a. The petition for a writ of certiorari was filed on April 19, 2010 and certiorari was granted on September 28, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Facts

On October 13, 2005, the Lexington Police conducted an undercover "buy-bust" operation, in which undercover informants purchased narcotics from felony drug traffickers. Joint Appendix (J.A.) 15-18. During this operation one such felon, after selling the undercover informant crack cocaine, began moving at a fast pace, running back to his apartment. J.A. 19-20.

An undercover officer radioed to waiting patrol cars that the felon was fleeing from the scene at a fast pace and that they should quickly move in and apprehend him. Uniformed officers, waiting nearby, immediately exited their cruisers and quickly proceeded to the apartment building breeze-way that the fleeing felon had entered. J.A. 17-21.

Upon entering the breeze-way, the officers heard a door slam at the far end of the hall. There were only two doors into which the felon could have fled. J.A. 21-23, 58-59, 65-66. The officers encountered the scent of burning marijuana, which became stronger as they approached the apartment doorway on the left of the hallway. Due to the strength of the odor at the door's threshold, the officers reasoned that the left rear door was the door that had recently been slammed. The officers reasoned that the opening of the left rear door which allowed the fleeing felon entry, also allowed the scent of burning marijuana to escape the apartment. The officers therefore believed that the fleeing felon had entered the apartment door on the left. J.A. 21-24, 31-32, 38-40, 46-47, 54-57, 65-66. However, out of an abundance of caution, not knowing specifically which door the felon entered, the police officers knocked loudly on the left door and announced themselves. J.A. 21-24.

After no response, the officers heard things inside the apartment being moved around. Based upon their training and experience, the officers recognized the sounds coming from the apartment to be consistent with the sounds of destruction of physical evidence. J.A. 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. J.A. 24-25, 45-47.

In an attempt to locate the fleeing suspect, the officers immediately conducted a protective sweep of the apartment. However, the suspect could not be located. J.A. 24-28, 63-65. After completing the protective sweep, the officers noticed in plain view several large quantities of both marijuana and cocaine. At this point the officers placed the occupants of the apartment under arrest. Respondent was one of the occupants in the apartment who was arrested. J.A. 24-26, 60, 64.

B. Procedural History

1. Fayette County Circuit Court

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

The circuit court held that the smell of burning marijuana coming from the apartment door provided the probable cause for the officers to continue their investigation. The court went on to state that the investigation was properly conducted by initially knocking on the door, announcing police presence, and awaiting a response or consensual entry. The circuit court held that no response from the apartment, coupled with noises indicative of destruction of

evidence, particularly narcotics due to the smell, constituted exigent circumstances justifying warrantless entry into the apartment. Pet. App. 9a-10a.

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

2. Kentucky Court of Appeals

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

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

action to prevent the destruction of evidence." Pet. App. 21a. The Court of Appeals stated,

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

Pet. App. 24a.

3. Kentucky Supreme Court

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

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

As to hot pursuit, the Kentucky Supreme Court stated that the exception did not apply because the suspect was unaware that the police were pursuing him. Pet. App. 40a-41a. The court reasoned that "[a]n important element of the hot pursuit exception is the

suspect's knowledge that he is, in fact, being pursued." Pet. App. 40a (citation omitted). Based upon this reasoning the court held that since there was no direct evidence that the suspected drug trafficker knew that the police were in pursuit of him, the police were not in hot pursuit. Pet. App. 41a.

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

In reaching this conclusion, the Kentucky Supreme Court acknowledged that, in some sense, exigent circumstances justifying warrantless entry are always created by the police. Pet. App. 44a. The court concluded, nonetheless, that in certain circumstances police may not create the exigent circumstances that would otherwise justify a warrantless entry. Pet. App. 43a.

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

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

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

Pet. App. 45a-46a.

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

marijuana emanating from the apartment door. Pet. App. 46a-47a.[1]

SUMMARY OF ARGUMENT

This Court has set forth well-established exceptions to the warrant requirement that are necessary for police officers to effectively carry out their duties.[2] One long established exception is when "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978). A paradigmatic example of exigent circumstances is when police reasonably believe that

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

[2] See *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403-407 (2006) (emergency aid); *Welsh v. Wisconsin*, 466 U.S. 740, 749-750 (1984) (discussing exceptions to the warrant requirement under exigent circumstances); *Payton v. New York*, 445 U.S. 573, 583-590 (1980) (same); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (emergency aid); *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978) (discussing exceptions to the warrant requirement under exigent circumstances); *United States v. Santana*, 427 U.S. 38, 42, 43 (1976) (hot pursuit); *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475 (1971) (discussing exceptions to the warrant requirement under exigent circumstances); *Katz v. United States*, 389 U.S. 347, 357 (1967) (same); *Schmerber v. California*, 384 U.S. 757, 770-771 (1966) (imminent destruction of physical evidence); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion) (same).

evidence is being destroyed. *Schmerber v. California*, 384 U.S. 757, 770-771 (1966); *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972). At issue in this case is whether the Fourth Amendment forbids police from acting upon that exigency – the destruction of physical evidence – if the defendant began destroying the evidence in response to an officer's lawful knock and announce. It does not.

