

1992

# State of Utah v. Arthur Ribe : Reply Brief

Utah Court of Appeals

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R. Paul Van Dam; Attorney General; Todd Utzinger; Assistant Attorney General; Attorneys For Respondent.

Robert Breeze; Attorney at Law; Attorney for Appellant.

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## Recommended Citation

Reply Brief, *Utah v. Ribe*, No. 920234 (Utah Court of Appeals, 1992).  
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BRIEF

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DOCKET NO.

920234

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
	:	Case No. 920234-ca
Plaintiff-Appellee,	:	
	:	
vs.	:	
	:	
ARTHUR RIBE,	:	Argument Priority
	:	Classification Number 2
Defendant-Appellant.	:	

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REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, JUDGE LESLIE A. LEWIS  
PRESIDING, DENYING DEFENDANT'S MOTION TO  
SUPPRESS EVIDENCE

ROBERT BREEZE  
Attorney at Law  
211 East Broadway, Suite 215  
Salt Lake City, Utah 84111

Attorney for Appellant

R. PAUL VAN DAM  
Attorney General  
TODD UTZINGER  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

FILED

JAN 19 1993

COURT OF APPEALS

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ROBERT BREEZE  
Attorney at Law  
211 East Broadway, Suite 215  
Salt Lake City, Utah 84111

Attorney for Appellant

R. PAUL VAN DAM  
Attorney General  
TODD UTZINGER  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

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The following Constitutional and Statutory provisions which are applicable to this Appeal are:

a. Fourth Amendment to the Constitution of the United States which reads in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

b. Article 1, Section 14 of the Utah Constitution which provides in relevant part: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no Warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized".

c. Section 77-23-10 Utah Code Annotated which reads in relevant part:

"When a search warrant has been issued authorizing entry into any building . . . the officer executing the warrant may use such force as is reasonably necessary to enter:

(1) If, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness; or

(2) . . . the magistrate . . . directs the officer need not give notice. . . ."

d. The Fifth Amendment to the United State Constitution which reads in relevant part:

"No person shall be . . . deprived of life, liberty or property without due process of law; . . .".

IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

STATEMENT OF ISSUES

The issues relevant to this reply brief are:

1. Do the facts warrant suppression under the new Rowe analysis?
2. Did the failure of the police to comply with the terms of 77-23-10 also constitute a violation of the Fourth Amendment to the Constitution of the United States?

SUMMARY OF ARGUMENT

As a preliminary matter, it should be pointed out that the State's assertion that the police officers uttered the words "search warrant" is without factual support in the record and is contrary to the findings of the trial court.

The evidence involved in this case is suppressible under the new Rowe doctrine. First, the violation of the knock and announce requirement set forth in the Utah Code is a violation of the Fourth Amendment to the Constitution of the United States as well as Article 1, Section 14 of the Utah Constitution. Secondly, the Appellant suffered prejudice when his home was invaded. Finally,

the conduct of the police officers was intentional and deliberate conduct which was a violation of the law. No exigent circumstances were involved, in fact, the State has waived any argument with regard to exigent circumstances.

#### ARGUMENT

##### POINT I

#### THE POLICE NEVER UTTERED THE WORDS "SEARCH WARRANT"

A careful review of the record reflects that the State in its brief at page 5, concedes that the police violated Section 77-23-10 Utah Code Annotated.

The State asserts at page 4 of its brief that someone uttered the words "search warrant". A careful review of the record shows that at page 13 and 14 of the Motion to Suppress Transcript indicates that the officer made one weak claim that the words "search warrant" were uttered. However, further questioning showed that the officer did not actually hear the words "search warrant" being uttered. Furthermore, the Court in its written Order Denying Motion to Suppress found, by implication, that the police had announced their presence and not that they had a search warrant. Any assertion that the police did in fact utter the words "search warrant" is a red herring and unsupported by the evidence as well as being contrary to the factual findings of the trial Court.

##### POINT II

#### SUPPRESSION IS APPROPRIATE UNDER THE NEW ROWE ANALYSIS

Since Appellant filed his opening brief in this matter two



important cases have been decided which bear on the issue before the Court at this time.

