NO. 06-1281

IN THE
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

FREDERICK CARL KRAUSE, III,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Kentucky erred in finding that Respondent's consent to a warrantless search was not voluntary, based on the court's application of the totality of the circumstances test to the facts of this case.

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RULE

Petitioner alleges a wide-ranging division among the lower federal and state courts about whether the Fourth Amendment permits police officers to misrepresent their purpose to obtain consent to a warrantless search. This division does not exist. Rather, the courts agree that, as a general matter, police may use a ruse and that the question whether any particular ruse is permissible depends on the specific facts of each case.

Below, the Kentucky Supreme Court agreed with Petitioner that the Constitution does not forbid use of a ruse to obtain consent but found that "this particular ruse," Pet. App. 5, 6, 9, went too far, in light of the totality of the circumstances. Thus, what Petitioner is really challenging is the Kentucky court's application of the law—as to which all parties agree—to the facts of "this particular ruse." Disagreement on that case-specific question is not worthy of the Court's review. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

STATEMENT OF THE CASE

Factual Background

Respondent Frederick Krause lived in a house in Paducah, Kentucky, with a roommate named Joe Yamada. On the evening of March 17, 2003, Kentucky State Police Trooper Jason Manar arrested a man for possession of cocaine. The man said that he had bought the drug from Yamada at Yamada's house in Paducah. "Instead of obtaining a search warrant, Manar went to the residence in the middle of the night accompanied by another trooper and a McCracken County Sheriff's Deputy." Pet. App. 21.

Manar did not think that the residents of the house would consent to a search for drugs. Therefore, he "fabricated a false story that he believed would more likely result in the

residents' consent to search." *Id*. at 29. After Krause answered the door, Manar falsely said that a young girl had just reported being raped by Yamada at the house, and Manar asked whether he could look around the house to see if the girl had accurately described the furniture and bedspreads. *Id*. at 2. When Krause went to get Yamada, Manar and the two other officers followed him into the house. *Id*. at 21. Yamada agreed to let the troopers look around the house to confirm the inaccuracy of the (fictitious) girl's rape allegation. The troopers then found cocaine and marijuana in the house. "[Manar] admitted that he did not tell Yamada and Krause that he was searching for drugs until after he had actually carried out the search." *Id*. at 22.

Krause was indicted on possession of drugs and drug paraphernalia. He moved to suppress the evidence seized from the warrantless search of his home. After the trial court denied the motion, he entered a conditional plea to the charges, subject to an appeal of the ruling on the motion to suppress. The Kentucky Court of Appeals affirmed. *Id*. 26.

Decision Below

The Kentucky Supreme Court reversed, holding that the motion to suppress should have been granted. The court explained that, under its case law, it "must make a careful scrutiny of all the surrounding circumstances in a specific case." *Id*. at 6 (citation omitted). The court then looked to "the time and nature of the trooper's ruse"—a 4:00 a.m. knock on the door by two officers saying that a young girl had just reported being raped by Yamada in their house. *Id*. It noted that the "tactics were unnecessary in this instance and not based on any pressing or imminent tactical considerations," such as safety reasons or to avoid the destruction of evidence. *Id*. The court also considered that the type of ruse at issue would discourage citizens from "'aiding to the utmost of their ability in the

apprehension of criminals' since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them." *Id*. at 7-8 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973)).

The Kentucky Supreme Court recognized that this Court "has long held that '[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises.'" *Id*. (quoting *Sorrells v. United States*, 287 U.S. 435, 441-42 (1932)). And the court explicitly did "not hold that the use of ruses, in general, is unconstitutional." *Id*. at 8. Although the court held that the facts in this case rendered the search unconstitutional, it was "careful to note that [its] holding is limited and narrow," *id*., applying to "this particular ruse," *id*. at 5, 6, 9, under "these unique circumstances," *id*. at 7.

