University of Baltimore Law Forum

Volume 26
Number 2 *Spring 1996*

Article 3

1996

Wilson v. Arkansas: The "Knock & Announce" Rennaissance

Philip S. Jackson

Wilson v. Arkansas: The "Knock & Announce" Rennaissance

Philip S. Jackson

Although characterized as a concept "woven in the fabric of early American law," and one now firmly "embedded in Anglo-American law," the Supreme Court has only recently, in *Wilson v. Arkansas*,[1] formally recognized that the "knock and announce" requirement remains a viable aspect of the Fourth Amendment's reasonableness requirement.[2] Notwithstanding the Court's characterization, in some quarters the holding in *Wilson* was viewed as a new twist in Fourth Amendment jurisprudence.[3] This stir was undoubtedly caused by the Court's finding that at the time of the Constitution's framing, the common law required that a law enforcement officer announce his presence and authority prior to breaking into a residence when executing a search and seizure warrant. Basing its holding upon that finding, the Court unanimously held that this common law "knock and announce" principle constitutes a part of the Fourth Amendment's reasonableness requirement. Consequently, when weighing the reasonableness of the execution of a search warrant in order to determine the admissibility of any evidence derived therefrom, a judge must consider whether an executing officer has complied with the "knock and announce" rule.

Any surprise that followed this decision was perhaps spawned by the infrequent litigation of this particular issue in state courts, both at the trial and appellate levels. In fact, the most recently reported opinion of the Court of Special Appeals of Maryland which squarely addressed a "knock and announce" issue dates from 1972.[4] Similarly, consequential discussion of the issue by the Court of Appeals of Maryland has not been undertaken since the first term of the Johnson Administration.[5]

Nevertheless, as Justice Thomas observed in the majority opinion of *Wilson*, the "knock and announce" requirement hardly qualifies as a change in Fourth Amendment jurisprudence because it originates from Thirteenth Century common law. Maryland appellate opinions which have addressed the issue confirm the vintage of the "knock and announce" requirement,[6] and its source in the common law.[7]

Ask any criminal practitioner, and he or she would likely confirm that since the advent of the "War on Drugs," law enforcement officers have increasingly executed search and seizure warrants without first warning occupants of their intention to enter. *Wilson* will likely bring renewed scrutiny to this long dormant area of the law. Therefore, this article is devoted to a brief analysis of the *Wilson* case specifically, and "knock and announce" law generally.

The *Wilson* Case

In late 1992, Sharlene Wilson allegedly made a series of sales of various controlled substances to an informant who was acting under the supervision of an Arkansas State Police officer. At least two of these transactions had some nexus to a residence Wilson shared with another individual. Based upon those sales, and apparently precipitated by a threat made by Wilson to the informant, the investigating officers applied for and obtained a search warrant for Wilson's residence.

When executing the warrant, the officers discovered the front door of Wilson's residence open and the outlying screen door unlocked. Opening the screen door, the officers proceeded inside while simultaneously identifying themselves as police officers there to execute a warrant. The officers caught Wilson in the process of flushing marijuana down a toilet. In completing execution of the warrant, the officers also recovered other types of controlled substances along with various accoutrements of the narcotics trade, including a gun and ammunition.

Wilson was indicted and later convicted on a variety of narcotics-related charges. In pretrial suppression motions and on appeal,[8] Wilson argued for the suppression of all evidence procured by the search on the grounds that the police failed to knock and

announce their presence before entering her residence and conducting the search. Wilson averred that the police had thereby violated the reasonableness standard of the Fourth Amendment. The Supreme Court of Arkansas summarily dismissed the contention that the Fourth Amendment requires law enforcement officers to knock and announce their presence before executing a search warrant.[9] Upon granting writ of certiorari, the United States Supreme Court, in noticeable contrast to the Supreme Court of Arkansas, focused on the knock and announce issue. Speaking for a unanimous Court, Justice Thomas wrote that the Fourth Amendment did indeed encompass a requirement that police officers executing a warrant must first knock on the door through which they intend to enter, identify themselves as law enforcement agents, and announce their presence and purpose prior to entrance of the residence. While recognizing that circumstances can obviate the necessity of this prerequisite, the Court reversed the holding of the Arkansas Supreme Court, and remanded the case for further factual findings.

