WARRANT EXECUTION ISSUES

Jack Wade Nowlin
Jessie D. Puckett, Jr., Lecturer in Law
Associate Professor of Law

University of Mississippi School of Law
University, MS 38677
(662) 915-6855

jnowlin@olemiss.edu

I. INTRODUCTION TO WARRANT EXECUTION ISSUES

A. THE OVER-ARCHING CONCERN: THE REASONABLENESS OF POLICE ACTION

B. LIMITED TEXTUAL GUIDANCE

C. COMMON APPROACHES: TOTALITY OF THE CIRCUMSTANCES, BALANCING OF STATE AND INDIVIDUAL INTERESTS, AND ADHERENCE TO HISTORICAL STANDARDS

II. TIMING OF EXECUTION OF SEARCH WARRANTS

A. TIME BETWEEN ISSUANCE OF WARRANT AND EXECUTION

1. Staleness, Search Warrants, Statutes, and Rules of Procedure
2. Execution of Search Warrant in Violation of Jurisdictional Rules: Warrant Potentially Held Void
3. Staleness and Search Warrants: Constitutional Status Uncertain but Unreasonable Delay Likely Implicates Fourth Amendment Reasonableness Concerns
4. Dissipation of Probable Cause in Light of New Information Renders Warrant Invalid
5. Staleness a Lesser Concern with Arrest Warrants

II. TIMING OF EXECUTION OF SEARCH WARRANTS

B. NIGHTTIME EXECUTION OF SEARCH WARRANTS

1. General Prohibition of Nighttime Execution, Absent Special Circumstances, by Statute or Rules of Procedure
2. Constitutional Reasonableness of Nighttime Execution of Search Warrants Uncertain but such Execution Likely Implicates Fourth Amendment Reasonableness Concerns

III. EXECUTION OF ARREST WARRANTS AND ENTRY INTO HOME

A. VALID ARREST WARRANT CARRIES LIMITED AUTHORITY TO ENTER DWELLING WHERE SUSPECT LIVES

B. QUANTUM OF SUSPICION FOR ENTRY INTO HOME TO SERVE ARREST WARRANT: REASONABLE BELIEF SUSPECT IS WITHIN

C. SEARCH WARRANT, NOT MERE ARREST WARRANT, REQUIRED TO ENTER INTO THIRD PARY'S HOME TO ARREST SUSPECT

D. ENTRY INTO THIRD PARTY'S HOME WITH AN ARREST WARRANT AND CHALLENGE BY ARRESTEE

IV.THE "KNOCK & ANNOUNCE" REQUIREMENT

A. "KNOCK AND ANNOUNCE": THE BASIC RULE

1. The "Knock and Announce" Rule's Basis in Common Law, Statutes, and Rules of Procedure
2. The "Knock and Announce" Rule is a Now a Constitutional Requirement
3. "Knock and Announce" and (Non-)Forcible Manner of Entry
   a. *Forcible* Entry Generally Triggers "Knock and Announce" Requirements
   b. Non-Forcible Entry Likely Does *Not* Trigger "Knock and Announce" Requirements

IV. THE “KNOCK & ANNOUNCE” REQUIREMENT

B. EXIGENCY EXCEPTIONS TO THE KNOCK AND ANNOUNCE RULE

1. Traditional “Exigency” Exceptions Retained in *Wilson*
2. Exigency Exception Analysis
   a. Case-by-Case, Totality of the Circumstances Standard, Rejection of Per Se Rules
   b. Mere Reasonable Suspicion of Exigency, Not Probable Cause, Required
3. “No-Knock” Entries Permissible if Reasonable Suspicion of Exigency
4. “No-Knock” Warrants–Issuance Permissible if Reasonable Suspicion of Exigency
5. “No-Knock” Entries and Damage to Property: No Higher Standard Because of Damage to Property

IV. THE “KNOCK & ANNOUNCE” REQUIREMENT

C. FORCIBLE ENTRIES *AFTER* KNOCKING AND ANNOUNCING

1. Same Standard as Exigency Exception
2. *Banks* and Two Points of Emphasis
   a. Reasonableness Based on Circumstances Known to Police
   b. Reasonableness Determined in Light of Exigency Concerns

D. REMEDIES FOR VIOLATIONS OF “KNOCK AND ANNOUNCE” RULES

1. A Civil Rights Suit is a Proper Remedy
2. Exclusionary Rule Generally Inapplicable

V. ENTRY WITH EXTRAORDINARY USE OF FORCE

A. TEST IS LIKELY ONE OF REASONABLENESS IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES

B. LOWER COURT CASES ON EXTRAORDINARY FORCE

1. “Low-Impact” Explosives not Inherently Unreasonable
2. Motorized Battering Rams not Inherently Unreasonable

C. REMEDIES FOR ENTRY WITH EXCESSIVE FORCE LIKELY TRACK “KNOCK AND ANNOUCE” RULE

VI. DAMAGES TO PROPERTY PURSUANT TO EXECUTION OF SEARCH WARRANT

A. *RAMIREZ* AND THE "REASONABLENESS" REQUIREMENT

1. No Higher Standards Due to Damage to Property for *Richards* "No-Knock" Entries
2. Fourth Amendment Does Prohibit Unreasonable Damage to Property

B. REMEDIES FOR DESTRUCTION OF PROPERTY

1. A Civil Rights Suit is a Proper Remedy
2. Destruction of Property Generally Does Not Implicate the Exclusionary Rule

VII. The Fourth Amendment May Not Require an Officer to Present a Property Owner with a Copy of the Warrant Before Conducting a Search

VIII. SEARCHES WHEN NO OCCUPANTS ON THE PREMISES

A. GENERALLY VIEWED AS CONSTITUTIONALLY REASONABLE

B. STATUTES AND RULES GOVERNING SEARCHES WHEN OCCUPANTS ARE ABSENT

C. TYPICAL PRACTICES THAT MAY BE CONSTITUTIONALLY REQUIRED

D. SURREPTITIOUS OR COVERT SEARCHES MAY TO BE HELD TO A HIGHER STANDARD

IX. DETENTION OF PERSONS DURING EXECUTION OF SEARCH WARRANT

A. *SUMMERS* AND THE BASIC RULE: DETENTION OF OCCUPANT DURING COURSE OF EXECUTION OF SEARCH WARRANT IS CONSTITUTIONALLY REASONABLE

B. POTENTIAL QUALIFICATIONS OF THE *SUMMERS* DETENTION RULE

1. The *Summers* Rule Extends to Warrant-Based Searches; Extension to Warrantless Searches Uncertain
2. The *Summers* Rule Extends to “Contraband”; Extension to “Mere” Evidence Uncertain
3. The *Summers* Rules and Residents versus mere Occupants
4. A Recent Application of the *Summers* Rule: *Muehler v. Mena*

X. SEARCH OF PERSONS ON PREMISES SUBJECT TO SEARCH

A. PERSONS DESCRIBED IN WARRANT WITH APPROPRIATE PROBABLE CAUSE AND PARTICULARITY MAY BE SEARCHED

B. PERSONS NOT DESCRIBED IN THE WARRANT: *YBARRA*–INDIVIDUALIZED SUSPICION REQUIRED FOR SEARCH

1. The Basic Rule: Individualized Suspicion Required for Search
2. Presence at Place Subject to Search Not Wholly Irrelevant to Individualized Suspicion
3. Public Accommodation versus Residence

