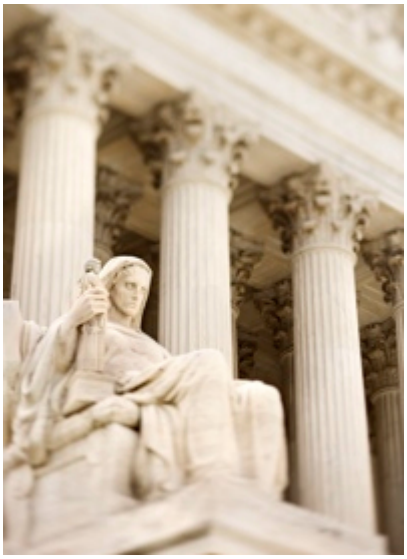
Written by **Thomas R. Eddlem** on May 18, 2011

Supreme Court Says Warrants, States' Rights Unnecessary



Ginsberg argued in her dissent: "The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant."

The court syllabus described the facts in the case:

> Police officers in Lexington, Kentucky, followed a suspected drug dealer to an apartment complex. They smelled marijuana outside an apartment door, knocked loudly, and announced their presence. As soon as the officers began knocking, they heard noises coming from the apartment; the officers believed that these noises were consistent with the destruction of evidence. The officers announced their intent to enter the apartment, kicked in the door, and found [the defendant] and others. They saw drugs in plain view during a protective sweep of the apartment and found additional evidence during a subsequent search.

The Kentucky lower courts convicted King, but the state supreme court ruled that police cannot "deliberately creat[e] the exigent circumstances with the bad faith intent to avoid the warrant requirement." In essence, the Kentucky Supreme Court ruled that police were too lazy to get a search warrant, and knew that if they had any reason to believe that evidence was being destroyed they wouldn't have to get one. So they went up to the apartment and knocked loudly on the door and announced that they were the police, expecting the drug dealer to start to try to destroy the evidence. As soon as they heard shuffling in the house, they broke down the door without a warrant.

The court, in rejecting the Kentucky Supreme Court's ruling, stated that the Kentucky decision "would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable based on what the officers knew at the time."

As Ginsberg explained in her dissent, "Circumstances qualify as 'exigent' [i.e., don't require a warrant,

according to the court] when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape." The majority in the court admitted that "destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police." Indeed, destruction of evidence in a murder case is not as practical; a body can not be easily disposed of in the same manner and other evidence (such as blood on carpets, DNA evidence, etc.) is even more difficult to destroy. So the "exigent circumstances" exception has largely been crafted by courts to accommodate the federal war on drugs.

But the Fourth Amendment makes no mention of an "exigent circumstances" exception to the warrant requirement. Ginsberg notes that "the Court has accordingly declared warrantless searches, in the main, '*per se* unreasonable,'" citing the 1978 precedent of *Mincey v. Arizona*. Indeed the Fourth Amendment uses a four-part test to define a reasonable search. All searches, to be "reasonable" under the Fourth Amendment, must contain: 1) "probable cause" and 2) a "warrant" that must be backed with 3) an "oath or affirmation" and 4) specificity "particularly describing the place to be searched, and the persons or things to be seized." Ginsberg stressed that the court overturned a 1947 ruling on an identical issue; in *Johnson v. U.S.*, police barged into a hotel room without a warrant after smelling burning opium and noises that appeared to be efforts to cover up the evidence.

In the Kentucky case, Ginsberg stressed that "there was little risk that drug-related evidence would have been destroyed had the police delayed the search pending a magistrate's authorization."

But Ginsberg failed to mention that the Supreme Court in the Kentucky case also violated the sovereignty of the Commonwealth of Kentucky by denying them the right to expand the understanding of the Fourth Amendment in state cases beyond what is required of federal officials. While the 14th Amendment denies states the right to infringe upon freedoms guaranteed by the U.S. Constitution, and gives Congress the power to enforce it, there's nothing in the U.S. Constitution that allows the federal courts to take away rights states guarantee to individuals. The first section of the 14th Amendment reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal courts since 1925 have understood that part of the 14th Amendment to mean that state governments may not deprive persons of any enumerated right under the Constitution or Bill of Rights. The so-called "incorporation doctrine" has been, until now, an expansive one. That is, states may define rights enumerated in the U.S. Constitution and Bill of Rights, or their own state constitutions, more broadly to confer wider freedoms upon their citizens than are protected under federal law — but not more narrowly. *Kentucky v. King* may be the first case decided by the Supreme Court that rules states may not grant more freedoms to their citizens than federal courts understand.

Ginsberg's dissent asked: "How 'secure' do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?" The answer is "not very."