Significantly, the Court recognized that police need not knock and announce at the execution of every search and seizure warrant. As the Court bluntly stated, "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."[10] Rather, the Court merely redressed the erroneous view held by the Arkansas Supreme Court that under the instant facts a "knock and announce" issue was not raised at all.

Despite recognizing the existence of exceptions to its holding, the Court failed to expressly enumerate the exceptions. The Court left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."[11] This lack of guidance creates uncertainty in jurisdictions, such as Maryland, which suffer from a dearth of case law addressing the issue. State courts who will soon be assaying "knock and announce" matters will be forced to adjudicate the issue without much mandatory legal authority. However, a plethora of federal cases exist which have examined the issue. Now that it has been held that the "knock and announce" requirement is an indispensable facet of the Fourth Amendment, the federal case law will likely be viewed as highly persuasive case law.[12]

Knock, Announce & Wait: The Case Law

One reason for the amount of federal law existing on this issue is the statutory "knock and announce" rule at 18 U.S.C. section 3109.[13] This statute has eliminated the need for the federal practitioner to be a diviner of the common law, and has thereby made the "knock and announce" rule more accessible. In pertinent part, the statute allows a federal officer to "break open any outer or inner door or window of a house . . . to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance . . . ."[14] Although the statute is laid out in express terms, it has been construed as merely expressive of the common law rule.[15] Because exceptions exist to the common law rule, the interpretation of the rule has been less than absolute. What immediately stands out upon review of the case law on this issue, is that "knock and announce" is perhaps a bit of a misnomer. The courts have repeatedly held and section 3109 explicitly states that the "knock and announce" rule contemplates not only a rap on the door and an identifying announcement, but also a refusal of entry by an occupant before a law officer can force an entrance. A more cumbersome but more accurate shorthand for the rule would be "knock, announce and wait." As the *Wilson* Court observed: "the constant practice at common law was that the officer may break open the door, if he be sure the offender is therein, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door."[16]

Of the component requirements of the "knock and announce" rule, the "refusal" element has proved most problematic. After all, the mechanics of knocking on a door, identifying oneself as a law officer and then indicating one's purpose at the residence's threshold should be readily assimilable by police. In a long settled Supreme Court case, *Miller v. United States,*[17] the Court held that a police officer violated section 3109 when he knocked upon the door, merely identified himself by saying, "Police," and then forced his way in without indicating his purpose.[18] Since *Miller,* there have been few reported decisions on these aspects of the issue.

However, the refusal prong of the "knock and announce" rule has garnered much appellate attention.

In a nutshell, the law demands that prior to forcing entry, either an explicit refusal of admittance *or* a lapse of time is necessary if no exigency exists.[19] An affirmative refusal is not required. Rather, circumstances may exist which constitute a constructive refusal by which the occupant's refusal may reasonably be inferred.[20]

Discussion of the doctrine of constructive or inferred refusal is pervasive in the cases addressing the refusal aspect of the "knock and announce" rule. This is because an overt refusal is not susceptible to interpretation, whereas silence in the face of a demand for entry can be ambiguous. Under such circumstances, the United States Court of Appeals for the Fifth Circuit has held that the failure of a residence's occupants to respond within a reasonable time is tantamount to a refusal. That court further characterized "a reasonable time" as "ordinarily very brief."[21] In terms of actual time, courts have held intervals of as little as from five to ten seconds between announcement and entry to be sufficient to infer refusal.[22] However, there is simply no hard and fast quantum of time that will, in all cases, be viewed as reasonable.

As a practical matter, the United States Court of Appeals for the District of Columbia Circuit has recognized that the execution of a search warrant targeting drug traffickers presents a more hazardous situation than the execution of a warrant targeting many other crimes. Thus, the D.C. Circuit has held that officers may quite reasonably infer refusal more readily when investigating drug cases than under other circumstances.[23] Similarly, the United States Court of Appeals for the Ninth Circuit upheld the propriety of an entry by police only "moments" after their announcement where the police were executing a warrant at the residence of a drug trafficker reasonably believed to be in possession of weapons.[24]

In sum, there is no bright-line rule of law readily applicable to the analysis of a "refusal" issue. The courts have addressed constructive refusal on a case by case basis, allowing police to infer refusal after the lapse of a much shorter period of time in drug and violent crime situations than that period of time needed to lapse when investigating non-violent crimes and criminals. In doing so, the various federal Circuits have employed the same type of sliding-scale analysis that the Supreme Court has recently utilized in its decisions on the reasonableness aspect of the Fourth Amendment.[25]

The Rule's Exceptions

There exists a temptation for defense attorneys to cite *Wilson* for the proposition that in all warrant execution situations law enforcement agents must first knock, announce and await refusal before entry. However, as discussed above, the Supreme Court in *Wilson* clearly recognized that exceptions to the rule exist. Again, the federal case law should prove instructive for the Maryland practitioner.