XI. SCOPE OF SEARCH

A. POLICE MAY SEARCH ANYWHERE ON PREMISES WHERE ITEMS DESCRIBED IN THE WARRANT MAY BE

B. SCOPE OF PREMISES SUBJECT TO SEARCH GENERALLY INCLUDES CURTILAGE AND STRUCTURES WITHIN CURTILAGE

C. SCOPE OF PREMISES SUBJECT TO SEARCH GENERALLY INCLUDES VEHICLES WITHIN CURTILAGE IF THERE IS PROBABLE CAUSE VEHICLES CONTAIN ITEMS DESCRIBED IN WARRANT

XI. SCOPE OF SEARCH

D. SEARCH MUST CEASE ONCE ARTICLES DESCRIBED IN SEARCH WARRANT ARE DISCOVERED

E. THE PLAIN VIEW DOCTRINE AND THE EXECUTION OF WARRANTS

1. Requirements of the Plain View Doctrine
2. Interaction with Execution of Warrants

XII. PROTECTIVE SWEEPS

A. DEFINITION AND SCOPE OF A PROTECTIVE SWEEP

B. EXECUTION OF ARREST WARRANTS AND THE PROTECTIVE SWEEP

1. Protective Sweep Issue May Arise During Execution of Warrants
2. Incident to Arrest–No Quantum of Suspicion Required for Searches of Spaces Immediately Adjoining the Place of Arrest From Which an Attack Could be Launched
3. Incident to Arrest–Reasonable Suspicion Required to Sweep Areas Beyond Those Immediately Adjoining the Place of Arrest From Which an Attack Could be Launched

C. PROTECTIVE SWEEPS WHEN THERE IS NO ARREST

Jack Wade Nowlin
Jessie D. Puckett, Jr., Lecturer in Law
Assistant Professor of Law

University of Mississippi School of Law
University, MS 38677
(662) 915-6855

jnowlin@olemiss.edu

WARRANT EXECUTION ISSUES

Jack Wade Nowlin
Jessie D. Puckett, Jr., Lecturer in Law
Associate Professor of Law
University of Mississippi School of Law
University, MS 38677
(662) 915-6855
jnowlin@olemiss.edu

Presentation Handout
Fourth Amendment Training Session
National Judicial College
National Center for Justice and the Rule of Law

WARRANT EXECUTION ISSUES

Jack Wade Nowlin

OUTLINE

I. INTRODUCTION TO WARRANT EXECUTION ISSUES
A THE OVER-ARCHING CONCERN: THE REASONABLENESS OF POLICE ACTION
B. LIMITED TEXTUAL GUIDANCE
C. COMMON APPROACHES: TOTALITY OF THE CIRCUMSTANCES, BALANCING OF STATE AND INDIVIDUAL INTERESTS, AND ADHERENCE TO HISTORICAL STANDARDS
II. TIMING OF EXECUTION OF SEARCH WARRANTS
A. TIME BETWEEN ISSUANCE OF WARRANT AND EXECUTION
    1. Staleness, Search Warrants, Statutes, and Rules of Procedure
    2. Execution of Search Warrant in Violation of Jurisdictional Rules: Warrant Potentially Held Void
    3. Staleness and Search Warrants: Constitutional Status Uncertain but Unreasonable Delay Likely Implicates Fourth Amendment Reasonableness Concerns
    4. Dissipation of Probable Cause in Light of New Information Renders Warrant Invalid
    5. Staleness a Lesser Concern with Arrest Warrants
B NIGHTTIME EXECUTION OF SEARCH WARRANTS
    1. General Prohibition of Nighttime Execution, Absent Special Circumstances, by Statute or Rules of Procedure
    2. Constitutional Reasonableness of Nighttime Execution of Search Warrants Uncertain but such Execution Likely Implicates Fourth Amendment Reasonableness Concerns
III. EXECUTION OF ARREST WARRANTS AND ENTRY INTO THE HOME
A. Valid Arrest Warrant Carries Limited Authority to Enter Dwelling Where Suspect Lives
B. Quantum of Suspicion for Entry into Home to Serve Arrest Warrant: Reasonable Belief Suspect is Within
C. Search Warrant, Not Mere Arrest Warrant, Required to Enter into Third Party's Home to Arrest Suspect
D. Entry into Third Party's Home with an Arrest Warrant and Challenge by Arrestee
IV. THE "KNOCK & ANNOUNCE" REQUIREMENT
A. "KNOCK AND ANNOUNCE": THE BASIC RULE
    1. The "Knock and Announce" Rule's Basis in Common Law, Statutes, and Rules of Procedure
    2. The "Knock and Announce" Rule is a Now a Constitutional Requirement
    3. "Knock and Announce" and (Non-)Forcible Manner of Entry
        (a) *Forcible* Entry Generally Triggers "Knock and Announce" Requirements
        (b) Non-Forcible Entry Likely Does *Not* Trigger "Knock and Announce" Requirements
B. EXIGENCY EXCEPTIONS TO THE KNOCK AND ANNOUNCE RULE
    1. Traditional "Exigency" Exceptions Retained in *Wilson*
    2. Exigency Exception Analysis
        (a) Case-by-Case, Totality of the Circumstances Standard, Rejection of Per Se Rules
        (b) Mere Reasonable Suspicion of Exigency, Not Probable Cause, Required
    3. "No-Knock" Entries Permissible if Reasonable Suspicion of Exigency
    4. "No-Knock" Warrants–Issuance Permissible if Reasonable Suspicion of Exigency
    5. "No-Knock" Entries and Damage to Property: No Higher Standard Because of Damage to Property
C. FORCIBLE ENTRIES *AFTER* KNOCKING AND ANNOUNCING
    1. Same Standard as Exigency Exception

2. *Banks* and Two Points of Emphasis
(a) Reasonableness Based on Circumstances Known to Police
(b) Reasonableness Determined in Light of Exigency Concerns
D. REMEDIES FOR VIOLATIONS OF "KNOCK AND ANNOUNCE" RULES
1. A Civil Rights Suit is a Proper Remedy
2. Exclusionary Rule Generally Inapplicable
V. ENTRY WITH EXTRAORDINARY USE OF FORCE
A. TEST IS LIKELY ONE OF REASONABLENESS IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES
B. LOWER COURT CASES ON EXTRAORDINARY FORCE
1. "Low-Impact" Explosives not Inherently Unreasonable
2. Motorized Battering Rams not Inherently Unreasonable
C. REMEDIES FOR ENTRY WITH EXCESSIVE FORCE LIKELY TRACK "KNOCK AND ANNOUNCE" RULE
VI. DAMAGES TO PROPERTY PURSUANT TO EXECUTION OF SEARCH WARRANT
A. *RAMIREZ* AND THE "REASONABLENESS" REQUIREMENT
1. No Higher Standards Due to Damage to Property for *Richards* "No-Knock" Entries
2. Fourth Amendment Does Prohibit Unreasonable Damage to Property
B. REMEDIES FOR DESTRUCTION OF PROPERTY
1.A Civil Rights Suit is a Proper Remedy
2. Destruction of Property Generally Does Not Implicate the Exclusionary Rule
VII. THE FOURTH AMENDMENT MAY NOT REQUIRE AN OFFICER TO PRESENT A PROPERTY OWNER WITH A COPY OF THE WARRANT BEFORE CONDUCTING A SEARCH
VIII. SEARCHES WHEN NO OCCUPANTS ON THE PREMISES
A. GENERALLY VIEWED AS CONSTITUTIONALLY REASONABLE
B. STATUTES AND RULES GOVERNING SEARCHES WHEN OCCUPANTS ARE ABSENT
C. TYPICAL PRACTICES THAT MAY NOT BE CONSTITUTIONALLY REQUIRED
D. SURREPTITIOUS OR COVERT SEARCHES MAY TO BE HELD TO A HIGHER STANDARD
IX. DETENTION OF PERSONS DURING EXECUTION OF SEARCH WARRANT
A. *SUMMERS* AND THE BASIC RULE: DETENTION OF OCCUPANT DURING COURSE OF EXECUTION OF SEARCH WARRANT IS CONSTITUTIONALLY REASONABLE
B. POTENTIAL QUALIFICATIONS OF THE *SUMMERS* DETENTION RULE
1. The *Summers* Rule Extends to Warrant-Based Searches; Extension to Warrantless Searches Uncertain
2. The *Summers* Rule Extends to "Contraband"; Extension to "Mere" Evidence Uncertain
3. The *Summers* Rules and Residents and Occupants
4. A Recent Application of the *Summers* Rule: *Muehler v. Mena*
X. SEARCH OF PERSONS ON PREMISES SUBJECT TO SEARCH
A. PERSONS DESCRIBED IN WARRANT WITH APPROPRIATE PROBABLE CAUSE AND PARTICULARITY MAY BE SEARCHED
B. PERSONS NOT DESCRIBED IN THE WARRANT: *YBARRA*–INDIVIDUALIZED SUSPICION REQUIRED FOR SEARCH
1. The Basic Rule: Individualized Suspicion Required for Search
2. Presence at Place Subject to Search Not Wholly Irrelevant to Individualized Suspicion
3. Public Accommodation versus Residence
XI. SCOPE OF SEARCH
A. POLICE MAY SEARCH ANYWHERE ON PREMISES WHERE ITEMS DESCRIBED IN THE WARRANT MAY BE

