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## CASE NOTE

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### “KNOCK, LISTEN, THEN BREAK THE DOOR DOWN”? THE POLICE-CREATED EXIGENCY DOCTRINE AFTER *KENTUCKY v. KING*

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In an effort to curtail the excesses of the general warrant<sup>1</sup> and to protect Americans and their private property,<sup>2</sup> the authors of the Bill of Rights in the Fourth Amendment conditioned the issuance of warrants on the presence of probable cause.<sup>3</sup> Though this language has been construed to require such a warrant for most searches of the home,<sup>4</sup> the Supreme Court has identified several exceptions to this rule, including the “exigent circumstances” exception. Where “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment,” a warrantless search is constitutional.<sup>5</sup> In an

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<sup>1</sup> See *Payton v. New York*, 445 U.S. 573, 583 (1980) (“[I]ndiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”).

<sup>2</sup> See *id.* at 585 (“The simple language of the Amendment applies equally to seizures of persons and to seizures of property.”).

<sup>3</sup> U.S. CONST. amend. IV.

<sup>4</sup> See *e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) (“[W]arrents are generally required to search a person’s home or his person . . .”).

<sup>5</sup> *Id.* at 394 (internal quotation marks omitted). The Supreme Court has identified several such exigencies, including the need to provide emergency medical aid, the “hot pursuit” of a fleeing suspect, and the prevention of imminent destruction of evidence. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011).

effort to clarify the boundaries of the exigent circumstances exception and to protect Fourth Amendment interests, several federal courts of appeals have held that the police cannot create an exigency and subsequently use it to justify a warrantless entry.<sup>6</sup> In order to determine if a Fourth Amendment violation has occurred in such a case, these courts have relied on a variety of tests.<sup>7</sup>

In *Kentucky v. King*, the Supreme Court sought to reconcile the “welter of tests”<sup>8</sup> articulated by the lower courts and to craft a uniform approach to police-created exigencies.<sup>9</sup> The Court addressed the question of whether the exigent circumstances exception applies “when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence.”<sup>10</sup> Reversing the Supreme Court of Kentucky, the Supreme Court found that where “the police d[o] not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”<sup>11</sup>

This ruling aligns with both the Court’s precedent and the motivations underlying the Fourth Amendment. Nevertheless, the Court’s

<sup>6</sup> See *United States v. Coles*, 437 F.3d 361, 371 (3d Cir. 2006) (declaring a warrantless search invalid because the arresting officers impermissibly created exigency in entering the defendant’s hotel room); *United States v. Gould*, 364 F.3d 578, 591 (5th Cir. 2004) (permitting a warrantless search where there was no evidence that the officers intentionally created the exigency); *United States v. Acosta*, 965 F.2d 1248, 1254 (3d Cir. 1992) (recognizing that police may not create an exigency to justify a forced warrantless entry); *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990) (holding that an exigency that supports warrantless entry “cannot be created by police officers”); *United States v. Timberlake*, 896 F.2d 592, 597 (D.C. Cir. 1990) (explaining that police may not intentionally create an exigency to justify a warrantless entry into a private dwelling); *United States v. Rengifo*, 858 F.2d 800, 804 (1st Cir. 1988) (“[E]xigent circumstances do not excuse the failure to secure a warrant when those circumstances are created by government officials . . .” (internal quotation marks omitted)); *United States v. Thompson*, 700 F.2d 944, 950 (5th Cir. 1983) (“The agents cannot justify their search on the basis of exigent circumstances of their own making.”).

<sup>7</sup> See, e.g., *United States v. Mowatt*, 513 F.3d 395, 402-03 (4th Cir. 2008) (using a reasonable foreseeability test); *United States v. Chambers*, 395 F.3d 563, 565 (6th Cir. 2005) (endorsing a probable cause and time to secure a warrant test); *Gould*, 364 F.3d at 591 (relying on a standard or good investigative tactics test); *King v. Commonwealth*, 302 S.W.3d 649, 656 (Ky. 2010) (adopting a bad faith intent test).

<sup>8</sup> 131 S. Ct. 1849, 1857 (2011).

<sup>9</sup> See *id.* at 1858-63 (considering alternate proposals and selecting a rule that was consistent with precedent and provided protection for Fourth Amendment rights).

<sup>10</sup> *Id.* at 1854.

<sup>11</sup> *Id.* at 1858.

test leaves some important questions unanswered, and the lower courts applying *King* will be forced to further develop the exigency exception to ensure that citizens’ Fourth Amendment rights are protected.

### I. *KENTUCKY V. KING*: FACTUAL AND PROCEDURAL BACKGROUND

The facts of *King* illustrate the challenges faced by law enforcement officials and the threats posed to police suspects’ Fourth Amendment rights. On the night in question, Officer Gibbons, an undercover officer in Lexington, Kentucky, executed a controlled buy of crack cocaine.<sup>12</sup> After the exchange, Officer Gibbons instructed several officers to pursue the suspect into the breezeway of a nearby apartment building.<sup>13</sup> Upon entering the breezeway, the responding officers detected a strong odor of burnt marijuana and heard a door shut somewhere in the breezeway.<sup>14</sup> The officers concluded that the odor was emanating from the back *left* apartment. Although Officer Gibbons radioed that he witnessed the suspect enter the back *right* apartment, the pursuing officers did not hear Officer Gibbons as they had already exited their vehicles.<sup>15</sup>

