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Defense Strategies for Drug Crimes

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Do You Hear What I Hear? Defense Strategies to Counter *Kentucky v. King* and Probable Cause Based on Subjective Sensory Perceptions

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Introduction

The courts have long upheld a finding of probable cause to search based on an officer's claim of smelling drugs emanating from a structure or vehicle. In so doing, the courts have accepted that bare assertion without subjecting it to traditional probable cause analysis, substituting an institutional bias that the police are generally truthful for the Fourth Amendment's requirement that the information used to establish probable cause be reasonably reliable. The case of *Kentucky v. King*, 131 S. Ct. 1849 (U.S. 2011), highlights reliance on another sensory perception—hearing—as the basis for an exigency supporting the warrantless search of a home.

Odors and sounds at the time police encounter your client's property are intangible and leave no trace. Confronted with such a case, defense counsel may think little can be done, and the outcome will turn on whether the judge believes the police—who swear they smelled drugs and heard what they heard—or your client—who swears the opposite. Given that scenario, it is not difficult to predict the police will prevail. However, there is a methodology that combines Fourth Amendment jurisprudence with firmly established scientific knowledge on the fallibility of human sensory perceptions, and diligent case investigation, that can be used to mount a vigorous defense. This approach presents a bold challenge to the way courts have traditionally reviewed police claims of smelling drug odors, and I am not aware of any published decisions that have addressed the challenge. With that said, it is time for defense counsel to fight back and start convincing trial judges that an officer's opinion of what he or she perceived is as likely to be wrong as an opinion that the world is flat because what can be seen ends at the horizon.

Police Sensory Perceptions Justify Warrantless Search of Home

In May 2011, the US Supreme Court issued an 8–1 decision upholding the warrantless entry of a private residence based on police officers' claims of hearing noises they believed meant the occupants were destroying drug-related evidence. *Id.* Justice Ginsburg summed it up: "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, never mind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force." *Id.*. at 1864 (Ginsburg, J., *dissenting*).

Justice Ginsburg and other commentators rightly criticized the majority in *King* for eliminating the widespread rule that police cannot, by their own actions, create the exigency necessary to justify a warrantless entry when they had the opportunity to obtain a warrant. *See*, *e.g.*, *United States v. Chambers*, 395 F.3d 563, 566 (6th Cir. 2005) ("For a warrantless search to stand, law enforcement officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves"); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004) (en banc) ("Although exigent circumstances may justify a warrantless probable cause entry into the home, they will not do so if the exigent circumstances were manufactured by the agents" (internal quotation marks omitted)).

In *King*, the officers knocked and announced their presence after smelling the odor of burnt marijuana emanating from the home, and then "could hear people inside moving," and "it sounded as [though] things were being moved inside the apartment." Those noises in turn "led the officers to believe that drug-related evidence was about to be destroyed." *King* 131 S. Ct. at 1854. Kentucky's highest court invalidated the search, holding that police may not rely on exigent circumstances—here the imminent destruction of evidence—if "it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances." *Id.* at 1855.

The Supreme Court rejected that test, holding "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 1862. The court observed that police do nothing illegal by knocking on a front door, and if occupants wish to avoid having their door kicked in, they need only remain silent and still until the police give up knocking and leave, or they may choose to open the door and speak with the officers, but not allow them to enter. *Id.* That reasoning supported the court's finding that the officers' conduct in knocking and yelling "Police!" was reasonable and not a threatened violation of the Fourth Amendment.

Sensory Perceptions Evade Traditional Probable Cause Analysis

King presents an even graver danger to the defense of citizens' rights against unlawful search and seizure than what Justice Ginsburg addressed in her dissent. This is because *King* involved probable cause based solely on the subjective sensory perception of smell—the odor of marijuana emanating from the home—with an exigency based solely on the subjective interpretation of sounds detected by the sensory perception of hearing, to dispense with a warrant. Unlike most facts giving rise to probable cause or exigent circumstances, odors and sounds are intangible and dissipate soon after allegedly perceived, leaving no record. Such "facts" are peculiarly unsusceptible to judicial review.