B. SCOPE OF PREMISES SUBJECT TO SEARCH GENERALLY INCLUDES CURTILAGE AND STRUCTURES WITHIN CURTILAGE
C. SCOPE OF PREMISES SUBJECT TO SEARCH GENERALLY INCLUDES VEHICLES WITHIN CURTILAGE IF THERE IS PROBABLE CAUSE VEHICLES CONTAIN ITEMS DESCRIBED IN WARRANT
D. SEARCH MUST CEASE ONCE ARTICLES DESCRIBED IN SEARCH WARRANT ARE DISCOVERED
E. THE PLAIN VIEW DOCTRINE AND THE EXECUTION OF WARRANTS
1. Requirements of the Plain View Doctrine
2. Interaction with Execution of Warrants
XII. PROTECTIVE SWEEPS
A. DEFINITION AND SCOPE OF A PROTECTIVE SWEEP
B. EXECUTION OF WARRANTS AND THE PROTECTIVE SWEEP
1. Protective Sweep Issue May Arise During Execution of Warrants
2. Incident to Arrest–No Quantum of Suspicion Required for Searches of Spaces Immediately Adjoining the Place of Arrest From Which an Attack Could be Launched
3. Incident to Arrest–Reasonable Suspicion Required to Sweep Areas Beyond Those Immediately Adjoining the Place of Arrest From Which an Attack Could be Launched
C. PROTECTIVE SWEEPS WHEN THERE IS NO ARREST

I. INTRODUCTION TO WARRANT EXECUTION ISSUES

A. OVER-ARCHING CONCERN: THE REASONABLENESS OF POLICE ACTION

The text of the Fourth Amendment prohibits "*unreasonable*" searches and seizures, and the Court has assumed that this Fourth Amendment requirement of "reasonableness" also governs the manner in which searches are done and thus the *execution* of search warrants. *See*, *e.g.*, *United States v. Ramirez*, 523 U.S. 65 (1998) (holding that the Fourth Amendment speaks to the manner of *executing* a warrant and that such execution is governed by the general touchstone of reasonableness that generally applies to all Fourth Amendment analysis).

notes:____
____
____
____
____
____

B. LIMITED TEXTUAL GUIDANCE

The Fourth Amendment, however, provides *no* clear textual elaboration upon the meaning of "reasonableness" in various search and seizure contexts, and while the Court has often looked to the second clause of the Fourth Amendment–concerning the issuance of warrants–to define "reasonableness" more generally, that approach has limited utility in the context of the *execution* of warrants.

notes:____
____
____
____
____
____

C. COMMON APPROACHES TOTALITY OF THE CIRCUMSTANCES, BALANCING OF STATE AND INDIVIDUAL INTERESTS, AND ADHERENCE TO HISTORICAL STANDARDS

In the context of execution of warrants, analysis of the decisions of the Supreme Court indicates three broad and overlapping approaches to defining reasonableness: (1) the fluid, case-by-case, "totality" of the circumstances approach; (2) the "balancing" of state and individual interests approach; and (3) the historical or common law approach, drawing on historical understanding of what constitutes reasonable search or seizure activity. These three approaches, often overlapping in their actual application, provide a schema for understanding the decisions of the Supreme Court

in this area.

notes:____

____

____

____

____

II. TIMING OF EXECUTION OF WARRANTS

A. TIME BETWEEN ISSUANCE OF WARRANT AND EXECUTION

1. Staleness, Search Warrants, Statutes, Rules of Procedure

Some jurisdictions, either by statute or rule of procedure, require that a *search warrant* be executed within a designated period of time–such as ten days from the time of the magistrate's signing of the warrant–on the assumption that the evidence supporting the search warrant is subject to "staleness" with the passage of time. *See*, *e.g.*, FED. R. CRIM. PRO. 41(e)(2)(a).

notes:____

____

____

____

____

2. Execution of Search Warrant in Violation of Jurisdictional Rules: Warrant Potentially Held Void and Search May Thus Violate the Fourth Amendment

If a jurisdiction has a rule designating a specified period of time for execution of a search warrant, execution of the warrant *after* that specified period of time has elapsed–and thus execution in violation of the governing statutory or procedural rules–could lead a court to find the warrant *invalid* or *void* as of the time of the search. Such a finding may lead the court to find that the search, unsupported by a valid search warrant, is violative of the Fourth Amendment. *See Sgro v. United States*, 287 U.S. 206 (1932).

notes:____

____

____

____

____

3. Staleness and Search Warrants: Constitutional Status Uncertain but Unreasonable Delay

Likely Implicates Fourth Amendment Reasonableness Concerns

The Supreme Court has *not* ruled on the question of whether there is any "bright-line" constitutional requirement mandating execution of a search warrant within a specific period of time–such as the ten days required by federal rule.

It is quite possible, however, in light of general Fourth Amendment principles, that a sufficiently "unreasonable" delay in executing a search warrant could be viewed by courts as constituting a potential Fourth Amendment violation–even in the absence of adoption of a "bright-line" rule or the violation of a specific statutory or procedural rule potentially voiding the warrant.

In any event, unreasonably delay in executing a search warrant raises concerns, discussed immediately below, concerning the dissipation of probable cause.

notes:____
____
____
____
____

4. Dissipation of Probable Cause in Light of New Information Renders Warrant Invalid

A warrant properly supported by probable cause when *issued* may lack proper support of probable cause when *executed* because of new information that has become known to the police. This may be viewed as a form of "staleness" of the warrant. In such cases, a search pursuant to the warrant, the probable cause of which has dissipated in light of new information, is generally viewed as unconstitutional. *See United States v. Bowling*, 900 F.2d 926 (6th Cir. 1990).

notes:____
____
____
____
____

5. Staleness a Lesser Concern with Arrest Warrants

"Staleness" of arrest warrants is generally viewed as a significantly lesser concern than "staleness" of search warrants. This is because arrests warrants concern issues of probable cause relating to whether a crime has been committed by a particular person, which by their very nature are less subject to "staleness" than those of search warrants, which concern issues of probable cause relating to the *location* of typically mobile items (or persons) subject to seizure due to their connection to crime. *See U.S. v. Watson*, 423 U.S. 411, 449-453 (1976)(Marshall, J., dissenting).

notes:____
____
____
____
____

B. NIGHTTIME EXECUTION OF WARRANTS

1. General Prohibition, Absent Special Circumstances, by Statute or Rules of Procedure

Nighttime execution of warrants are disfavored because they are generally viewed as more intrusive upon privacy interests, as more likely to result in violence, and as more likely to entail damage to property. Federal law limits execution of search warrants to daytime unless "reasonable cause" is shown. *See* FED. R. CRIM PRO 41(e)(2)(b). Approximately half the states have similar restrictions prohibiting nighttime execution of search warrants absent special or exigent circumstances.

