

# THIRD DEGREE COMMUNICATIONS, INC.

## TRAINING BULLETIN: LEGAL UPDATE

### *Knock – Notice and the Exclusionary Rule*

**M. McKay-McCoy, J.D.**

In the recent case of *Hudson v. Michigan* (2006) 547 U.S. \_\_ the United States Supreme Court, in a 5-4 decision, held that the exclusionary rule does not apply to evidence seized with a lawful search warrant but without compliance with the knock-notice rule.

The knock-notice rule has always presented officers with safety issues. The mechanics of knock-notice are easy enough (“Police, open up, we have a warrant!” accompanied by knocking on the door of the residence). The officers must then wait a “reasonable” amount of time until they are admitted or denied entry, the measure of what is “reasonable” being an assessment of how long it would take the occupants to destroy whatever evidence is being sought (*U.S. v. Banks* [2003] 540 U.S. 31).

The purpose of the knock-notice rule is to avoid violent reactions by occupants who mistake the police for intruders and defend the peace and privacy of their homes with force (*Ibid.*) The likelihood that occupants are engaged in illegal activities, are expecting the police, and have some objection to seeing their drugs and guns seized as evidence is not part of the equation. As soon as you give knock-notice, the occupants know where you are. You have no idea where *they* are or what they are doing.

In *Hudson v. Michigan* the police had a search warrant for guns and drugs which was served on a residence. It was not a “no knock” search warrant because Michigan law doesn’t allow “no knock” search warrants. The police knocked and announced their presence, but waited only a few seconds before entering. The prosecution conceded that this was a violation of the knock-notice rule (and it was), so the sole issue before the court was whether the exclusionary rule should apply.

Justice Scalia, writing for the majority, held that the exclusionary rule should *not* apply for two reasons. First, the knock-notice rule only protects the privacy interests of the occupants; there is no corresponding “right” to protect evidence from a lawful search warrant. Second, the exclusionary rule should apply only where its benefits in deterring police misconduct outweigh the substantial social costs of losing the evidence. Applying that balancing test, the majority found that there are other remedies for failure to comply with knock-notice which are less drastic than excluding the evidence altogether. These include civil law suits under 42 U.S.C. 1983 and administrative remedies by the police agencies themselves against individual officers.

Justice Breyer, writing for the dissenters, argued that the failure to comply with knock-notice rendered the entire search unlawful, just as if it had been a warrantless entry and search, so the evidence should have been suppressed. The dissent also worried that without the exclusionary rule, officers would have no incentive at all to comply with the knock-notice rule.

Note that the ruling in this case was close (5-4) and was tied to the fact that the officers had a search warrant. It shouldn't be read as a license to start ignoring the knock-notice rule. If the United States Supreme Court starts seeing a "widespread pattern of violations" as Justice Kennedy states in his concurring opinion, we could have more case law restricting the police, just as we saw with the disapproved practice of going outside Miranda (continuing to question a suspect after he invokes his Miranda rights).

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