

## What Are They Thinking?

By: Monte E. Hester; July 2006

Our United States Supreme Court, that non-political body that takes an oath swearing to uphold the U.S. Constitution and to follow the principal of Stare Decisis, has ruled in Hudson v. Michigan, 04-1360, that a violation of the “knock and announce” rule as it relates to the service of a search warrant is of no consequence because if the parties would have done it correctly, they still would have discovered the evidence.

The whole idea is not to protect the police when they do not abide by constitutional constraints, the concept is to protect the privacy of individuals in their homes. Let people dress without fear of 16 officers observing them. Let people answer their doors without their houses being broken into, only to be rushed by troopers who give no indication of who they are or why they are there, resulting in a gun battle and innocent lives being taken. The majority who have no regard for their oath are an unfortunate threat to the rule of law. Remember, we are a nation of laws, not men and for good reason.

History will repeat itself if we ignore the lessons from prior experiences. Here’s a little tutorial on the history of “knock and announce” which we published in our newsletter in 1996. Let’s hope the people (judges) in whom we have entrusted our constitution will have the integrity to do what they have sworn to do.

### 1996 Article:

#### Knock Knock -- Who’s there? This Ain’t no Santa Callin’

By: Monte E. Hester

"The poorest man may in his cottage bid defiance to all the forces of the crown." William Pitt as quoted in Miller v. United States, 357 U.S. 301, 307, 78 S.Ct. 1190.

The "knock and announce" rule requires that officers serving a search warrant, before entering, give notice of their office and purpose. This rule has a constitutional foundation under the Fourth Amendment to the United States Constitution and Article I, § 7 of the Washington State Constitution.

The rule has been codified in the Federal Criminal Code at 18 USC § 3109:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Also, RCW 10.31.040 reads:

[t]o make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.

There is a tendency for lawyers and courts to treat this rule as a form over substance issue. Hopefully a brief look at its history will be a good reminder of its valuable purpose.

The rule was rooted in both English and United States common law. From the beginning to present the purposes of the rule remain the same; (1) protect the public from unreasonable invasion of privacy; (2) reduce the risk of violence to police and occupants; (3) prevent needless destruction of private property; and (4) provide an opportunity to correct police who arrive at the wrong address.

Case law has established that if there are exigent circumstances the rule does not need to be strictly or literally applied. These exigent circumstances for the most part deal with situations where it was clear that the occupants were aware of the presence of police and their purpose, such as eye to eye contact.

The strongest surviving purpose for the rule relates to officers and occupant safety. During the Nixon administration, war on drugs legislation was passed that authorized federal "no-knock" warrants. During the debates before passage of the "no-knock" provision Senator George McGovern warned of the reality of "no-knock" ..."think for a moment what will occur when policemen charge into citizen's homes...and the likely response of an average citizen when someone, he probably would not know who, breaks into his home in the middle of the night. No-knock means extreme physical danger to all of us, including the police." 116 Cong. Rec., 25, 201 (1970).

The Senator's warnings were prophetic. The demise of the federal no-knock legislation followed the revelation of many tragic experiences resulting in officer and citizen death.

The current status of "knock and announce" in Washington can best be gleaned by a review of State v. Alldredge, 73 Wn.App. 171, 176-77, 868 P.2d 183 (1994). The court in discussing the purposes of the rule stated as follows:

For the most part, each of these purposes is fulfilled not later than when the door of the premises is open, attended by an occupant, and the police have announced to the occupant their identity and purpose. . . .By then, the occupant knows the persons seeking entry are police, and the rule's purpose of preventing violence has been achieved to whatever extent is possible. . . . Highly personal activities are likely to have been terminated in the interval between the knock and the opening of the door, and entry can be made through the open door without damage to property. Thus, from a constitutional perspective, the rule's waiting period should end not later than when the door of the premises is open, attended by an occupant, and the police have announced their identity and purpose while face to face with the occupant.

The occupants must be given an opportunity to respond to the announcement.

In the case of U.S. v. Becker, 23 F.3rd 1537 (9th Cir. 1994), the Court found that forced entry simultaneous with an announcement of the presence of police was not justified based upon a generalized fear that homeowners might be dangerous, and that a methamphetamine laboratory might be on the premises. In doing so the court stated as follows:

No where is the protective force of the Fourth Amendment more powerful than it is when the sanctity of the home is involved. . . the protection offered by the Fourth Amendment and by our law does not exhaust itself once a warrant is obtained. . . .While it is true that "exigent circumstances can justify immediate entry, incantation of that phrase does not dissolve the shield that our law provides."

What's happening locally? I'll let you decide. Recently, at a hearing, three law enforcement officers testified that out of 550 knock and announce entries the knock was answered only five times before entry.

The remedy for violation of the rule is suppression. The failure to find violation of the rule unfortunately has and will result in terrible personal tragedies. As stated in State v. Alldredge, supra at page 176:

[3] . . . .If the police enter a residence before its occupants perceive their identity and purpose, the occupants will be surprised; they may believe themselves under attack; and they may respond with force. If the police enter after the occupants have perceived their identity and purpose, it is more likely than otherwise that the occupants will peacefully submit to their authority.

The rule must be enforced. To do otherwise will and has resulted in death and serious injuries both to officers and occupants. The enforcement of the rule will deter violations and more importantly save both officers and occupants from serious injury and death.