The officers then knocked on the back left door “as loud as [they] could” and announced “[t]his is the police,” or “[p]olice, police, police.”<sup>16</sup> After knocking on the door, the officers heard objects being moved somewhere inside the apartment.<sup>17</sup> Fearful that drug-related evidence was going to be destroyed, the officers shouted that they “were going to make entry inside the apartment.”<sup>18</sup> One of these officers, Officer Cobb then kicked the door open and entered the back left apartment.<sup>19</sup> The police detained the three occupants of the apartment, including King, and although the original suspect had entered a different apartment, they nonetheless discovered and confiscated cocaine, cash, and drug paraphernalia lying in plain view.<sup>20</sup>

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<sup>12</sup> *Id.* at 1854.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1854.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

At trial, King moved to suppress the evidence obtained during this warrantless search.<sup>21</sup> The state trial court denied his motion, reasoning that the police entry was justified by the exigent circumstances of the imminent destruction of evidence.<sup>22</sup> King then entered a conditional guilty plea for trafficking in a controlled substance and other crimes.<sup>23</sup> He was sentenced to eleven years in prison, and the Kentucky Court of Appeals affirmed.<sup>24</sup>

The Kentucky Supreme Court reversed, determining that the officers had impermissibly created the exigent circumstances which led to the warrantless search and ultimately to King's conviction.<sup>25</sup> In reaching this conclusion, the Court set forth a two-part test based on bad faith and reasonable foreseeability for identifying a police-created exigency.<sup>26</sup> Applying the test to King's case, the Kentucky Supreme Court found that, though there was no evidence of bad faith, the police could have reasonably foreseen that their actions would spur the defendants to destroy evidence, and therefore, that the police search violated the Fourth Amendment.<sup>27</sup> The Court granted King's motion to suppress and vacated his conviction.<sup>28</sup>

## II. THE SUPREME COURT DECISION

The United States Supreme Court reversed.<sup>29</sup> Writing for the eight-Justice majority, Justice Alito rejected the Kentucky Supreme Court's reasoning and adopted the Court's preferred rule, stating that police officers cannot rely on the exigent circumstances exception to the warrant requirement when they created the exigency by "engaging or threatening to engage in conduct that violates the Fourth

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<sup>21</sup> *Id.* at 1855.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *King v. Commonwealth*, 302 S.W.3d 649, 657 (Ky. 2010).

<sup>26</sup> *See id.* at 656. The court first held that police could not "deliberately create[] the exigent circumstances with the bad faith intent to avoid the warrant requirement." *Id.* (quoting *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004)). The court then explained that even absent bad faith, police may not rely on exigent circumstances if it "was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances." *Id.* (quoting *Mann v. State*, 161 S.W.3d 826, 834 (Ark. 2004)).

<sup>27</sup> *See King v. Commonwealth*, 302 S.W.3d at 656-57.

<sup>28</sup> *Id.* at 657.

<sup>29</sup> *King*, 131 S. Ct. at 1864.

Amendment.”<sup>30</sup> The Court grounded its test in reasonableness,<sup>31</sup> the “touchstone of the Fourth Amendment,”<sup>32</sup> and two analogous areas of Fourth Amendment law that permit warrantless searches—the plain view exception<sup>33</sup> and consent-based encounters.<sup>34</sup>

The Court then discussed and rejected four other tests developed by the lower courts.<sup>35</sup> First, the Court rejected the Kentucky Supreme Court’s “bad faith” test—which asks whether an officer attempted to circumvent the warrant requirement<sup>36</sup>—stating that the Court had repeatedly declined to adopt tests based on subjective intent.<sup>37</sup> The Court similarly refused to implement a reasonable foreseeability test, which focuses on whether it was reasonably foreseeable that an

<sup>30</sup> *Id.* at 1858.

<sup>31</sup> *Id.* (“[W]arrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, . . . the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense.”).

<sup>32</sup> *Id.* at 1856 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

<sup>33</sup> *See id.* at 1858 (“[W]e have held that law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made.”).

<sup>34</sup> *See id.* (“[O]fficers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs.”). These analogies have been criticized as irrelevant to the facts of *King* and ignorant of the special protection afforded to homes under the Fourth Amendment. *See, e.g.*, 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 6.5 (rev. 4th ed. Supp. 2011) (“[N]either [analogy] is particularly relevant to . . . *King*, where the logical starting point is that homes are entitled to ‘special protection . . . .’” (quoting *Georgia v. Randolph*, 547 U.S. 103, 115 (2006))); *id.* (explaining that when dealing with home searches, the Court practices a “rather strict application of the fundamental rule that ‘whenever practical [sic], [the police must] obtain advance judicial approval of searches and seizures through the warrant procedures.’” (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968))). However, these criticisms ignore the purpose for which the exigent circumstances exception itself was created: in certain instances, where an emergency has presented itself, a warrantless search of a home may be “objectively reasonable under the Fourth Amendment,” irrespective of the special protections afforded to the home. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978). The Court’s analogies demonstrate the validity of the officer’s actions prior to the alleged Fourth Amendment violation and illustrate that the Court’s rule is consistent with its Fourth Amendment jurisprudence.

<sup>35</sup> *See King*, 131 S. Ct. at 1859-1861.

<sup>36</sup> *Id.* at 1859.