The circumstances in *King* produced a new hybrid of police sensory perception cases in Fourth Amendment jurisprudence: the "plain smell" alone of narcotic drugs provides probable cause to search or arrest. *See*, *e.g.*, *Johnson v. United States*, 333 US 10 (1948); *Odor Detectable by Unaided Person as Furnishing Probable Cause for Search Warrant*, 106 A.L.R.5th 397 (originally published in 2003). Warrants may be foregone once the odor of drugs is detected through a variety of exemptions, most commonly the "automobile exception" and "search incident to arrest." Such exceptions are objectively based (i.e., Was the vehicle mobile at the time of the stop? Was the suspect arrested in conjunction with the search?)

King will likely be interpreted as authorizing the subjective sensory perception of hearing to establish exigent circumstances, even when the subjective sensory perception of smell is what provides probable cause. Although that is not the holding of *King*, decisions by the Supreme Court are rarely given a narrow reading by the lower courts, particularly when the decision is useful to law enforcement.

Given the subjective nature of a police officer's assessment of a particular odor and what it means, how can defense counsel effectively challenge an officer's testimony that he or she smelled drug odors and then heard noises that, in his or her training and experience, were consistent with persons engaged in destroying drug evidence?

Attacking Sensory Perceptions as Evidence: Essential Steps

The courts have long required that information used to support probable cause be "reasonably trustworthy." *See*, *e.g.*, *Draper v. United States*, 358 U.S. 307, 333 (1959). In addition, the factual basis for the officer's opinion or conclusion must be provided, so that the magistrate can fulfill his or her vital function as the independent evaluator of probable cause. *See*, *e.g.*, *Illinois v. Gates*, 462 U.S. 213, 239 (1983); *see also Johnson*, 333 U.S. 10, 13-14 (1948).

> Even assuming "credibility" amounting to sainthood, the judge still may not accept the bare conclusion of that "credible" informant any more than he may accept the bare conclusion of a sworn and known and trusted police-affiant. To do so would be an unconstitutional delegation of the decision-making function which the Fourth Amendment lodges exclusively in the judge himself.

Id.; LaFave, 2 *Search and Seizure* § 3.3 (4th ed.).

For too long, these Fourth Amendment safeguards have been dodged by "the officer engaged in the often competitive enterprise of ferreting out crime" who claims to have smelled the drugs that he or she cannot see. *Johnson*, 333 U.S. at 14. The courts have deemed the officer to be credible, and stopped all further inquiry, without determining whether the officer's opinion about detecting the odor is reliable (i.e., "reasonably trustworthy") information, and supported by a factual basis rather than a bare assertion. However, the Supreme Court has emphasized that probable cause "demands" factual "specificity," and "must be judged according to an objective standard." *Terry v. Ohio*, 392 U.S. 1, 21-22; 88 S. Ct. 1886 (U.S. 1968).

Step One: Judicial Acknowledgment of Odor or Sound Recognition as Opinion Evidence

In light of these well-established precedents, defense counsel must first get the trial judge to recognize that an officer's claim of odor detection is an opinion or conclusion from what he or she observed. *See*, *e.g.*, *United States v. Santana*, 342 F.3d 60, 68-69 (1st Cir. 2003) (police officer could offer lay opinion that he smelled marijuana during search of home); *United States v.*

Skeet, 665 F.2d 983, 985 (9th Cir. 1982) (what a witness sees or smells is an opinion); *United States v. Rhiger*, 315 F.3d 1283, 1292 (10th Cir. 2003) (discussing, without deciding, whether the officer's testimony about smelling drug odors on the defendant's clothing was expert or lay opinion). The same applies to an officer's claim of hearing noises he or she interprets as the destruction of evidence.

