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Exigent Circumstances: What Is That?

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On May 16, 2011, the United States Supreme Court clarified the standard for the "exigent circumstances" exception to the Fourth Amendment.[1] Specifically, the court held that "the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."[2]

The Fourth Amendment establishes two requirements: (1) all searches and seizures must be reasonable; and (2) a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. [3] The court has established certain reasonable exceptions to the warrant requirement, including the "exigent circumstances" exception that applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."[4] The court has identified several exigencies that may justify a warrantless search of a home, including the need to prevent destruction of evidence.[5]

In *Kentucky v. King*, Lexington, Kentucky, police officers set up a controlled buy of crack cocaine outside of an apartment complex. When uniformed officers followed the suspect into an apartment breezeway, they heard a door shut and detected a very strong odor of marijuana. At the end of the breezeway, the officers found two apartments: one on the left and one on the right. The marijuana odor was emanating from the apartment on the left. The officers banged on that door "as loud as they could" and announced "this is the police" or "police, police, police." The officers immediately heard people moving inside, making noises that led them to believe that drug-related evidence was about to be destroyed. At that point, the officers announced their intention to enter the apartment and kicked in the door. Officers discovered marijuana and powder cocaine in plain view with a subsequent search revealing crack cocaine, cash, and drug paraphernalia.

In *King*, the Kentucky Supreme Court announced a two-part test: (1) police cannot "deliberately create the exigent circumstances with the bad faith intent to avoid the warrant requirement"; and (2) 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."[6]

The "police-created exigency" doctrine provides that police may not rely on the need to prevent destruction of evidence if the conduct of the police "created" or "manufactured" the exigency. Courts, however, require proof of more than just a suspect's fear of detection by police having caused the destruction of the evidence. In *King,* the U.S. Supreme Court stated that "[w]here, as here, the police did 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 allowable."[7]

In *King*, the U.S. Supreme Court noted that some lower courts impose additional standards to the warrantless search that the court found unsound and therefore rejected. Some courts, for example, inquire as to whether police officers acted in bad faith by deliberately creating exigent circumstances to avoid the warrant requirement. The court found, however, that such an approach is fundamentally inconsistent with the principles of the Fourth Amendment. Cases consistently reject the subjective approach when analyzing such matters and instead examine whether circumstances, viewed objectively, justify the action. The court stated that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[8]

Some courts hold that police officers may not rely on an exigency if "it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances."[9] Courts that apply this test invalidate warrantless searches of homes if it was reasonably foreseeable to the police officers that the act of knocking on the door and announcing their presence would cause the drug suspect to attempt to destroy evidence. The U.S. Supreme Court found, however, that application of this test would interject an unacceptable degree of unpredictability into law enforcement.

Other courts, when applying the "police-created exigency" doctrine, fault officers who do not seek a warrant once they have sufficient evidence to establish probable cause to search a residence but rather knock on the door and attempt to speak with the occupant or obtain consent to search. The court, however, found that this approach "unjustifiably interferes with legitimate law enforcement strategies." The court further stated that "[l]aw 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."[10]

In *King*, the respondents also argued that the officers, through their tone of voice and the forcefulness of their knocks, impermissibly created an exigency by "[engaging] in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." [11] The U.S. Supreme Court found that such a rule would make it extremely difficult for officers to determine exactly how hard they should knock or how loudly to announce their presence. Likewise, courts would find it nearly impossible to determine whether officers crossed a threshold.

For argument purposes, the U.S. Supreme Court assumed that an exigency existed in *King* and focused on the question before it: "Under what circumstances do police impermissibly create an exigency?" The court held that respondents provided no evidence that "the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment." The court reasoned that the officers' actions of banging loudly on the door and announcing either "this is the police" or "police, police, police" was consistent with the Fourth Amendment.[12]

The court concluded that "[b]ecause the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency, we hold that the exigency justified the warrantless search of the apartment."[13] By clarifying the "exigent circumstances" rule—particularly, the need to prevent the destruction of evidence—the U.S. Supreme Court has provided law enforcement agencies with clearer guidelines for the proper execution of warrantless searches under these circumstances.

The U.S. Supreme Court makes it clear that if officers knock or bang on a door and announce their presence and then become aware of sounds indicating the likelihood that evidence is in the process of being destroyed, those officers may enter the home without a warrant to prevent the destruction of such evidence. What is not permissible, however, is for law enforcement officers to bang on a door and immediately demand entrance to a home and threaten to break down the door if such entrance is not granted. The U.S. Supreme Court stated unequivocally that if law enforcement officers behave in this manner, it will constitute an actual or threatened violation of Fourth Amendment rights and is therefore impermissible. ■

Notes:

[1] *Kentucky v. King*, 131 S. Ct. 1849, 2011 U.S. LEXIS 3541 (2011).
[2] *Id.* at 1862.
[3] *Payton v. New York*, 445 U.S. 573, 584 (1980).
[4] *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), citing *McDonald v. United States*, 335 U.S. 451, 456 (1948) *and Johnson v. United States*, 333 U.S. 10, 14–15 (1948).
[5] *King*, at 1858–1859.
[6] *Id.* at 1855, citing *King v. Commonwealth*, 302 S.W.3d at 655 (Ky. 2010).
[7] *King*, at 1858.
[8] *Id.*, quoting *Horton v. California*, 496 U.S. 128, 138 (1990).
[9] *King v. Commonwealth*, 302 S.W.3d at 655, quoting *Mann v. State*, 357 Ark. 159, 161 S.W.3d 826, 834 (2004).
[10] *King*, at 1860–1861, quoting *Hoffa v. United States*, 385 U.S. 293, 310 (1966).
[11] *King*, at 1861.
[12] *Id.* at 1862–1863.
[13] *Id.* at 1863.

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