No. 09-1272

In the
Supreme Court of the United States
October Term, 2010

COMMONWEALTH OF KENTUCKY,
Petitioner,
vs.

HOLLIS DESHAUN KING,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF AMICI CURIAE
of
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, AND
THE NATIONAL SHERIFFS' ASSOCIATION,
IN SUPPORT OF PETITIONER.

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INTEREST OF AMICI CURIAE

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Timely notice of intent to file this brief has been served upon Counsel for each party. Consent to file has been granted by Counsel for the Petitioner and Counsel for the Respondent. Letters of consent of the Petitioner and Respondent have been filed with the Clerk of this Court, as required by the Rules.[1]

Americans for Effective Law Enforcement, Inc. (AELE), as a national not for profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as amicus curiae over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: this brief was authored for the amici by James P. Manak, Esq., Counsel of Record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc. made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), was founded in 1893 and is the largest organization of police executives and line officers in the world. IACP's mission, throughout the history of the association, has been to identify, address and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America. It conducts programs of training, publications and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national associations representing the interests of law enforcement agencies at the national, state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of formulating rules and policies on warrantless searches and the safety of police officers in conducting their sworn duties; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policies on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and counsel, we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

This brief concerns policy and legal issues, including the importance of effective rules, procedures and training for conducting warrantless searches and the protection of law enforcement officers from injury and death as they perform their duties. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues as these in conducting warrantless searches based upon exigent circumstances.

STATEMENT OF THE CASE

Police officers entered an apartment building in 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 offender had entered. A strong odor of marijuana came from one of the doors, and the officers believed the trafficker had entered that apartment.

After knocking on the door the officers heard noises indicating that physical evidence was being destroyed. Faced with exigent circumstances that reasonably indicated that evidence was being destroyed, the officers entered the apartment and found large quantities of drugs.

The Kentucky Supreme Court, King v. Commonwealth, 302 S.W. 3d 649 (Ky. 2010) held that this evidence should have been suppressed, ruling inter alia, that the exigent circumstances exception to the Fourth Amendment warrant requirement did not apply because the officers had themselves created the exigency by knocking on the door.

This Court granted certiorari on the issue: "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?" The issue is of utmost importance to police administrators and trainers because they must know how this Court will resolve the split in the courts in the United States and whether the Court will adopt a rule that is not only faithful to Fourth Amendment principles but workable for day-to-day police operations.

SUMMARY OF ARGUMENT

The Kentucky Supreme Court has created an unworkable test for determining when police can enter a residence without a warrant to seize evidence based upon exigent circumstances. The court pointed out that there is a split among the federal circuit courts of appeals on this issue. In fact, there are five different tests that the various circuits have been using to determine when police may rely upon exigent circumstances for warrantless entry of premises. These tests are, the First and Seventh Circuits: unreasonable delay in obtaining a warrant;

the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits: unreasonable delay in obtaining a warrant coupled with deliberate conduct in an attempt to evade the warrant requirement; the Third and Fifth Circuits: bad faith and unreasonable police action; the Fourth and Eighth Circuits: foreseeability of results of police action resulting in exigent circumstances; and the Second Circuit: lawfulness of police conduct. The state courts vary to an even greater degree, many of which have pieced together hybrid tests, using various portions of different federal circuit rules.

Amici take the position that these different and conflicting tests restrict lawful police action and effectively negate the exigent circumstances exception to the warrant requirement. In the Third and Fifth Circuits, for example, exigent circumstances must exist prior to police arrival, otherwise the police presence will be deemed to have created any exigent circumstances that may arise. In the Fourth and Eighth Circuits police may not rely on any exigencies if they were a foreseeable result of police action. However, since the police are trained to expect an illegal response, all reactions from suspects would be foreseeable.

These tests reward illegal action in response to a lawful knock on the door by the police. They are basically unusable, and the courts that have adopted them are, in reality, attempting to narrow and negate the exigent circumstances exception to the warrant requirement to the point of virtual non-existence.

The position of amici is that the exigent circumstances exception to the warrant requirement

should be governed by the Reasonableness Clause of the Fourth Amendment. We ask the Court to adopt an objective reasonableness standard for law enforcement that looks at the totality of the circumstances to determine whether officers' warrantless entries into premises pursuant to exigent circumstances is proper under the Fourth Amendment. We ask the Court to adopt a uniform rule that will apply to all jurisdictions under the Fourth Amendment so that officers—no matter what jurisdiction they are in—will have clear guidance for training and operational purposes. We believe that the lack of a clear, uniform rule on exigent circumstances for police entry of premises to prevent destruction of evidence also results in a distinct danger to the safety of law enforcement officers due to the uncertainty of how the myriad of rules operates, resulting in the diminished ability of officers to take self-protective action while engaged in law enforcement evidence-gathering activities.

ARGUMENT

THE COURT SHOULD ADOPT AN OBJECTIVE REASONABLENESS STANDARD FOR LAW ENFORCEMENT ACTIVITY THAT CONSIDERS THE TOTALITY OF THE CIRCUMSTANCES TO DETERMINE WHEN OFFICERS' WARRANTLESS ENTRIES INTO PREMISES PURSUANT TO EXIGENT CIRCUMSTANCES IS PROPER UNDER THE FOURTH AMENDMENT; LAW ENFORCEMENT OFFICERS NEED CLEAR GUIDANCE AND A UNIFORM RULE FOR TRAINING AND OPERATIONAL PURPOSES AND FOR THEIR

SAFETY IN DEALING WITH DANGEROUS OFFENDERS.