<sup>37</sup> *See id.* (explaining that an officer’s motives never invalidate an otherwise valid search and citing precedent to that effect). Supreme Court precedent supports the rejection of the bad faith test. *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (“An 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.’” (alterations in original) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978))).

officer's action would create an exigency, such as the imminent destruction of evidence.<sup>38</sup> The Court found this test unpredictable and unclear,<sup>39</sup> explaining that it would be difficult to apply, given that law enforcement officers must make split-second decisions in the field and judges would be forced to determine reasonableness "based on what the officers knew at the time."<sup>40</sup>

The Court also dismissed a test that asks whether police engaged in a warrantless search despite having probable cause and time to secure a warrant.<sup>41</sup> The Court found that this test "unjustifiably interferes with legitimate law enforcement strategies," because "law enforcement officers are under no constitutional duty to halt a criminal investigation the moment they have minimum evidence to establish probable cause."<sup>42</sup> Finally, the Court rejected a test that considers whether police had engaged in standard or good investigative tactics, on the ground that such an inquiry "fails to provide clear guidance for law enforcement officers and authorizes courts to make judgments on matters that are the province of those who are responsible for federal and state law enforcement agencies."<sup>43</sup>

The Court then applied its preferred standard to the facts of the case, and finding no Fourth Amendment violation, reversed the Kentucky Supreme Court's suppression of the evidence.<sup>44</sup> The Court concluded that the officers' actions, including banging on the door and announcing their presence, were "entirely consistent with the Fourth Amendment," and found "no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so."<sup>45</sup>

### III. JUSTICE GINSBURG'S DISSENT: "KNOCK, LISTEN, THEN BREAK THE DOOR DOWN"

Justice Ginsburg dissented from the majority, arguing that police officers would manipulate this new standard in an attempt to circumvent the warrant requirement.<sup>46</sup> In her view, law enforcement officers

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<sup>38</sup> See *King*, 131 S. Ct. at 1859-60.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1860.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1860-61 (quoting *Hoffa v. United States*, 385 U.S. 293, 310 (1966)).

<sup>43</sup> *Id.* at 1861.

<sup>44</sup> *Id.* at 1863.

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* at 1864 (Ginsburg, J., dissenting).

could “now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant.”<sup>47</sup> The Court’s new test would not only permit but also incentivize police officers to go door-to-door, pounding loudly and announcing their presence, and “on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity.”<sup>48</sup>

Justice Ginsburg advocated for the probable cause and time to secure a warrant test instead, arguing that the majority’s test “arms the police with a way routinely to dishonor the Fourth Amendment’s warrant requirement in drug cases.”<sup>49</sup> Under Justice Ginsburg’s alternative rule, the exigencies “must exist . . . when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.”<sup>50</sup> Because the police in *King* had ample time to secure a warrant yet failed to do so, Justice Ginsburg would have found a Fourth Amendment violation.<sup>51</sup>

Justice Ginsburg’s proposed rule is appealing because it recognizes the possibility of police abuse or manipulation in justifying intrusions into private homes, the “chief evil against which . . . the Fourth Amendment is directed.”<sup>52</sup> However, Justice Ginsburg failed to adequately respond to the majority’s concern that her rule would limit police autonomy and effectiveness. As the majority pointed out, good *legal* reasons exist for rejecting Justice Ginsburg’s preferred test.<sup>53</sup> In addition, members of the Court asked questions at oral argument that echoed Justice Ginsburg’s concerns,<sup>54</sup> and the Court apparently found

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1865.

<sup>49</sup> *Id.* at 1864.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1866 (claiming that “securing a warrant was entirely feasible in this case”).

<sup>52</sup> *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

<sup>53</sup> See *King*, 131 S. Ct. at 1860-61 (stating that Justice Ginsburg’s test unreasonably interferes with law enforcement tactics).

<sup>54</sup> See, e.g., Transcript of Oral Argument at 13, *Kentucky v. King*, 131 S. Ct. 1849 (2011) (No. 09-1272) (Sotomayor, J.) (“[H]ow does this holding by us not become a simple warrantless entry in any drug case?”); *id.* at 19 (Sotomayor, J.) (“[D]oes a ruling in this case that any lawful conduct by the police mean that the police knock, somebody gets up on the other side and . . . closes a door in the back, and police say, ‘In my experience it’s . . . consistent with the destruction of property . . .’”); *id.* at 24 (Breyer, J.) (“[W]hat we’re trying to rule out is . . . they get this bright idea, the police: We’ll go knock at every door.”); *id.* at 52 (Kagan, J.) (“[T]he concern here is that your test is going to enable the police to penetrate the home . . . without a warrant . . . in a very wide variety of cases, that all police really have to say is: We saw pot, we heard noise.”).

that the risk of police abuse were not sufficient to reject the test the Court ultimately adopted.

Despite the Court's rejection of Justice Ginsburg's test, there are strong arguments in its favor. First, police can, in Justice Ginsburg's view of the *King* doctrine, simply "knock, listen, then break the door down."<sup>55</sup> *King* has reduced the circumstances in which warrantless searches will result in the suppression of evidence, and this allows—or perhaps, encourages—police to test the limits of the Fourth Amendment more frequently which in turn will increase the number of unlawful invasions by police. Those who are victims of these type of Fourth Amendment violations are left in a "remedial gap" in which they can "recover from neither the officer nor the government."<sup>56</sup> Alternatively, defendants guilty of criminal conduct sometimes receive a "get-out-of-jail-free" card in the form of the suppression remedy.<sup>57</sup> In other words, under the current Fourth Amendment remedial scheme, "[c]riminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy."<sup>58</sup>

Whether Justice Ginsburg's prediction of increased police misconduct will materialize depends on how the Supreme Court and lower courts construe the *King* doctrine in response to two issues: "exactly how . . . the line [is] to be drawn between permissible and impermissible police conduct potentially creating exigent circumstances," and "assuming permissible conduct, how convincing must the evidence be that exigent circumstances, in the form of a risk of loss of evidence, are present."<sup>59</sup> If the lower courts continue to effectively develop the police created exigency doctrine by correctly applying the *King* rule,<sup>60</sup> Justice Ginsburg's fears will likely never be realized.

