Case excerpts; law review articles

Staff note: Quoted excerpts from the cases noted below have been edited for brevity, and most of the internal citations have been removed. The full text of each case can be viewed by clicking on the hyperlink. The law review article noted on the last page of this document, although dated, provides a detailed history of the requirement to knock and announce before entry.

United States Supreme Court cases

- Wilson v Arkansas (1995)

We granted certiorari to resolve the conflict among the lower courts as to whether the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry. We hold that it does …

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. … An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.

…Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. … we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.

We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally

defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

- Richards v Wisconsin (1997)

In *Wilson* v. *Arkansas*, 514 U. S. 927 (1995), we held that the Fourth Amendment incorporates the common-law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. At the same time, we recognized that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.*, at 934, and left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment," *id.*, at 936.

In this case, the Wisconsin Supreme Court concluded that police officers are *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation. In so doing, it reaffirmed a *pre-Wilson* holding and concluded that *Wilson* did not preclude this *per* se rule. We disagree with the court's conclusion that the Fourth Amendment permits a blanket exception to the knock-and-announce requirement for this entire category of criminal activity.

… In reaching this conclusion, the Wisconsin court found it reasonable-after considering criminal conduct surveys, newspaper articles, and other judicial opinions-to assume that all felony drug crimes will involve "an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police." Notwithstanding its acknowledgment that in "some cases, police officers will undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce," the court concluded that exigent circumstances justifying a no-knock entry are always present in felony drug cases. Further, the court reasoned that the violation of privacy that occurs when officers who have a search warrant forcibly enter a residence without first announcing their presence is minimal, given that the residents would ultimately be without authority to refuse the police entry. The principal intrusion on individual privacy interests in such a situation, the court concluded, comes from the issuance of the search warrant, not the manner in which it is executed. Accordingly, the court determined that police in Wisconsin do not need specific information about dangerousness, or the possible

destruction of drugs in a particular case, in order to dispense with the knock-and-announce requirement in felony drug cases.

We recognized in *Wilson* that the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." 514 U. S., at 936. It is indisputable that felony drug investigations may frequently involve both of these circumstances. The question we must resolve is whether this fact justifies dispensing with case-by-case evaluation of the manner in which a search was executed.

The Wisconsin court explained its blanket exception as necessitated by the special circumstances of today's drug culture, and the State asserted at oral argument that the blanket exception was reasonable in "felony drug cases because of the convergence in a violent and dangerous form of commerce of weapons and the destruction of drugs." But creating exceptions to the knock-and-announce rule based on the "culture" surrounding a general category of criminal behavior presents at least two serious concerns.

First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry. Wisconsin's blanket rule impermissibly insulates these cases from judicial review.

A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others. Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a *per se* exception were allowed for each category of criminal investigation that included a considerable-albeit hypothetical-risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.

Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard - as opposed to a probable-cause requirement - strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. … This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

Footnotes: The State asserts that the intrusion on individual interests effectuated by a no-knock entry is minimal because the execution of the warrant itself constitutes the primary intrusion on individual privacy and that the individual privacy interest cannot outweigh the generalized governmental interest in effective and safe law enforcement. … While it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. As we observed in *Wilson* v. *Arkansas*, 514 U. S. 927, 930-932 (1995), the common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.

Additionally, when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry. The State pointed out at oral argument that, in Wisconsin, most search warrants are executed during the late night and early morning hours. The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

…

A number of States give magistrate judges the authority to issue "no knock" warrants if the officers demonstrate ahead of time a reasonable suspicion that entry

without prior announcement will be appropriate in a particular context. See, *e. g.,* 725 Ill. Compo Stat., ch. 725, § 5/108-8 (1992); Neb. Rev. Stat. §29-411 (1995); Okla. Stat., Tit. 22, § 1228 (Supp. 1997); S. D. Codified Laws § 23A-35-9 (1988); Utah Code Ann. § 77-23-210 (1995). But see *State* V. *Arce,* 83 Ore. App. 185, 730 P. 2d 1260 (1986) (magistrate has no authority to abrogate knock-and-announce requirement); *State* V. *Bamber,* 630 So. 2d 1048 (Fla. 1994) (same).

The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time. But, as the facts of this case demonstrate, a magistrate's decision not to authorize a no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed.

See further Geiger v Sloan (5th Circ., 2019), a civil case:

The plaintiffs successfully alleged a no-knock violation. The Supreme Court established the standard for no-knock entries in its 1997 decision *Richards*. The officers "must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." **And drug investigations don't automatically meet this requirement.** Rather, the court must consider the actual circumstances of each particular case. [Emphasis added.]

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- Hudson v Michigan (2006)

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See *Wilson* v. *Arkansas*, 514 U. S. 927, 931–932 (1995). Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law, see 40 Stat. 229, and is currently codified at 18 U. S. C. § 3109. We applied that statute in *Miller* v. *United States*, 357 U. S. 301 (1958) , and again in *Sabbath* v. *United States*, 391 U. S. 585 (1968) . Finally, in *Wilson*, we were asked whether the rule was also a command of the Fourth Amendment. Tracing its

origins in our English legal heritage, 514 U. S., at 931–936, we concluded that it was.

