No. 99-1132

In the

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Rather than address the heart of this case, Respondent instead focuses on its periphery. Seizing on several moments during which Officer Love stood in Respondent's doorway and watched him retrieve cigarettes and make telephone calls, Respondent would elevate these marginal events to the focal point of this case. His arguments, and those of *amici curiae* supporting him, treat this case as one that hangs on an illegal search, thereby practically ignoring the fact that the impoundment procedure carried out by Officer Love deliberately avoided the need for a warrantless search and limited the police officer's pre-warrant entries to brief, consensual and ultimately unincriminating observations.[1] The Court should resist Respondent's entreaties to let the tail wag the dog in this matter.

I. RESPONDENT'S POSSESSION OF MARIJUANA AND PARAPHERNALIA WAS SUFFICIENTLY SERIOUS TO JUSTIFY THE EXTERNAL IMPOUNDMENT OF HIS RESIDENCE WHILE A SEARCH WARRANT WAS SOUGHT.

Respondent contends that the misdemeanor offenses with which he was ultimately charged were not serious enough to justify Officer Love's actions. This claim is new to this case; it was never made in the trial or appellate court. In any event, it misapprehends this Court's pronouncements regarding the place that the nature of the offense occupies in the Fourth Amendment's balancing of interests.

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[1] *See* Pet. Brief at 12, 22-24.

Respondent principally relies on *Welsh v. Wisconsin*, 466 U.S. 740 (1984), for the proposition that the marijuana and paraphernalia possession misdemeanors charged in this case lacked sufficient gravity. That case is distinguishable from the instant one in several critical respects. *Welsh* involved drunk driving, which was, under Wisconsin law, "a nonjailable traffic offense," 466 U.S. at 742.[2] By contrast, the offenses with which Respondent has been charged are criminal drug violations, for which sentences of incarceration may be imposed. *See* Pet. Brief at 5 n. 3. The attachment of criminal penalties to the possession of even a small quantity of marijuana, as well as to the possession of equipment for its consumption, suggests that Illinois takes such matters more seriously. In addition, *Welsh* involved a nighttime warrantless entry into a home to make an arrest of the occupant, 466 U.S. at 741-43, while the instant case involves a mid-afternoon external seizure of a residence that was designed to, and did, avoid the need for a warrantless search.

When applied to the Fourth Amendment's balancing test, these two factors, the greater legal consequence of the offenses and the lesser intrusion of daytime impoundment, both militate in favor of a finding of reasonableness. Indeed, the *Welsh* Court considered the seriousness of the offense to be related to the presence of exigent circumstances sufficient to justify a warrantless entry. 466 U.S. at 749-52. Because the impoundment effected in this case required no entry at all, and in the absence of any non-consensual entry, this case really presents no occasion to consider the application of an exception to the search warrant requirement.

[2] Welsh himself was ultimately charged with a criminal misdemeanor because of a prior conviction; however, because the arresting officers did not know of the prior conviction, the Court considered the officers to have had probable cause to believe only that he had committed a civil violation. 466 U.S. at 746 n.6.

II. THE DISTINCTION BETWEEN FELONIES AND MISDEMEANORS IS NOT SUITED TO SUPPORTING A "BRIGHT-LINE RULE" TO GOVERN THE PROPRIETY OF EXTERNAL IMPOUNDMENT.

Respondent urges the Court to seize upon the legal character of the charges against him by creating a "bright line rule" for determining whether "the seizure of and warrantless entry into the home" to preserve evidence is authorized. Resp. Brief at 29. Assigning determinative weight to the legal classification of an offense would go well beyond *Welsh*, which merely held that the seriousness of the offense was a factor to be considered in determining whether warrantless entry was proper, 466 U.S. at 751, 753. Lower court cases cited by Respondent (Resp. Brief at 26-28) involved felonies, but none held that warrantless provisional measures would not have been justified by misdemeanor offenses.

Laying aside the fact that no warrantless entry occurred in this case except by consent, the felony-misdemeanor distinction is a poor one upon which to base such a rule. The classification of an offense as a misdemeanor is simply not a reliable indicator that the offense is not serious. In asserting broadly that misdemeanor offenses lack sufficient consequence to justify warrantless impoundment or entry, Respondent cites a few such provisions of Illinois criminal law that he

deems wanting. Resp. Brief at 35. His list omits more weighty misdemeanor offenses, including 720 ILCS 5/11-9.1(a) (sexual exploitation of a child), 5/12-2(a) (numerous forms of aggravated assault), 5/12-3.1 (battery of an unborn child), 5/12-3.2 (domestic battery), 5/12-15 (certain forms of criminal sexual abuse), 5/12-21.6 (endangering the life or health of a child), 5/24-1 (certain weapons possession offenses), 5/24-3.1 (certain firearms possession offenses), and 5/31-1 (resisting or obstructing a peace officer). The designation of these offenses as misdemeanors demonstrates, as this Court has recognized, that the felony/misdemeanor distinction, once "'broad and deep,'" is now "minor and often arbitrary," and that "numerous misdemeanors involve conduct more dangerous than many felonies." *Tennessee v. Garner*, 471 U.S. 1, 14 (1985) (citation omitted).