#### IV. APPLYING *KING*: ANALYSIS AND CRITICISM

The Supreme Court chose the best test among those developed by lower courts. While it was the narrowest of the possibilities available to

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<sup>55</sup> *King*, 131 S. Ct. at 1864 (Ginsburg, J., dissenting).

<sup>56</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812 (1994).

<sup>57</sup> See *Hudson v. Michigan*, 547 U.S. 586, 595 (2006) (explaining the high costs of the exclusionary rule).

<sup>58</sup> Amar, *supra* note 56, at 758.

<sup>59</sup> LAFAVE, *supra* note 34, at § 6.5

<sup>60</sup> See cases cited *infra* notes 62-63, 67-68 75-77.

the Court,<sup>61</sup> the lower courts have had little difficulty utilizing the Court's test in factual circumstances similar to those of *King*, where police anticipated the imminent destruction of evidence and entered a residence without a warrant,<sup>62</sup> and have even applied the rule to dissimilar fact patterns. For example, the Fourth and Fifth Circuits, following *King*'s reasoning, found exigency based on officer safety, analogizing a threat to officer safety to the risk of the destruction of evidence in *King*.<sup>63</sup> Most importantly, the lower courts have applied *King*'s reasoning without falling into the traps envisioned by Justice Ginsburg and other critics.<sup>64</sup>

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<sup>61</sup> LAFAVE, *supra* note 34 ("The Supreme Court . . . adopt[ed] from the 'welter of tests' devised by lower courts the one providing by far the narrowest exception to the exigent circumstances rule . . .").

<sup>62</sup> See, e.g., *United States v. Willis*, 443 F. App'x 806, 808 (4th Cir. 2011) (per curiam) (finding no police-created exigency where the defendant saw and fled from police, the defendant agreed to exit the apartment but failed to do so, and police "believed immediate entry was necessary to prevent the destruction of evidence"); *United States v. Hoskins*, No. 10-20677, 2011 WL 4062307, at \*4 (E.D. Mich. Sept. 13, 2011) (finding no police-created exigency where drug trafficker was using a cell phone at time of arrest, and detectives feared he "was arranging for an associate to destroy evidence at his residence before a search warrant could be obtained"); *United States v. Franklin*, No. 5:11-CR-42-KKC, 2011 WL 5827605, at \*3-4 (E.D. Ky. Aug. 31, 2011) (finding no police-created exigency where police entered defendant's backyard without a warrant after tracking him for more than an hour); *Fulton v. State*, No. 27A02-1101-CR-132, 2011 WL 3847082, at \*3 (Ind. Ct. App. Aug. 30, 2011) (unpublished table decision) (finding no police-created exigency where police sought a "knock-and-talk" to ascertain the whereabouts of a suspect but heard increased commotion inside the apartment and someone yell to "flush" something); *State v. Wood*, No. COA10-372, 2011 WL 3891357, at \*2-5 (N.C. Ct. App. Sept. 6, 2011) (unpublished table decision) (holding that there was no police-created exigency where police received tip that defendant was dealing drugs at a hotel, the defendant's girlfriend "began to come unraveled and physically shaken" when speaking with police, and police heard a door slam when approaching defendant's hotel room).

<sup>63</sup> See, e.g., *United States v. Moore*, 453 F. App'x 401, 403-04 (4th Cir. 2011) (per curiam) (finding no constitutional violation where police looked through a broken window and observed a suspect with cocaine base as well as a gun, and the suspect pointed the firearm toward the door on which police had knocked); *United States v. Montanya*, 425 F. App'x 392, 393 (5th Cir. 2011) (per curiam) (finding no constitutional violation when police officers searched a house without a warrant after observing a known narcotics trafficker engage in an apparent drug deal and then throw a weapon under the car when they approached him); see also *People v. Torrez*, No. H036145, 2011 WL 3654453, at \*5 (Cal. Ct. App. Aug. 19, 2011) (finding no police-created exigency where police were responding to a domestic violence call, heard loud noises inside the house, and a male spoke to police through the door but refused them entry).

<sup>64</sup> See *infra* note 67 and accompanying text.

A. *Does King Tempt Courts to Excuse Unconstitutional Conduct?*

One critic of *King* has expressed concern that a two-step analysis—in which the reviewing court first determines whether an exigency existed, and then decides whether the police inappropriately created some or all of that exigency—will lead judges to excuse police misconduct.<sup>65</sup> Since a judge will have already affirmed that an exigency existed, the reasoning goes, the judge may be hesitant to invalidate the search on the ground that police conduct may have contributed to that exigency.<sup>66</sup> But the lower court decisions in the wake of *King* have not inappropriately excused police misconduct. In fact, courts have not hesitated to suppress evidence gathered following a police-created exigency.<sup>67</sup> For example, the Arizona Court of Appeals suppressed the fruits of a warrantless search where, “[u]nlike the circumstances in *King*, in which the officers testified that . . . they could hear people moving things within the apartment,” there was no evidence before the court that “the officers heard any noise or made any other observations suggesting the imminent destruction of evidence.”<sup>68</sup> Accordingly, because the occupant of the premises chose not to answer the door but officers nevertheless threatened to enter, the court found that the officer’s threat was “not reasonable conduct under the Fourth Amendment and was therefore unlawful.”<sup>69</sup> As a result, the court suppressed the evidence gathered through the unconstitutional search.<sup>70</sup>

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<sup>65</sup> See *The Supreme Court, 2010 Term—Leading Cases*, 125 HARV. L. REV. 211, 220 (2011) (arguing that a one-step test avoids the structural bias against criminal defendants that a two-step test would engender).

