No. 20-139

In the Supreme Court of the United States

BRYANT KAZUYOSHI IWAI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly determined that exigent circumstances justified law-enforcement officers' entry into petitioner's residence based on their belief that incriminating evidence was being destroyed.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (Haw.):
United States v. *Iwai*, No. 15-cr-723 (Jan. 10, 2018)

United States Court of Appeals (9th Cir.):
United States v. *Iwai*, No. 18-10015 (July 23, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-45) is reported at 930 F.3d 1141. The order of the district court (Pet. App. 60-97) is not published in the Federal Supplement but is available at 2016 WL 2770785.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2019. A petition for rehearing was denied on March 4, 2020 (Pet. App. 99-100). The petition for a writ of certiorari was filed on June 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Hawaii, petitioner was convicted of conspiring to distribute and possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 846, and 21 U.S.C.

841(b)(1)(A) (2012); and possessing of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A) and (c)(2). Judgment 2. The district court sentenced petitioner to 196 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-45.

1. On August 4, 2015, the United States Postal Inspection Service in Honolulu intercepted a suspicious package addressed to petitioner's residence. Pet. App. 2. After a narcotics detection dog alerted on the package, agents obtained a search warrant, opened the package, and discovered approximately six pounds of methamphetamine. Presentence Investigation Report (PSR) ¶¶ 7-8, 18-19; Pet. App. 2-3. Agents obtained a warrant to track the package, and then removed a majority of the methamphetamine, replaced it with a non-narcotic substance, attached a beeper device set to alert when the package was opened, and repackaged the parcel for a controlled delivery. PSR ¶¶ 19-20; Pet. App. 2-3.

The agents learned that the delivery address was located in a multi-story condominium building and that packages were delivered to a central location, rather than to the individual apartments. Pet. App. 3. Believing that they did not have probable cause to obtain an anticipatory search warrant for petitioner's residence, the agents left the package at the front desk of the condominium building and monitored the delivery. *Id.* at 3-4. They observed petitioner pick up the package and bring it into his residence. *Id.* at 4. Approximately two hours later, the beeper device indicated that the package had been opened. *Ibid.*

After the beeper went off, agents knocked on petitioner's door and announced their presence. Pet. App.

4. No one responded, but an agent near the door saw the shadowy movement of a person approaching the peephole and then retreating. *Ibid.* The agent knocked and announced again, but received no response. *Ibid.* The agent then heard plastic or paper rustling noises from the apartment that, in his judgment, were consistent with the destruction of evidence. *Id.* at 4, 9-10.

Believing that evidence was being destroyed, the agents forcibly entered the residence. Pet. App. 4. Upon entering, the agents saw the package, which turned out to be unopened, as well as a gun and zip lock bags appearing to contain methamphetamine in plain view. *Id.* at 5. Petitioner consented to a search of his apartment, and agents recovered approximately 14 pounds of methamphetamine, over $32,000 in cash, and other drug paraphernalia. *Ibid.*

2. A federal grand jury in the District of Hawaii charged petitioner with conspiring to distribute and possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 846, and 21 U.S.C. 841(b)(1)(A) (2012); two counts of possessing with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A) (2012); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A) and 924(c)(2). D. Ct. Doc 106, at 2-3 (June 29, 2016). Petitioner moved to suppress the evidence recovered from his home, arguing that exigent circumstances did not justify entry into his apartment. D. Ct. Doc. 24, at 5-7 (Oct. 13, 2015).

Following an evidentiary hearing, the district court denied petitioner's motion to suppress. Pet. App. 60-98. The court found that the officers' testimony was credible and determined that exigent circumstances justified

entry into petitioner's residence because, although the beeper had apparently malfunctioned, the officers reasonably believed that incriminating evidence was being destroyed. *Id.* at 63, 68-71.

Petitioner pleaded guilty to conspiring to distribute and possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 846, and 21 U.S.C. 841(b)(1)(A) (2012), and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A) and 924(c)(2). Plea Agreement 1-3. Petitioner's plea was conditional, preserving his right to appeal the denial of his motion to suppress. See Pet. App. 2. The district court sentenced petitioner to 196 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1-45. The court recognized that "any [warrantless] entry into a residence is presumptively unreasonable without an applicable exception" to the warrant requirement. *Id.* at 7. "Considering all the[] facts together" in this case, however, the court determined that exigent circumstances supported the warrantless entry. *Id.* at 9.