The legal classification of criminal offenses based on available punishments also does not lend itself to useful application by officers in the field. To be of any use, a line, however bright, must be visible to the observer under the conditions in which it is to be observed. Whether a crime is classified as a felony or misdemeanor depends on the lawful range of available sentences, a consideration divorced in time and relevance from the concerns that are paramount when someone's conduct is being investigated. Despite Respondent's contentions to the contrary, the assumption that officers in the field are specifically aware of the sentencing classification of offenses is unsupported and does not comport with common sense or the definition of their jobs. Whether a crime is a felony or a misdemeanor is primarily a concern of lawyers and judges.

Moreover, even assuming a police officer happens to know whether a particular offense is a felony or misdemeanor, it is unlikely that he or she would know, or even could know, in the midst or even (as here) at the outset of an investigation, what crime (or crimes) will ultimately be charged. Similar concerns prompted the Court, soon after *Welsh* was decided, to decline to create an exception to the rule of *Miranda v. Arizona*, 384 U.S. 436 (1986), based on the nature of the offense under investigation. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court concluded that officers questioning an arrested suspect were not in a good position to predict what charges might ultimately be brought. The Court reasoned that officers acting at that preliminary stage often would not know sufficient facts to choose from among a series of available charges, perhaps because the charges ultimately brought might depend on facts they could not then know (including events that had not yet occurred), or because an investigation into a minor offense could escalate into a more serious one. 468 U.S. at 430-31.

The circumstances of this case well illustrate these points. The information supplied by Tera McArthur did not include the quantity of marijuana Respondent had hidden under his couch. Without that information, Officer Love could not have known whether its mere possession would have been a felony or a misdemeanor. Because not more than 2.5 grams of marijuana was recovered, Respondent was charged with a misdemeanor violation under 720 ILCS 550/4(a) (as well as two misdemeanor paraphernalia violations). Had the quantity been 30 grams or more, even its mere possession would have been a felony under 720 ILCS 550/4(d).

Likewise, as in *Welsh* (*see supra* at p. 2, n. 2), if Respondent had a prior conviction for a like offense, a fact the officers would not have been in a position to know at the time (*see Berkemer*, 468 U.S. at 430-31), possession of a mere 10 grams would have given rise to a felony charge, 720 ILCS 550/4(c). The officers also could not know, as they stood outside Respondent's trailer, whether even a small quantity of marijuana would ultimately prove to be evidence of a broader or more aggravated course of felony conduct, such as conspiracy, distribution or trafficking, or delivery to a type of person protected by a specific statute. *See* 720 ILCS 550/5 through 550/9.

The distinction between felonies and misdemeanors may readily be applied to determinations made by judges and lawyers in legal proceedings, such as whether a defendant has a right to a jury trial, *see Duncan v. Louisiana*, 391 U.S. 145 (1968), or to be represented by counsel at trial, *see Argersinger v. Hamlin*, 407 U.S. 25 (1972), but not to decisions, like that considered in *Berkemer*, that must be made by police officers in the field as the events of a criminal investigation unfold. It is particularly unsuited to use in decisions involving the execution of search warrants. Issuance of a search warrant depends not on whether an entire offense has been established, even if only by probable cause; instead an officer need only aver the presence of some evidence relevant to the commission of a crime. (For example, the warrant in this case authorized a search for items "which have been used in the commission of, or which constitute evidence of" possession of marijuana. Jt. App. 3.). Search warrants are by definition preliminary devices designed to assist in determining what charges may ultimately be appropriate; the manner of their

execution, and the procedures available to ensure that their execution is effective, should not be guided by what a full and complete investigation may ultimately dictate.

Although *Welsh* promotes consideration of the seriousness of an offense as a factor to be weighed in the Fourth Amendment balance, consideration of that factor does not dictate the result in this case, nor does it promote Respondent's proposed bright-line rule. The possession of even the drug amount recovered in this case, as well as paraphernalia designed for its use, was deemed sufficiently serious by the Illinois legislature to justify criminal sanctions that could include imprisonment. More to the point, the law places no limitation on the use of search warrants themselves in misdemeanor cases. Absent such a restriction, the impoundment procedure employed by Officer Love in aid of obtaining a warrant was a reasonable measure designed to preserve the efficacy of the warrant process. Moreover, *Welsh* does not support the elevation of the felony/misdemeanor distinction to a controlling principle. It has no real relevance to officers in the field, who will seldom have either the particulars or the precognition to foretell what charges a prosecutor may bring once the investigation is complete.