Neither the Fourth Amendment nor this Court's analysis of its protections, constrains law enforcement in such a manner as to prevent their action in the face of illegal activity. This holds true regardless of the officers' subjective intent in knocking and announcing and regardless of whether the officers should have foreseen the possibility of the defendant's illegal actions. See *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403-404 (2006) (subjective intent is irrelevant); *Horton v. California*, 496 U.S. 128, 138 (1990) (foreseeability does not invalidate seizure).

The Kentucky Supreme Court's ruling in this case improperly relies on these two specific conditions, subjective intent and foreseeability. In doing so, its ruling unduly impinges upon proper police investigation and rewards unlawful behavior. This Court should therefore reverse the lower court's decision and instead hold (as the Second Circuit has) that so long as law enforcement officers act lawfully, they do not impermissibly "create" exigent circumstances. Adoption of this easily discernable rule simplifies "on the spot" determinations that police officers must make and preserves the proven effectiveness of the

"knock and talk" procedure, while discouraging police abuse. See *New York v. Belton*, 453 U.S. 454, 459-460 (1981) (noting clear standards provide individuals with knowledge of constitutional protections and police with scope of authority).

ARGUMENT

The Officers Did Not Impermissibly "Create" the Exigent Circumstances That Justified Their Entry Into Respondent's Apartment

A. Law Enforcement Officers Act Reasonably When They Knock and Announce, and Then Enter a Home Based on Exigent Circumstances

The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).[3] This Court has consistently applied this objective standard to analyze Fourth Amendment cases.[4]

[3] "The test of reasonableness under the Fourth Amendment is an objective one." *Los Angeles County, California v. Rettele*, 550 U.S. 609, 614 (2007) citing *Graham v. Connor*, 490 U.S. 386, 397 (1989) (addressing the reasonableness of a seizure of the person). See also *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness . . . is measured in objective terms by examining the totality of the circumstances.").

[4] See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 38-39 (1996) (objective standard dealing with removal of individuals from vehicles); *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991) (objective standard dealing with whether consent was valid); *Illinois v. Rodriguez*, 497 U.S. 177, 188-189 (1990) (objective standard

(Continued on following page)

The validity of law enforcement officers' actions therefore depends on "the reasonableness in all the circumstances" of the law enforcement practice at issue. *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (citation omitted). The first relevant action the officers in this case took was knocking on the door of Respondent's apartment and announcing their presence. The second relevant action was entering the apartment after reasonably concluding that they heard evidence being destroyed. Under well-established Fourth Amendment jurisprudence, both actions were plainly reasonable and therefore permissible.

1. "Knock and Talk" is an Objectively Reasonable Investigatory Procedure That Initiates a Consensual Encounter

Police officers engage in myriad encounters with the general public, only a fraction of which constitute

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dealing with whether consent was valid); *United States v. Place*, 462 U.S. 696, 702 (1983) (objective standard dealing with temporary detention of personal items based on less than probable cause); *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979) (objective standard dealing with temporary detention of a motor vehicle based on less than probable cause); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (objective standard dealing with temporary detentions of individuals based on less than probable cause). Likewise, this Court uses an objective test even in determining an officer's good faith. *Maryland v. Garrison*, 480 U.S. 79 (1987) (upholding the search of an apartment not included in the search warrant because the "objective facts available to the officers at the time suggested no distinction between [the suspect's] apartment and the third-floor premises.").

seizures within the meaning of the Fourth Amendment. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen" has a seizure occurred. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968). When the police have not seized an individual – for example, when police initiate a consensual conversation with a person – "there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion). In addition, this Court has held that the purpose of the Fourth Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals," and *not* to eliminate all contact between police and the citizenry. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

Subjecting consensual encounters between the police and the public to Fourth Amendment strictures, "while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *Mendenhall* at 554. Indeed, "police questioning" is an important "tool in the effective enforcement of the criminal laws." *Ibid.*

One of the most common police investigatory procedures is a "knock and talk," in which officers lawfully approach a person's home and engage them in conversation. As then-Justice Rehnquist pointed

out in his dissent to this Court's decision in *Dunaway v. New York*, 442 U.S. 200, 222 (1979),

> [t]here is obviously nothing in the Fourth Amendment that prohibits police from calling from their vehicle to a particular individual on the street and asking him to come over and talk with them; nor is there anything in the Fourth Amendment that prevents the police from knocking on the door of a person's house and when the person answers the door, inquiring whether he is willing to answer questions that they wish to put to him.

