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IN THE SUPREME COURT OF THE UNITED STATES

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KENTUCKY, :

Petitioner :

v. : No. 09-1272

HOLLIS DESHAUN KING :

- - - - - x

Washington, D.C.

Wednesday, January 12, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

JOSHUA D. FARLEY, ESQ., Assistant Attorney General, Frankfort, Kentucky; on behalf of Petitioner.

ANN O'CONNELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioner.

JAMESA J. DRAKE, ESQ., Assistant Public Advocate, Frankfort, Kentucky; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 09-1272, Kentucky v. King.

5 Mr. Farley.

6 ORAL ARGUMENT OF JOSHUA D. FARLEY

7 ON BEHALF OF THE PETITIONER

8 MR. FARLEY: Mr. Chief Justice, and may it
9 please the Court:

10 The issue before you today, of whether or
11 not police can impermissibly create exigent
12 circumstances, arises from the improper suppression of
13 reasonably seized evidence after a reasonable
14 warrantless entry. The test set forth by the Kentucky
15 Supreme Court is improper for several reasons, the first
16 of which is that this Court has routinely held that the
17 subjective intent of police officers when effecting a
18 warrantless entry is irrelevant.

19 JUSTICE GINSBURG: Where did the -- where
20 did the Kentucky Supreme Court -- where did the Kentucky
21 Supreme Court say that it was looking to a subjective
22 state of mind on the part of the police?

23 MR. FARLEY: Well, the Kentucky Supreme
24 Court's first prong of their test -- and I believe it's
25 in our petition appendix on page 26 -- I'm sorry.

1 Their -- their discussion starts on page 44a and carries
2 over to 46a. The first question of their test is
3 whether or not the officers acted in bad faith in an
4 attempt to purposefully evade the warrant requirements.

5 JUSTICE GINSBURG: That didn't -- that
6 didn't apply in this case?

7 MR. FARLEY: That is correct.

8 The second prong of the Kentucky Supreme
9 Court's test is whether or not the actions of the
10 Respondent in this case or the occupant of the home
11 would have been foreseeable by the police officers
12 before they knocked and announced their presence.

13 Now, the problem with the foreseeability
14 test --

15 JUSTICE GINSBURG: But why is -- why is that
16 subjective? Why isn't that -- would it be foreseeable
17 to a reasonable police officer similarly situated?

18 MR. FARLEY: Well, Justice Ginsburg, it --
19 it isn't directly a subjective inquiry. However, police
20 officers are trained to expect and foresee illegal
21 activity so that they may carry out the duties of their
22 job in protecting the citizens. So under a
23 foreseeability test, a reasonable officer will always
24 foresee illegal activity in response to his actions, be
25 it walking down the street or knocking on your door. A

1 reasonable officer will always foresee illegal activity,
2 and for that reason, the Kentucky Supreme Court's test
3 is completely unworkable.

4 Several of the other circuits and the lower
5 courts have adopted tests that also attempt to add an
6 extra exception, an unwarranted closure of the exigent
7 circumstances exception that narrows the use of that
8 exception by police officers. The test that the
9 Commonwealth would propose is a simple lawfulness test.

10 Now, under this test, as long as an officer
11 behaves lawfully, there should be no suppression of
12 evidence seized after an otherwise reasonable search.

13 CHIEF JUSTICE ROBERTS: So, you have an
14 apartment building where the police know from experience
15 there's a lot of illegal activity, a lot of drugs, drug
16 transactions. Every 2 weeks, they walk through and
17 knock on every door and wait for evidence of the
18 destruction of -- of drugs. Is that all right?

19 MR. FARLEY: Well, there's -- I would say
20 "yes," if there's probable cause as well as exigent
21 circumstances.

22 CHIEF JUSTICE ROBERTS: Well, the probable
23 cause, of course, comes when they hear the, you know,
24 flushing and the, you know, hiding or whatever behind
25 the door.

1 MR. FARLEY: Well, I would assert that there
2 are -- there are two separate issues here. You must
3 have probable cause separate from the existence of
4 exigent circumstances. In this case, there was probable
5 cause due to the smell of marijuana.

6 JUSTICE GINSBURG: They go to the apartment
7 building, and they sniff at every door, and when they
8 sniff, when a strong smell of marijuana emanates from
9 the door, then they go through this routine, but they do
10 it as a matter of every 2 weeks, as the Chief said, as a
11 routine matter. They don't just knock on every door,
12 but they knock on the doors where they smell marijuana,
13 and they do that just as a routine, in all the buildings
14 where they suspect there may be drug -- drugs being
15 stashed.

16 MR. FARLEY: Justice Ginsburg, under a
17 simple lawfulness test, since the officers have not
18 violated the Fourth Amendment prior to the exigency
19 arising, there would be no need to suppress any
20 evidence. That would be perfectly fine for the officers
21 to do that. It may not be the most --

22 JUSTICE SOTOMAYOR: -- to the Chief Justice
23 when he said -- and I think this was the Solicitor
24 General's position -- that the police can routinely
25 knock at a door and wait to see if they hear a toilet

1 flushing. I -- I've taken it out of this case but --
2 because I don't know what noise means. But your answer
3 would be "yes"?

4 MR. FARLEY: Yes, if -- if probable cause
5 exists, because --

6 JUSTICE SCALIA: Well, that's what --

7 JUSTICE SOTOMAYOR: Well, why -- why do you
8 need the probable cause inquiry? What does it have to
9 do with anything?

10 MR. FARLEY: Well, under the Fourth
11 Amendment, for a reasonable warrantless search to occur,
12 a police officer must have --

13 JUSTICE SOTOMAYOR: Before they can go in --

14 MR. FARLEY: Yes. The police officer must
15 have --

16 JUSTICE SOTOMAYOR: -- because they've just
17 heard the toilet flushing?

18 MR. FARLEY: They must have probable cause
19 coupled with exigent circumstances.

20 CHIEF JUSTICE ROBERTS: I'm sorry. I think
21 I've got two different probable causes that's caused --
22 causing me some confusion. I understand their
23 requirement of probable cause, and that they hear sound
24 of evidence being destroyed and therefore enter. Is
25 that -- or are you talking about the probable cause to

1 think there's something going on in the first place?

2 MR. FARLEY: There are two separate issues
3 here. They must have probable cause aside from exigent
4 circumstances. Then they must also have --

5 JUSTICE KENNEDY: To knock on the door?

6 MR. FARLEY: -- a reasonable belief --

7 JUSTICE KENNEDY: They must have probable
8 cause to knock on the door?

9 MR. FARLEY: No, Justice Kennedy.

10 JUSTICE KENNEDY: No. All right.

11 MR. FARLEY: They can -- just as citizen
12 could --

13 JUSTICE KENNEDY: Okay. Take us --

14 MR. FARLEY: -- they could knock on the
15 door. However --

16 JUSTICE KENNEDY: Take us through it -- take
17 us through it chronologically. The policeman is walking
18 through the hallway. He has no probable cause. He --
19 he --

20 MR. FARLEY: He could knock on the door.

21 JUSTICE KENNEDY: He smells marijuana --

22 MR. FARLEY: The smell of --

23 JUSTICE KENNEDY: -- then he knocks on the
24 door. When did the probable cause arise and when must
25 it arise?

1 MR. FARLEY: Well, the smell of marijuana
2 would give probable cause to obtain a search warrant.
3 Once he knocks on the door and hears noises consistent
4 with the destruction of physical evidence, then an
5 exigency has arised. Now the officer has both probable
6 cause and an exigent circumstance. And under the --

7 JUSTICE KAGAN: But I don't understand why
8 the smell of marijuana is necessary. This goes back to
9 what Justice Sotomayor was saying, you don't need
10 probable cause to knock on a door. Knocking on a door
11 is perfectly lawful. So, if there's just a lawfulness
12 test, the knock is fine. And then when you hear
13 whatever it is that you hear that you think creates
14 exigent circumstances, whether it's a toilet flushing or
15 whether it's just noise, that, too, gives you the
16 ability to go right in.