"Daylight" is most commonly defined by specific hours in state statutes. The Federal rules define daylight as 6:00 a.m. to 10:00 p.m., local time. *See* FED. R. CRIM. PRO. 41(a)(2)(b).

notes:____
____
____
____
____

2. Constitutional Status Uncertain but Nighttime Execution Likely Implicates Fourth Amendment Reasonableness

The Supreme Court has not determined whether the Fourth Amendment constitutionalizes the predominant state and federal practice on the issue of nighttime execution of warrants–which would prohibit the nighttime execution of a search warrant absent reasonable belief in special circumstances justifying the nighttime execution.

Notably, the Supreme Court in *Gooding* did approve of a nighttime execution of a search warrant without a showing of special cause, though the issue was one of statutory interpretation rather than of constitutional reasonableness under the Fourth Amendment. *See Gooding v. United States*, 416 U.S. 430 (1974)(holding that 21 U.S.C. § 879, a controlled substance statute, requires no special showing for a nighttime execution of warrant).

Some lower courts, however, have suggested that nighttime execution of a search warrant, absent special circumstances, may violate the Fourth Amendment. *See United States v. Gibbons*, 607 F.2d 1320 (10th circ. 1979).

Finally, it is difficult to imagine that the nighttime execution of a warrant is irrelevant to the general "totality of the circumstances" analysis often used to determine constitutional reasonableness under the Fourth Amendment.

notes:____
____
____
____
____

III. EXECUTION OF ARREST WARRANTS AND ENTRY INTO THE HOME

A. Valid Arrest Warrant Carries Limited Authority to Enter Dwelling Where Suspect Lives

In *Payton*, the Supreme Court held that an entry into the dwelling of a suspect in order to place the suspect under arrest requires an *arrest* warrant, but not a *search* warrant. The Court reasoned that an arrest warrant provides sufficient protection for the suspect's privacy interest in his or her dwelling–given the connection between an individual and that individual's dwelling–and thus that a valid arrest warrant carries with it a limited authority to enter the dwelling of the suspect to make an arrest. *See Payton v. New York*, 445 U.S. 573 (1980). While the Court's reasoning is controversial, the rule is clear.

notes:____
____
____
____
____

B. Quantum of Suspicion for Entry into Home to Serve Arrest Warrant: "Reason to Believe" Suspect is Within the Dwelling

In *Payton*, the Supreme Court also held that entry into a suspect's dwelling to make an arrest, in addition to a valid arrest warrant, requires "reason to believe" that the suspect is within the dwelling at the time of the entry. *Payton v. New York*, 445 U.S. 573, 603 (1980)

The Supreme Court has never defined the language of "reason to believe," though some lower courts define it as probable cause. *See United States v. Gorman*, 314 F.3d 1105 (9th cir. 2002). *See also Payton v. New York*, 445 U.S. 573 (1980)(White, J., dissenting).

notes:____
____
____
____
____

C. Search Warrant, Not Mere Arrest Warrant, Required to Enter into Third Party's Home to Arrest Suspect

In *Steagald*, the Supreme Court held that entry to make an arrest into the home of a third party requires a *search* warrant, not a mere arrest warrant. *See Steagald v. United States*, 451 U.S. 204 (1981).

A *search* warrant is required in this class of cases because an *arrest* warrant's derivative privacy protection for the dwelling of the arrestee does not extend beyond the arrestee's home to protect the privacy interests of third parties in their homes. Thus *Payton*'s policy justification–arrest warrants provide derivative privacy protection for the arrestee's home–clearly does not apply when the entry to arrest is made into a third-party's home. In sum, execution of an arrest warrant by entry into the home of a non-arrestee third party, absent a search warrant, consent, or other justification, is a violation of the Fourth Amendment.

notes:____
____
____
____
____

D. Entry into Third Party's Home with an Arrest Warrant and Challenge by Arrestee

Significantly, in the *Steagald* context discussed immediately above, the person raising the Fourth Amendment challenge is not the suspect or arrestee, but rather the third party whose privacy interests in his or her home is violated by a search for the suspect or arrestee in the third party's home unsupported by a search warrant.

Does the arrestee have "standing" to raise the third-party's Fourth Amendment claim? Or to put it another way, if the arrestee is arrested in the dwelling of a third party and the police entry into that third-party dwelling violates the Fourth Amendment under *Steagald* because it is unsupported by a search warrant, has any personal Fourth Amendment right of the suspect/arrestee been violated by the entry?

The answer would seem to be yes in many cases. The Supreme Court in Minnesota v. Olson held that an *overnight guest* may raise a Fourth Amendment privacy claim with respect to a third-party dwelling in which he or she is an overnight guest. *See Minnesota v. Olson*, 495 U.S. 91 (1990). Additionally, the range of opinions in the Supreme Court's decision in Minnesota v. Carter suggests that *many, perhaps most, social guests* may have personal Fourth Amendment privacy rights with respect to the dwellings in which they are guests. *See Minnesota v. Carter*, 525, U.S. 83 (1998)(Kennedy, J., concurring).

Notably, however, the principles of *Payton* can be read to suggest a limitation of the ability of a suspect or arrestee to raise a *Steagald* claim: If one has a privacy interest in a dwelling sufficient to

assert a “reasonable expectation of privacy” for purposes of Fourth Amendment “standing” or “personal rights” analysis, the dwelling, at least in some cases, could be considered the arrestee’s temporary “home,” in which case, under *Payton*, only an arrest warrant, and not a search warrant, is required to satisfy the Fourth Amendment rights of the arrestee. *See Payton v. New York*, 445 U.S. 573 (1980)(Rehnquist, J., dissenting); *Minnesota v. Olson*, 495 U.S. 91 (1990)(assuming rights of an overnight guest are equivalent to those of a “householder” entitled to the protection of the *Payton* arrest warrant requirement but not the broader protection of a search warrant).

IV. THE “KNOCK & ANNOUNCE” REQUIREMENT

A. “KNOCK AND ANNOUNCE:” THE BASIC RULE

1. The “Knock and Announce” Rule’s Basis in Common Law, Statutes, and Rules of Procedure

The common law adhered to the “knock and announce” requirement, which prohibited–absent exigent circumstances–officers from *forcibly* entering a home for warrant execution purposes, unless they first indicated their presence, identified themselves as officers, stated their purpose for requesting admission, requested permission to enter, and were refused. The “knock and announce” requirement is viewed as promoting policies of minimizing privacy intrusion, violence, and property damage. Federal law codifies this long-standing “knock and announce” common law rule. *See* 18 U.S.C. § 3109. Many states have similar codifications by statute or rule of procedure.

notes:____
____
____
____
____

2. The “Knock and Announce” Rule is Now a Constitutional Requirement

The Supreme Court in *Wilson v. Arkansas* held that the common law “knock and announce” rule “forms a part of the reasonableness inquiry under the Fourth Amendment” and therefore that the Fourth Amendment, as a general matter, prohibits violations of the traditional contours of the “knock and announce” rule. *See Wilson v. Arkansas*, 514 U.S. 927 (1995).

notes:____
____
____
____
____

3. “Knock and Announce” and Manner Entry

(a) Forcible Entry is Trigger of the "Knock and Announce" Requirement

It is *forcible* entry, typically interpreted as a traditional "breaking," that triggers the "knock and announce" rule. *See Sabbath v. United States*, 391 U.S. 585 (1968)(interpreting 18 U.S.C. § 3109 and holding that it applies when "officers *break* down a door, force open a chain lock on a partially open door, open a locked door by using a passkey, or, as here, open a closed but unlocked door.")(emphasis added). Notably, *Wilson*, discussed above, involved the opening of a closed but unlocked screen door. *See Wilson v. Arkansas*, 514 U.S. 927 (1995).