REASONS FOR DENYING THE WRIT

A. The Decision Below Does Not Conflict With The Decisions Of Any State Or Federal Appellate Court.

Petitioner claims a "wide split among the state and federal courts" on the question "whether the police may employ deception with regard to their purpose [to] obtain voluntary consent to search." Pet. 11. No such split exists. In fact, the lower courts agree both that ruses are, as a general matter, a permissible means of obtaining consent, and also that whether consent attributable to any particular ruse was voluntary depends on the totality of the circumstances in each particular case. The decision below is entirely consistent with this line of cases.

Although the petition is replete with case citations purporting to illustrate a division of authority, most of the cases cited do not involve a ruse as to the purpose for which the

police requested consent to a warrantless search. Of those that do involve such a ruse, none conflicts with the decision below. Like that decision, the cases cited in the Petition look to the totality of the circumstances to make determinations based on the facts of each case.

1. As might be expected when the courts are engaging in fact-intensive determinations, some warrantless searches involving ruses are upheld and others are not. Yet the courts consistently apply the same legal test—the totality of the circumstances test. The cases show no conflict or confusion warranting review.

Only one case cited by Petitioner involves circumstances, like those here, in which the police officers completely misrepresented both what they were searching for and why. Both the approach and holding of that decision are consistent with the decision below. *See People v. Daugherty*, 514 N.E.2d 228, 232, 233 (Ill. App. Ct. 1987) (looking to "totality of the circumstances," consent invalid where, to gain consent to enter, police claimed to be investigating theft previously reported by defendant but sole purpose was to search for marijuana); *cf. State v. McCrory*, 851 P.2d 1234, 1240 (Wash. Ct. App. 1993) (officer exceeded scope of consent when, after officer promised defendant that he would not be arrested if he allowed officer to enter, officer promptly arrested defendant).

In another state intermediate court decision cited, *State v. Schweich*, 414 N.W.2d 227 (Minn. Ct. App. 1987), the officers truthfully stated one object of their search, but not the other. The analysis and holding of this case are also consistent with the decision below. In *Schweich*, the defendant had called the police to report that he had been threatened with a gun by the boyfriend of his upstairs neighbor. *Id*. at 228. After the

police arrived, they obtained his and his neighbor's consent to search their homes for the gun. The officers also intended to look for drugs, but they did not tell that to the defendant when they asked his consent to search. *Id*. at 230. After finding the gun, one officer took the defendant to the police station to give a statement. Meanwhile, another officer continued to search the defendant's apartment for drugs, which he found inside a small zipped compartment in a scuba diving bag. *Id*. at 229. The defendant moved successfully to suppress the evidence of the drugs as based on an unlawful search. On appeal by the state, the court considered various factors, such as that consent was obtained through misrepresentation about the intended scope of the search, and that the defendant was not informed that he was under investigation when he gave consent, was not present tacitly to approve an expanded search, and had "no idea" that the search was ongoing when he left for the police station to give a statement with respect to the gun threat. *Id*. Given "the totality of the circumstances," the appellate court upheld the trial court's finding that the consent was invalid. *Id*. at 230, 231.

Although so few "ruse" cases cited by Petitioner involve misrepresentations as to the object of the search, dicta in some of the other cases address this circumstance. Those dicta agree that such a misrepresentation weighs against a finding of voluntary consent. *See United States v. Bosse*, 497 F.2d 113, 115 (9th Cir. 1990); *United States v. Briley*, 726 F.2d 1301, 1304 (8th Cir. 1984); *United States v. Ressler*, 536 F.2d 208, 211 (7th Cir. 1976).

Other federal circuit and state high court "ruse" cases cited by Petitioner involve circumstances in which the officers truthfully stated *what* they were looking for, but not *why*. This sort of ruse is different from the one at issue in the decision below, but the legal analysis is the same and suggests no

inconsistency. In each case, the courts assessed the legality of the search based on the totality of the circumstances.