17 So -- so if it's just lawfulness, you don't
18 need the marijuana smell even, do you?

19 MR. FARLEY: Well, I think -- I think we're
20 confused. In order to enter with exigent circumstances,
21 you must also have separate probable cause, and it's
22 that you could have gotten --

23 JUSTICE KAGAN: Probable cause beyond
24 thinking that the evidence --

25 MR. FARLEY: Beyond the reasonable belief --

1 JUSTICE KAGAN: -- is being destroyed?

2 MR. FARLEY: Yes. Correct.

3 JUSTICE KAGAN: Okay.

4 MR. FARLEY: That is correct.

5 JUSTICE SCALIA: It might just be somebody
6 going to the toilet, right?

7 (Laughter.)

8 MR. FARLEY: It could be. It could be. It
9 could very well be.

10 JUSTICE SCALIA: So, you have to suspect
11 that the reason the toilet is flushing is somebody is
12 trying to get rid of evidence. And in order for that to
13 be the case, you have to have smelled the marijuana?

14 MR. FARLEY: Yes, Justice Scalia, you're
15 absolutely correct.

16 CHIEF JUSTICE ROBERTS: So there's only one
17 probable cause, right?

18 MR. FARLEY: Yes.

19 CHIEF JUSTICE ROBERTS: Okay.

20 MR. FARLEY: Yes. The exigent circumstances
21 is a reasonable belief based upon the totality of the
22 surrounding circumstances. Here, given that the
23 officers had a reasonable belief that they were chasing
24 a fleeing felon, they had a reasonable belief that this
25 was the doorway he had entered, then you couple that

1 with the noises that they heard, they testified were
2 based on their training --

3 JUSTICE GINSBURG: May --

4 MR. FARLEY: -- and experience --

5 JUSTICE GINSBURG: May we just go back
6 over -- you're putting in the fleeing felon, but as far
7 as I understand from this record, it was never shown
8 that the dealer that the police were following was aware
9 that he was following and that he was fleeing from them.
10 This is the -- it's not part of the question you
11 presented, because we granted only on the exigent
12 circumstances, but I didn't think that there was -- the
13 dealer wasn't called, and he wasn't asked did you even
14 know that the police were following you?

15 MR. FARLEY: That -- that's correct, Justice
16 Ginsburg. However -- and we cannot divorce the
17 officers' chase of this suspect, regardless of whether
18 he knew of their hot pursuit or not, we cannot divorce
19 those facts from what the officers knew when they
20 knocked on the door.

21 CHIEF JUSTICE ROBERTS: Sure, you can.
22 There's nothing illegal about walking down the hall and
23 knocking on somebody's door. And if as a police officer
24 you say I smell marijuana, and then you hear the
25 flushing, then there's probable cause. You don't need

1 any business about the dealer and the breezeway and all
2 that at all.

3 MR. FARLEY: Certainly. Certainly, Mr.
4 Chief Justice. You're absolutely correct. I was -- I
5 was just speaking in terms of this case, saying that
6 there were -- there was ample evidence that exigent
7 circumstances existed here, coupled with the probable
8 cause.

9 JUSTICE GINSBURG: May I ask a question --

10 JUSTICE SOTOMAYOR: And in your view --

11 JUSTICE GINSBURG: May I ask a question that
12 goes back to what you said? You have clarified very
13 nicely that there has to be probable cause to think that
14 there's something wrong going on in the -- the
15 apartment. And you said that is, at that point when
16 they -- the marijuana -- a strong smell comes from the
17 door, at that point the police could go and get a
18 warrant. Then they don't have to, because then they
19 knock on the door.

20 We start out with a strong presumption that
21 the Fourth Amendment requires a warrant, a strong
22 preference for getting the warrant. So why in this
23 situation wouldn't the first response of the police
24 be -- instead of knocking, because once they knock they
25 alert the people in there: Let's get a warrant; we'll

1 come back.

2 MR. FARLEY: Well, the officers testified
3 under these circumstances that they believed that they
4 were in hot pursuit of this felon. So at the time they
5 were at the door, they believed he had entered this
6 apartment and was aware of their presence and was
7 destroying evidence of his deal of crack cocaine, so
8 this is a fluid, evolving --

9 JUSTICE SOTOMAYOR: Counsel, how does this
10 -- how does this holding by us not become a simple
11 warrantless entry in any drug case? Meaning: Police
12 knock on the door, suspect doesn't answer it, gets up
13 and moves to their bedroom. Because there's no noise
14 that was described by this police officer. It was
15 simply not answering the door and moving. So if that's
16 all it takes, any police officer will come in and say:
17 In my experience, most drug dealers destroy the evidence
18 when we knock.

19 MR. FARLEY: Well --

20 JUSTICE SOTOMAYOR: Aren't we just doing
21 away with Johnson? And aren't we just simply saying
22 they can just walk in whenever they smell marijuana,
23 whenever they think there's drugs on the other side?
24 Why do we even bother giving them a -- a warrant?

25 MR. FARLEY: Well, I would disagree with
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1 you. I think that when determining whether an exigent
2 circumstance exists, you look at the totality of the
3 circumstances. So -- and there would be a myriad of
4 cases in which a court would determine that, simply
5 based upon the testimony or the noises that were heard,
6 with no surrounding circumstances, that exigent
7 circumstances may not have existed.

8 JUSTICE SCALIA: What if -- what if the
9 defendants here had not flushed the evidence down but
10 had answered the door and said "Yes?"?

11 (Laughter.)

12 JUSTICE SCALIA: Would the policemen have
13 been able to do anything just because they had smelled
14 marijuana?

15 MR. FARLEY: They could have sought a
16 consensual encounter with the occupant.

17 JUSTICE SCALIA: Oh, yes, but they'd say:
18 Oh, heck, no, you can't come in --

19 MR. FARLEY: Well, then --

20 JUSTICE SCALIA: -- do you have a warrant?

21 MR. FARLEY: Then the officers would not
22 have been able to force entry.

23 JUSTICE SCALIA: So basically the -- the
24 police were taking advantage of the stupidity of the
25 criminals; is that right?

1 MR. FARLEY: Well, I don't know about --

2 JUSTICE SCALIA: That's terrible. That's
3 not fair, is it?

4 MR. FARLEY: I don't know that I would
5 phrase it -- there is no -- there is not a requirement
6 to inform an occupant of a right to denial. However,
7 the officers could not have forced their way into the
8 home. That would have made this a case like Johnson.

9 JUSTICE SOTOMAYOR: What if the officers had
10 simply knocked, said "We're going to kick the door in if
11 you don't open it"?

12 MR. FARLEY: I believe that's still fine
13 under a lawfulness test, unless the occupant of the home
14 submits to that show of authority and comes to the door
15 and allows entry. Now, if that --

16 JUSTICE SCALIA: Well, after -- after
17 they've heard the -- the movement inside or the flushing
18 or whatever. You can't just kick it in because you've
19 smelled marijuana. You -- can you do it, because you --
20 you knock on the door because you smell marijuana,
21 nobody answers, and you kick the door in?