While *Sabbath* involves an interpretation of the federal "knock and announce" statute, its holding is likely to be adopted in the context of the constitutional "knock and announce" requirement, given the likely significant overlap between the federal statutory standards and constitutional standards in this area indicated by the Supreme Court.

notes:____
____
____
____
____

(b) Non-Forcible Entry Does Not Trigger the "Knock and Announce" Requirement

Entry through an *open* door is generally viewed as not constituting forcible entry or a "breaking" for purposes of the "knock and announce" rule. Therefore officers are not required to "knock and announce" their presence before entering through an open door in the presence of the defendant. *See United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985). Such entries are not thought to present the same policy concerns in terms of intrusion, violence, and property damage as forcible entries.

The predominant position among lower courts is that entry by a "ruse" or false pretense does not constitute a "forcible" entry or "breaking" and therefore does not trigger any form of "knock and announce" or "notice" requirement. *See United States v. Contreras-Ceballos*, 999 F.2d 432 (9th Cir. 1993). Entry by ruse or false pretense, as with entry through an open door, is not thought to present the same level of policy concerns in terms of intrusion, violence, and property damage as does a forcible entry.

Again, while these cases involve interpretations of the federal "knock and announce" statute, their holdings are likely to be adopted in the context of the constitutional "knock and announce" requirement, given the significant overlap between the two standards.

notes:____
____
____
____
____

B. EXIGENCY EXCEPTIONS TO THE KNOCK AND ANNOUNCE RULE

1. Traditional "Exigency" Exceptions Retained in *Wilson*

As noted above, the traditional "knock and announce" rule–both at common law and as typically codified in federal and state law–contains a general exigency exception.

In *Wilson,* the Supreme Court constitutionalized not only the "knock and announce" rule, but also recognized the constitutional status of the range of exigency exceptions to the rule. The Court stated that it need not attempt a comprehensive catalog of exceptions in *Wilson*, but rather would leave that task to the lower courts. *See Wilson v. Arkansas*, 514 U.S. 927 (1995).

notes:____
____
____
____
____

2. Exigency Exception Analysis

(a) Case-by-Case, Totality of the Circumstances Standard, Rejection of Per Se Rules

In *Richards v. Wisconsin*, the Supreme Court rejected creation of any *per se* exception to the "knock and announce" rule based on the seriousness or nature of the offense in question. Therefore there is no per se "felony," "dangerous felony," or "drug" exception to the "knock and announce" requirement of the Fourth Amendment.

Instead, the Supreme Court, in *Richards*, adopted a traditional case-by-case, "totality of the circumstances," reasonableness analysis to determine whether dispensing with the "knock and announce" requirement is justified in a given set of circumstances. *See Richards v. Wisconsin*, 520 U.S. 385 (1997).

notes:____
____
____
____
____

(b) Mere Reasonable Suspicion of Exigency, Not Probable Cause, Required

In *Richards*, the Supreme Court held that in order to satisfy the requirements of the exigency exception to the "knock and announce"rule, officers must possess "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." The Court thus *rejected* the higher probable cause standard. *See Richards v. Wisconsin*, 520 U.S. 385 (1997).

notes:____

3. "No-Knock" Entries Permissible if Reasonable Suspicion of Exigency

Richards concerned the exigency exception for "no-knock" entries, holding that such entries are constitutionally reasonable if grounded in a reasonable suspicion of a sufficient exigency (such as officer safety or destruction of evidence) in light of all the facts and circumstances. *See Richards v. Wisconsin*, 520 U.S. 385 (1997).

notes:____

4. "No-Knock" Warrants–Issuance Permissible if Reasonable Suspicion of Exigency

The Court in *Richards* also stated that a magistrate judge is acting within the Constitution to authorize a "no-knock" entry by warrant when the warrant applicant provides reasonable grounds to suspect that an exigency exists or will arise. *See Richards v. Wisconsin*, 520 U.S. 385 (1997). Some states provide for issuance of "no-knock" warrants and some do not. *See Richards v. Wisconsin*, 520 U.S. 385, 396, n. 7 (1997).

notes:____

5. "No-Knock" Entries and Damage to Property: No Higher Standard Because of Damage to Property

In *Ramirez*, the Supreme Court held that the Fourth Amendment does not hold officers to a higher

standard when a "no-knock" entry results in the destruction of property. *See United States v. Ramirez*, 523 U.S. 65 (1998)

The Supreme Court stated that, under *Richards*, a no-knock entry is justified if police have a "reasonable suspicion" that knocking and announcing their presence before entering would "be dangerous or futile, or . . . inhibit the effective investigation of the crime." The Court reasoned that whether such a reasonable suspicion exists–or not–in no way depends on whether police must destroy property in order to enter. Therefore the destruction of property is irrelevant to the *Richards* reasonableness inquiry. *See United States v. Ramirez*, 523 U.S. 65 (1998)

notes:____
____
____
____
____

C. FORCIBLE ENTRIES AFTER KNOCKING AND ANNOUNCING

1. Same Standard as Exigency Exception

In *Banks*, the Court held that the standards bearing on whether officers can legitimately enter premises by force *after* "knocking and announcing" are the same as those for dispensing with the "knock and announce" altogether. *United States v. Banks*, 124 S. Ct. 521 (2003).

As established by *Richards*, the analysis is a case-by-case inquiry, in light of the "totality of the circumstances," and seeks to determine whether the officers had "reasonable suspicion" of futility or exigency, after knocking and announcing, sufficient to justify entry.

In *Banks*, the Court held that the officers were justified–in light of the totality of the circumstances known to the officers–in forcibly entering Banks apartment 15-20 seconds after "knocking and announcing" their presence and receiving no response from within the apartment, given the potential for the destruction of evidence of narcotics sought by police. *United States v. Banks*, 124 S. Ct. 521 (2003). The Court did indicate that the "call [was] a close one."

notes:____
____
____
____
____

2. *Banks* and Two Points of Emphasis

(a) Reasonableness Based on Circumstances Known to Police

In *Banks*, the Supreme Court emphasized that the Fourth Amendment reasonableness of the officers' entry was to be determined in light of what was reasonably known to the officers at the time. Therefore, the fact that Banks's delay in responding to the officers "knock and announcement" of their presence may have been due to his having been in the shower is irrelevant to the Fourth Amendment inquiry because officers reasonably did not *know* he was in the shower. *See United States v. Banks*, 124 S. Ct. 521 (2003).

notes:____

(b) Reasonableness Determined in Light of Exigency

In *Banks*, the Supreme Court also emphasized that the Fourth Amendment reasonableness of the officers' entry was to be determined in light of the exigency in question–in *Banks* the destruction of the drugs sought by police–and therefore that the relevant inquiry in terms of the officers' delay between announcement and entry was the time necessary to destroy the evidence of narcotics, not the time it may have taken Banks to answer the door. *See United States v. Banks*, 124 S. Ct. 521 (2003).

notes:____

D. REMEDIES FOR VIOLATIONS OF "KNOCK AND ANNOUNCE" RULES

1. Civil Rights Suit is a Proper Remedy

One obvious remedy for a violation of the Fourth Amendment's "knock and announce" rules is a civil right suit pursuant to 42 U.S.C. § 1983.

notes:____

2. Exclusionary Rule Generally Inapplicable

In *Wilson v. Arkansas*, the case first constitutionalizing the knock-and-announce requirement, the

Court expressly declined to resolve the question of whether "any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation" and thus whether "exclusion [of that evidence] goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation." *See Wilson v. Arkansas*, 514 U.S. 927 (1995), note 4.