The court of appeals explained that the district court, "[c]onsidering the totality of the circumstances," had "credited the agents' testimony and concluded that they reasonably believed that the imminent destruction of evidence existed to justify the agents' entry" into petitioner's residence. Pet. App. 8. The court of appeals described the "key evidence adduced at the hearing" that supported the district court's finding, including that a package with "six pounds of methamphetamine" had been addressed to petitioner; that petitioner had taken that package to his apartment; that the beeper thereafter signaled that the package was open; that

drugs are easily destroyed or disposed of; that an agent saw "a shadowy figure approach the door and then retreat" when police announced themselves; and that an agent "heard a suspicious rustling noise from inside, which in his experience as a highly trained narcotics investigator, indicated the destruction of evidence was occurring." *Ibid.* Based on all of those circumstances, the court of appeals agreed with the district court that "it was reasonable to conclude that the destruction of incriminating evidence was occurring." *Id.* at 9.

The court of appeals declined to consider whether police should have obtained a warrant after petitioner took the package to his apartment, noting that petitioner had only challenged the government's failure to seek "an *anticipatory* warrant" before the package was delivered. Pet. App. 11. The court also declined to address the argument that agents had manufactured any exigency by "conducting an improper 'knock and talk,'" again observing that petitioner had not raised such a claim. *Id.* at 12 (citation omitted).

Judge Bybee dissented. Pet. App. 13-45. In his view, the officers should have obtained an anticipatory warrant before the controlled delivery, or a warrant after petitioner brought the package inside his residence. *Id.* at 17-32. Judge Bybee also disagreed with the court of appeals' and the district court's factual determination that the officers reasonably believed that incriminating evidence was being destroyed, and opined that officers had improperly created any exigent circumstances through their knock-and-announce procedure. *Id.* at 33-45.

ARGUMENT

Petitioner contends (Pet. 4-18) that the entry of law enforcement officers into his home violated the Fourth

Amendment. The court of appeals' fact-bound decision does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. The general presumption that a warrant is required to conduct a search inside a home may be overcome by a showing that "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978) (citation omitted). One exigency that may justify a warrantless search is the need "to prevent the imminent destruction of evidence." *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006); see also *Kentucky* v. *King*, 563 U.S. 452, 460 (2011); *Georgia* v. *Randolph*, 547 U.S. 103, 116 n.6 (2006); *Minnesota* v. *Olson*, 495 U.S. 91, 100 (1990). Concerns about the destruction of evidence arise most commonly in drug cases "because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain." *King*, 563 U.S. at 461. It makes no difference to the lawfulness of a warrantless search based on exigent circumstances that officers may themselves have caused the exigency, for example, by knocking on a door and announcing their identity. So long as "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 allowed." *Id.* at 462.

Applying those principles, the court of appeals determined that exigent circumstances justified entry into petitioner's residence. Pet. App. 8. The court recognized that warrantless home searches are "presumptively unreasonable," *id.* at 6 (quoting *Payton* v. *New*

York, 445 U.S. 573, 585-586 (1980)), and that the "presumption is overcome only '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,' " *ibid.* (quoting *King*, 563 U.S. at 460) (brackets in original). And the court found that standard satisifed here, based on the perceived risk that petitioner would destroy evidence. As the court of appeals and the district court emphasized, petitioner was the intended recipient of a substantial quantity of methamphetamine, agents were under the good faith impression that he had opened the incriminating package, and the agent standing nearest to petitioner's door after the officers announced themselves credibly testified that he heard noises in petitioner's apartment that were consistent with the destruction of evidence. *Id.* at 8-11 & n.2, 68-71. "Considering all of these facts together," the court of appeals determined that "it was reasonable to conclude that the destruction of incriminating evidence was occurring." *Id.* at 9.

That factbound determination does not warrant this Court's review. This Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10; *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). And petitioner identifies no case—from this

Court or another court of appeals—reaching the opposite result on comparable facts.