22 MR. FARLEY: Well, I believe that the noises
23 that they heard were consistent with destruction of
24 physical evidence based upon their training and
25 experience.

1 JUSTICE SCALIA: Yes, but without that
2 noise. Just --

3 MR. FARLEY: Then, no. No.

4 JUSTICE SCALIA: No, of course not.

5 MR. FARLEY: No, of course not. They would
6 have to obtain a warrant at that point. If the person
7 came to the door and denied them consent, they would
8 have to obtain a warrant. If the person did not come to
9 the door and made -- no exigency arose, then the
10 officers would still have to go and obtain a warrant --

11 JUSTICE KENNEDY: But -- this may be a bit
12 rudimentary, but can you tell me why isn't the evidence
13 always being destroyed when the marijuana is being
14 smoked? Isn't it being burnt up?

15 (Laughter.)

16 MR. FARLEY: I -- Justice Kennedy, I -- I
17 would tend to -- I would tend to agree with you.
18 However, I know this Court in Johnson stated that the
19 smell of burning opium was not the destruction of
20 evidence, and the only thing they could have obtained
21 would have been the fumes or the vapors. I tend to
22 agree -- disagree with that personally. However, from a
23 legal viewpoint, the simple smell of burning marijuana
24 is not --

25 JUSTICE KENNEDY: So the distinction is
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1 being destroyed as opposed to being consumed?

2 MR. FARLEY: Correct, that is -- that is
3 correct.

4 JUSTICE GINSBURG: And how is it -- you
5 mention Johnson.

6 MR. FARLEY: Yes.

7 JUSTICE GINSBURG: And I think the other
8 side says it was the same thing except it was a hotel
9 room instead of an apartment building. The police
10 smell -- in that case, it was -- what was it?

11 MR. FARLEY: Well, what occurred in Johnson,
12 I believe, is -- is completely different than what
13 occurred here. What occurred in Johnson was the
14 officers forced their way into the occupant's apartment
15 -- the occupant's hotel room and then said: Consider
16 yourself under arrest.

17 JUSTICE GINSBURG: Didn't they smell
18 marijuana or opium or something?

19 MR. FARLEY: Well, they did, and they
20 knocked on the door, and she came to the door and
21 they -- they forced their way in. There was no -- there
22 was no "let us in," there was no demand for entry, there
23 was no even ask-for consent to enter. They then said:
24 Consider yourself under arrest. They searched, and then
25 held her under arrest based upon the evidence that they

1 obtained.

2 JUSTICE GINSBURG: You left out one thing.
3 I thought they heard ruffling noises before they
4 attempted to get into the apartment -- into the hotel
5 room. There was something about noises.

6 MR. FARLEY: Well, I believe they heard
7 sounds when they knocked on the door. But she actually
8 came to the door, and then the officers forced entry.
9 Here we don't have that. We have no forced entry.
10 These are two different circumstances. In Johnson, an
11 exigency did not exist. Here an exigency does exist.

12 If there are no further questions, I'd like
13 to reserve the remainder of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.
15 Farley.

16 MR. FARLEY: Thank you.

17 CHIEF JUSTICE ROBERTS: Ms. O'Connell.

18 ORAL ARGUMENT OF ANN O'CONNELL,
19 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
20 SUPPORTING THE PETITIONER

21 MS. O'CONNELL: Mr. Chief Justice, and may
22 it please the Court:

23 If police officers act lawfully in
24 conducting their investigation, they may respond to any
25 exigencies that arise. It is up to police officers to

1 determine how they will collect evidence in any given
2 case as long as they stay within the confines of the
3 Fourth Amendment. Although securing a warrant --

4 JUSTICE SOTOMAYOR: Could you -- does a
5 ruling in this case that any lawful conduct by the
6 police mean that the police knock, somebody gets up on
7 the other side and walks through a closed door, and
8 closes a door in the back, and police say, "In my
9 experience it's -- it's consistent with the destruction
10 of property that drug dealers will go into a closed room
11 to get rid of it" -- is that enough?

12 MS. O'CONNELL: I don't think so, Justice
13 Sotomayor. I think that in any case --

14 JUSTICE SCALIA: Why -- why not? I mean
15 people -- you know, when there's a knock on -- on the
16 door, is the normal human reaction to walk into the
17 other room and shut the door?

18 MS. O'CONNELL: Well, a person might not --

19 JUSTICE SCALIA: I mean, that's peculiar
20 behavior, isn't it?

21 MS. O'CONNELL: A person doesn't have to
22 answer the door. A person might come to the door; they
23 might also ignore whoever is at the door. Both of those
24 options are fine.

25 JUSTICE SCALIA: Is that a common

1 experience, that you knock on a door and all you hear is
2 somebody walking out of the room and shutting a door?

3 MS. O'CONNELL: I mean, I -- I guess that a
4 person is entitled to do that.

5 JUSTICE SCALIA: I don't recall it ever
6 happening to me, but maybe -- maybe I'm a likable fellow
7 and people open the door.

8 (Laughter.)

9 MS. O'CONNELL: I mean, I think that that --
10 that's certainly a lawful option that somebody has when
11 the police officers knock at their door. And,
12 certainly, in this case --

13 JUSTICE SCALIA: They could say "Go away."
14 They could do a lot of stuff. But walk in the other
15 room and shut the door?

16 MS. O'CONNELL: That's --

17 JUSTICE SCALIA: Strange.

18 MS. O'CONNELL: I guess some people might do
19 that if they don't want to give consent to police entry.
20 I think that in order to go in, based on an exigent
21 circumstance, the police would have to be able to
22 articulate to a court that they objectively, reasonably
23 believed that there was destruction of evidence
24 occurring inside.

25 JUSTICE GINSBURG: And what was that here?

1 Because it was kind of vague. They heard movement.
2 What kind -- what kind of movement? It didn't -- it
3 said nothing about a toilet flushing --

4 MS. O'CONNELL: Justice Ginsburg, it's our
5 position that the Court should assume that there was an
6 exigency in this case.

7 In the Respondent's brief in opposition, he
8 argued that there was insufficient evidence of exigency.
9 The Court nonetheless granted cert on the question of
10 whether a police-created exigency would be okay under
11 the Fourth Amendment. The Solicitor General believes
12 that the Court should assume there was an exigency, and
13 if it agrees with Kentucky on the question presented and
14 then reverses, it should remand to the Kentucky Supreme
15 Court for a determination of whether an exigency
16 existed.

17 The trial court in this case certainly found
18 that the movement inside of the apartment was enough for
19 the officer to reasonably conclude that somebody inside
20 was destroying evidence. The Kentucky Supreme Court
21 assumed that that was so in order to reach the question
22 presented in this case that the Court granted cert on.

23 JUSTICE KAGAN: Ms. O'Connell, if I could
24 ask you about the government's proposed standard: You
25 say that as long as each step in the police conduct is

1 lawful, that's sufficient. And each step would -- the
2 way the Fourth Amendment works, each step -- we're
3 asking, essentially, whether each step is reasonable.

4 What some courts have done, in addition to
5 that -- and this was not the approach of the court
6 below -- but what some courts have done is to say we
7 also ask a more holistic reasonableness question. We
8 say: Is the whole process by which the police operated
9 with respect to this person reasonable? So, for
10 example, we might say, you know, was there time to get a
11 warrant, or did it look like the police were just --
12 they preferred not to have to deal with a magistrate?

13 So what's wrong with that sort of standard?
14 In addition to asking whether each step is reasonable,
15 to say, look, is the whole pattern here of what the
16 police did to come up with this evidence reasonable?