See also *Schneckloth v. Bustamonte,* 412 U.S. 218, 231 (1973) ("Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, *or in a person's home or office*, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning.") (emphasis added); *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (noting Fourth Amendment protection against unreasonable searches and seizures does not prohibit voluntary cooperation).

This police investigatory procedure is employed every time an officer approaches a home to speak with the occupants concerning a crime that has occurred. Federal courts have recognized the "knock and talk" strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to

search or when officers reasonably suspect criminal activity.[5] See *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005) (recognizing legitimate investigative procedure of "knock and talk" consensual encounters).[6]

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[5] Petitioner contends that reasonable suspicion need not be present for an officer to engage in a consensual encounter with a citizen. Court's have addressed that reasonable suspicion is not necessary for a "knock and talk." See *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001) (recognizing that reasonable suspicion is not mandatory to conduct a "knock and talk" investigation); *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000) (recognizing suspicion not required to justify "knock and talk"); *United States v. De Jesus Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006) (affirming "knock and talk" as reasonable tactic even absent reasonable suspicion). However, regardless of whether the proper standard for conducting a "knock and talk" investigation is no suspicion, reasonable suspicion, or probable cause, it does not matter for the purposes of this case. It is undisputed that the officers here had probable cause of a crime occurring within the apartment. Pet. App. 39a.

[6] See also *Hardesty v. Hamburg Twp.*, 461 F.3d 646, 653-654 (6th Cir. 2006) (recognizing validity of soliciting consent through "knock and talk"); *United States v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991) *cert. denied*, 502 U.S. 907 (1991) ("Reasonable suspicion cannot justify the warrantless search of a house, but it can justify the agents' approaching the house to question the occupants."); *United States v. Hardeman*, 36 F.Supp.2d 770, 777 (E.D.Mich.1999) (discussing the "knock and talk" procedure to obtain a suspect's consent to search).

2. Entry Based On Exigent Circumstances That Arose After a Lawful "Knock and Talk" is Objectively Reasonable

Lawful police action sometimes results in the creation of exigent circumstances – particularly when the police act based on a reasonable suspicion of wrongdoing. Yet under the decision below and the rules adopted by multiple circuits, the police are barred from acting in response to those exigencies. In those jurisdictions, an officer who hears evidence being destroyed or an individual being attacked – merely because the officer knocked on the door – violates the Fourth Amendment by entering the residence in response to that exigency. It is critical that this Court remove that senseless bar on the ability of the law enforcement community to protect the public.

As noted, police officers may engage in warrantless searches and seizures if there is a "specially pressing or urgent law enforcement need, *i.e.*, 'exigent circumstances.'" *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). For example, "law enforcement officers may make a warrantless entry onto private property . . . to prevent the imminent destruction of evidence." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (citing *Ker v. California*, 374 U.S. 23, 40 (1963)). See also *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972); *Schmerber v. California*, 384 U.S. 757, 770-771 (1966).

Accordingly, the officers in this case engaged in two actions that, viewed independently, raise no Fourth Amendment concerns. Here, officers acted reasonably in knocking on the Respondent's door. See *United States v. Mendenhall*, 446 U.S. 544 (1980). The officers then acted reasonably when they entered Respondent's home based on the exigent circumstances exception of the destruction of physical evidence.[7] See *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972); *Schmerber v. California*, 384 U.S. 757, 770-771 (1966).

These two actions also raise no Fourth Amendment concern when viewed as part of one continuous course of conduct. Two Fourth Amendment "rights" do not make a "wrong."

The Kentucky Supreme Court nonetheless concluded that the officers violated the Fourth Amendment because they "created" the exigency by knocking and announcing their presence. In particular, the court held that it is unreasonable for officers to knock and announce, and then enter an apartment after they hear evidence being destroyed, if (1) it was foreseeable that knocking and announcing would prompt the exigency (here, the destruction of evidence), or (2) the officers acted in bad faith or otherwise intended that result. The Kentucky Supreme Court thus concluded that two "rights" make a

[7] The existence of exigent circumstances have been assumed for purposes of this case. Pet. App. 43a.

"wrong." This math is unsupported by the Fourth Amendment. Obviously, two reasonable actions on the officers' part, should not an unreasonable action make. As discussed below, the Kentucky Supreme Court's holding finds no support in this Court's decisions, undermines accepted and laudable police practices, and rewards illegal conduct.