First, State v. Rowe, 196 U.A.R. 14 (Ut 1992) overruled the Utah Court of Appeals decision in State v. Rowe, 806 P.2d 730 (Utah App. 1991).

The Utah Supreme Court held in the new Rowe case that:

1. Only fundamental [Fourth Amendment] violations of rules of criminal procedure warrant suppression unless:

a. The Appellant suffered prejudice, meaning either the search would not have occurred or the intrusion would not have been so abrasive;

or

b. The police acted in intentional and deliberate disregard for the law.

Do the facts involved in this case require suppression under the new Rowe analysis?

#### VIOLATION OF A FUNDAMENTAL RIGHT

In State v. Thurman, Utah Supreme Court, 910494, decided January 7, 1993, the Utah Supreme Court specifically refused to answer the crucial question involved in this case, i.e. whether a violation of the knock and announce statute is also a violation of the Fourth Amendment to the Constitution of the United States. In Thurman, the court, in dicta, refused to adopt a bright line, 30 second standard regarding the amount of time an officer must wait after knocking. The court, at page 6, seemed to be saying that each case must be analyzed on its own facts, cited U.S. v.

McConney, 728 F.2d 1195, 1206 and U.S. v. Baker, 638 F.2d 198, 202.

In McConney the court affirmed that exigent circumstances can justify a departure from the knock and announce requirement.

However, as stated in Appellant's opening brief, the current status of the law in the 10th Circuit, see U.S. v. Ruminer, 786 F.2d 381 (1986 10th Circuit) is that a violation of the knock and announce statute is a Fourth Amendment violation.

The court should also examine United States v. Mueller, 902 F.2d 336, 343 5th Circuit (1990), which noted that "[s]ince Ker, most of the circuits have followed, although with certain embellishments, the four-justice dissent in Ker, which contended that a violation of the knock and announce rule of [18 U.S.C.] Section 3109, should also be a violation of the Fourth Amendment".

Because the failure of the police to comply with the Utah knock and announce statute is a violation of the Fourth Amendment to the Constitution of the United States and Article 1, Section 14 of the Constitution of Utah this court, pursuant to the new Rowe doctrine should suppress all the evidence seized herein for the reason and on the grounds that the failure of the police to comply with the knock and announce requirement implicates a fundamental Fourth Amendment violation.

#### PREJUDICE

The Appellant suffered the very prejudice that the Fourth Amendment to the Constitution of the United States was designed to protect against. Specifically, the sanctity of this Appellant's home was invaded when the police burst through the storm door.

Although the Appellant herein cannot claim that he suffered prejudice in the sense that the search would never have occurred, the search conducted by the police officers herein was certainly more abrasive than necessary. The police had the opportunity to detain the Appellant and request permission to enter the home. They did not do so. There were no exigent circumstances involved.

#### INTENTIONAL POLICE MISCONDUCT

It is clear from the record that the police agents involved in the execution of the warrant at the Appellant's home did not do as required by Section 77-23-10.

There is no evidence in the record indicating that the police thought they had a no knock warrant which would enable them to enter in the manner used by the police.

#### CONCLUSION

The conduct of the police was a violation of the Utah knock and announce statute.

There were no exigent circumstances involved. The failure to knock and announce is a Fourth Amendment violation. The Appellant suffered prejudice. The violation of the law by the police officers was intentional.


WHEREFORE, Appellant prays for the following relief:

1. For an Order ruling that the evidence should have been suppressed as a matter of law;
2. For an Order suppressing from use at trial the evidence relevant herein;
3. In the alternative, should the Court deem exigent

circumstances relevant, for an Order remanding this matter for such further proceedings as are just with regard to the issue of exigent circumstances;

4. For such other and further relief as is just and proper under the circumstances.

DATED this 15 day of January, 1993.


  
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ROBERT BREEZE  
Attorney for Appellant

**CERTIFICATE OF MAILING**

I certify I mailed four copies of the foregoing to:

Todd Utzinger  
Deputy Utah Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114

on this 15 day of January, 1993.

  
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