We recognized that the new constitutional rule we had announced is not easily applied. *Wilson* and cases following it have noted the many situations in which it is not necessary to knock and announce. It is not necessary when "circumstances present a threat of physical violence," or if there is "reason to believe that evidence would likely be destroyed if advance notice were given," *id.*, at 936, or if knocking and announcing would be "futile," *Richards* v. *Wisconsin*, 520 U. S. 385, 394 (1997) . We require only that police "have a reasonable suspicion … under the particular circumstances" that one of these grounds for failing to knock and announce exists, and we have acknowledged that "[t]his showing is not high." *Ibid*.

When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds' wait are too few? Our "reasonable wait time" standard, see *United States* v. *Banks*, 540 U. S. 31, 41 (2003), is necessarily vague. *Banks* (a drug case, like this one) held that the proper measure was not how long it would take the resident to reach the door, but how long it would take to dispose of the suspected drugs—but that such a time (15 to 20 seconds in that case) would necessarily be extended when, for instance, the suspected contraband was not easily concealed. *Id.*, at 40–41. If our *ex post* evaluation is subject to such calculations, it is unsurprising that, *ex ante*, police officers about to encounter someone who may try to harm them will be uncertain how long to wait.

Happily, these issues do not confront us here. From the trial level onward, Michigan has conceded that the entry was a knock-and-announce violation. The issue here is remedy. *Wilson* specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement. That question is squarely before us now.

…

Another consequence of the incongruent remedy Hudson proposes would be police officers' refraining from timely entry after knocking and announcing. As we have observed, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others. We deemed these consequences severe enough to produce our unanimous agreement that a mere "reasonable suspicion" that knocking and announcing "under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime," will cause the requirement to yield.

Next to these "substantial social costs" we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. (It is not, of course, a sufficient condition: "[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even "reasonable suspicion" of their existence, *suspend the knock-and-announce requirement anyway*. Massive deterrence is hardly required.

It seems to us not even true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all. Of course, even if this assertion were accurate, it would not necessarily justify suppression. Assuming (as the assertion must) that civil suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly "undeterred." When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only "effective deterrent"? And what, other than civil suit, is the "effective deterrent" of police violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes—and yet nothing but "ineffective" civil suit is available as a deterrent. And the police incentive for those violations is arguably greater than the incentive for disregarding the knock-and-announce rule.

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Mapp could not turn to 42 U. S. C. §1983 for meaningful relief, which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the §1983 remedy was extended to reach the deep pocket of municipalities. Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971) .

Hudson complains that "it would be very hard to find a lawyer to take a case such as this," 42 U. S. C. §1988(b) answers this objection. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.

Hudson points out that few published decisions to date announce huge awards for knock-and-announce violations. But this is an unhelpful statistic. Even if we thought that only large damages would deter police misconduct (and that police somehow are deterred by "damages" but indifferent to the prospect of large §1988 attorney's fees), we do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury. It is clear, at least, that the lower courts are allowing colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity. As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts…

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to "assume" that unlawful police behavior would "be dealt with appropriately" by the authorities, but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers. Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There is also evidence that the increasing use of various forms of citizen review can enhance police accountability.

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrence against them are substantial—incomparably greater than

the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

Law Review Articles

Mark Josephson, "Fourth Amendment – Must Police Knock and Announce Themselves before Kicking in the Door of a House," Journal of Law and Criminology (Northwestern, 1996)

Wilson v. Arkansas, the Supreme Court held that the knock-and-announce rule is only one factor in determining whether a search is reasonable under the Fourth Amendment. The Court came to its determination by looking only at the common law background of the knock-and-announce rule. In doing so, the Court's decision undervalued the important personal security and privacy interests served by police announcement. A balancing of the interests involved, coupled with a proper reading of the history of the rule, shows that a stronger rule is necessary to protect the interests at stake. Instead of making the knock-and-announce rule a factor in the reasonableness equation, the Court should have held that unannounced entries into homes are presumptively unreasonable, unless the police know that the occupant of the home is aware of their purpose, or the police can show reasonable suspicion that announcement would lead to violence or the destruction of evidence. However, the Court announced the constitutionality of the rule in such a mild way, and with so little guidance, that the Court's decision leaves important Fourth Amendment concerns subject to erosion.

Arthur Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates," Journal of Criminal Law and Criminology (1974)

It should also be noted that the federal rules now define "daytime" to mean the hours between 6:00 A.M. and 10:00 P.M. This definition reflects the increasing urbanization of our society in which most persons infrequently retire for the night prior to 10:00 P.M. and usually arise sometime around 6:00 A.M. It also reflects a judgment concerning law enforcement needs in coping with an ever-increasing volume of crimes associated with our population shift. The choice appears to strike a reasonable balance between the needs of law enforcement and the right of special privacy during those hours of repose, rest and sleep, in which an intrusion should

only be justified by exceptional circumstances. With this expansion of the hours for daytime warrants, nighttime warrants should only be issued upon a proper showing that execution must be made between the hours of 10:00 P.M. and 6:00 A.M.