B. It is Reasonable for an Officer to Engage in a Consensual Encounter with a Person Regardless of Whether it is Foreseeable That the Person Will Respond by Engaging in an Unlawful Act

This Court has never held that it is unreasonable for a police officer to engage a member of the general public in a consensual encounter on the ground that the person may respond by committing an unlawful act that necessitates a seizure. To the contrary, in *Horton v. California*, 496 U.S. 128, 138 (1990), this Court held that "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search" should not invalidate its seizure if the search is confined to a valid exception to the warrant requirement. In other words, simply because seizure is foreseeable, it should not be invalidated. The same principle is applicable here. Simply because police officers could arguably foresee an illegal reaction to their lawful "knock and talk" does not render their actions a Fourth Amendment violation. To hold otherwise would reward illegal behavior and stand contrary to this Court's prior precedents.

A contrary rule would have several deleterious consequences. First, it would be utterly unworkable for officers in the field. Officers engage in countless consensual interactions with suspects. A foreseeability rule would require officers, *every time* they approach a suspect on the street or knock on a suspect's door, to assess whether the possibility of an unlawful response bars that otherwise lawful consensual encounter. But how is an officer to know? Different suspects react in different ways to police encounters; and even when a suspect might be expected to hide or destroy contraband, how is the officer to know that the suspect will do so loudly or openly enough that it will create an exigent circumstance justifying a warrantless seizure or entry?

A foreseeability test would mean that officers are *not* permitted to approach suspects who, based on their observed attributes and past history, seem more likely to respond illegally (by, for example, drawing a weapon or destroying evidence), but *are* permitted to approach suspects who appear less likely to respond in that manner. More dangerous suspects would therefore be more shielded from police encounters. Such a rule makes no sense, and its consequence is obvious: "the security of all would be diminished." *Schneckloth*, 412 U.S. at 225.

Even worse, this test rewards the illegal actions of a suspect in response to lawful police action. It is the actions of the suspect that give rise to the exigent circumstances, not the lawful actions of the officers who are attempting to engage him in conversation.

For example, a home's occupants have a choice to engage in a consensual encounter with police (either by speaking with the police and granting them consent or by refusing to speak with them and shutting the door) or to behave in an illegal manner (by destroying physical evidence, fleeing, or drawing their weapons). This Court should not reward illegal responses by preventing officers from responding to them. Such a test flies in the face of common sense and unduly restricts lawful police conduct. Police should not be restricted in their actions where a lawful citizen would not be.

In the end, there is no principled reason that *officers* should be deemed responsible – to have violated the Constitution – because *suspects* chose to commit the crime of destroying evidence. It is the suspect's unlawful reaction to lawful police action that causes an exigency to arise. See *United States v. MacDonald*, 916 F.2d 766, 771 (2nd Cir. 1990) (en banc) *cert. denied*, 498 U.S. 1119 (1991) ("The fact that the suspects may reasonably be expected to behave illegally does not prevent law enforcement agents from acting lawfully to afford the suspects the opportunity to do so."); *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (stating that a suspect's reaction (fleeing from police) to lawful police conduct *creates an exigency* that the suspect should not be allowed to benefit from through invalidation of a search (warrantless entry)).

To the extent a foreseeability rule is intended to ferret out deliberate efforts by officers to avoid the

warrant requirement, it fails for several reasons. First, as discussed in Section D, *infra*, the subjective intentions of officers are irrelevant to the Fourth Amendment inquiry. Even if an officer approached a suspect in the street, or knocked on his door, with the intent of producing an exigent circumstance that would justify a warrantless seizure or entry, there would be no Fourth Amendment violation.

Second, such a rule wrongly assumes that if officers could foresee a particular reaction, they intended for that reaction to occur. However, most interactions with police officers do not give rise to exigent circumstances. See *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) ("[C]itizens will often react positively when police simply ask for their help as responsible citizens to give whatever information they may have to aid in law enforcement.") (quotation marks and brackets omitted). Common sense tells us that there is a wide gap between what officers might foresee as a possible response and what they deliberately intend to produce. Indeed, a look at the risks and benefits facing officers shows that a foreseeability rule is not needed to prevent officers from "misusing" the combination of consensual encounters and the exigent circumstances exception. As Judge Sutton has noted,

> When no one answers the door (even if the residents are home), when no one at the home is willing to talk about the matter or when no one at the home does anything incriminating, the investigation will have

> reached a conspicuously low point. The officers will have to leave, and the drug manufacturer will have the kind of warning that even the most elaborate security system cannot provide.