So long as the judge views the officer's testimony about what he or she heard or smelled as a hard fact, rather than the officer's subjective opinion, the judge is likely to disparage this line of defense as an unwarranted attack on the officer's truthfulness. Case law—including civil cases—from your jurisdiction, where the courts have recognized that testimony regarding sensory perceptions is opinion testimony, is essential to getting the trial judge to scrutinize the officer's testimony in this new light.

It is a tactical decision whether this legal issue should be briefed for the judge in advance of the hearing. In a warrantless search case, you need not reveal your strategy, because the burden is on the prosecution to establish the validity of the search. If you do brief the issue as part of your suppression motion, you can begin to challenge the basis for the officer's opinion, including reasons why the weight of that opinion should not rise to the level of probable cause, during cross-examination, without risk of the judge becoming annoyed with you for attacking what he or she views as hard facts related by a presumably truthful officer. Some judges will sustain relevancy objections or otherwise tell defense counsel to "move on" if they do not appreciate the legal basis for your line of questioning. Knowing your judge will help decide which tact to take.

Consider asking the officer whether he or she is testifying as an expert on the drug odor or sounds at issue, and hope he or she says "yes." In most cases, there is little to lose from this approach. Once you start attacking the officer's opinion, he or she is going to testify about the "hundreds" of times he or she smelled drugs and then found them, regardless of whether he or she claims to be an expert. Additionally, the trial judge may consider the officer an expert even if the legal distinction between lay and expert opinion evidence is not raised. If the officer claims to be an expert, or the prosecution tenders the testimony as an expert, that opens the door to a

long line of questions concerning the officer's specialized training in drug odor or sound recognition, including whether his or her expertise has been subjected to blind testing, his or her awareness of the scientific literature on selective perception and other reasons for human fallibility in odor detection, and studies that show police officers do no better than lay persons in blind testing. Case law dealing with the reliability of canine sniff searches, some of which is cited, *infra*, provides a good starting point for developing questions.

In cross-examining the officer about his or her opinion, you will likely encounter the officer's belief that what he or she smelled is an irrefutable fact, and that you are trying to prove him or her a liar through some tricky "back-door" approach. The officer's demeanor is likely to become hostile or agitated. It is important for you to stick to questions that establish the underlying facts to challenge his or her opinion, and avoid sounding argumentative. Do not ask "How is it possible you smelled the drugs from that distance?" or "Isn't it really true that you were mistaken about smelling drugs?" or "Do you agree you could have made a mistake about smelling drugs?" The trial judge will almost always side with the officer if the questioning becomes argumentative, or at best you will score few points. The officer will probably testify that he or she has smelled drugs under worse conditions and then recovered the contraband. The officer will not admit having made a mistake when probable cause depends on him or her smelling the odor, and will probably launch into anecdotal narratives of field experience designed to bolster his or her opinion.

Step Two: Assertion That Probable Cause Has No Factual Basis

Defense counsel must next assert that an officer's opinion is entitled to no evidentiary weight in the determination of probable cause or exigent circumstances without a factual basis to support it. This is true whether the opinion is testimonial during a motion to suppress hearing in a warrantless search case, or contained within the four corners of a search warrant affidavit. The officer's claim of smelling marijuana coming from the place he or she wants to search is simply "a mere conclusory statement that gives the magistrate virtually no basis at all for making [such] a judgment." *Gates*, 462 U.S. at 239; *see also Aguilar v. Texas*, 378 U.S. 108 (1964) (rejecting

warrant where magistrate "necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion'").

The courts of appeal have recognized the need for search warrant affidavits to contain particularized facts from which the magistrate can determine whether the opinions or conclusions of police officers, as well as informants, are reasonably reliable. *See*, *e.g.*, *United States v. Vigeant*, 176 F.3d 565, 571 (1st Cir. 1999) (police officer's conclusion that suspect's businesses were "front companies"); *United States v. Clark*, 31 F.3d 831 (9th Cir. 1993), *cert. denied*, 513 U.S. 1119 (1995) (officer's conclusion that suspect residence had high power consumption indicative of marijuana growing); *United States v. Pope*, 467 F.3d 912, 920 (5th Cir. 2006) (noting that conclusory statements deprive magistrate of the facts and circumstances needed for the magistrate to independently determine probable cause); *United States v. Weaver*, 99 F.3d 1372, 1377-1378 (6th Cir. 1996) (boilerplate statements do not suffice to show "particularized facts" needed to support conclusions).