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., *United States v. Fuentes*, 800 F. Supp. 2d 1144, 1153-54 (D. Or. 2011) (finding that the police-created exigency was a Fourth Amendment violation where the officer peered through a window without a “specific, particularized basis for believing that a crime had been committed, that his safety was threatened, or that evidence was being destroyed,” and only on the basis of what he saw, executed a search); *State v. Walker*, No. A-4672-08T1, 2011 WL 2535295, at \*5 (N.J. Super. Ct. App. Div. June 28, 2011) (per curiam) (finding police-created exigency where defendant opened his door while smoking a marijuana cigarette, and upon seeing a badge hanging around the officer’s neck, ran into his apartment, prompting police to follow). Cf. *State v. Young*, 2d Dist. No. 24537, 2011-Ohio-4875, ¶ 52 (Froelich, J., dissenting) (“[T]here was no *King* justification to look for drugs or the destruction of evidence. In this case, a search (albeit designated as a sweep) has been bootstrapped from a mother’s calling the police with a complaint that her son continues to argue with her and keeps her up all night.”).

<sup>68</sup> *State v. Aguilar*, 267 P.3d 1193, 1196 (Ariz. Ct. App. 2011).

<sup>69</sup> *Id.* at 1197.

<sup>70</sup> *Id.*

This decision is consistent with *King*'s recognition that occupants have no obligation to open the door to police who request entry without a warrant.<sup>71</sup> Furthermore, decisions such as this one protect the rights of citizens against the type of unlawful home entry Justice Ginsburg feared. To avoid the risk that police will “knock, listen, then break the door down,”<sup>72</sup> citizens in their homes need only to “stand on their constitutional rights”<sup>73</sup> and decline to respond to police questions or requests for entry.

Of course, there is a risk that an overly zealous police officer could interpret any noise emanating from a targeted residence—including those caused by everyday activities—as indicative of an exigency. However, discerning whether sounds are consistent with an exigency is a fact-bound inquiry that is the province of the trial court.<sup>74</sup> When police violate Fourth Amendment rights on the basis of pseudo-exigencies, courts applying *King* have been, and must continue to be, swift to invalidate the search. Vigilance in this regard is a necessary corollary to the permissiveness of the *King* rule, and provides an answer to Justice Ginsburg's concerns.

Like the Arizona Court of Appeals, other courts have rejected warrantless entries where only a *possible* exigency existed. For example, the Iowa Supreme Court invalidated a warrantless search following the arrest of a drug trafficking suspect because “the record [did] not support an inference that drugs were likely to be destroyed . . . [h]ence, there was no reasonable fear that evidence would be lost during the time necessary to obtain a warrant.”<sup>75</sup> Though the officer claimed he thought someone else in the apartment might destroy evidence, the court rejected this justification in the absence of any supporting evidence.<sup>76</sup> These decisions, and others like them, show that lower courts

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<sup>71</sup> *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011) (“[W]hether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.”).

<sup>72</sup> *Id.* at 1864 (Ginsburg, J., dissenting).

<sup>73</sup> *Id.* at 1862 (majority opinion).

<sup>74</sup> *See id.* at 1863 (“Any question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court on remand.”).

<sup>75</sup> *State v. Watts*, 801 N.W.2d 845, 851-52 (Iowa 2011) (citing *King*, 131 S. Ct. at 1854).

<sup>76</sup> *See id.* at 851 (reasoning that “nothing indicated another individual *might* be potentially inside the apartment”). The court nevertheless affirmed the defendant's convictions because the evidence was procured during a later search pursuant to a valid warrant. *Id.* at 856.

applying *King* are willing to invalidate improper entries on a case-by-case basis if the facts show that police committed misconduct.

It is true that a few lower courts have authored questionable *King* analyses and have justified possible police exploitation. In *United States v. Alba*, police entered a residence pursuant to a valid warrant, but realized after entry that the warrant listed, and they had entered, the incorrect residence.<sup>77</sup> After receiving directions to the correct house from another agent, the police entered without a warrant,<sup>78</sup> “based on the need to protect the agents from persons inside the residence, the risk of destruction of evidence inside the house, and the belief that the occupants of [the defendant’s] residence were aware of the agents’ presence.”<sup>79</sup> The Fifth Circuit found that the officers did not engage or threaten to engage in conduct that violated the Fourth Amendment by entering the second residence, even though the warrant listed the first residence.<sup>80</sup>

The Fifth Circuit’s analysis ignores the obvious fact that the police could have avoided risks to officer safety and the possible destruction of evidence by not entering the incorrect house. Because the Supreme Court published *King* after the trial proceedings ended, the defendant did not raise the manufactured-exigency argument in his motion to suppress at trial.<sup>81</sup> This timing may have affected the Fifth Circuit’s decision, as it reviewed the district court’s denial of his motion under the more lenient plain error standard instead of under the *de novo* standard.<sup>82</sup>

Despite these mitigating circumstances, decisions like *Alba* may encourage exploitative police work and could allow for *ex post facto* justifications of unlawful entries based on police or magistrate error.<sup>83</sup>

<sup>77</sup> Brief for the United States of America at 4-6, *United States v. Alba*, 439 F. App’x 291 (5th Cir. 2011) (No. 10-51019) (describing how investigators confused the addresses).