The Supreme Court has since articulated a bright-line attenuation rule for violations of the knock-and-announce requirement. In *Hudson v. Michigan*, the Court held that an unlawful entry into the home in violation of *Wilson*'s knock-and-announce requirement does not "taint" evidence discovered in the home after entry during the execution of a valid search warrant. *See Hudson v.Michigan*, 126 S.Ct. 2159 (2006).

The doctrinal vehicle for this rule is an attenuation analysis under the judicially-created exclusionary rule. In *Hudson*, the Court stated that attenuation occurs not only "when the causal connection is remote" but also "when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." Thus, as the Court put it, "the reason for a rule must govern the sanctions for the rule's violation" and thus governs whether the exclusionary rule applies as a matter of attenuation analysis. *See Hudson v. Michigan*, 126 S.Ct. 2159 (2006).

Applying this analysis in the context of knock-and-announce violations, the Court stated that the knock-and-announce rule protects one's interest in "human life and limb," "property," and "those elements of privacy and dignity that can be destroyed by sudden entrance" but "has never protected . . . one's interest in preventing the government from seeing or taking evidence described in a warrant." Thus, "[s]ince the interests that [are] violated in [knock-and-announce violation cases] have nothing to do with the seizure of evidence" discovered during the execution of a valid search warrant after the violation, "the exclusionary rule is inapplicable" in such cases. *See Hudson v. Michigan*, 126 S.Ct. 2159 (2006).

notes:____

V. ENTRY WITH EXTRAORDINARY USE OF FORCE

A. TEST IS LIKELY ONE OF REASONABLENESS IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES

While the Supreme Court has not addressed the question of *entry* to execute a warrant with "extraordinary" force, the inquiry is likely to be a case-by-case analysis of "reasonableness" in light of the totality of the circumstances as informed by predominant police practice, though the Court might be tempted to create a bright(er)-line rule.

One can compare the approach courts might take here with that taken by the Supreme Court in the context of excessive force in the area of Fourth Amendment seizures. *See Graham v. Connor*, 490 U.S. 386 (1989)(holding that Fourth Amendment prohibits use of "excessive" force in seizing suspects and that "excessiveness" is determined by inquiring into "whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting them"); *See Tennessee v. Garner*, 471 U.S. 1 (1985)(holding that Fourth Amendment prohibits effectuating seizure by deadly force unless officer has probable cause to believe that the suspect poses a threat of serious physical harm and such force is necessary to apprehend the suspect).

B. LOWER COURT CASES ON ENTRY WITH EXTRAORDINARY FORCE

1. "Low-Impact" Explosives not Inherently Unreasonable

In *Langford*, a California court upheld, as "reasonable," the use by police of "flash-bang" devises–low-impact explosives designed to cause panic and confusion–in cases where the explosive power of the device is reduced, the target residence is fortified, and the officers have looked into the targeted room. *See Langford v. Superior Court*, 43 Cal.3d 23 (1987)

The test here, following *Richards v. Wisconsin*, is likely one of reasonableness in light of the totality of the circumstances, eschewing bright-line rules and exceptions for felony or drug cases. *See United States v. Jones*, 214 F.3d 836 (7th cir., 2000)(citing *Richards* and stating that "police cannot *automatically* throw bombs into drug dealers' houses, even if the bomb goes by the euphemism "flash-bang device")(emphasis added).

notes:____
____
____
____
____

2. Motorized Battering Rams Not Inherently Unreasonable

In *Stewart*, the Tenth Circuit held the use of a motorized battering ram unreasonable on the totality of the circumstances in a case where (1) *all* the claimed exigencies were known at least 24 hours before the entry; (2) most of the facts used to justify the mode of entry were "generalities that bore no relation to the particular premises being searched or the particular circumstances surrounding the

search"; and (3) of the two specific facts known to the officers, one was stale and an isolated incident, and the other was an improper consideration (the suspect's ethnicity). *United States v. Stewart*, 867 F.2d 581 (10th Cir. 1989). Notably, the court did not find the use of a motorized battering ram to be inherently unreasonable.

notes:____
____
____
____
____

C. REMEDIES FOR ENTRY WITH EXCESSIVE FORCE LIKELY TRACK "KNOCK AND ANNOUNCE" RULE

The issues concerning remedies for entries with excessive force likely track those discussed under the "knock and announce" rule. A civil right suit is certainly a proper remedy. Following *Hudson v. Michigan*, the exclusionary rule is likely inapplicable given that "the interests that [are] violated" in excessive force cases, as with knock-and-announce cases, generally "have nothing to do with the seizure of evidence" discovered during the execution of a valid search warrant after the entry with excessive force. *See Hudson v. Michigan*, 126 S.Ct. 2159 (2006).

VI. DAMAGES TO PROPERTY SEARCHED PURSUANT TO WARRANT

A. RAMIREZ AND THE "REASONABLENESS" REQUIREMENT

1. No Higher Standards Due to Damage to Property for Richards "No-Knock" Entry

As discussed above, in United States v. Ramirez, the Court held that the Fourth Amendment does not hold officers to a higher standard than required by *Richards* when a "no-knock" entry results in the *destruction* of property. *See United States v. Ramirez*, 523 U.S. 65 (1998).

notes:____
____
____
____
____

2. Fourth Amendment Does Prohibit Unreasonable Damage to Property

The Supreme Court in *Ramirez*, however, did hold that excessive or unnecessary property destruction during a search may violate the Fourth Amendment. The Court made clear that analysis for property damage under *Ramirez* proceeds under a general "totality of the circumstances" test and thus only "unreasonable" damage in light of all the facts and circumstances is prohibited by the Fourth

Amendment. *See United States v. Ramirez*, 523 U.S. 65 (1998).

notes:____
____
____
____
____

B. REMEDIES FOR DESTRUCTION OF PROPERTY

1. A Civil Rights Suit is a Proper Remedy

A civil rights suit under 42 U.S.C. § 1983 is obviously a proper remedy for constitutionally "unreasonable" damage to property.

notes:____
____
____
____
____

2. Destruction of Property Generally Does Not Implicate the Exclusionary Rule

The Court in *Ramirez* observed that the while the "destruction of property in the course of a search may violate the Fourth Amendment," the "entry itself [may be] lawful and the fruits of the search . . . not subject to suppression."

Thus it seems clear that in a case of entry into a residence in execution of a search warrant that fails Fourth Amendment scrutiny only in the sense that it involved an *excessive destruction of property*, the remedy is not exclusion of evidence, but a civil rights suit. *See United States v. Ramirez*, 523 U.S. 65 (1998).

This view is reinforced by *Hudson v. Michigan*'s ruling that violations of the knock-and-announce rule generally do not trigger the exclusionary rule because the interests protected by the rule–such as the protection of property–are not served by the suppression of evidence seized during an otherwise lawful search. *See Hudson v. Michigan*, 126 S.Ct. 2159 (2006). The same rule likely applies in the context of unreasonable destruction of property.

notes:____
____
____
____
____

VII. THE FOURTH AMENDMENT MAY NOT REQUIRE AN OFFICER TO PRESENT A PROPERTY OWNER WITH A COPY OF THE WARRANT BEFORE CONDUCTING A SEARCH

In *Groh v. Ramirez*, the Court reserved judgment on the question of "[w]hether it would be unreasonable [for an officer] to refuse a request to furnish [a] warrant at the outset of [a] search when, . . . an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission." *Groh v. Ramirez,* 540 U.S. 551 (2004), note 5.