In sum, these cases hold that "exigent circumstances" eliminate the duty of an officer to strictly comply with the "knock and announce" rule.[26] In fact, exigent circumstances can excuse the complete failure to knock, announce or await refusal.[27] Simply put, where the crimes or criminals under investigation are not violent and where the evidence is not easily disposed of (i.e., a forgery investigation where the suspect has no record), a court will be hard pressed to find an exigent circumstance that would justify a forced entry without a knock and announcement. On the other end of the spectrum, a warrant related to a serial murder investigation could probably safely proceed without complying with the formalities of the "knock and announce" rule. Of course, most cases fall somewhere in the middle of those two extremes.

Recently, courts have addressed how exigency determinations should be affected when the crime investigated is some type of narcotics offense. As previously mentioned herein, officers investigating narcotics cases are only required to wait a very short time between the announcement of their presence and purpose and the forced entry. The reasons for the short duration are that narcotics evidence can be quickly and easily disposed of, and that narcotics traffickers present a danger to police because they are usually armed. For the same reasons, courts have been prone in narcotics cases to waive the need for a knock and announcement altogether.[28]

However, not every execution of a warrant seeking evidence of narcotics will present an exigent circumstance situation. The Court of Appeals for the Fourth Circuit rejected a bright-line approach in *United States v. Lalor.*[29] The court explained, "[t]here is no support for the proposition that each and every narcotics search carries a risk that evidence will be destroyed."[30] In order to constitute an "exigent circum-

stance" exception, there must exist in each case a particularized, articulated basis for the belief that the evidence will be destroyed. A contrary rule "would totally eviscerate the Fourth Amendment, and could easily be expanded to include searches for any item that is easily disposed of."[31] Ironically, *Henson v. State*,[32] one of the few Maryland cases that has dealt with a "knock and announce" issue, seems to hold to the contrary.[33] However, because the *Wilson* holding is closely aligned with the case by case analysis propounded in *Lalor*, it is likely that the rule of law in *Lalor* and not *Henson* will prevail in the future in Maryland appellate courts.

Lalor also provides an example of where the dangerousness of an individual under investigation can provide the exigent circumstance which allows a police officer to forgo the formality of complying with the "knock and announce" rule. In *Lalor*, the officer had executed a warrant for the seizure of narcotics, but had forced entry without knocking, announcing or awaiting refusal.[34] The officer justified his actions by claiming: (1) that he knew through his training and experience that drugs can be readily destroyed, (2) that the defendant had previously been arrested in possession of a weapon, (3) that the defendant had been surly with the police on another occasion, and (4) that firearms are commonly used by narcotics traffickers.[35] Although the Fourth Circuit rejected the blanket assertion of narcotics' evanescence as an exigent circumstance, the court upheld the forced entry on the grounds of the articulated police safety concerns.[36]

Another example of where concern for officer safety proved to be an exigent circumstance can be found in *United States v. Ramirez*.[37] In *Ramirez*, a forced entry without a knock and announcement was held lawful where the lead officer executing a search warrant late at night was advised through police teletype that the defendant was considered armed and dangerous.[38]

Often it is the combination of the crime under investigation and the criminal targeted by the investigation that provides the articulable basis for a forced entry without satisfying the "knock and announce" requirements. A recent example of this scenario was described in *United States v. Kennedy*.[39] In that case, although the officers conducting a narcotics raid only announced "Police" while simultaneously battering down the door, the court upheld the propriety of the warrant's execution. The articulated reasons for the exigency were that the police knew that the targets were experienced drug dealers who would likely attempt to destroy evidence, that a pre-raid surveillance revealed heavy traffic in and out of the residence indicative of an ongoing narcotics enterprise, that firearms are common in drug transactions, and that several individuals who had been identified as co-conspirators in the group targeted by the warrant had violent pasts.[40] The lesson of *Kennedy* seems to be that, although the court will consider generalities (i.e., that narcotics crimes frequently involve firearms), the police must have case-specific facts of that tendency before they opt to force entry without complying with the "knock and announce" rule.