<sup>78</sup> *Id.* at 6.

<sup>79</sup> *United States v. Alba*, 439 F. App’x 291, 293 (5th Cir. 2011) (per curiam).

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

<sup>82</sup> *Id.* (“In considering a ruling on a motion to suppress . . . we review a district court’s conclusions on Fourth Amendment issues *de novo* and its factual findings for clear error. . . . However, because *Alba* did not raise his manufactured-exigency argument in his motion to suppress, that issue is reviewed for plain error.” (citations omitted)).

<sup>83</sup> For a second example of questionable application of the *King* doctrine, see *United States v. Hall*, No. 11-60169-CR, 2011 U.S. Dist. LEXIS 133522, at \*9 (S.D. Fla. Nov. 16, 2011) (finding no police-created exigency where police covered the peep hole of the defendant’s door as they knocked, and did not identify themselves, despite defendant’s contention that this action “made it more likely that [he] would approach the door armed based on a fear that robbers were at the door”).

Fortunately, such questionable applications of the *King* rule have been few and far between.

### B. Is *King* Confusing or Open to Abuse?

Others have criticized the *King* decision as confusing or as enabling law enforcement to circumvent the warrant requirement. This first criticism is somewhat valid, insofar as both courts and law enforcement may struggle to apply the *King* rule to new facts.<sup>84</sup> However, the remaining critics misunderstand or oversimplify the Court’s holding.

For example, *King*’s detractors have characterized the decision as “holding that in certain circumstances police *may provoke* exigent circumstances to justify a warrantless search.”<sup>85</sup> But this criticism misinterprets *King*: provoking an exigency is akin to creating the exigency, both of which the Fourth Amendment already proscribes. In reality, to intentionally provoke exigent circumstances, the police would have to demand entry or feign the existence of a warrant and threaten entry, giving the residents inside reason to believe entry was imminent and inciting them to attempt to destroy evidence. Such actions are violations of the Fourth Amendment and are explicitly prohibited by *King*.<sup>86</sup>

Other critics have read *King* to imply that when citizens refuse to respond to police requests for warrantless searches, they risk creating a *King*-supported exigency by their non-responsiveness:

The sound of people moving around might indicate that they are about to destroy evidence but it also might mean that they are simply ignoring the police and going about their business. Moreover, had they remained perfectly still, the police might have inferred that they were steeling themselves to attack. This leaves answering the door as the only option

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<sup>84</sup> See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 38 (2011) (“[P]olice can only rely on exigent circumstances to justify a warrantless search so long as they did not ‘violate or threaten to violate the Fourth Amendment prior to the exigency.’ To call this thicket a bright-line rule governing the entry of a home is an insult to lines (or brightness).” (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1863 (2011))).

<sup>85</sup> Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CALIF. L. REV. CIRCUIT 52, 56 n.26 (2011) (emphasis added).

<sup>86</sup> *Kentucky v. King*, 131 S. Ct. 1849, 1863 (2011) (reasoning that police would violate the Fourth Amendment “by announcing that they would break down the door if the occupants did not open the door voluntarily”).

that does not create an exigency, but the Court went out of its way in *King* to say that one has a [sic] every right not to answer.<sup>87</sup>

However, *King* does not foreclose the option to ignore police. In fact, the Court explicitly recognized that, upon a request for entry to a home, “whether the person who knocks . . . is a police officer or a private citizen, the occupant has no obligation to open the door *or to speak*.”<sup>88</sup> Choosing not to speak gives no indication of imminent destruction of evidence and does not create sufficient exigency for police to enter a private residence without a warrant.

*King* might pose a risk to citizens who, in response to a police knock, choose to move around in their home but do not destroy evidence. Police may conflate the sounds of normal movement with an attempt to destroy evidence, as may have occurred in *King* itself.<sup>89</sup> However, the veracity of officers’ beliefs that sounds are consistent with the destruction of evidence is a factual matter to be determined by the trial court, and does not fall under the purview of the Supreme Court rule.<sup>90</sup> In fact, on remand from the Supreme Court decision, the Kentucky Supreme Court determined that the sounds relied on by the officers in *King* to justify their entry “were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door.”<sup>91</sup> The court vacated *King*’s conviction on the grounds that the Commonwealth had failed to “show something more than a possibility that evidence [was] being destroyed.”<sup>92</sup> The Kentucky Supreme Court’s subsequent decision demonstrates that *King* provides a remedy when police enter a

<sup>87</sup> Michael J. Z. Mannheimer, *Thoughts on Kentucky v. King*, PRAWFSBLAWG (May 17, 2011, 2:31 PM), <http://prawfsblawg.blogspot.com/prawfsblawg/2011/05/thoughts-on-kentucky-v-king.html>.

<sup>88</sup> *King*, 131 S. Ct. at 1862 (emphasis added).

<sup>89</sup> *Id.* (recognizing that the Kentucky Supreme Court had expressed doubt “as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed” (quoting *King v. Commonwealth*, 302 S.W.3d 649, 655 (Ky. 2010)) (alterations in original)).