United States v. Chambers, 395 F.3d 563, 577 (6th Cir. 2005) (Sutton, J. dissenting).

Knocking and announcing in the hope of creating an exigent circumstance is a gamble that no reasonable officer would be willing to take. The possibility that an officer might nonetheless attempt to do so does not justify establishing a sweeping, prophylactic foreseeability rule that would prevent officers from using commonplace, lawful police tactics such as knocking on doors and initiating conversations with suspects. Such a rule would perversely reward the suspect's unlawful response. Nonetheless, multiple circuits have adopted tests that improperly rely on foreseeability.[8] It would be a dangerous rule, in the absence of illegal police action, to hold that police can impermissibly create the exigent circumstances that allow for their warrantless entry, thus prohibiting entry in times of dire need.

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[8] The Fourth and Eighth Circuits improperly rely on a foreseeability test. See *United States v. Mowatt*, 513 F.3d 395, 400-403 (4th Cir. 2008) (holding that officers created the exigency because the results of their actions were foreseeable); *United States v. Duchi*, 906 F.2d 1278, 1284-1285 (8th Cir. 1990) *cert. denied*, 516 U.S. 852 (1995) (same).

C. An Officer With Probable Cause to Obtain a Warrant May Engage in Consensual Encounters Such as "Knocking and Talking"

In this case, the officers attempted to initiate a consensual encounter with suspects even though they had probable cause to obtain a warrant. Pet. App. 35a-37a, 39a, 46a-47a. This Court has never held that the existence of probable cause, which would entitle an officer to obtain a warrant authorizing search and/or seizure, forbids the officer from taking the lesser step of initiating a consensual encounter. Just the opposite.

In *Schneckloth*, 412 U.S. at 227-228, this Court held that:

> in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

Nor would a rule barring consensual encounters when officers have probable cause to obtain a warrant make sense. The Fourth Amendment is designed to

restrain the government in searching private residences. *Payton v. New York*, 445 U.S. 573, 585 (1980). It would be passing strange to construe it as requiring the government to conduct a search instead of a consensual encounter.

It would seem antagonistic of this principle to require law enforcement to obtain a search warrant and conduct a search, rather than attempting a consensual encounter. Indeed, such a rule would give officers *less* authority to speak with suspects, via a "knock and talk," when they have probable cause that a crime has or is occurring, than when the officers do not have probable cause. Yet law enforcement officers necessarily have more authority to act when they have probable cause of wrongdoing. Such a rule stands contrary to normal Fourth Amendment understanding.

Finally, a rule limiting officers' authority to engage in consensual encounters when they have probable cause to obtain a warrant would create serious practical problems. It is often unclear whether officers' possess the requisite showing of probable cause to obtain a search warrant. This Court has specifically refused to require officers to guess when probable cause has arisen and, in fact, has held that there is "no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause." *Hoffa v. United States*, 385 U.S. 293, 310 (1966). See also *Cardwell v. Lewis*, 417 U.S. 583, 595 (1974) (stating that police need not obtain a warrant as soon

as they have probable cause and that exigent circumstances in vehicular searches need not be unforeseeable). An officer's determination of probable cause should not be open to questioning in hindsight by a reviewing court. See *Chambers*, 395 F.3d at 576 (Sutton, J. dissenting) ("making the manufactured-exigency exception applicable whenever courts (though not the police) conclude that probable cause existed before the encounter would create a peculiar rule in which searches could be invalidated either because the police did not have probable cause or because they did"). All told, "the law should permit continued reasonable investigation, allowing police to gather more information and thus build a stronger evidentiary case." Bryan Abramsoke, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 Suffolk U.L. Rev. 561, 581 (2008).

A test that questions police timing based upon the availability of a search warrant is unsatisfactory. However, multiple circuits have adopted just such a test.[9] Such a test places a heavy burden on officers to

[9] The First, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits adopted tests that ask whether officers unreasonably delayed in obtaining a warrant, after probable cause existed. See *United States v. Rengifo*, 858 F.2d 800 (1st Cir. 1988) (holding that officers cannot rely on exigencies that arise if the officers unreasonably delayed in obtaining a warrant); *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002) (same); *United States v. Dowell*, 724 F.2d 599 (7th Cir. 1984)

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immediately obtain a warrant once probable cause has arisen, even when other lawful courses seem preferable based on the circumstances and the officers' experience. It also means that evidence can be suppressed when a reviewing court, in hindsight, determines that probable cause existed prior to exigent circumstances arising, even though officers at the scene did not believe they had probable cause to obtain a warrant. Any assertion that there are no further legitimate reasons for investigation by officers once probable cause is said to be found is purely speculative. It is this speculation that unmoors a timing of probable cause analysis from the touchstone of Fourth Amendment analysis and looks at subjective intentions rather than objective reasonableness.