III. OFFICER LOVE'S CONDUCT FALLS WITHIN A REASONABLE RULE ALLOWING EXTERNAL IMPOUNDMENT OF A RESIDENCE BASED ON PROBABLE CAUSE WHILE A SEARCH WARRANT IS SOUGHT.

Aside from his contention that his offense was not serious enough, Respondent does not seem to dispute

the notion that officers armed with probable cause may secure a residence from the outside while they seek a warrant to search it. Instead, Respondent claims that his situation does not fit within the parameters of a reasonable rule allowing such action. In fact, this case presents a paradigmatic example of external impoundment as an appropriate response. Officer Love's actions were necessary to preserve evidence of a crime and sufficiently supported to warrant the intrusion, which was itself sufficiently mitigated to accommodate Respondent's constitutionally-protected privacy rights.

Two of Respondent's initial contentions may be disposed of quickly. His claim that probable cause was lacking at the time of the impoundment because Tera McArthur had not told the officers that she knew what marijuana looked like is also new to this case; as the appellate court noted, Pet. App. 4, Respondent did not contest the existence of probable cause for the seizure below.[3] His challenge now made defies common sense. Mrs. McArthur told Officer Love that Respondent had "dope" in the trailer and, when asked what kind, identified it as "pot." Jt. App. 15, 19. The officer was entitled to assume that, by identifying the substance as marijuana, Mrs. McArthur was tacitly asserting that she knew what marijuana looked like. This conclusion was further supported by her statement that Respondent had hidden the substance under the couch, Jt. App. 19. Language in her warrant affidavit explicitly

[3] In his brief in this Court, Respondent claims he did not "dispute" probable cause because he did not "concede" it and that he did claim on appeal that he was essentially arrested without probable cause, Resp. Brief at 12, assertions that do not contradict the appellate court's statement.

memorializing her recognition (Jt. App. 9) was merely a matter of form and did not undermine Officer Love's reasonable assumption to that effect. Respondent's suggestion that the seizure of his home lasted too long is similarly meritless. Although Respondent correctly notes that this Court disapproved a seizure of property that lasted 90 minutes in *United States v. Place*, 462 U.S. 696, 710 (1983), that seizure was supported only by reasonable suspicion. The seizure in this case was effected based on probable cause, which, as explained in Petitioner's opening brief (at 16), has been held to be a sufficient basis to permit provisional seizures of property for the time required to obtain a warrant. The impoundment of Respondent's trailer lasted at most two hours and perhaps less than that (*see* Pet. Brief at 4 and n. 2), an eminently reasonable period in which to draft and submit a warrant. There has been no suggestion of undue or intentional delay on the part of the officers in obtaining it.

Respondent's assertion that he did not consent to being observed from his doorway by Officer Love when he briefly re-entered his home after it had been secured should also be rejected, and not just because those entries were inconsequential. Initially, Respondent is wrong in claiming that Petitioner waived the argument that Respondent consented to these entries. Petitioner did argue consent in the appellate court in its reply brief (at page 7-8). Because Respondent did not raise unlawful entry as grounds for suppression in the trial court at all, and did so for the first time in his brief on appeal, that reply brief presented Petitioner's first opportunity to make the point. Respondent is also wrong in asserting that Petitioner "admitted" that he did not

consent (Resp. Brief at 22); the statements he cites in Petitioner's appellate court brief refer to his initial refusal to consent to a search of the trailer, and not to his later consent to be observed inside once Officer Love had secured it.

In any event, Respondent has not made out a claim of unlawful coercion. His reliance on *Bumper v. North Carolina*, 391 U.S. 543 (1968), and *Johnson v. United States*, 333 U.S. 10 (1948), is misplaced. In both those cases, entry was gained as a result of acquiescence to officers who, in fact, had no lawful authority to enter. *Bumper*, 391 U.S. at 549-50; *Johnson*, 333 U.S. at 13-15. Because Officer Love was entitled to impound Respondent's trailer, Respondent yielded to the officer's actual and lawful authority to prevent him from entering alone in deciding to allow the officer to observe him. The fact that he would have preferred, on the whole, to enter alone did not make his consent constitutionally involuntary.