17 MS. O'CONNELL: I think the problem with
18 that test, Justice Kagan, is that police officers have
19 options of how they can conduct searches and seizures.
20 Getting a warrant is one way that they could do that.
21 Getting consent to conduct a search or a seizure is
22 another way. There's no justification in this Court's
23 precedents for requiring police officers to choose one
24 of those options over another if both options are
25 lawful.

1 In this case, the police officers knocked on
2 the door, not sure which apartment the person that they
3 were pursuing fled into, in order to determine whether
4 that was the correct apartment. There's no reason why
5 they needed to get a warrant before knocking on the door
6 and seeking cooperation of the people inside.

7 JUSTICE KENNEDY: Is it your position that
8 the police can do anything that's lawful, even if the
9 purpose of doing so is to create exigent circumstances?

10 MS. O'CONNELL: Yes, I think that under this
11 Court -- the way that this Court has interpreted Fourth
12 Amendment warrant exceptions, as long as there is no
13 violation of the Fourth Amendment, that is okay. The
14 police officers can rely on any ensuing exigency.

15 JUSTICE KENNEDY: The -- the question
16 presented in the blue brief used the word
17 "impermissible," and we're talking about "unlawful." I
18 take it that there is a difference in those -- or no
19 difference?

20 MS. O'CONNELL: Well, yes, there is a
21 difference. I think that that comes up in Respondent's
22 argument that if there was an impermissible demand for
23 entry -- for example, if the police officer said "I have
24 a warrant, let me in," even though he didn't, as in
25 Bumper v. North Carolina -- that that could still be

1 okay under a lawfulness test as long as the suspect
2 reacted by destroying evidence instead of by coming to
3 the door, like in Bumper or Johnson, and going about
4 with a --

5 JUSTICE BREYER: What are the objections to
6 adding in the alternative "or in bad faith"?

7 MS. O'CONNELL: Justice Breyer, the
8 objection to that is simply that in all cases that are
9 founded upon probable cause that are not programmatic
10 searches that are conducted without any individualized
11 suspicion, this Court has repeatedly rejected prongs of
12 a Fourth Amendment test that -- that rely on the
13 subjective assessment --

14 JUSTICE BREYER: Objectively? I mean, what
15 we're trying to rule out is they -- they hitch -- they
16 get this bright idea, the police: We'll go knock at
17 every door. You know. So what about that, objectively
18 determined bad faith?

19 MS. O'CONNELL: I'm sorry. I don't --

20 JUSTICE BREYER: My point is a solely
21 unlawfulness test would allow the police to get into the
22 habit of just knocking at every door, but if you say
23 that also it has to survive a bad-faith test, where bad
24 faith is objectively, not subjectively, determined, then
25 you will rule out the possibility of the police

1 hatching -- which I don't know if they would, but
2 hatching such a plan.

3 MS. O'CONNELL: I guess that it's not
4 totally clear what bad faith would mean in this
5 context --

6 JUSTICE BREYER: Well, there are circuits
7 who have adopted a bad-faith test in the alternative
8 with other things than the word "unlawful." The Second
9 Circuit uses only the word "unlawful," and I thought we
10 took this case to iron out that discrepancy. And if we
11 did, I'd like to know your objection to ironing it out
12 by taking the Second Circuit test but adding on an
13 objectively determined bad-faith rule.

14 MS. O'CONNELL: Justice Breyer, I don't -- I
15 don't know what it means to act in bad faith in a case
16 like this as a police officer.

17 JUSTICE ALITO: Maybe it could mean having
18 no reason for knocking on the door other than to create
19 exigent circumstances.

20 MS. O'CONNELL: Well, Justice Alito, I think
21 that it would be difficult to determine objectively
22 whether that was the case. Certainly --

23 JUSTICE BREYER: Well, the police say: Oh,
24 I don't want to get a warrant. It's such a bore. We
25 have other things to do. I have a great idea; let's

1 knock at the door, and then as soon as he starts moving
2 around, I know what his going to the -- going into the
3 bathroom means, and we'll hear that, and we'll be able
4 to get in.

5 MS. O'CONNELL: I think that --

6 JUSTICE BREYER: Hey, great idea.

7 Okay? Now suppose that's the record.

8 MS. O'CONNELL: I think that there's already
9 a significant risk built into the Fourth Amendment that
10 police officers, if they knock on the door and they
11 don't hear somebody destroying evidence inside, they're
12 going to have to leave and get a warrant. I think
13 that's enough of a deterrent.

14 JUSTICE SCALIA: You don't know that they're
15 destroying evidence unless you have reason to believe
16 that there is contraband inside. I mean, the -- the
17 hypothetical is an unrealistic one. They knock on the
18 door, and somebody moves inside -- that doesn't give
19 them any exigency --

20 JUSTICE BREYER: No, no. I mean to add:
21 And, in fact, there's probable cause.

22 JUSTICE SCALIA: Okay. They --

23 JUSTICE BREYER: In addition, he smelled the
24 marijuana. I just was trying to stick to the relevant
25 points.

1 JUSTICE SCALIA: Well, that's a different
2 hypothetical.

3 JUSTICE BREYER: Yes. All right. Add that
4 to the hypothetical.

5 JUSTICE SCALIA: There's a hypothetical in
6 which they knock on every door under which they smell
7 marijuana.

8 JUSTICE BREYER: Correct. That's what I
9 mean, and I don't always spell it out.

10 JUSTICE SCALIA: Perfectly okay?

11 MS. O'CONNELL: Right, and I think that
12 there's -- the Court shouldn't be concerned, and
13 certainly shouldn't be concerned enough to adopt a
14 bad-faith or a subjective motivation prong to a test
15 that it creates which is --

16 JUSTICE SOTOMAYOR: But what makes that
17 different than knocking on the door and saying "Open the
18 door or I'm going to kick it in"? You're saying that's
19 lawful because until the person submits, you're
20 suggesting there's no coercion in that whatsoever.

21 MS. O'CONNELL: That's true, and, Justice
22 Sotomayor, to be clear --

23 JUSTICE SOTOMAYOR: So why wouldn't that
24 objectively be bad faith if what we find out is that
25 they now have a tactic which is they go through this

1 building, and every time they smell marijuana, hash, or
2 -- I don't know if crack cocaine smells or not when
3 they're smoking it -- but whenever they smell something,
4 they just do that.

5 MS. O'CONNELL: I think the -- the fact that
6 if the person actually does what the police officer says
7 and answers the door will mean that the evidence would
8 be excluded as a coerced consent search is enough of a
9 deterrent to that sort of conduct.

10 JUSTICE SOTOMAYOR: So there's no bad-faith
11 measure whatsoever in your analysis --

12 MS. O'CONNELL: I don't think it's
13 necessary.

14 JUSTICE SOTOMAYOR: -- and lawfulness is
15 defined by actual physical seizure. So if we have cases
16 that suggest something else, a command to submit, your
17 argument would be lost, correct?

18 MS. O'CONNELL: I think that's right, if the
19 person submits to the command.

20 JUSTICE SOTOMAYOR: No, no. I --

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Ms. O'Connell.

23 Ms. Drake.

24 ORAL ARGUMENT OF JAMESA J. DRAKE

25 ON BEHALF OF THE RESPONDENT
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1 MS. DRAKE: Mr. Chief Justice, and may it
2 please the Court:

3 The odor of burnt marijuana, coupled with
4 Officer Cobb's cursory and equivocal testimony about the
5 sounds of movement he couldn't discern exactly and that
6 his training and experience led him only possibly to
7 conclude was consistent with the destruction of
8 evidence, is insufficient to establish exigent
9 circumstances.