For example, in *State v. Johnson*, 856 P.2d 134 (Kan. 1993), the police obtained consent to search the defendant's home to look for a man named Boyce by saying that Boyce was wanted for a parole violation. That reason was untrue; the police wanted to look for Boyce because they were concerned for his safety. The defendant later argued that the ruse invalidated his consent. After specifying numerous factual circumstances that weighed in favor of and against a finding that consent was voluntarily given, the court upheld the search based on the totality of the circumstances. *Id*. at 140, 141.[1]

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[1]Federal circuit court cases cited by Petitioner in which police officers revealed the true object of their search but not the true reason include *United States v. Davis*, 749 F.2d 292, 296 (5th Cir. 1985) (search upheld based on totality of circumstances where officers did not disclose to defendant all purposes for their search for guns, but defendant knew that officers were looking for guns); *United States v. Andrews*, 746 F.2d 247, 248, 251 (5th Cir. 1984) (search upheld in "narrow" decision "under the facts of this case," where agent asked to see defendant's shotgun by saying that defendant fit description of person who committed various robberies, but real reason agent wanted to see gun was to establish illegal possession of firearm by a felon); and *Brown v. Brierley*, 438 F.2d 954, 959 (3d Cir. 1971) (where defendant gave officer his gun because officer had offered to sell gun for defendant, and officer did sell gun but then borrowed it from new owner to run ballistics test, defendant's relinquishment of gun was not unlawful search and seizure). *See also People v. Zamora*, 940 P.2d 939, 943-44 (Colo. Ct. App. 1996) (totality of circumstances supported

(continued...)

The cases recognize that there are situations in which a misrepresentation about the purpose of a search is not enough to vitiate consent. In this case, however, the police appeared at Krause's and Yamada's home at 4:00 in the morning, falsely told them that Yamada had been accused of an exceptionally serious crime, and implicitly suggested that they could disprove the charge by letting the police inside the house to see that the victim's description was inaccurate—factual circumstances that would have an obvious tendency to overwhelm anyone's ability to make an uncoerced choice.

2. The majority of the cases cited by Petitioner are inapposite. First, like Petitioner, *see* Pet. 13, and the Kentucky Supreme Court, Pet. App. 5, the lower courts consistently recognize that *Schneckloth* established that a "totality of the circumstances" test is the proper standard for assessing whether consent to a warrantless search was voluntary. Petitioner offers a list of some of the factors that courts have considered in applying this test. *Id*. at 22-23. Although the cases cited address challenges to the voluntariness of consent, not one involves a ruse. *See* cases cited at Pet. 22-23.

Second, in many other cases cited in the Petition, the defendants challenged warrantless searches by arguing that the involvement of undercover officers vitiated any consent. The

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[1](...continued)
voluntariness of consent where officers truthfully stated that they wished to see layout of apartment but misrepresented the crime they were investigating); *People v. Avalos*, 55 Cal. Rptr. 2d 450, 455-56 (Cal. Ct. App. 1996) (search upheld where police obtained consent to look in truck for stolen property and "other contraband," but only real object of search was "other contraband").

decisions uniformly hold that the involvement of an undercover officer is an acceptable "ruse" that does not vitiate consent. *See*, *e.g.*, *Lewis v. United States*, 385 U.S. 206 (1967); *United States v. Scherer*, 673 F.2d 176 (7th Cir. 1982); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994); *cf. United States v. Bosse*, 898 F.2d at 115 (undercover or "surreptitious" entry must be limited to purposes contemplated by suspect, and undercover officer may not "conduct a general search for incriminating materials") (quoting *Lewis*, 385 U.S. at 211). The decision below expressly "do[es] not question" the use of undercover officers. Pet. App. 8.