D. Subjective Intentions Are Irrelevant in Assessing Whether Officers' Actions Violate the Fourth Amendment

The Kentucky Supreme Court held that "courts must [first] determine whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement." Pet.

(same); *United States v. VonWillie*, 59 F.3d 922 (9th Cir. 1995) (same); *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991) (same); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991) (en banc) *cert. denied*, 502 U.S. 907 (1991) (same); *United States v. Socey*, 846 F.2d 1439 (D.C. Cir. 1988) *cert. denied*, 488 U.S. 858 (1988) (same).

App. 45a-46a (internal citation and quotation marks omitted). That rule, also adopted by multiple circuits,[10] departs from this Court's longstanding rule that "[t]he officer's subjective motivation is irrelevant" to the Fourth Amendment inquiry. *Brigham City,* 547 U.S. at 404-405.

As this Court made clear in *Whren v. United States,* 517 U.S. 806, 813 (1996),

> the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

(Internal quotation marks omitted).

The Court has applied this rule in a variety of Fourth Amendment contexts. For example, in *Bond v. United States*, 529 U.S. 334 (2000), this Court held that the law enforcement officer's physical manipulation of the defendant's carry-on bag on a bus violated the Fourth Amendment. In so holding, this Court

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[10] The Third and Fifth Circuits improperly inquire as to the bad faith subjective intentions of officers. *See United States v. Coles*, 437 F.3d 361 (3rd Cir. 2006) (holding that officers cannot evade the warrant requirement in bad faith and then rely on any exigencies that arise); *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004) *cert. denied*, 543 U.S. 955 (2004) (same).

noted that "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment." *Id*. at 339 n. 2 See also *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (an officer's "subjective reason for making the arrest" need not coincide with facts providing probable cause); *Ohio v. Robinette*, 519 U.S. 33, 38-39 (1996) (an officer's subjective intent has no impact on the reasonableness of duration of a traffic stop); *Whren*, 517 U.S. at 813 (an officer's subjective intentions have no place in Fourth Amendment analysis); *Florida v. Jimeno*, 500 U.S. 248, 250-252 (1991) (an officer's subjective intentions in conducting a consensual search does not limit the scope of the search); *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (an officer's subjective intentions in conducting surveillance from a particular vantage point does not render the evidence obtained invalid); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n. 3 (1983) (an officer's subjective intentions in conducting a brief, suspicionless detention of a ship for a documentation check does not invalidate any evidence obtained via the stop).

This rule does not cease to exist simply because this Court is analyzing a case involving exigent circumstances. Objective reasonableness, absent any subjective motivation of the officer, continues to be the standard when dealing with exigent circumstances cases. This Court has recognized that "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search

is objectively reasonable." *Michigan v. Fisher*, ___ U.S. ___, 130 S.Ct. 546, 548 (2009) quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978).

This Court adopted the objective standard for exigent circumstance cases over an explicit request to delve into the officer's subjective intent. For example, in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006), the respondents urged this Court "to consider, in assessing the reasonableness of the entry, whether the officers were 'indeed motivated primarily by a desire to save lives and property.'" This Court noted, however, that its "cases have repeatedly rejected this approach." *Id.* Rather, "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" *Id.* quoting *Scott v. United States*, 436 U.S. 128, 138 (1978) (emphasis in original). See also *Bond v. United States*, 529 U.S. 334, 338, n. 2 (2000) ("The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions"); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("[O]ur prior cases make clear" that "the subjective motivations of the individual officers . . . ha[ve] no bearing on whether a particular seizure is

'unreasonable' under the Fourth Amendment").[11] In fact, this Court emphasized its distaste for subjective-based tests in *United States v. Leon*, 468 U.S. 897 (1984), when it stated that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Id*. at 923, n. 23, quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting). Thus, a test that looks to the subjective intent of officers under the particular circumstances of this case is invalid.