<sup>90</sup> *See id.* at 1864 (remanding for further proceedings as to whether an exigency existed to justify a warrantless police search); *see also* *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (remanding for proceedings to determine whether exigent circumstances were present).

<sup>91</sup> *King v. Commonwealth*, No. 2008-SC-000274-DG, 2012 WL 1450081, at \*3 (Ky. Apr. 26, 2012).

<sup>92</sup> *Id.*

residence based on the mistaken and unreasonable interpretation of everyday noises as sounds indicating the destruction of evidence.

### C. Should King Have Adopted Another Test Altogether?

Rather than critiquing the risks of confusion or exploitation created by the *King* decision, other critics have called for a different test altogether. Lewis Katz argues that “[p]olice could have avoided the exigency by not knocking on the door, concealing their presence while they called for a warrant” and that the exigency, therefore, “was entirely police made and calls into question the entire doctrine of police-created exigency.”<sup>93</sup> In raising such a concern, Katz and other commentators push for the adoption of the probable cause and time to secure a warrant test,<sup>94</sup> which the *King* Court explicitly rejected.<sup>95</sup> While securing a warrant may be preferable in some circumstances, *requiring* police to clear this hurdle in every circumstance unnecessarily restricts the options available to law enforcement and may result in the interruption of police investigations when immediate action is necessary.<sup>96</sup> In addition, the question of whether police possessed time to secure a warrant is subjective and fact-intensive; police, magistrates, and judges adjudicating claims may offer diverging interpretations of the amount of time required.<sup>97</sup> Further, these critics fail to respond to the Court’s reasons for rejecting the probable cause and time to secure a warrant test in the first place, and their criticism of the *King* test is unpersuasive.

Finally, one commentator has called for a new one-step doctrine, rejecting both the Court’s chosen test and those articulated by the

<sup>93</sup> LEWIS R. KATZ, OHIO ARREST, SEARCH AND SEIZURE § 9.5 (2012). *See also King*, 131 S. Ct. at 1864 (Ginsburg, J., dissenting) (criticizing the majority for creating a rule whereby police may gain entry premised on an exigency, “nevermind that they had ample time to obtain a warrant”).

<sup>94</sup> *See, e.g., LAFAVE, supra* note 34, at § 6.5 (“The *King* Court rejects [the probable cause rule] on the ground that there may be good reasons for the police to opt instead for contact with the occupants of the suspect premises, but some of the reasons given by the Court seem rather thin.”).

<sup>95</sup> *See King*, 131 S. Ct. at 1860 (arguing that “[t]his approach unjustifiably interferes with legitimate law enforcement strategies”).

<sup>96</sup> *See, e.g., Hoffa v. United States*, 385 U.S. 293, 310 (1966) (“Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause . . .”).

<sup>97</sup> In rejecting the reasonableness test, the Court recognized that such a test would require “quantify[ing] the degree of predictability that must be reached before the police-created exigency doctrine comes into play,” and described the difficulties inherent in making such a calculus. *King*, 131 S. Ct. at 1859-60.

lower courts.<sup>98</sup> This critic has argued that since “the police-created exigency doctrine is just another variable in the holistic calculus of whether exigent circumstances existed,”<sup>99</sup> the Court should have “included police causation as part of its [holistic] exigent circumstances inquiry, [which] could have prevented manipulation of the rule, avoided interference with law enforcement, protected the privacy of the home, and ensured a more neutral analysis.”<sup>100</sup>

But, as the author of this critique recognizes, the exigent circumstances calculus is already fact-intensive and requires a nuanced, holistic inquiry.<sup>101</sup> Accordingly, to add another factor to the analysis, especially one as outcome-determinative as whether the police impermissibly created the exigency, would only serve to further complicate the Court’s Fourth Amendment jurisprudence.

Ultimately, the reasonable time to secure a warrant test, along with the other tests examined and rejected by the Court, provide no more guidance or support to officers seeking to obey the Fourth Amendment’s commands or to judges as they examine the validity of warrantless searches. Further, none of these tests are better than the *King* test at targeting the risk of police exploitation. By tying the demands of the test directly to the Fourth Amendment—rather than creating another nebulous or restrictive standard—the Court chose the option which best promulgates a relatively clear and concise statement of permissible police behavior.

#### IV. THE *KING* STANDARD: STRENGTHS AND WEAKNESSES

Despite its critics, the *King* decision is commendable, both for its consistency with past precedent and for its relatively clear guidance to police and courts.<sup>102</sup> Nevertheless, “the application of *King* in all cases

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<sup>98</sup> See *The Supreme Court, 2010 Term*, *supra* note 65, at 217-219 *see also supra* text accompanying notes 65-66 (summarizing this commentator’s criticism).

<sup>99</sup> See *The Supreme Court, 2010 Term*, *supra* note 65, at 218.

<sup>100</sup> *Id.* at 217.

<sup>101</sup> See *id.* (outlining the multitude of factors the Court has considered in determining whether a warrantless entry was reasonable based on an alleged exigency).