"No-Knock" Warrants

In what is sure to be one of the more vexing issues tied to the impending onslaught of "knock and announce" law, the matter of "no-knock" warrants will surely garner attention. A "no-knock" warrant is, in essence, a pre-authorized, judicially issued license allowing law enforcement officers to force entry in the execution of a search warrant without satisfaction of the "knock and announce" rule. A "no-knock" warrant is generally effected when the issuing judge includes a clause in the actual search warrant that, in effect, sanctions non-compliance with the "knock and announce" rule. The "no-knock" provision in a warrant is presumably based upon facts articulated in the warrant affidavit.

While some federal circuits have dealt with the evidentiary use of the fruits of a search executed pursuant to a "no-knock" warrant,[41] there is not one reported decision from a Maryland appellate court on the validity, effect, or implications of "no-knock" warrants. This is surprising, given the dramatic increase in the use of "no-knock" warrants over the course of the last few years.

Two potential problems exist regarding "no-knock" warrants. The first is whether judges have the power to issue such warrants. The statutory authorization to issue search warrants contains no indication of whether judges have the power to issue warrants that direct the specific manner of a warrant's execution.[42]

A second potential area of contention is connected with the "Good-Faith Exception" to the Fourth Amendment's exclusionary rule.[43] Suppose that not-

withstanding the failure of an affidavit to articulate exigent circumstances sufficient to allow the officers to avoid the "knock and announce" requirement, a judge nonetheless issues a "no-knock" warrant. Should the "Good Faith Exception" save the fruits of any search carried out under that warrant? The federal circuits that have addressed the issue have responded resoundingly to that question in the affirmative.[44] In all three cases, a state court judge had authorized a "no-knock" warrant based on an affidavit later found deficient. The fruits of those searches were nonetheless saved by applying the "Good Faith Exception" to the police conduct. The underlying rationale for its application is best summed in *United States v. Moland*,[45] where the court held that although the "Good Faith Exception" does not typically apply to the improper execution of a warrant, the exception does apply where the execution was in accordance with the terms of the warrant.[46] While the authority is not definitive, at least in this limited area, the federal courts have lent some guidance.

Conclusion

The logical consequence of the *Wilson* case is that a new and unprecedented amount of "knock and announce" issues will soon be litigated in Maryland. While Maryland precedents do not greatly assist the practitioner in this particular area, the federal courts have already satisfactorily addressed many of the same issues that will no doubt be raised in the near future. The federal courts' interpretation teaches that each case should be weighed on its own merits. In that light, the successful practitioner will be the one who develops facts conducive to the balancing, sliding-scale type of analysis that this issue demands.

About the Author:
Philip Jackson is a 1984 graduate of the University of Baltimore School of Law and currently serves as an Assistant United States Attorney in the Drug and Violent Crime Unit.

ENDNOTES:

[1]___ U.S. ___, 115 S. Ct. 1914 (1995).

[2]The Fourth Amendment to the United States Constitution reads in pertinent 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." U.S. Const. amend. IV.

[3]Witness a Daily Record article heralding that this "case is destined to change Maryland law." Gregory C. Baumann, *Supreme Court Ruling Knocks Police Who Don't Before Search*, Daily Record, May 23, 1995, at 14.

[4]*Neam v. State*, 14 Md. App. 180, 286 A.2d 540 (1972).

[5]*Henson v. State*, 236 Md. 518, 204 A.2d 516 (1964). Note that the Fourth Circuit has held somewhat more recently that the common law "knock and announce" requirement is a concomitant of Maryland law through the Fourth Amendment. *See Simmons v. Montgomery County Police Officers*, 762 F.2d 30, 33 (4th Cir. 1985).

[6]*Henson*, 236 Md. at 522, 204 A.2d at 519.

[7]Indeed, because its source is in common law, the citizens of Maryland have the benefit of the "knock and announce" requirement by virtue of Article 5 of the Maryland Declaration of Rights irrespective of any Fourth Amendment considerations.

[8]878 S.W.2d 755 (1994).

[9]*Id.* at 758.

[10]*Wilson*, 115 S.Ct. at 1918.

[11]*Id.* at 1919.