Injecting a subjective element into the Fourth Amendment's reasonableness inquiry for exigent circumstances to prevent the destruction of evidence would not only contravene precedent, it would also invite inconsistent and unpredictable application and chill sound police practices. Subjective inquiries

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[11] This Court has routinely found the subjective intent of law enforcement to be irrelevant. See *Missouri v. Seibert*, 542 U.S. 600, 623 (2004) (O'Connor, J., dissenting) (agreeing with the plurality's decision not to consider the subjective intent of the interrogating officer and instead to formulate an objective test); *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the actual motivations of individual officers do not affect the constitutional reasonableness of traffic stops); *Horton v. California*, 496 U.S. 128, 138 (1990) (stating, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer"); *Scott v. United States*, 436 U.S. 128, 136-138 (1978) (rejecting a "good faith" exception and focusing instead on the police officers' actions, not their motives).

necessarily import variability and instability into the law. Officers on the ground can have little confidence that the judicial reconstruction of motives months later "in the peace of a judge's chambers" and "with the 20/20 vision of hindsight" will vindicate the hurried judgments they were forced to make with limited information and seconds to deliberate. *Graham v. Connor*, 490 U.S. 386, 396 (1989). When, as often occurs multiple officers with potentially multiple motives are involved, the inquiry becomes exponentially unwieldy. See *United States v. Leon*, 468 U.S. 897, 923 n. 23 (1984) ("sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources") (internal quotation marks omitted).

Moreover, if a subjective test were applied, the "constitutionality of an [entry] under a given set of known facts will 'vary from place to place and from time to time.'" *Devenpeck*, 543 U.S. at 154 (quoting *Whren*, 517 U.S. at 815). This would make the Fourth Amendment's protection "arbitrarily variable." *Id*. at 154. Case law will offer little or no reliable guidance to officers who are "forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving" about the appropriateness of a search and entry. *Graham*, 490 U.S. at 397.

Given that an erroneous judgment by officers may result in both the suppression of evidence and exposure to personal liability for the constitutional violation, the inevitable consequence of such instability and complexity in the law will be hesitation by

officers on the scene, which could lead to serious consequences. There is no discernible constitutional gain in having the lawfulness of entries turn upon later-litigated subjective purposes. If the objective circumstances point to an exigency and officers enter to quell that exigency, the infringement on privacy is identical regardless of the subjective state of mind of the individual officers.

Accordingly, there is no basis for undertaking an inquiry into subjective motives when officers make an entry based on circumstances that reasonably indicate the existence of an emergency. In the context of exigent-circumstances entries, the central Fourth Amendment goal of avoiding arbitrary police intrusions is met by considering whether the facts known to the officer, viewed objectively, support a reasonable belief that a crime has been, is being, or is about to be committed, and whether the objective facts support immediate action. The Kentucky Supreme Court erred in adopting a subjective test that looks to officers' subjective reasons for knocking and talking, and then entering the apartment.

For this same reason the varied tests employed by all of the circuits, except for the Second Circuit (discussed *infra*), are also improper. Each of the other circuits' tests improperly adhere to a subjective determination of an officer's intentions. These circuits' tests, whether examining foreseeability, the timing of probable cause, or bad faith, all stand

contrary to Fourth Amendment analysis.[12] The only test adopted by the lower courts that is proper, under this Court's analysis of Fourth Amendment protections, is the Second Circuit's "lawfulness" test.

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[12] Each of the tests set forth by the other circuits has a subjective intent component necessitating that courts examine an officer's intentions. Several of the circuits attempt to insulate their subjective analysis by enforcing it under the guise of "timing" or "foreseeability." However, even ignoring the subjective analysis involved in these tests, neither "timing" nor "foreseeability" should be determinative of when officers impermissibly create exigent circumstances. See Argument I(C), *supra*; *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-228 (1973); Argument I(B), *supra*; *Horton v. California*, 496 U.S. 128, 138 (1990). These components run afoul of this Court's well-settled Fourth Amendment analysis. See Katherine A. Carmon, *Don't Act Like You Smell Pot! (At Least, Not In The Fourth Circuit): Police Created Exigent Circumstances In Fourth Amendment Jurisprudence*, 87 N.C.L. Rev. 621 (2009) (discussing that every circuit other than the Second Circuit, relies on a subjective test). Seminal cases from each circuit include: *United States v. Rengifo*, 858 F.2d 800, 804 (1st Cir. 1988); *United States v. Coles*, 437 F.3d 361, 370-372 (3rd Cir. 2006); *United States v. Mowatt*, 513 F.3d 395, 400-403 (4th Cir. 2008); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004) *cert. denied*, 543 U.S. 955 (2004); *Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002); *United States v. Berkwitt*, 619 F.2d 649, 654 (7th Cir. 1980) abrogated on other grounds by *Dowling v. United States*, 473 U.S. 207 (1985); *United States v. Duchi*, 906 F.2d 1278, 1284-1285 (8th Cir. 1990) *cert. denied*, 516 U.S. 852 (1995); *United States v. VonWillie*, 59 F.3d 922, 926 (9th Cir. 1995); *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991) (en banc) *cert. denied*, 502 U.S. 907 (1991); *United States v. Socey*, 846 F.2d 1439, 1449 (D.C. Cir. 1988) *cert. denied*, 488 U.S. 858 (1988).