In most instances, the questions you should ask the officer to attack his or her opinion are those you do not know the answer to in advance. You must violate that cardinal rule of cross-examination to never ask a question if you do not know the answer. For example, when odor is the issue, you must inquire about the officer's distance when he or she first perceived the smell, the weather conditions at the time, precisely how the drugs were packaged when ultimately found, and reasons for expecting to find drugs before first smelling the odor. Most often, these facts are not recorded in the police reports. You should conduct investigation in advance of the hearing, including gathering weather data and obtaining scene photos and measurements, as well as a witness who can testify to those facts, so you will be prepared to impeach the officer's testimony if he says he cannot recall, or if he tries to bend the facts. These facts are the foundation for your expert's testimony about the reliability of the officer's sensory perception, and often the only way to get them in the record is to start with cross-examination of the officer.

Counsel should go to the scene of the search, preferably under similar weather and light conditions as the time that officers encountered your client. Always obtain and review digital copies of photographs taken by the police. There will be data included with each image file that shows the time

and date the photo was taken, and some equipment may record GPS data as well. And no matter what you see in the photographs, consider conducting an evidence view in advance of the suppression hearing. Examine the drug packaging material for how it was originally sealed and how likely it would have been for air to flow through it. If the drugs are available, you will be able to assess the odor for yourself.

Thus far, the federal courts have not expressly applied this Fourth Amendment requirement of a factual basis to an officer's conclusion that he or she smelled the odor of drugs he or she could not see. However, the courts have shown some willingness to scrutinize police claims that certain sounds meant evidence was being destroyed. That case law, discussed *infra*, could be argued by defense counsel to persuade the trial judge that police sensory perceptions—be it smell rather than hearing—should not be blindly accepted as fact and must be reviewed by the court for reliability, and supported by an objective factual basis.

Step Three: Establishing the Unreliability of Police Sensory Perceptions

A corollary to the need for a factual basis to support opinions or conclusions is the Fourth Amendment's insistence that the information furnishing probable cause must be reasonably reliable or trustworthy. In "plain smell" cases, defense counsel should tender evidence on the current state of uncontroverted, scientific knowledge concerning the highly subjective and unreliable ability of humans—including experienced law enforcement officers—to accurately detect marijuana plant odors as well as other odors. *See*, *e.g.*, Doty, R.L., Wudarski, T.J., & Hastings, L. *Marijuana Odor Perception*: *Studies Modeled from Probable Cause Cases*, 28 LAW & HUMAN BEHAVIOR, 223-233 (2004) (concluding that the odor of both "immature" growing marijuana and dried, packaged marijuana was not reliably discernable by persons with an excellent sense of smell, and that higher "false positive" rates "would be expected in persons who would have greater benefit in detecting the presence of marijuana, as might occur in some law enforcement situations"). The same reasoning applies to cases involving the sounds of evidence destruction. When the courts fail to scrutinize officers' claims of smelling drug odors or hearing evidence being destroyed in light of current scientific knowledge and these traditional

Fourth Amendment safeguards, and simply accept such claims upon an officer's assurance that he or she knows the smell or the sound from past experience, it reduces the warrant clause to a rubber stamp.
In *Johnson*, *supra*, the Supreme Court stated:

> If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

Johnson, 333 U.S. at 13.

Defense counsel should contend that by "qualified to know the odor," the trial court must find more than simply the officer is familiar with the odor. The court must also consider the officer's ability to reliably detect the odor under the totality of the circumstances, including any facts suggestive of selective perception contributing to false claims of odor detection. The same applies to an officer's claim of interpreting sounds to equate with the destruction of evidence.

