



Written by [Bob Adelman](#) on January 16, 2011

Kagan, Sotomayor, Ginsburg, and the 4th Amendment

But what if police pick the wrong house, pound on the door loudly, announce that “This is the police!” and then, smelling pot, break down the door without a warrant and arrest the homeowner for violating local drug laws? What if the homeowner is sentenced to 11 years? What if all appeals rule in favor of the police?



Picture this: It’s 9:30 at night, and a police informant does a drug deal with a known narcotics dealer outside an apartment complex in Lexington, Kentucky. Upon completion of the deal, the informant calls in the local police waiting nearby to arrest the miscreant, but isn’t clear about which apartment the dealer entered: door number One, or door number Two? The police arrive at the scene, and pick door number One, occupied by Hollis King and some friends, no relation to the dealer behind door number Two. The police, smelling marijuana, bang on the door, and, when they hear movement inside, break down the door, find drugs, and arrest King and his friends.

Despite claiming that the police had no proper warrant, King gets 11 years. The police officers claim an “exception” to the Fourth Amendment, called an “[exigent circumstance](#),” and the courts buy the police story. According to testimony, the officers not only smelled the burning weed, but, after announcing themselves loudly, they “heard movement” inside the apartment that they concluded was the occupant trying to destroy potentially damaging evidence. Since this was happening in the instant, there was no time to get a warrant; they had to move quickly, and so they kicked down the door, found some drugs, and arrested King.

When the case reached the Kentucky Supreme Court, however, that court ruled that there was no “exigent circumstance” and, even if there was, the police couldn’t use that as an excuse because their actions created the “circumstance” in the first place. [Said the court](#),

While probable cause existed for police to obtain a warrant to enter the apartment occupied by King, police did not have proper exigent circumstances to justify a warrantless entry. Further, the entry was not justified by imminent destruction of evidence. The odor of marijuana alone did not provide a justification, and any exigency arising from the sounds of movement inside the apartment was created by [the] police, and therefore cannot be relied upon as a justification.

Now the Supreme Court has agreed to hear the case. Justice Elena Kagan explained her concerns: “One of the points of the Fourth Amendment is to ensure that when people search your home, they have a



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warrant [but] of course there are exceptions to that." Justice Ruth Bader Ginsburg wondered aloud whether the lower courts' positions, if allowed to stand, would allow the police to "go to the apartment building and then sniff at every door," trying to find a reason to invade the home without a warrant. Justice Sonia Sotomayor expressed concern as to whether the police could enter a dwelling at any time without a warrant, so long as they thought some kind of wrongdoing was taking place on the other side of the door. She wondered if the police could use the "King" excuse about hearing suspicious noises inside as sufficient probable cause to enter.

On the other hand, Justice Antonin Scalia opined that the police did nothing wrong. When they knocked on the door, the occupants could simply have answered and denied the police entry without a proper warrant: "Everything done was perfectly lawful. It's unfair to the criminal? Is that the problem? I really don't understand the problem." But the homeowner did not invite the police in either, and law enforcement's forcible entry raises questions about how secure Americans are in their homes from "unreasonable searches and seizures," the clear language of the Fourth Amendment notwithstanding.



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