In *United States v. Grubbs*, an anticipatory warrant case, the Supreme Court observed broadly that "neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposes"a requirement that an "officer must present the property owner with a copy of the warrant before conducting his search." United States v. Grubbs,126 S.Ct. 1494 (2006).

As a policy justification for this view, the Court stated that "[t]he Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the 'deliberate, impartial judgment of a judicial officer . . . between the citizen and the police.' *Wong Sun v. United States*,371 U. S. 471, 481-482 (1963), and by providing, *ex post,* a right to suppress evidence improperly obtained and a cause of action for damages." United States v. Grubbs,126 S.Ct. 1494 (2006).

While there may be some question as to whether *Grubbs'* statement on this question is dicta or holding, the implication of *Grubbs* is clear: The majority of the Justices of the Supreme Court appear to believe that there is no Fourth Amendment requirement that an officer present a property owner with a copy of the warrant before conducting a search.

notes:____
____
____
____
____
____
____
____
____

VIII. SEARCHES WHEN NO OCCUPANT ON THE PREMISES

A. GENERALLY THOUGHT CONSTITUTIONALLY REASONABLE

Courts are in general agreement suggests that a execution of a search warrant is permissible even in

the absence of the occupant of the premises searched, despite concerns about potential property damage, pilferage, and searches beyond the scope of the warrant, which are implicated when the occupant of searched premises is not present during the search.

The general reasoning in favor of such searches is grounded in policies favoring conservation of police resources and the importance of crime control. In particular, an individual should not be able to insulate his or her premises from search by the simple expedient of remaining off those premises. *See United States v. Gervato* 474 F2d 40 (3rd Cir. 1973); *U.S. v. Chubbuck* 32 F.3d 1458, (10th cir.1994).

notes:____
____
____
____
____

B. STATUTES AND RULES GOVERNING SEARCHES WHERE OCCUPANTS ARE ABSENT

Statutes, rules of procedure, or departmental polices typically require officers, when searching premises in the absence of the occupant, to leave on the premises a *copy* of the search warrant and an *inventory* of seized items.

For instance, the federal rules require that "[t]he officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the warrant and receipt at the place where the officer took the property." *See* FED.R.CRIM.PRO. 41(f)(3).

notes:____
____
____
____
____

C. TYPICAL PRACTICES MAY NOT BE CONSTITUTIONALLY REQUIRED

It is unclear whether the predominant practices of leaving a copy of a search warrant and inventory or receipt of seized items on the premises searched when the occupants are absent is required by constitutional reasonableness in ordinary cases in light of potential heightened privacy concerns surrounding "covert" searches, but it is possible that such practices are not required. *See United States v. Simons*, 206 F3d 392 (4th circ. 2000)(holding that the Fourth Amendment does not require officers to leave a copy of the search warrant or an inventory of items seized).

notes:____

____
____
____
____

D. TRULY SURREPTITIOUS OR COVERT SEARCHES MAY BE HELD TO A HIGHER CONSTITUTIONAL STANDARD

It is clear that the Fourth Amendment does not prohibit all forms of covert entries. *See Dalia v. United States*, 441 U.S. 238 (1979). However, covert *searches*, where the very existence of the search is concealed indefinitely from the occupants of the premises, may be held to a higher constitutional standard than ordinary searches.

For instance, in *Freitas*, the Ninth Circuit held that a warrant allowing covert entry to search without any provision for post-search notice to the occupants within a timely fashion was constitutionally defective. *See United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir.1986)(stating that surreptitious searches and seizures strike at the very heart of the interests protected by the Fourth Amendment). *Cf. United States v. Simons*, 206 F3d 392 (4th circ. 2000)(holding that the Fourth Amendment does not require officers to leave a copy of the search warrant or an inventory of items seized).

The likely proper inquiry in these cases is to return to the touchstone of Fourth Amendment analysis: Reasonableness in light of the totality of the circumstances, careful balancing of state and individual interests, and due regard for longstanding legal traditions.

notes:____
____
____
____
____

IX. DETENTION OF PERSONS DURING EXECUTION OF SEARCH WARRANT

A. *SUMMERS* AND THE BASIC RULE: DETENTION OF OCCUPANT DURING COURSE OF EXECUTION OF SEARCH WARRANT IS CONSTITUTIONALLY REASONABLE

In the absence of individualized suspicion, can police *detain* (i.e., seize) persons on a premises subject to search pursuant to a search warrant during the execution of a search warrant ?

In *Summers*, the Supreme Court held that police can detain an occupant of premises while police conduct a search of the home, pursuant to a warrant, for contraband, even in the absence of any

individualized suspicion. *See Michigan v. Summers*, 452 U.S. 692 (1981).

The Court in *Summers* cited a number of policy justifications for this rule, including the necessity of preventing flight of suspects, the importance of minimizing any risk of harm to the officers conducting the search, and the value of the presence of occupants for facilitating the search–such as opening locked containers. The Court concluded that these policy concerns outweighed any minimal burden on the detainee, given that most persons would wish to remain on their premises while police conduct a search in any event.

notes:____
____
____
____
____

B. POTENTIAL QUALIFICATIONS OF THE *SUMMERS* DETENTION RULE

1. The *Summers* Rule Extends to Warrant-Based Searches; Extension to Warrantless Searches Uncertain

Notably, *Summers* leaves open a number of questions relating to the scope of what can be called the *Summers* detention "bright-line" rule.

For example, the Court emphasized the fact that police in *Summers* were executing a search *warrant* and left open the question of the application of the *Summers* rule to warrantless searches. The Court did, however, state in a footnote that its holding did not foreclose the possibility that "comparable police conduct may be justified by exigent circumstances in the absence of a warrant." *Michigan v. Summers*, 452 U.S. 692, 702 n. 17 (1981).

notes:____
____
____
____
____

2. The *Summers* Rule Extends to "Contraband"; Extension to "Mere" Evidence Uncertain

The Court also emphasized that the search at issue in *Summers* was for contraband–broadly defined to include fruits and instrumentalities of crime–but did not include "mere evidence" of criminal wrongdoing. The Court, in a footnote, expressly left open the question of whether the *Summers* detention rule would extend to cases of "mere evidence," stating "[w]e do not decide whether the same result would be justified if the search warrant merely authorized a search for evidence." *Michigan v. Summers*, 452 U.S. 692, 705 n. 20 (1981).

Any distinction in this context between "mere evidence" of crime, on the one hand, and contraband, on the other, likely turns on the fact that "mere evidence" of crime is more likely to be possessed by *innocent* parties than is contraband and therefore search of a residence for mere evidence does not provide as sound of a basis for suspicion of the residents themselves (and thus their detention) as does a search of the residence for contraband. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 581-82 (1978)(Stevens, J., dissenting).

notes:____

3. The *Summers* Rules and Residents and Occupants

Finally, the Court used both the words "occupant" and "resident" in its opinion and a significant part of its policy rationale was linked to the typical desire of residents to stay on their premises while police search, raising the question of whether the scope of its holding actually is intended to extend beyond persons who have a residential connection of some kind to the premises searched. *Michigan v. Summers*, 452 U.S. 692 (1981). Thus, for instance, it is unlikely that the *Summers* detention rule would apply to "occupants" who are clearly fleeting or momentary visitors at another person's place of residence.

notes:____

4. A Recent Application of the *Summers* Rule: *Muehler v. Mena*

In the recent decision of Muehler v. Mena, the U.S. Supreme Court upheld under the *Summers* detention rule a two- to three-hour detention–including the use of handcuffs on the individual detained–pursuant to the execution of a search warrant for weapons and evidence of gang membership. The Court emphasized the *Summers* rule policy of officer safety and the reasonableness of the officers' actions in light of the nature of the search and the totality of the circumstances. *See Muehler v. Mena*, 544 U.S. 93 (2005).

notes:____

____
____

X. SEARCH OF PERSONS ON PREMISES SUBJECT TO SEARCH

A. PERSONS DESCRIBED IN THE SEARCH WARRANT

A search warrant may authorize the search of a *named* individual either as an individual or in conjunction with a search of a particular location. *See United States v. Ward*, 682 F.2d 876 (10th Cir. 1982).