The courts of appeal have required a showing of reliability before canine drug odor detection may establish probable cause. *See*, *e.g.*, *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993) (a canine sniff alone can supply the probable cause necessary for issuing a search warrant if the affidavit establishes the dog's reliability); *United States v. Sundby*, 186 F.3d 873, 876 (8th Cir.1999); *United States v. Hill*, 195 F.3d 258, 273-274 (6th Cir. 1999); *Cf., Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (trial court found dog sniff alert to narcotics sufficiently reliable to establish probable cause; Supreme Court notes the record contained no evidence or findings regarding error rates or false positives). Thus far, the courts have not required any showing of reliability for human drug odor detection, notwithstanding that the dog's sense of smell is far superior to that of humans. Instead, the courts have pared this down *dicta* from *Johnson* to a rule that an officer's detection of drug odors can by itself establish probable cause to search, and they have upheld warrants to search private residences based on little more than a claim of marijuana odor detection by an officer

who claims familiarity with that smell. *See*, *e.g.*, *Miller v. Sigler*, 353 F.2d 424, 427 (8th Cir. 1965); *United States v. Kerr*, 876 F.2d 1440, 1445 (9th Cir. 1989); *United States v. Elkins*, 300 F.3d 638, 659 (6th Cir. 2002); *but cf. United States v. DeLeon*, 979 F.2d 761, 765 (9th Cir. 1992) (recognizing that growing marijuana plants have no commonly recognized odor, based on expert testimony by Dr. James Woodford).

King presents the danger of being read to authorize warrantless searches of homes based on a claim of smelling burnt marijuana emanating from a residence. After all, if officers smell burning marijuana (i.e., the consumption or destruction of the drug), why is noise also needed to establish exigent circumstances?

Use of Experts to Refute Odor Detection

Expert testimony is essential to educate the court about the facts of human odor detection. *See*, *e.g.*, Moskowitz, H., Burns, M., & Ferguson, S. *Police officers detection of breath odors from alcohol* ingestion. 31 ACCIDENT ANALYSIS AND PREVENTION 175–180 (1999) (discussing research in which subjects who drank various types of alcohol and ate foods breathed through a hole in the wall where police officers on the other side were unable to distinguish by smell whether the beverage was beer, wine, bourbon, or vodka, and others were unable to distinguish between alcohol, acetone, perfume, and ice cream).

If your client cannot afford an expert, the fallback method is to brief the issue with citations to authorities that would not likely be disputed, and request judicial notice. The basic mechanism for humans to smell any odor is the same. First, the odor must be generated at the source. The odor then must become airborne and reach a person's nose in sufficient quantity to interact with the nerve endings of the olfactory system. John E. Amoore, James W. Johnston Jr., & Martin Rubin. *Stereochemical Theory of Odor*, SCIENTIFIC AMERICAN 42–49 (Feb. 1964); Neil Carlson, *Olfaction*, Physiology of Behavior 247 (Allyn and Bacon Inc., 1977). What we call an "odor" is actually one or more molecules. Some odors are single molecules, like ammonia. There are also complex odors, including marijuana, that are comprised of intercoils of different molecules. *Chemical Composition of the Volatile Oil of Cannabis Prepared for Fresh and Dried Buds,* 59 JOURNAL OF

NATURAL PRODUCTS 1, 50, Table 2 (1996); *Headspace Volatiles of Marijuana*, 242 NATURE 402–403 (April 1972). As complex odor molecules travel through air, the molecules disintegrate and lose their characteristic odor.
In criminal cases, there is the inherent danger of "planned smell" versus "plain smell," when officers expect to find evidence of drugs on premises under investigation. However, police officers are trained about the dangers of selective perception and the high probability of false positives, so not taking steps to protect against that and thereby ensure that officers' investigative conclusions are reliable is dishonest. *See* George T. Payton, Observation and Perception: Mechanics of Faulty Perception, Patrol Procedure 191 (Legal Book Corp, Los Angeles, CA).