<sup>102</sup> See, e.g., Orin Kerr, *Choosing the Rule for Police-Created Exigencies in Kentucky v. King*, SCOTUSBLOG (May 17, 2011, 7:52 PM), <http://www.scotusblog.com/2011/05/the-fourth-amendment-and-pragmatic-rulemaking/> (“[T]he Court’s method for choosing a rule is notable. The Court’s opinion tries to work through the various possible tests to find a balanced and workable test to distinguish police-created from suspect-created exigencies.”).

isn’t entirely certain,”<sup>103</sup> and the lower courts must now confront the gaps in the doctrine. The test developed in *King* does not answer every question raised by the police-created exigency doctrine, and it presents a challenge to law enforcement officials and those seeking to protect personal privacy. Where police *implicitly* demand entry to a home, the doctrine does not make clear whether a resulting exigency would be police-created or not:

[I]magine the police come to a home, knock on the door, and say, “This is the police! Open up!” The statement to “open up” is not a direct threat — the police didn’t say, “open up or else we will do X” — but it is a form of an order. A police order to take certain conduct may or may not count as a “seizure” of the person who is commanded to take the step. The cases on that are actually quite unclear. . . . And even then, the seizure doesn’t occur until the person actually complies with the order. . . . So can the police yell to “open up”? It’s not clear.<sup>104</sup>

This concern was raised prior to the Court’s ruling in *King*<sup>105</sup> and has served as a source of criticism since the decision.<sup>106</sup> The Court appeared to consider this possibility at oral argument, but chose not to use this case to resolve the issue.<sup>107</sup> Owing to the subtleties involved in determining whether police threatened the occupant in *King*, the Court should have remanded the case for further proceedings on that

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (citations omitted).

<sup>105</sup> See, e.g., Orin Kerr, *Police-Created Exigent Circumstances in Kentucky v. King*, SCOTUSBLOG (Jan. 5, 2011, 1:44 AM), <http://www.scotusblog.com/2011/01/police-created-exigent-circumstances-in-kentucky-v-king/> (“[T]he officers [in *King*] didn’t just knock and announce themselves: They knocked, announced their presence, and *demanded* to be let inside.”).

<sup>106</sup> See, e.g., LAFAVE, *supra* note 34, at § 6.5 (“The chilling message of *King* thus seems to be that threats to violate the Fourth Amendment are not verboten, at least if made with a modicum of subtlety.”).

<sup>107</sup> See Transcript of Oral Argument at 35, *Kentucky v. King*, 131 S. Ct. 1849 (2011) (No. 09-1272) (Alito, J.) (“[I]t might make a difference to me whether the police demanded entry prior to the time when the alleged exigent circumstances arose. And the only testimony on this point that I am aware of [is recorded in court documents] when police banged on the door as loud as they could and announced ‘Police, police, police.’”); *id.* at 44 (Sotomayor, J.) (“[T]here is something troubling about the police attempting to coerce entry as opposed to requesting entry, but . . . it’s not clear from this record which of the two the police did.”); *id.* at 53 (Scalia, J.) (“It wouldn’t technically be a Fourth Amendment violation, would it, if the police gave the impression that they had a warrant and were about to kick in the door? Is that a Fourth Amendment violation in and of itself?”).

point.<sup>108</sup> The Court found no evidence in the record of a demand by the police amounting to a threat to violate the Fourth Amendment, but stated that “if there is contradictory evidence [on that point] . . . , the state court may elect to address that matter on remand.”<sup>109</sup>

Courts applying *King* have addressed the problem of explicit threats, but they have not yet confronted implicit threats.<sup>110</sup> In addition, “[w]hether a threat did or did not occur will depend upon the exact words utilized by the police, and this is a matter likely to be a matter of dispute in a great many cases.”<sup>111</sup> As such, in the event that an implicit demand case comes before the Court, it should take the opportunity to resolve this issue. In doing so, the Court must be careful not to undermine the clarity of the *King* rule. Until that day, lower courts applying *King* must engage in the holistic, “totality of the circumstances” analysis required in exigent circumstances cases, and determine whether, on the facts of each case, a police officer’s actions amount to an unconstitutional threat or demand to enter.

#### CONCLUSION

Despite the weaknesses in the doctrine and the plethora of criticisms levied at the decision, *King* sets forth a bright line rule in a murky area of criminal law and is notable for its consistency with past precedent. As long as lower courts are vigilant in applying the test and in safeguarding citizens’ Fourth Amendment rights, *King* will protect the sanctity of Americans’ homes while allowing law enforcement the freedom required to investigate violations of the law efficiently and effectively.

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<sup>108</sup> See Mannheimer, *supra* note 87 (arguing that the Court should have remanded the case for a determination whether police demanded entry).

<sup>109</sup> *Kentucky v. King*, 131 S. Ct. 1849, 1853 (2011).

<sup>110</sup> See, e.g., *United States v. Estrada*, No. 1:11-CR-101 TS, 2012 WL 2367992, at \*6 (D. Utah June 21, 2012) (“Here, the officers ‘threaten[ed] to engage in conduct that violates the Fourth Amendment’ when they attempted to enter the [hotel] room with the key card. Therefore, any destruction of evidence . . . was the result of police created exigency and cannot be considered by the Court.” (first alteration in original) (quoting *King*, 131 S. Ct. at 1862)); *People v. Cervantes*, No. A131298, 2012 WL 2055106, at \*6 (Cal. Ct. App. June 8, 2012) (“[W]e do not agree with appellant that Officer DeJesus’ statement, ‘open the door,’ as officers knocked and identified themselves, constituted a threat to violate the Fourth Amendment.”); *State v. Wood*, No. COA10-372, 2011 WL 3891357, at \*4 (N.C. Ct. App. Sept. 6, 2011) (unpublished table decision) (“They entered the room with the permission of one of its occupants, Ms. Mills, using her room key. They did not threaten to enter without permission unless they were admitted.”).

<sup>111</sup> LAFAVE, *supra* note 34, at § 6.5 (rev. 4th ed. Supp. 2011).

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