Amici will not repeat the legal arguments put forward by the Petitioner in this case, in particular the review of the case law from the circuit courts of appeals and the state courts on the various rules pertaining to exigent circumstances; we do, however, support them. As national representatives of law enforcement officers, administrators and legal advisors, we wish to inform the Court of certain policy considerations from our professional perspective.

A visitor from a foreign country would perhaps view the myriad of different and conflicting federal and state court rules on the exigent circumstances doctrine with some degree of perplexity. This especially in light of the fact that all of the court cases cited by both petitioner and respondent are construing and applying the same seminal document—the Fourth Amendment (as opposed to state constitution equivalents—independent state grounds). Amici are not unfamiliar with this type of problem. We are hampered in setting training, policy and conduct standards for our constituents—local, state and federal law enforcement agencies. We submit that the Framers did not think that the Fourth Amendment would mean different things in different jurisdictions of the federal union. And we applaud the Court for accepting appeal in this case to resolve this conflict.

Amici submit, however, that resolution of this issue is easily reached. This Court has already

supplied the necessary mechanism for resolving the issue. We defer to some well-established case law of the Court to illustrate our point.

This Court has long recognized that "[t]he touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). The Court has said that warrantless searches and seizures are presumptively unreasonable and are therefore prohibited under the Fourth Amendment, unless an exception applies. California v. Acevedo, 500 U.S. 565, 580 (1991) ("It remains a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." ; see also Katz v. United States, 389 U.S. 347, 357 (1967). "Such exceptions are based on the Supreme Court's determination that a particular search is reasonable, that is, that the government's legitimate interests in the search outweigh the individual's legitimate expectation of privacy in the object of the search." United States v. Salmon, 944 F.2d 1106, 1120 (3d Cir. 1991).

The Court has determined that one exception to the warrant requirement is that of exigent circumstances, Mincey v. Arizona, 437 U.S. 385 (1978). The Kentucky lower courts, like most courts, have recognized this exception. They have held the exception applies in situations in which an officer reasonably believes that there is a possibility that evidence of a serious crime may be destroyed. In the case of a private residence there must also be

probable cause. Taylor v. Commonwealth, 577 S.W.2d 46, 48 (Ky.App. 1979); Baltimore v. Commonwealth, 119 S.W.3d 532, 538 (Ky.App. 2006); Southers v. Commonwealth, 210 S.W.3d 173, 176 (Ky.App. 2006).

Here, as the officers reached the middle of the apartment building's hallway, they smelled a strong odor of burnt marijuana. As they came closer to respondent's door, they reasonably believed that the odor was coming from that apartment. A police officer testified that after knocking and announcing the presence of the police, there was no response to his request to open the door, but he heard the sounds of concerted movement within the apartment. Based upon well-established experience with those who ply the drug trade, the police reasonably believed that evidence of a drug felony was in the apartment and that the occupants of the apartment were in the process of destroying the evidence. At this point they entered and found narcotics.

In the brief filed by Amici in Brigham City v. Stuart, 547 U.S. 398 (2006) we argued, and the Court agreed, that the core element of the Fourth Amendment is reasonableness. Thus, although a warrantless entry into one's home by police is presumptively unreasonable, "that presumption can be overcome." Michigan v. Fisher, ___ U.S. ___, 130 S.Ct. 546, 548 (2009). "For example, 'the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable,'" quoting Mincey v. Arizona, supra, 393-94.

The test for probable cause does not include the subjective intentions of officers when judicial review is considered. Whren v. United States, 517 U.S. 806, 818 (1996) ("subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). It is strictly an objective reasonableness test. As this Court said in the context of the emergency assistance exception in Brigham, supra, at 404, ". . . whether the officers' motivation for entering is to arrest suspects and gather evidence or to assist the injured is irrelevant so long as the circumstances objectively justify the action."

This Court has already made clear that the exigent circumstances exception is evaluated using the totality of the circumstances known to the police at the time. See, Mincey, supra, 393-94. In resolving the conflict in the federal and state courts and clarifying the appropriate test to be used in exigent circumstances cases, such as the instant case, it is respectfully submitted that the Court has no farther to look than its own adoption of the objective reasonableness, totality of the circumstance test that it has used in the past for resolution of Fourth Amendment issues in general. Under this test the mere fact that an officer used a proper "knock and talk" procedure as an initial approach to an apartment door would simply be one fact among many in the totality of the circumstances.

From the position of amici's law enforcement constituents the need to resolve this conflict in the courts is also "exigent." The confusion that abounds in the courts has led to uncertainty in training, setting policy and internal reviews of police conduct,

in cases similar to this case. When officers are uncertain about the limits of their authority in conducting drug arrests and searches and hesitate in pursuing leads and information when dealing with violent drug dealers, they are also susceptible to injury and death. Thus, this case presents the additional issue of officer safety. Amici respectfully request the Court to end the conflict in the courts and apply the objective reasonableness test based upon the totality of the circumstances in exigent circumstances search cases. In doing so the Court will not be creating new law, but simply applying its own well-established jurisprudence to this area of Fourth Amendment activity.

CONCLUSION

Amici Curiae respectfully request the Court to reverse the Supreme Court of Kentucky and establish objective reasonableness based upon the totality of the circumstances as the standard for the exigent circumstances exception to the warrant requirement. We ask the Court to uphold the constitutionality of the law enforcement conduct involved in this case on the law and as a matter of sound judicial policy.

Respectfully submitted,

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