Challenging the Certainty That Sounds Indicate Destruction of Evidence

Defense counsel should also challenge assertions that sounds of movement within a dwelling in response to police knocking on the door is proof of evidence destruction, rather than a mere possibility of evidence concealment. *See*, *e.g.*, *United States v. Coles*, 437 F.3d 361, 364 & n. 3, n.4 (3rd Cir. 2006) (distinguishing between hearing sounds of movement and hearing sounds of a toilet flushing); *United States v. Leveringston*, 397 F.3d 1112, 1116 (8th Cir. 2005) (officers could reasonably infer that sounds of pots and pans slamming, dishes breaking, water flowing, and a garbage disposal running indicated destruction of evidence in response to police presence); *United States v. Medonsa*, 989 F.2d 366, 370-71 (9th Cir. 1993) (noise from within the house, which was more consistent with normal living sounds or someone coming to answer the door than destruction of evidence, does not establish exigency).

Notably in *King*, where only sounds of movement were heard, there was no issue as to whether exigent circumstances existed, but only whether the urgency was a product of the police conduct. *King*, 131 S. Ct. at 1855 (expressly noting that the Kentucky Supreme Court had observed that the sounds heard could be inadequate to show destruction of evidence, but assumed for argument that exigent circumstances existed). Counsel must not overlook that large chink in *King*'s armor for warrantless entries, and assume that a simple assertion by police that they heard sounds consistent with destruction of evidence will suffice. *Cf. Michigan v. Fisher*, 130 S. Ct. 546, 548-49 (2009) (officer's subjective motivation is irrelevant to determine

whether a warrantless entry based on exigency is justified—the sole considerations are whether objective circumstances justify the action). There must be an objectively reasonable basis for believing the sounds officers describe hearing meant evidence was being destroyed. The officer's sensory perception of the actual sounds—whatever they were—is simply the officer's subjective opinion, the same as his or her conclusions about what he or she smelled or saw. The officer's conclusion that what he or she believed was heard meant that certain unseen actions were occurring is likewise his or her subjective opinion.

Defense counsel should stress to the trial court that, as a general rule, exigent circumstances exist only where there is a genuine risk that evidence will be destroyed if entry is delayed until a warrant can be obtained. *See*, *e.g.*, *United States v. Blount*, 123 F.3d 831, 837 (5th Cir. 1997) (en banc). There is no "genuine risk" of evidence destruction unless the officer's opinion about what he or she heard is reasonably reliable and supported by facts. Mere speculation is not sufficient to show exigent circumstances. *See*, *e.g.*, *United States v. Howard*, 828 F.2d 552, 555 (9th Cir. 1987) (the government bears a heavy burden to show specific articulable facts; speculation about what may or might happen is inadequate).

There is a whole body of science dealing with human ability to hear and to accurately determine both sound source and location. *See*, *e.g.*, Scharine, Letowski, & Sampson. *Auditory Situation Awareness in Urban Operations*. 11 JOURNAL OF MILITARY AND STRATEGIC STUDIES (Spring 2009) (citing many published studies), available at www.jmss.org/jmss/index.php/jmss/article/view/45/42. Who has not heard a loud pop and wondered whether it was a gunshot or a car engine backfiring?

Was there music, television, or other pervasive noise in or near the home police entered? Was the home in an apartment complex or in close proximity to other locations where the same type of noise could come (e.g., a toilet flushing)? Defense counsel may consider using expert testimony on human errors in accurately assessing the spatial location of the noise, or source of the noise in multi-sound situations, as well as the impact of selective perception on interpreting what human conduct produced the sound. Such testimony will at least reinforce the law's recognition that an officer's testimony about what he or she perceived through the senses is simply an opinion or conclusion, not an objective fact.