10 CHIEF JUSTICE ROBERTS: Although you're --

11 JUSTICE SCALIA: The -- I'm sorry.

12 CHIEF JUSTICE ROBERTS: You're describing
13 what you think the evidence was to support exigency, and
14 the suggestion we've heard on the other side is that
15 that's an issue that can be addressed on remand once we,
16 according to the other side, correct the State court's
17 error in that this -- you -- the police cannot create
18 exigent circumstances.

19 So I -- I don't know that it's terribly
20 relevant what the underlying facts about what they heard
21 was. That will be relevant depending, or not --
22 depending on what our opinion says.

23 MS. DRAKE: It's relevant because it goes to
24 whether exigent circumstances existed. And as to the
25 question of whether a remand would be appropriate in

1 this case, the question of whether exigent circumstances
2 existed is logically antecedent in any created exigency
3 case.

4 CHIEF JUSTICE ROBERTS: No, it's -- it's not
5 at all. The court said: I don't care whether exigent
6 circumstances existed; you cannot create exigent
7 circumstances; so I don't care whether they were or not.

8 The legal standard is antecedent to the
9 application of the facts.

10 MS. DRAKE: There's no point in delving into
11 whether an exigency was created by the police if there
12 is no exigency to begin with.

13 JUSTICE KENNEDY: Well, I -- I think the
14 Court is interested in taking the case on the question
15 whether or not the police may create exigent
16 circumstances and use those exigent circumstances to
17 enter. Now, whether or not there were exigent
18 circumstances here because of the sound is -- is, it
19 seems to me, a subsidiary question.

20 MS. DRAKE: The other problem with remanding
21 this case for further determination on this issue is, as
22 this Court is aware, the procedural posture of this case
23 is troubling. The case has already been dismissed.
24 There is no potential for further proceedings here.
25 There is no --

1 CHIEF JUSTICE ROBERTS: Oh, sure, there is.
2 It was dismissed because the State supreme court held
3 you can't bring this evidence in. If we say, oh, yes,
4 you can, then the issue becomes live again.

5 MS. DRAKE: That conclusion is dependent on
6 the notion that an indictment is merged with the
7 judgment such that a decision in the Commonwealth's
8 favor in this case would vacate the decision of the
9 Kentucky Supreme Court, which in turn vacates the
10 underlying suppression order. But there is no authority
11 for the notion that an indictment and a judgment merge
12 as a matter of Kentucky law, and so a decision --

13 CHIEF JUSTICE ROBERTS: This is the argument
14 you presented to us in the letter, right?

15 MS. DRAKE: Yes, Your Honor.

16 CHIEF JUSTICE ROBERTS: And yet, we
17 nonetheless decided to have argument.

18 MS. DRAKE: Yes, Your Honor.

19 CHIEF JUSTICE ROBERTS: So maybe it would
20 be -- it's your case, but maybe it would be best to move
21 on to the legal issue.

22 MS. DRAKE: If we move to the question of
23 whether the police have created exigent circumstances,
24 it's important that we're all operating on the same
25 understanding, the facts in this case. This case does

1 not involve a simple knock at the door, and -- and the
2 distinction is important. In this case, at 9:50 p.m.,
3 the officers banged on the door as loudly as they could.

4 JUSTICE SOTOMAYOR: Did the trial court make
5 those findings? I know that you said it in your brief,
6 and I thought I read the trial court record. I know
7 they knocked loudly.

8 MS. DRAKE: Yes.

9 JUSTICE SOTOMAYOR: But what else did they
10 do?

11 MS. DRAKE: Yes. And this is located at the
12 appendix to the petition in the bottom of page 3a
13 carrying on to 4a. The trial court found: Detective
14 Maynard, who was accompanying Officer Cobb in the
15 breezeway attempting to locate and arrest the suspect in
16 question, banged on the door of the apartment on the
17 back left of the breezeway, identifying themselves as
18 police officers and demanding that the door be opened by
19 persons inside.

20 Officer Cobb testified at the suppression
21 hearing -- and this is at page 22 of the joint appendix:
22 Detective Maynard made contact with the door, announced
23 our presence, banged on the door as loud as we could,
24 announced "Police, police, police."

25 This is not the case where --

1 CHIEF JUSTICE ROBERTS: Where's -- no "Open
2 up." I thought you said earlier they said "Open up."

3 MS. DRAKE: Yes. Then Officer Cobb later
4 goes on to explain -- and this is on page 24 of the
5 joint appendix: Detective Maynard with Sergeant
6 Simmons, we explained to them -- referring to the
7 occupants of the apartment -- we were going to make
8 entry inside the apartment.

9 CHIEF JUSTICE ROBERTS: Is that after --
10 after the exigent circumstances or the alleged exigent
11 circumstances were presented? And that's after they
12 heard what they thought -- and I know you disagree --
13 was the destruction of evidence.

14 MS. DRAKE: It's -- it's unclear from the
15 trial court's factual finding what the order of events
16 was. The trial court found: Banged on the door of the
17 apartment, identified themselves as police officers,
18 and --

19 JUSTICE SCALIA: Loudly. Is any of that
20 unlawful? Is -- is knocking loudly on the door
21 unlawful?

22 MS. DRAKE: It's unreasonable conduct.

23 JUSTICE SCALIA: Is it -- is it unlawful?
24 Is -- is saying "Open up, police" -- is that unlawful?

25 MS. DRAKE: Well, it's certainly not

1 unlawful in the sense that it violates any provision of
2 the penal code. But this is a Fourth Amendment case, so
3 the question is whether it's reasonable.

4 JUSTICE SCALIA: Ms. Drake, the problem I
5 have is there are a lot of constraints on -- on law
6 enforcement, and the one thing that -- that it has going
7 for it is that criminals are stupid.

8 (Laughter.)

9 JUSTICE SCALIA: And we had a case some
10 years ago in which the issue was whether the Washington
11 police could enter buses arriving from -- from the south
12 and -- and randomly ask passengers, do you mind if we
13 look in your luggage? And the -- the -- the mules who
14 were carrying marijuana were stupid enough to say, oh,
15 of course. Just to show that they had nothing to fear.
16 And an enormous number of arrests were -- were effected
17 in that fashion.

18 We didn't say that's not fair because you're
19 taking advantage of the -- of the ignorance of these --
20 these poor criminals. We said that's perfectly okay.
21 And it seems to me the same thing is going on here.

22 These people could have answered the door --
23 there's a policeman knocking on the door; all he's
24 saying is "Open the door, open the door" -- and say
25 "Yes, what do you want?" Say -- you know, blah, blah,

1 blah. They say "Well, get a warrant." Shut the door.

2 They didn't do that. But everything done
3 was perfectly lawful. It's unfair to the criminal? Is
4 that -- is that the problem? I really don't understand
5 the problem.

6 MS. DRAKE: I have two responses to Your
7 Honor's question. The first is that -- and along with
8 this notion that criminals are stupid and so that's why
9 we get all these criminal cases, there is no difference
10 between what happened in this case and how an innocent
11 person would respond.

12 Recall Officer Cobb's testimony is simply
13 that, after banging, he heard movement. Any innocent
14 person at 10:00 at night would have to move in order --

15 JUSTICE ALITO: Could I ask you this? It
16 might -- it might make a difference to me whether the
17 police demanded entry prior to the time when the alleged
18 exigent circumstances arose. And the only testimony on
19 this point that I am aware of is on pages 22 and 23 of
20 the appendix, when police banged on the door as loud as
21 they could and announced "Police, police, police," and
22 then Detective Maynard banged on the door and said "This
23 is the police."