Third, Petitioner relies on four cases addressing the voluntariness of a confession. Although the test for assessing voluntariness of a confession is similar to the test for assessing consent to a warrantless search, the confession cases cannot demonstrate a split among the lower courts because, not only do they not address the question presented by Petitioner or even involve warrantless *searches*, but three of the decisions are from *this* Court. *See Illinois v. Perkins*, 496 U.S. 292 (1990); *Colorado v. Spring*, 479 U.S. 564 (1987); *Frazier v. Cupp*. 394 U.S. 731 (1969); *Commonwealth v. Haynes*, 577 A.2d 564 (Pa. Super. 1990), *all cited at* Pet. 22.

Finally, Petitioner incorrectly claims that the law in the Sixth and Eighth Circuits is internally inconsistent. Pet. 18. As to the Eighth Circuit, Petitioner's first citation is to a case in which consent to search was obtained without any ruse at all, and the consent was upheld in a "narrow" holding based on the "totality of the circumstances." *See Briley*, 726 F.2d at 1305 ("The officers' cryptic statement that they had important matters to discuss with Briley does not appear to have been said with the intention of tricking [his girlfriend] into consenting to an entry."). Its other citation is to a case in which an undercover officer, using the pretext of car trouble, asked the

defendant to open his door and from the doorway was able to see drug and drug paraphernalia in plain view. *See United States v. Wright*, 641 F.2d 602, 603 (8th Cir. 1981). As in *Briley*, the search in *Wright* was upheld. The holdings in these two decades-old cases are fully consistent, both with one another and with the law in other jurisdictions.

Likewise, Petitioner cites two cases from the early 1908s to show inconsistency in the Sixth Circuit. One case is a brief decision rejecting a Fourth Amendment challenge to the admission of drug evidence obtained by an undercover officer. *United States v. Baldwin*, 621 F.2d 251, 253 (6th Cir. 1980). In the other, five officers obtained "consent" to enter the home of defendant's friend by banging on the door, with guns drawn, hollering "Police, open the door," and stating that they had a warrant, which suggested a search warrant when in fact they had an arrest warrant. "Viewing the 'totality of the circumstances,'" the court held that the consent was not voluntary. *United States v. Jones*, 641 F.2d 425, 429 (6th Cir. 1981) (quoting *Schneckloth*, 412 U.S. at 227). The outcome in *Jones* was the opposite of that in *Baldwin*—one search was invalidated and the other allowed—but there is no inconsistency in the analyses or holdings of the two cases.

B. The Answer To Petitioner's Question Presented Is Unlikely To Affect The Outcome Of This Case.

The question presented by Petitioner is whether consent to a warrantless search can be deemed voluntary when the police use a ruse regarding their purpose to obtain that consent. The answer to this question is very unlikely to affect the outcome of this case. If a ruse as to purpose is *never* permissible, then the decision below would be affirmed because the court below held that the ruse in this particular case was not permissible. On the other hand, if a ruse as to purpose is

sometimes permissible, depending on the facts presented, then the decision below would still be upheld because the court below agreed that ruses can sometimes be okay: Its "limited and narrow" holding, Pet. App. 8, was that "this particular ruse," *id*. at 5, 6, 9, in "these unique circumstances," *id*. at 7, "crossed the line." *Id*. at 9.

The Court's answer to Petitioner's question would affect the outcome here only if the Court were to hold that a ruse as to purpose categorically cannot affect the voluntariness of consent and is not a permissible factor for courts to consider when evaluating the totality of the circumstances to determine voluntariness. That answer, however, is extremely unlikely because this Court has already instructed that the totality of the circumstances test is the proper approach to evaluating consent to a warrantless search. *Schneckloth*, 412 U.S. at 229. And in doing so, the Court rejected the notion that the "presence or absence of" any particular factor should be controlling. *Id*. at 226, 229. Moreover, no case cited by Petitioner supports the argument that a ruse as to purpose is not a permissible consideration, among others that make up the totality of the circumstances. Indeed, Petitioner itself does not make this argument.

In short, as long as the use of a ruse to obtain consent to a search is a proper factor to consider in evaluating the totality of the circumstances, the decision below would be upheld. Accordingly, review should be denied because the answer to the question presented will not affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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