Respondent's attempts to escape the implications of *Segura v. United States*, 486 U.S. 796 (1984), for his case are unavailing. Despite the endorsement of the concept of external impoundment by all members of that Court, *see* Pet. Brief at 17-18, Respondent insists that the case has no bearing on one in which the homeowner is present and has his freedom of movement in some way restricted. In this regard it is worth noting that Respondent concedes, although his movement was restricted, that his person was not seized. Resp. Brief at 13-14. It is difficult to imagine how a residence could be effectively secured without placing *some* restriction on the movements of persons inside, a concept that could not have been lost on the members of the *Segura*

Court in expressing their approval of external impoundment.[4] Indeed, no member of the Court relied on the absence (due to arrest) of the occupants of the apartment in expressing their approval of external impoundment; the issue of the occupants' absence arose only in discussions regarding the internal nature and 18-20-hour length of the impoundment of the apartment. 468 U.S. at 813 (Opinion of Burger, C.J., joined by O'Connor, J.); *id.* at 826-827 (Stevens, J. dissenting).

As noted above, Respondent's claim that there was no showing of exigent circumstances is irrelevant. Exigent circumstances are a predicate for exception from the warrant requirement, *United States v. Karo*, 468 U.S. 705, 714-15 (1984); *Steagald v. United States*, 451 U.S. 204, 211-12 (1981), and have not been held to be necessary in the absence of a warrantless entry (or, as here, an entry supported by another exception, *i.e.* that of consent). Even if such circumstances were required in this case, they were clearly present. Respondent has admitted as much, both in person and through counsel. At the suppression hearing, Respondent conceded that he would have destroyed the evidence had he been given the opportunity. Jt. App. 27, 29. Respondent's refusal to recognize the implications of that concession is steadfast, even to the point that he relies on it to argue that preventing him from doing so caused the seizure of that

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[4] It is especially hard to ascribe significance to preventing someone from entering his home in this case, considering that Officer Love could have arrested Respondent and thereby restricted his movements entirely, *see* Pet. Brief at 13-14, as *amicus* National Association of Criminal Defense Attorneys, apparently without irony, suggests he should have, Brief of NACDL at 14-15.

evidence he now challenges. Resp. Brief at 37-38. This argument contravenes the *Segura* Court's rejection of a "'constitutional right' to destroy evidence," 468 U.S. at 816.

The exigency in this case was not the risk, but the certainty, of the destruction of evidence. And regardless of how "imminent" the law requires that destruction to be, *see* Resp. Brief at 17, this case possesses more than the necessary immediacy. There is no reason to believe that, had he been permitted to re-enter his home alone, Respondent would have delayed in destroying the evidence in accordance with the intention he has so candidly declared. That intention might well have arisen as soon as the officers arrived at the trailer, *see* Pet. Brief at 12 n. 9, but became acute once Officer Love had sought consent to search.

IV. SUPPRESSION IN THIS CASE WOULD DISSERVE THE POLICIES BEHIND THE EXCLUSIONARY RULE BY PENALIZING AN OFFICER'S DELIBERATE EFFORTS TO HONOR A DEFENDANT'S CONSTITUTIONAL RIGHTS.

Finally, this Court should reject Respondent's suggestion that the policies behind the exclusionary rule require suppression of the evidence in this case.[5] Respon-

[5] Although Respondent argues that Petitioner has waived any claim in this regard in this Court, that assertion is inaccurate. The appellate court decided this case on the basis of its conclusion that the securing of Respondent's residence violated the Fourth Amendment, and never addressed any claim related to the validity of the warrant later issued. Pet. App. 11-14. Should this Court agree with the lower court's position on the Fourth Amendment claim and decide not to reach the issue of (continued...)

dent concedes that he is asking this Court to reexamine *Segura*, but offers no substantive grounds upon which to do so. Instead, he argues that suppression is necessary to avoid the elimination of "incentives" on the part of police officers to follow constitutional rules. Acceptance of this argument would not only require overruling *Segura*; it would also contravene *Murray v. United States*, 487 U.S. 533, 539-40 (1988), in which the Court found the incentives created by the exclusionary rule to be just the opposite.

Respondent's reliance on the policy underlying the exclusionary rule is especially ironic in light of the facts of this case. He argues that "without the application of the exclusionary rule, there is no incentive for the police not to seize a person's home *and make a warrantless entry inside* under the guise of preserving evidence. . . ." Resp. Brief at 38 (emphasis supplied). If anything is clear from the way Officer Love conducted himself in this case, however, it is that he demonstrated an awareness of and sensitivity to Respondent's Fourth Amendment rights and, implicitly, the possibility of exclusion of anything he recovered if he violated those rights. Officer Love eschewed the warrantless entry of which Respondent complains in favor of the less intrusive option of external impoundment precisely because of that concern. To repay the sort of conscious regard for constitutional rights that this Court encourages in police officers would essentially turn the incentives behind the exclusionary rule on their heads.

[5] (...continued)
the validity of the warrant, nothing would preclude the appellate court from considering the issue (including any claim of waiver in that court) on remand.

CONCLUSION

The judgment of the Appellate Court of Illinois should be reversed.

Respectfully submitted,

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