24 Now, is there any -- anything more in the
25 record? Any evidence that they -- prior to the time

1 when they heard what they allegedly heard, that they
2 said "Open the door"?

3 MS. DRAKE: The portion of the Joint
4 Appendix that I quoted to the Court -- we explained to
5 them we were going to make entry -- appears on page 24.

6 JUSTICE ALITO: Right.

7 MS. DRAKE: So, if Your Honor keeps
8 reading --

9 JUSTICE ALITO: It starts -- it says: We
10 knew that there was possibly something that was going to
11 be destroyed inside the apartment. At that point
12 Detective Maynard -- this is after they heard the
13 sounds, after they claim to have heard the sounds.

14 MS. DRAKE: Yes. Officer Cobb's testimony
15 suggests that the demand came after they heard the sound
16 of movement. The finding by the trial court, however,
17 is that this was all happening simultaneously and in
18 very quick fashion.

19 JUSTICE ALITO: Is there any -- is there any
20 evidence of that? Did anybody else testify to what
21 happened?

22 MS. DRAKE: No, Your Honor. Officer Cobb's
23 testimony was -- was all the Commonwealth offered.

24 But the chronology of the demand is not
25 dispositive in this case because the demand itself is

1 not dispositive. The demand removes any doubt that the
2 officers were not seeking a consensual encounter, but
3 you still have the behavior of banging on the door.

4 JUSTICE ALITO: Well, does it -- does it
5 turn on how loudly they knocked? If they just knock on
6 the door and say "This is the police," is -- is that --
7 is there anything wrong with that?

8 MS. DRAKE: It -- it depends entirely on
9 whether a reasonable person would interpret that
10 behavior as the officer conveying the impression that
11 entry was imminent and inevitable. And this feeds back
12 to Justice Scalia's question, which is, well, what --
13 what is unreasonable about what the officers did here?

14 JUSTICE ALITO: What was there here to make
15 a reasonable person believe that -- that entry was
16 imminent and inevitable, if -- if all that's done is a
17 knock on the door and they say "Police, police, police,
18 this is the police"? Maybe it turns on how loudly they
19 spoke or how loudly they -- they knocked; is that the
20 point?

21 MS. DRAKE: That is the point. Those are
22 all relevant criteria because, in every Fourth Amendment
23 case, we're considering the totality of the
24 circumstances.

25 CHIEF JUSTICE ROBERTS: It seems to me that
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1 you're trying to change the case. I mean, this is not a
2 case where they come in and, in effect, demand entry.
3 My understanding is that the issue in the case is
4 whether or not, after a request for entry, they can then
5 base probable cause in dispensing with the warrant based
6 on what they hear from behind the door.

7 Now, I know you think that they -- whatever
8 they hear is perfectly innocent; but the issue is
9 whenever they knock on the door, "Police" or "Can we
10 come in" or whatever, and then they hear that, the
11 activity behind the door, they have reason and can --
12 can enter.

13 Now, what you're -- it seems to me what
14 you're arguing is, well, they did something else. They
15 banged on the door, they yelled "Police"; it wasn't
16 simply knocking on the door and seeking entry. And you
17 may be right, again, on the facts, but it seems to me
18 that's for -- for later on.

19 I want to know what your position is on
20 whether they can assume, at least for me, they knock and
21 say "Can we come in" or knock and say "Police" -- no
22 demand to get in.

23 MS. DRAKE: If I understand Your Honor's
24 question, the officers are engaging in what we would
25 call a true "knock and talk." They're seeking --

1 they're on -- the scenario is such that no one would
2 doubt they're attempting a consensual encounter.

3 Our position is because that behavior is
4 reasonable, it is not made unreasonable by the fact that
5 evidence may be destroyed, and so suppression would not
6 be the remedy. Well, then, here --

7 JUSTICE BREYER: All right. So you agree
8 that -- that the court below is wrong because what they
9 say, as I read it, is irrespective of how reasonably the
10 police behave, if it is reasonably foreseeable that
11 their tactic will create exigent circumstances -- and I
12 would think it's reasonably foreseeable, when you knock
13 on the door very politely and say "The police," that
14 somebody might shout out "Hide the pot"; all right?

15 (Laughter.)

16 JUSTICE BREYER: That if that's reasonable
17 foreseeable, says the court, then that violates the
18 Fourth Amendment. But we have the Second Circuit that
19 says as long as the police behaved unlawfully, it --
20 lawfully, lawfully -- it does not violate the Fourth
21 Amendment; and we have the First Circuit that has some
22 kind of bad-faith test plus an unreasonable or improper
23 test; and we have the Fourth and Eighth circuits that
24 yet have some different kind of test.

25 And one of the things I'd be interested in
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1 hearing your view on at some point is just what the
2 Chief Justice said, that assuming from your point of
3 view this is a hypothetical case, nonetheless we would
4 like your view on which of those tests or some other
5 test is the appropriate test and why. That was the
6 question he started with and Justice Kennedy started
7 with, and I'd also be interested in your view on that.

8 MS. DRAKE: The appropriate test is the test
9 that we propose. Under our test, the police act
10 unreasonably when they convey the impression to an -- to
11 a reasonable person that entry is imminent and
12 inevitable. Our test follows directly from the Fourth
13 Amendment requirement that people in their homes deserve
14 precision.

15 By conveying the impression that entry is
16 imminent and inevitable, the police are -- and they
17 don't have judicial authority for doing that -- there --
18 there's no warrant -- they are engaging in behavior that
19 would confuse an ordinary citizen and make him or her
20 uncertain about whether the assertion of right to
21 privacy and security in the home --

22 JUSTICE KAGAN: Well, Ms. Drake if that's
23 the case, in some way you're agreeing with the
24 Government. You, too, are saying that -- that there's a
25 lawfulness test. You're just disagreeing about what's

1 lawful.

2 MS. DRAKE: And to the extent that "lawful"
3 is defined as a synonym for "unreasonable" and to the
4 extent that there does not need to be a completed
5 antecedent Fourth Amendment violation, we would agree.
6 There is area of agreement between the Commonwealth and
7 I, and it is on the issue of this "knock and talk." Of
8 course, police officers need to have the investigative
9 tool of a knock and talk. There's nothing wrong with an
10 officer attempting to gain consensual entry. And our
11 position is that that's not made unreasonable by factors
12 outside the officer's control, no matter how
13 foreseeable.

14 JUSTICE ALITO: So what took this outside of
15 the category of the ordinary knock and talk?

16 MS. DRAKE: This is not a knock and a --
17 knock and talk case; this is a knock and announce case
18 or a knock and demand case, which is how the trial court
19 characterized it. And the staff --

20 JUSTICE ALITO: Well, I don't know about the
21 labels, but what did they -- what did the police do that
22 went beyond what would be permitted under your
23 understanding of a pure knock and talk? It's -- it's
24 the volume of the -- of the knocking?

25 MS. DRAKE: Yes, it's the -- it's the
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1 banging, not knocking. It's announcement --

2 JUSTICE ALITO: Banging, not knocking?

3 MS. DRAKE: Banging, not a soft -- not the
4 knock that you would expect a reasonable person to
5 engage in, in the ordinary discourse with another
6 person, or that you would expect from an officer
7 attempting to gain consensual --

8 JUSTICE SCALIA: But I -- you -- you might
9 have considerable support on the Court for the
10 proposition that if the exigent circumstance is created
11 by unlawful activity by the police, which would include
12 conveying the impression that they are about to kick the
13 door in, then -- then you have a different case. But --
14 but I thought the case we had before us is what if the
15 police officers are behaving perfectly lawfully and
16 they're not threatening to kick down the door, and they
17 smelled the marijuana and then they hear the motion
18 inside, does that justify their going in?