E. Police Do Not Impermissibly "Create" Exigent Circumstances When They Act in an Objectively Reasonable or Lawful Manner

The foregoing discussion demonstrates that the test set forth by the Kentucky Supreme Court – reliance on bad faith subjective intentions and police foreseeability – is improper. It also demonstrates that the various tests adopted by the majority of the lower courts are also improper. The proper test 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) ("when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances.").

This test is based upon objective standards and allows law enforcement to interact with citizens, just as citizens would interact with one another. This allows officers freedom in their lawful investigatory practices and provides a clear rule of what activities are permissible under Fourth Amendment analysis. It means that lower courts are not asked to delve into the subjective intentions of officers, but only to address the officers' actions at face value. And it does not force officers to second-guess decisions, hesitate, or abort lawful investigatory practices for fear of a court later determining, in hindsight, that their actions were impermissible. This objective test also enables easier governance and uniform, thorough, protection of Fourth Amendment rights – for, as

Judge Sutton noted, "the traditional rules governing the exigent-circumstances exception" address any concern about "undermining the warrant requirement." *Chambers*, 395 F.3d at 576.

It is this face value, objective analysis that this Court has routinely set forth when analyzing Fourth Amendment protections. See *Michigan v. Fisher*, ___ U.S. ___, 130 S.Ct. 546, 548 (2009). See also Argument I(D), *supra*. 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. This "lawfulness" test, as set forth by the Second Circuit, is simply an adoption of this Court's general practice of analyzing Fourth Amendment inquiries under an objective reasonableness lens. This test flows from this Court's prior analysis as discussed above. See Argument I(A)-(D), *supra*. In this context, lawful actions are necessarily reasonable within the meaning of the Fourth Amendment when there is no evidence of coercion. When, as here, there can be no coercion because the suspect did not answer his door, lawful actions must necessarily also be objectively reasonable.[13] So long as each individual

[13] It should be of no importance whether police could have obtained a warrant or what their subjective intentions were when approaching a door for a "knock and talk." What should be important for Fourth Amendment protection is whether police acted lawfully in conducting their "knock and talk" and attempting to gain consent for entry. When no one answers a door, it is immaterial whether police have arrived with weapons drawn or

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step taken by the officers is lawful they cannot amount to unreasonable action within the meaning of the Fourth Amendment when viewed collectively.

F. The Evidence in This Case Should Not Have Been Suppressed

For the reasons discussed in Sections (A)-(D), the evidence found by the officers following their entry into Respondent's apartment should not have been suppressed. None of the officers' actions in this case were unlawful. The officers here, while investigating a fleeing felon, lawfully knocked and announced themselves at what they believed to be the door into which the felon fled. J.A. 21-24, 31-32, 38-40, 46-47, 54-57, 65-66. The officers neither demanded entry nor threatened the occupants, but merely announced that the police were at the door. J.A. 21-24. After receiving no response to their knock and announce, it was at that point that the officers heard noises consistent with the destruction of physical evidence and forced entry to prevent the destruction of crack cocaine and possibly marijuana. J.A. 23-25, 40-43, 45-47. Officers also conducted a protective sweep in an effort to

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peacefully, those facts impact the validity of consent when someone answers the knock. When no one answers a knock, no coercion can occur, and as such, the subjective intentions of police officers are immaterial to a discussion of whether their action in knocking on a citizen's door and attempting to engage them in conversation is objectively reasonable. It should only matter that, when the citizen does not answer his door, that the officer's actions were lawful in knocking.

locate the fleeing felon that they had been pursuing. J.A. 24-28, 63-65. All of these actions are lawful and reasonable under proper Fourth Amendment analysis. None of the officers' actions in knocking on the Respondent's door and effecting warrantless entry in reaction to the exigency of destruction of physical evidence were unlawful, and therefore the culmination of those actions was objectively reasonable under a simple "lawfulness" test. As such, these two reasonable actions – knocking and announcing; and warrantless entry in response to the destruction of physical evidence – did not transmogrify into unreasonable conduct in violation of the Fourth Amendment. Neither the possibility that the officers might have foreseen that the apartment's residents would react by trying to destroy the evidence, nor the existence of probable cause to obtain a search warrant, barred them from knocking on Respondent's door to initiate a consensual encounter. Finally, the officers' subjective intent in knocking on the Respondent's door is also irrelevant to assessing whether their actions violated the Fourth Amendment. As such, the exigent circumstance that arose when the Respondent and his co-defendants reacted to the police presence by attempting to destroy physical evidence, were not impermissibly created by the officers' lawful knock and announce.

CONCLUSION

For the reasons stated above, the opinion and judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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