2. Petitioner errs (Pet. 18) in asserting that the court of appeals' decision conflicts with this Court's decisions in *King*, *supra*, and *United States* v. *Grubbs*, 547 U.S. 90 (2006).

a. In *King*, police officers followed a suspected drug dealer to an apartment building, smelled marijuana coming from inside an apartment, knocked loudly on the apartment door, and announced their presence. 563 U.S. at 456. After hearing noises coming from the apartment that they believed were consistent with the destruction of evidence, the police made a warrantless entry into the apartment and saw drugs in plain view. *Ibid.* The issue before the Court was whether the police had impermissibly created an exigency by knocking loudly on the door and announcing their presence. *Id.* at 471. 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," *id.* at 469, and the Court concluded that no such violation occurred on those facts, *id.* at 470. The Court did not decide whether an exigency justified the warrantless entry, leaving that issue for the state court on remand. *Id.* at 470-471.

Petitioner quotes extensively (Pet. 13-16) from the discussion in *King* of the "police-created exigency" doctrine. The panel majority below, however, did not address that issue because petitioner did not raise it before the district court or the court of appeals. Pet. App. 12 (citing *Padgett* v. *Wright*, 587 F.3d 983, 986 n.2 (9th Cir. 2009) (per curiam) ("This court will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening

brief." (citation and internal quotation marks omitted))). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (citation omitted). Petitioner provides no reason to depart from that practice in this case.

In any event, petitioner's suggestion that the exigency in this case was created by unreasonable police conduct lacks merit. The court of appeals acknowledged *King*'s observation that an occupant has "'no obligation to open the door or to speak'" to the police, and pointed to evidence showing that if "no other factors triggering an exigency had occurred," the officers here would properly have refrained from entering petitioner's home without a search warrant. Pet. App. 12 n.4 (citation omitted). The court's determination that the facts of this case—from which "it was reasonable to conclude that the destruction of incriminating evidence was occurring," *id.* at 9—supported the warrantless entry does not conflict with *King*.

b. In *Grubbs*, this Court considered the validity of an anticipatory warrant that would be executed when the defendant brought a suspicious parcel into his residence. 547 U.S. at 92. The Court explained that a valid anticipatory warrant must satisfy two "prerequisites of probability": the warrant must demonstrate first, that "*if* the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place,'" and second, that "there is probable cause to believe the triggering condition *will occur*." *Id.* at 96-97.

Petitioner argues (Pet. 7-9) that police could have obtained an anticipatory search warrant for petitioner's

apartment consistent with the probable cause requirements described in *Grubbs*. But the panel majority did not hold otherwise. Instead, as the court of appeals explained, "whether or not the agents could have obtained an anticipatory search warrant in this case is beside the point." Pet. App. 7. Because police did not have a warrant, "any entry into [petitioner's] residence was presumptively unreasonable," and "entry [was] lawful only if an exception to the warrant requirement such as exigent circumstances existed." *Id.* at 7-8. And, as described above, the court determined that exigent circumstances justified the entry into petitioner's residence in this case. Nothing about that analysis conflicts with *Grubbs*.

3. Petitioner's remaining claims in support of suppression—namely, that agents could have obtained a telephonic warrant after petitioner brought the package to his residence (Pet. 10-12), and that no evidence corroborated the agent's testimony about the noises in petitioner's residence (Pet. 17-18)—likewise warrant no further review.

Petitioner argues (Pet. 10-12) that agents could have obtained a warrant after petitioner brought the package into his apartment but before the beeper indicated that the package had been opened. That, however, is another claim that the panel majority did not address, explaining that petitioner did not raise it. Pet. App. 11. As previously noted, this Court ordinarily does not consider such issues. See *Zobrest*, 509 U.S. at 8. Petitioner provides no reason to deviate from that approach here.

Petitioner also argues (Pet. 17-18) that the agent testimony at his suppression hearing should not be credited. As the court of appeals explained, however, "the trial court found [the agent] testimony credible" based

on its direct observation of the witnesses, and that credibility determination was subject to reversal only for clear error. Pet. App. 10 & n.2. The court of appeals found "no evidence in the record" to support reversal of the district court's finding. *Id.* at 10. Petitioner does not acknowledge or attempt to meet that demanding standard of review; even if he did, that fact-bound issue would not warrant this Court's review. See *Johnston*, 268 U.S. at 227.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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