19 And that's what I thought we took the case
20 for, and that's a different question. You're trying to
21 -- you're trying to make the police officers' actions
22 unlawful, and I will stipulate that if their actions
23 were unlawful you have a different case, and probably
24 the evidence would have to be suppressed, but I didn't
25 think we were here to decide that, whether they knocked

1 too loud, whether they threatened to kick in the door.
2 The opinion below says if they created the exigent
3 circumstances, whether they did so lawfully or
4 unlawfully, they cannot go in. And that's, that's the
5 issue.

6 MS. DRAKE: What the officers did in this
7 case is the functional equivalent of saying "We're going
8 to kick in the door." Now, I wouldn't go that -- that
9 far, but it -- it's the functional equivalent of a knock
10 and announce, which is exactly the behavior the police
11 engage in when they are executing a warrant. And it is
12 that behavior that conveys the impression that an
13 occupant has no authority to keep the officers at arm's
14 length.

15 JUSTICE SCALIA: That wasn't the basis for
16 the decision below, though. The court below didn't say
17 these police officers were behaving as though they had a
18 warrant and were about to kick in the door. The opinion
19 below just said, yes, there were exigent circumstances,
20 but they were the result of the police knocking on the
21 door and saying "We're the police."

22 MS. DRAKE: I don't disagree that the lower
23 court did not analyze the problem in this fashion, did
24 not analyze the question in this fashion, but it's a
25 legal question that calls for an examination of how a

1 reasonable person would interpret the behavior, and
2 so --

3 JUSTICE SOTOMAYOR: But what does that have
4 to do with the -- the police officers' lawfulness? Now,
5 I -- I grant you that attempting -- that there is
6 something troubling about the police attempting to
7 coerce entry as opposed to requesting entry, but as my
8 colleagues have pointed out, it's not clear from this
9 record which of the two the police did, in a loud voice
10 or not.

11 You're saying just a loud knock, a scream,
12 "Police," that that would be coercive? That's how I'm
13 reading you.

14 MS. DRAKE: I --

15 JUSTICE SOTOMAYOR: Or -- or are you going
16 further and trying to say that, as a matter of fact, the
17 testimony's critically clear that they knocked loudly,
18 said "Police," and said "Let us in or we're going to
19 bust it"?

20 MS. DRAKE: The factual record is clear.
21 The -- Officer Cobb testified he banged as loud as
22 possible. This is -- this not the normal knock that an
23 officer engages in when he's seeking consensual --
24 consent, you know, consent to search, and this is at
25 10:00 at night. He's saying we announced "Police,

1 police, police!" -- exclamation point. That -- that's
2 how it appears in the record. Again --

3 CHIEF JUSTICE ROBERTS: So just assume, for
4 my sake, that the police comes to the door. It's not
5 10:00 at night; it's, you know, 6:00 at night. Knocks
6 quietly on the door and says "We're the police. Can we
7 talk?" And then there was the smell of marijuana. And
8 then he hears the sounds that do convey to a reasonable
9 police officer that evidence is being destroyed. At
10 that point can they enter without a warrant?

11 MS. DRAKE: Yes.

12 CHIEF JUSTICE ROBERTS: Okay.

13 JUSTICE BREYER: But you said -- just add on
14 to that. Look, the question presented that they raised:
15 Which of the five tests currently being used by the U.S.
16 court of appeals is proper? Now, you've said something
17 about your view on that, but I'd like you to say
18 anything else you'd like to say about that, which of the
19 five tests, or some sixth test if you like, and you tell
20 me the words that you would like us to use when we
21 answer that question.

22 MS. DRAKE: I would like this Court to adopt
23 the test that we have proposed.

24 JUSTICE BREYER: Which is?

25 MS. DRAKE: Which is that an officer acts

1 unreasonably when he or she conveys the impression that
2 entry into a home is imminent and inevitable.

3 JUSTICE BREYER: No, no, no. But the test
4 you're using there, the key word is "unreasonable."

5 MS. DRAKE: Yes, Your Honor.

6 JUSTICE BREYER: Okay. And the reason you
7 choose the word "unreasonable" rather than the Second
8 Circuit's test of "unlawful" is?

9 MS. DRAKE: Because, frankly, I'm not sure
10 what that means, and I think that's become clear in the
11 context of this briefing. Does "unlawful" mean the
12 police have had to violate a portion of the penal code?
13 Does "unlawful" mean, as the Commonwealth is contending,
14 that there has to be a completed Fourth Amendment
15 violation --

16 CHIEF JUSTICE ROBERTS: You know -- you
17 don't know what --

18 MS. DRAKE: -- the seizure went forward.

19 CHIEF JUSTICE ROBERTS: You don't know what
20 "unlawful" means, but you know what "unreasonable"
21 means.

22 MS. DRAKE: Yes. Unreasonable is the
23 touchstone of every, you know, Fourth Amendment case,
24 and so we're saying there does not have to be an
25 antecedent completed Fourth Amendment violation. The

1 question is, as is the case in every Fourth Amendment
2 case, did the officers act --

3 JUSTICE SCALIA: Do you have any doubt that
4 it's unlawful for a police officer to threaten to burst
5 into a home?

6 MS. DRAKE: No, Your Honor.

7 JUSTICE SCALIA: So why do you need
8 unreasonable? If, indeed, there -- there was a threat
9 of imminent entry -- we're going to bust down the -- if
10 that was the threat, then it's unlawful, surely.

11 MS. DRAKE: Yes, and that's why my answer to
12 Justice Kagan's question was to the extent that
13 "unlawful" and "unreasonable" are synonyms, we would
14 agree.

15 Now, if the Court is not terribly -- does
16 not find our test convincing, the next-best test, we
17 believe, is a foreseeability test.

18 JUSTICE GINSBURG: Is your test is something
19 novel? I mean, Justice Breyer mentioned that there are
20 some five tests in the different circuits, and the
21 foreseeability test is the one that the Kentucky Supreme
22 Court used, but is your -- does your test coincide with
23 the tests of any other circuits, or is it different?

24 MS. DRAKE: Our test is a novel test. It
25 has not been, to my knowledge, considered by any of the

1 other circuits.

2 JUSTICE BREYER: But your test is -- I mean,
3 it's not wild. It just says it says "unreasonable" in
4 the Fourth Amendment. Probably when they act lawfully,
5 they are acting reasonably and not unreasonably, but it
6 could be sometimes they're not. That's your view?

7 MS. DRAKE: That's correct, and by the
8 way --

9 JUSTICE BREYER: No test. All right.

10 MS. DRAKE: -- we're not saying that --
11 we're essentially saying the police shouldn't act as
12 though they have a warrant when they don't have one,
13 which is exactly what they did in this case. And that
14 proposition is not new. In Bumper, this Court made
15 clear that if the police act as though they have a
16 warrant when they don't have one, any consent would be
17 coerced.

18 So reviewing courts are already making these
19 determinations about how loud was the knock and how
20 aggressive was the demand, simply in another context.
21 And by the other -- on the other hand, police officers
22 are already receiving the same instruction that they
23 would need in order to apply our rule, which is, don't
24 act as though you have a warrant. Don't engage in the
25 functional equivalent of a knock and announce if you do

1 not have prior judicial authority.