[12]The persuasive nature of federal authority stems from the fact that Article 26 of the Maryland Declaration of Rights and the Fourth Amendment of the U.S. Constitution have invariably been interpreted as to be *in para materia*, and Maryland has no exclusionary rule independent of that thrust upon it by *Mapp v. Ohio*, 367 U.S. 643 (1961). *See Howell v. State*, 60 Md. App. 463, 467-68, 483 A.2d 780, 782 (1984).

[13]18 U.S.C. § 3109 (1995).

[14]*Id.*

[15]*Simons*, 762 F.2d at 33.

[16]*Wilson*, 115 S.Ct. at 1917.

[17]357 U.S. 301 (1958).

[18]The Supreme Court has addressed the "knock and announcement" rule as a statutory requirement in *Miller* and other cases. *Wilson* is the first case to address the requirement as constitutionally mandated.

[19]*United States v. Bustamente-Gamez*, 488 F.2d 4, 11 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

[20]*United States v. Bonner*, 874 F.2d 822, 824 (D.C. Cir. 1989).

[22]*See United States v. One Parcel of Real Property*, 873 F.2d 7 (1st Cir. 1989), *cert. denied, sub nom. Latraverse v. United States*, 110 S.Ct. 236 (1989); *United States v. Ruminer*, 786 F.2d 381 (10th Cir. 1986); *United States v. Wysong*, 528 F.2d 345 (9th Cir. 1976).

[23]*Bonner*, 874 F.2d at 824.

[24]*United States v. Nabors*, 901 F.2d 1351 (6th Cir. 1990), *cert. denied*, 498 U.S. 871 (1990).

[25]*See Brown v. Texas*, 443 U.S. 47 (1979) (holding that the reasonableness of seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers); *United States v. Sharpe*, 470 U.S. 683 (1985) (holding that the inquiry for evaluating the reasonableness of an investigatory stop involves examining the justification for the stop at its inception, and whether the intrusion was reasonably related in scope to the circumstances which justified the interference in the first place).

[26]*Mensh v. Dyer*, 956 F.2d 36, 40 (4th Cir. 1991).

[27]*See Ker v. California*, 374 U.S. 23 (1963); *United States v. Jackson*, 585 F.2d 653 (4th Cir. 1974).

[28]*See United States v. Couser*, 732 F.2d 1207 (4th Cir. 1984); *United States v. Tolliver*, 665 F.2d 1005, 1008 (11th Cir. 1982), *cert. denied*, 456 U.S. 935 (1982); *United States v. Manning*, 448 F.2d 992 (2nd Cir. 1971), *cert. denied*, 404 U.S. 995 (1971).

[29]996 F.2d 1578 (4th Cir. 1993).

[30]*United States v. Lalor*, 996 F.2d 1578, 1584 (4th Cir. 1993).

[31]*Id.*

[32]236 Md. 158, 202 A.2d 758 (1964).

[33]In allowing the forced entry without announcement, the *Henson* court held that "[p]racticalities and exigencies in searches for narcotics require the element of surprise entry, for if opportunity is given all evidence easily may be destroyed during the time required to give notice, demand admittance and accept communication of denial of entry." *Henson*, 236 Md. at 523, 204 A.2d at 519.

[34]*Lalor*, 996 F.2d at 1580.

[35]*Id.* at 1583-84.

[36]*Id.* at 1584.

[37]770 F.2d 1458 (9th Cir. 1985).

[38]*Id.*

[39]32 F.3d 876 (4th Cir. 1994).

[40]*United States v. Kennedy*, 32 F.3d 876, 882-83 (4th Cir. 1994).

[41]*See United States v. Carter*, 999 F.2d 182 (7th Cir. 1993).

[42]*See* Md. Ann. Code art. 27, § 551 (1995).

[43]In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held that the Fourth Amendment's exclusionary rule does not apply to evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant.

[44]*United States v. Carter*, 999 F.2d 182 (7th Cir. 1993); *United States v. Moore*, 956 F.2d 843 (8th Cir. 1992); *United States v. Moland*, 996 F.2d 259 (10th Cir. 1993).

[45]996 F.2d 259 (10th Cir. 1993).

[46]*Id.*

The University of Baltimore *Law Forum*

The University of Baltimore School of Law

We are currently soliciting articles on legal topics of interest to members of the Maryland Bar for publication in future editions. Please contact or send submissions directly to:

Articles Editor
University of Baltimore *Law Forum*
The John and Frances Angelos Law Center
1420 North Charles Street Room 200
Baltimore, MD 21201
(410) 837-4493