If your client's home is located in an urban area, it is vital to go to the scene at the same time and day of the week as the police encounter, to experience the ambient noise in the environment first-hand. Recurring sounds could be recorded by your investigator and offered in evidence. It is also worthwhile to attempt to recreate the noises that existed at the time inside your client's home, and find out what can be heard outside the home from the vantage point of where the police claim to have heard the noise. Can you really hear the toilet flushing in the back bedroom while standing on the front porch with the television on in the client's living room? If not, have your investigator record what can be heard, and offer his or her testimony to contradict the officer's. Always take it one step further. For example, can the sound be heard with the windows open? Can you hear stomping if you cannot hear feet shuffling? Can you hear a dish smashed with a hammer if you cannot hear a dish thud against the sink? Evidence that similar but louder noises could not be heard, or that the noise the officer described could not be heard under the most favorable conditions, will stand a better chance of convincing the judge that the officer's opinion is unreliable.

Conclusion

The war against drugs continues to be politically popular, and given the near unanimous holding in *King*, do not expect a retreat from judicially endorsed justifications for warrantless home searches anytime soon. Definitely raise and rely on state statute or constitutional provisions that may provide greater protections against search and seizure than the Fourth Amendment. After all, the Kentucky Supreme Court found the search objectionable, but its decision interpreted the Fourth Amendment, making it subject to being overturned by the federal courts.

When searches are based on police sensory perceptions—the smell of unseen drugs, the sounds of evidence destruction—defense counsel should fight with vigor to undermine the officer's bare assertions and challenge the existence of probable cause, or exigency that excuses obtaining a warrant. Remind the trial judge that only he or she can act as the neutral and detached magistrate the founding fathers envisioned as the guardian of freedom from unwarranted police invasion of our homes. To fulfill this duty, the trial judge must see police claims of smelling drugs or hearing

evidence destruction for what they are—opinions, not fact—and scrutinize the reliability of those opinions.

The courts want to believe the police and uphold searches rather than suppress evidence. You can attack the reliability of the officer's opinion without necessarily attacking the officer's truthfulness. You can stress that the rules of constitutional law protect all of our rights, not just your client's, and thus the trial judge's decision is about enforcing the Constitution, not condoning your client's conduct.

Key Takeaways

- Structure your defense around the assertion that the officer's claim that he or she smelled drugs or heard evidence being destroyed is an opinion rather than a fact.
- Understand the science of human odor detection and sound recognition, and use that knowledge to show that the officer's opinion is unreliable.
- Scene investigation and reconstruction of the conditions existing at the time the police claim to have sensed drugs or evidence destruction is vital preparation for cross-examining the officers.
- Challenge probable cause based on officer opinions of odor or sound detection that are not supported by the facts specific to your case. Argue that a bare assertion without an objective factual basis is entitled to no weight in the probable cause calculus.

Related Resources

- Dr. Warren James Woodford Ph.D., www.mindspring.com/~woodford/
- Johann P. Lehrner, Judith Blück, and Matthias Laska, *Odor identification, consistency of label use, olfactory threshold, and their relationships to odor memory over the human lifespan*, 24 CHEMICAL SENSES: 337–346 (1999), *available at* www.chemse.oxfordjournals.org/content/24/3/337.full.pdf+html
- François-Xavier Lesage, Nicolas Jovenin, Frederic Deschamps, and Samuel Vincent, *Noise-induced hearing loss in French police officers*, 59

OCCUPATIONAL MEDICINE 483-486 (2009), *available at* www.occmed.oxfordjournals.org/content/59/7/483.full.pdf+html

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Dedication: *I would like to dedicate this chapter to my parents, William and Joan Wood, who raised me to stand up for the rights of others.*

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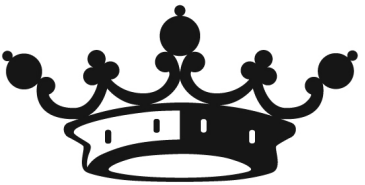

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