2 And what is appealing about our test, unlike
3 the foreseeability test, which we believe it's a
4 refinement of, is it allows for conduct by the police
5 that's reasonable at its inception to remain reasonable
6 regardless of the suspect's response, no matter how
7 foreseeable.

8 CHIEF JUSTICE ROBERTS: What is -- what is
9 an example of conduct that you would consider
10 unreasonable resulting in suppression of the evidence
11 that would not be unlawful?

12 MS. DRAKE: Well, it's very hard -- it's
13 very hard to conceive of where the daylight would be --

14 CHIEF JUSTICE ROBERTS: Right.

15 MS. DRAKE: -- between those terms,
16 "reasonable" and "unlawful," so long as "unlawful"
17 doesn't mean violation of a penal code provision and so
18 long as it doesn't mean, as the Commonwealth is
19 suggesting, that there has to be -- that the defendant
20 would have to first demonstrate that the police were
21 seized in order to be able to convincingly argue that
22 the search was unreasonable.

23 CHIEF JUSTICE ROBERTS: So you can't --
24 can't give me one example of some conduct that's
25 unreasonable under your test that would not be unlawful?

1 MS. DRAKE: I can't -- I can't think of one,
2 Your Honor.

3 JUSTICE SCALIA: The problem is that as
4 reasonable as the test is, it's not the test that was
5 used by the court below, and you want us to affirm the
6 decision below, which simply said if the exigent
7 circumstances are -- are the consequence of the police
8 action, whatever the police action was -- lawful,
9 reasonable, whatever -- the evidence has to be excluded.
10 How can we affirm that decision as you want
11 us to do, even -- even applying your test?

12 MS. DRAKE: Well, the factual record in this
13 case is fully developed, and how a reasonable person
14 would interpret the scenario is a mixed question of law
15 and fact, which -- this Court would review the decision
16 of the Kentucky Supreme Court in that regard de novo
17 anyway. In that regard, it's no different than any
18 other case that makes its way to this Court where this
19 Court is asked to review the record, make a
20 determination of how an ordinary person would interpret
21 the officers' conduct.

22 It is simply unreasonable and unlawful for
23 purposes of the Fourth Amendment for an officer to
24 convey the impression that he has the authority of a
25 warrant when he doesn't have one and when that prompts,

1 as it obviously would, an occupant of a home to move,
2 and then that movement is used as evidence that exigent
3 circumstances exist and warrantless search is justified.
4 If this Court were to, you know, adopt the framework the
5 Commonwealth is arguing for, the exception to the
6 warrant requirement would be the rule.

7 So we would ask this Court to affirm the
8 decision of the Kentucky Supreme Court.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Farley, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF JOSHUA D. FARLEY

12 ON BEHALF OF THE PETITIONER

13 MR. FARLEY: My time is short, so I would
14 just like to make a few quick points.

15 I believe Mr. Chief Justice and Justice
16 Kennedy were absolutely, absolutely correct. The
17 question before this Court is: Can lawful police action
18 impermissibly create exigent circumstances? And the
19 answer to that question is no.

20 There is never a circumstance in which
21 lawful police behavior under a Fourth Amendment analysis
22 can impermissibly create an exigency. I would point the
23 Court to *Hodari D.*, which I believe Justice Scalia wrote
24 for the Court, that we should not punish police officers
25 for attempted Fourth Amendment violations or Fourth

1 Amendment violations that do not reach fruition, because
2 it does not serve the point of the exclusionary rule.

3 JUSTICE KAGAN: Mr. Farley, one of the
4 points of the Fourth Amendment is to ensure that when
5 people search your home, they have a warrant. And, of
6 course, there are exceptions to that. But if there is
7 one place where the warrant requirement has real force,
8 it's in the home.

9 And I think that the concern here -- and you
10 have some strong arguments on your side, but the concern
11 here is that your test is going to enable the police to
12 penetrate the home, to search the home, without a
13 warrant, without going to see a magistrate, in a very
14 wide variety of cases, that all the police really have
15 to say is: We saw pot, we heard noise. Or: We think
16 there was some criminal activity going on for whatever
17 reason, and we heard noise.

18 How do you prevent that from happening? How
19 do you prevent your test from essentially eviscerating
20 the warrant requirement in the context of the one place
21 that the Fourth Amendment was most concerned about?

22 MR. FARLEY: Well, Justice Kagan, I would
23 disagree with you. I don't think that it would. I
24 believe that what the Commonwealth is asking for is no
25 more or no less than reviewing courts have done for

1 generations. You look to determine whether there was a
2 Fourth Amendment violation, whether there was an
3 unlawful entry, whether there was an unlawful seizure,
4 or whether there was a coercion that then they gained
5 consent for entry.

6 If those things occurred, they are clearly
7 Fourth Amendment violations. There should be a
8 suppression of the evidence. The exigent
9 circumstances --

10 JUSTICE SCALIA: It wouldn't technically be
11 a Fourth Amendment violation, would it, if the police
12 gave the impression that they had a warrant and were
13 about to kick in the door? Is that a Fourth Amendment
14 violation in and of itself?

15 MR. FARLEY: I don't believe so.

16 JUSTICE SCALIA: So your -- the -- the
17 unlawfulness test would not prevent that then?

18 MR. FARLEY: No, Justice Scalia, it would
19 not.

20 JUSTICE SCALIA: It would not prevent it?

21 MR. FARLEY: It would not prevent --

22 JUSTICE SCALIA: Oh, whoa. Maybe we have to
23 come up with an unreasonable test, then.

24 MR. FARLEY: Well, I believe, under
25 Hodari D., if the officers demand entry and there is no

1 response to that demand, there is no -- been no
2 completion of the Fourth Amendment violation. The
3 officers could stand outside the door --

4 JUSTICE SCALIA: Oh, it's perfectly okay for
5 officers to do that? To pretend that they have a
6 warrant and "Open the door or we'll kick it in" --
7 that's perfectly okay?

8 MR. FARLEY: Well, I believe that there are
9 -- there are large restrictions and prohibitions to
10 that, that officers are well aware of, because if the
11 person does answer the door, the officers know, well,
12 everything is going to be suppressed. Or if the
13 officers do --

14 JUSTICE SCALIA: But why? You say that what
15 they've done is not unlawful. Why would it be
16 suppressed?

17 MR. FARLEY: Well, if they demand entry and
18 entry is given, that is then a Fourth Amendment
19 violation, because they've demanded entry without a
20 warrant. And in that case, suppression -- once they
21 have entry, the evidence would be suppressed.

22 CHIEF JUSTICE ROBERTS: But they can't gain
23 entry by deception. They can't knock on the door and
24 say "Pizza"; right?

25 (Laughter.)

1 MR. FARLEY: No.

2 CHIEF JUSTICE ROBERTS: No, no? Okay.

3 MR. FARLEY: We would just assert that under
4 the lawfulness test, we aren't asking for anything more
5 or less than this Court has done or other reviewing
6 courts have done for generations, and this is a simple
7 Fourth Amendment analysis.

8 There was no demand in this case. This was
9 a simple knock-and-announce case, regardless of the time
10 of day. There was no coercion. There was no seizure.
11 There was no consent given. Officers should not be held
12 accountable for unlawful reactions by suspects.

13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 You will have noticed that Justice Kennedy
16 left the bench a few minutes early. He is going to
17 Tucson to represent the Court as the Circuit Justice for
18 the Ninth Circuit at the memorial service there. He
19 will review the tapes and transcripts of the rest of the
20 argument and fully participate in the decision.

21 This case is submitted.

22 (Whereupon, at 11:58 a.m., the case in the
23 above-entitled matter was submitted.)

24

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