As a general matter, a search warrant purporting to authorize search of *all persons* found in particular location is invalid under basic principles of probable cause and particularity unless properly supported by facts establishing probable cause and justifying the search of all such individuals with reasonable particularity (i.e, the degree of particularity is reasonable in light of what police could be expected to know prior to the search).

notes:____
____
____
____
____

B. PERSONS NOT DESCRIBED IN THE SEARCH WARRANT: INDIVIDUALIZED SUSPICION REQUIRED

1. The Basic Rule: Individualized Suspicion Required

In *Ybarra*, the Supreme Court addressed the question of searches of persons on premises subject to search pursuant to a search warrant. The question before the Court was whether, in the absence of individualized suspicion, police can *frisk* (i.e., search) persons on a premises subject to search pursuant to a search warrant during the execution of the search warrant. *See Ybarra v. Illnois*, 444 U.S. 85 (1979).

The Supreme Court in *Ybarra* held that the *mere presence* of an individual on premises subject to search under a search warrant is not itself a justification for a search of the individual. What is required is the ordinary level of individualized suspicion required for the search conducted (i.e., probable cause for a full search and reasonable suspicion for a "frisk").

notes:____
____
____
____

2. Presence at Place Subject to Search Not Irrelevant to Individualized Suspicion

It should be noted that the "reasonable suspicion" test for a *Terry* frisk, as with the probable cause test for a fuller search, is a broad "totality of the circumstances" test, and, therefore, the fact of an individual's presence on a premises subject to search is a "circumstance" that must go into the "totality" analysis.

notes:

3. Place of Public Accommodation versus Residence

Ybarra involved a place of *public accommodation*, and the Supreme Court has not determined whether its rule requiring individualized suspicion also applies to private homes or residences, where the connection between the individuals on site and the placed to be searched is significantly stronger in most cases. *Cf. Michigan v. Summers*, 452 U.S. 692 (1981)(upholding the *detention* of the occupant of a private residence subject to search pursuant to a search warrant).

notes:

XI. SCOPE OF SEARCH

A. POLICE MAY SEARCH ANYWHERE ON PREMISES WHERE ITEMS DESCRIBED IN THE WARRANT MAY BE

In *Ross*, the Supreme Court observed that "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *United States v. Ross*, 456 U.S. 798 (1982). Thus, as a general matter, police may search anywhere on premises subject to search where items described in the warrant may be.

notes:

B. SCOPE OF PREMISES SUBJECT TO SEARCH GENERALLY INCLUDES CURTILAGE AND STRUCTURES WITHIN CURTILAGE

Courts have generally found the issuance of a warrant to search a residence implies a right to search the curtilage and structures within the curtilage. *See United States v. Gorman*, 104 F.3d 272 (9th Cir.1996).

notes:____

C. SCOPE OF PREMISES SUBJECT TO SEARCH GENERALLY INCLUDES VEHICLES WITHIN CURTILAGE IF VEHICLES COULD CONTAIN ITEMS DESCRIBED IN WARRANT

Courts also generally find that the issuance of a warrant to search a residence implies a right to search vehicles within the curtilage, so long as there is probable cause to believe that the items described in the warrant may be found in the vehicle. *See United States v. Evans*, 92 F.3d 540 (7th Cir. 1996).

notes:____

D. SEARCH MUST CEASE ONCE ARTICLES DESCRIBED IN SEARCH WARRANT ARE DISCOVERED

Once the items described in the warrant are discovered, the search must cease absence additional justifications.

However, in cases where the warrant properly authorizes search for an undisclosed number or amount of things subject to seizure, the search may continue even though significant quantities of the items described have already been found. *See Hagler v. State*, 726 P.2d 1181 (Okl. Crim. App. 1986)(warrant authorizing search for "marijuana in general" allowed police to continue search of premises even after large quantities of marijuana had been found.).

notes:____

____
____
____

E. THE "PLAIN VIEW" DOCTRINE AND THE EXECUTION OF WARRANTS

1. Requirements of the Plain View Doctrine

It is important to understand the interaction of the "plain view" doctrine and the execution of warrants. The "plain view" doctrine allows an officer to seize an item without warrant if (1) it is observed from a lawful vantage point; (2) the officer has a right of access to it; and (3) its nature as fruit, instrumentality, or evidence of crime subject to seizure is immediately apparent. *See*, *e.g.*, *Horton v California*, 496 U.S. 128 (1990).

notes:____
____
____
____
____

2. Interaction with Execution of Warrants

Execution of a search warrant routinely gives offices both a "lawful vantage point" from which to view items and "right of access" to obtain items, undescribed in warrant, whose nature as subject to seizure is "immediately apparent" to the officer. These items are then subject to seizure under the "plain view" doctrine without warrant.

notes:____
____
____
____
____

XII. PROTECTIVE SWEEPS

A. DEFINITION AND SCOPE OF PROTECTIVE SWEEPS

The Supreme Court has *defined* the "protective sweep" as a "quick and limited search of a premises, incident to arrest and conducted to protect the safety of officers or others." *Maryland v. Buie*, 494 U.S. 325 (1990).

The Supreme Court has described the *scope* of a protective sweep as "narrowly confined to a cursory visual inspection of those places which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325

(1990).

notes:____
____
____
____
____

B. EXECUTION OF WARRANTS AND THE PROTECTIVE SWEEP

1. Protective Sweep Issue May Arise During Execution of Warrants

The question of a protective sweep routinely arises when officers execute an arrest warrant in order to place a suspect under arrest or when officers establish probable cause to arrest an individual during execution of a search warrant.

notes:____
____
____
____
____

2. Incident to Arrest–No Quantum of Suspicion Required for Searches of Spaces Immediately Adjoining the Place of Arrest From Which an Attack Could be Launched

In *Buie*, the Court held that "as an incident to arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and others spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Maryland v. Buie*, 494 U.S. 325 (1990).

notes:____
____
____
____
____

3. Incident to Arrest–Reasonable Suspicion Required to Sweep Areas Beyond Those Immediately Adjoining the Place of Arrest From Which an Attack Could be Launched

In *Buie*, the Court also held that "beyond" the "spaces immediately adjoining the place of arrest from which an attack could be immediately launched," officers must have "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believe that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325 (1990).

notes:____
____
____
____
____

C. PROTECTIVE SWEEPS WHEN THERE IS NO ARREST

The Court's rationale is *Buie* is clearly tied to the fact of arrest and therefore it is unlikely its logic would extend beyond the arrest context. However, two points are worth noting here.

First, a "protective sweep" or "cursory visual inspection of places where a person could be hiding" will often be *within the scope of the search warrant* and therefore no additional justification for the sweep is needed.

Second, a "protective sweep," even if it involves a search beyond the scope of the warrant, is likely to be judged by a totality of the circumstances "reasonableness" test and, therefore, if reasonable under the circumstances, it will likely be viewed as constitutional.

notes:____
____
____
____
____