# "Knock and Talks"

*"[T]he appearance of four officers at the door may be a disturbing experience."*[1]

The name of the first officer who conducted a "knock and talk" is forever lost. But there is a good chance he worked for the Ancient Rome Police Department in the year 100 B.C. or thereabouts. This seems likely because it was about then that organized police forces were formed. And if those early officers were anything like their modern counterparts, they probably welcomed the opportunity to go over to a suspect's house and talk to him, see if he lies, or is nervous, or has an alibi. Of course, in ancient times they might also search his house (warrants had not yet been invented) or simply feed him to the lions.

In any event, after hundreds of years of knocking and talking, officers in America decided the tactic needed a catchy name—thus, "knock and talk."[2] Ironically, by this time the phrase no longer accurately described the officers' primary objective which had switched from "talking" with the suspect to obtaining his consent to search his house.[3]

**THEY'RE LEGAL, BUT . . .**

There is, of course, nothing inherently unlawful about knock and talks.[4] In fact, they have been described as "a reasonable investigative tool," and a "legitimate method of investigation."[5] Still, many courts are leery of them.[6] Here's why.

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[1] *People* v. *Michael* (1955) 45 Cal.2d 751, 754.

[2] **NOTE**: The phrase made its first appearance in a published case in 1991 in *State* v. *Land* (Or. App. 1991) 806 P.2d 1156, 1157.

[3] See *U.S.* v. *Miller* (M.D.N.C. 1996) 933 F.Supp. 501, 502 [the "knock and talk" procedure "consists of knocking on a suspect's door to engage in conversation regarding narcotic activity occurring in the suspect's residence, and then seeking the resident's consent to search."]; *U.S.* v. *Hardeman* (E.D. Mich. 1999) 36 F.Supp.2d 770, 777 ["Courts have defined this tactic as a noncustodial procedure in which the officer identifies himself and asks to talk to the home occupant and then eventually requests permission to search the residence."]; *U.S.* v. *Weston* (8th Cir. 2006) 443 F.3d 661, 667 ["[T]he officers approached the front door to announce their presence, to inquire about the stolen vehicles, and to request consent to search the remainder of the property. This tactic [is] commonly referred to as a 'knock and talk'"]; *State* v. *Smith* (N.C. 1997) 488 S.E.2d 210, 214 ["'Knock and talk' is a procedure utilized by law enforcement officers to obtain consent to search when they lack probable causes necessary to obtain a search warrant."]. ALSO SEE *Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 227 ["In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."].

[4] See *People* v. *Michael* (1955) 45 Cal.2d 751, 754; *U.S.* v. *Miller* (M.D.N.C. 1996) 933 F.Supp. 501, 505 ["The 'knock and talk' tactic has been upheld as a manner of obtaining consent to search."]; *Scott* v. *State* (Ark. 2002) 67 S.W.3d 567, 575 ["Every federal appellate court which has considered the question . . . has concluded that the 'knock and talk' procedure is not per se violative of the Fourth Amendment."]; *State* v. *Smith* (N.C. 1997) 488 S.E.2d 210, 214 ["That officers approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband does not taint the consent or render the procedure per se violative of the Fourth Amendment."].

First, any warrantless entry into a residence by officers naturally causes heightened concern.[7] Second, because knock and talks occur in private, there are no neutral observers. As the Ninth Circuit pointed out, "[T]he nonpublic setting substantially increase[s] the coercive nature of the encounter."[8] Third, judges may view knock and talks as an attempt to obtain the suspect's consent through the deliberate use of fear and surprise. This seems to be the view of the Washington Supreme Court which observed, "[A]ny knock and talk is inherently coercive to some degree."[9]

Fourth, there is legitimate concern that knock and talks may take on the character of the "dreaded knock on the door" that is associated with police states. Just consider how most people would probably feel when, upon answering the door (maybe late at night) they see several strangers on the porch (knock and talks are never conducted by a lone officer). To make matters worse, many of these people (maybe all) are dressed in plain clothes, sometimes the shabby garb of the drug culture. And, even though they identify themselves and seem friendly, it quickly becomes apparent that they *want* something. Eventually it comes out: they want to come in and search the house.

Commenting on situations such as these, the court in *United States* v. *Morgan* pointed out, "The right of officers to thrust themselves into a home is a grave concern, not only to the individual but to society which chooses to dwell in reasonable security and freedom from surveillance."[10]

Consequently, when the courts are called upon to evaluate the lawfulness of knock and talks they tend to carefully scrutinize everything the officers said and did, looking closely for any evidence of coercion. It is therefore important that officers who conduct knock and talks appreciate the sensitive nature of these undertakings. To put it another way, it is a job best suited for officers who have experience, sound judgment, and a good understanding what they can and cannot do.

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[5] See *U.S.* v. *Jones* (5th Cir. 2001) 239 F.3d 716, 720 ["Federal courts have recognized the 'knock and talk' strategy as a reasonable investigative tool"]; *U.S.* v. *Hardeman* (E.D. Mich. 1999) 36 F.Supp.2d 770, 777 ["['Knock and talks' are] generally upheld as a legitimate method of investigation, designed to obtain a suspect's consent to search."].

[6] See *People* v. *Jenkins* (2004) 119 Cal.App.4th 368, 372 [Trial judge: "[I]t's too intrusive to make that leap that we can go door to door and just say, hi, my name is officer so and so, can I talk to you and would you give me consent to search your house."]; *Scott* v. *State* (Ark. 2002) 67 S.W.3d 567, 582 [conc. opn. of Hannah, J.]["[T]his new breed of search and seizure law, the 'knock and talk,' warrants our departure from federal examples where the citizens of Arkansas face yet another attack limiting the protection of their homes against unlawful intrusion."]; "'Knock and Talk' Consent Searches" (1999) 55 J. Mo. B. 25, 25 ["'Knock and talk' cases send up red flags for many criminal practitioners"].

[7] See *Payton* v. *New York* (1980) 445 U.S. 573, 585 ["[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."]; *U.S.* v. *Washington* (9th Cir. 2004) 387 F.3d 1060, 1067-8 ["[N]owhere if the protective force of the fourth amendment more powerful than within the sanctity of the home."]; *U.S.* v. *Conner* (8th Cir. 1997) 127 F.3d 663, 666 ["[N]o zone of privacy is more clearly defined than a person's home."]; *U.S.* v. *Hardeman* (E.D. Mich. 1999) 36 F.Supp.2d 770, 778 ["Since a person naturally has a greater expectation of privacy in his home than in his vehicle or in public, the Court must closely scrutinize any warrantless search of a residence"].

[8] *Orhorhaghe* v. *I.N.S.* (9th Cir. 1994) 38 F.3d 488, 495. ALSO SEE *U.S.* v. *Washington* (9th Cir. 2004) 387 F.3d 1060, 1068 [the encounter was "shielded from the view of the vast majority of the public"].

[9] *State* v. *Ferrier* (Wash. 1998) 960 P.2d 927, 933.

[10] (6th Cir. 1984) 743 F.2d 1158, 1161.

As we will explain in this article, there are two legal requirements. First, the encounter between the officers and the occupants must have been consensual at all times, at least until the incriminating evidence was discovered. If, on the other hand, a court finds that the officers conducted themselves in a manner that reasonably indicated that the occupants were not free to refuse their requests, the encounter will be deemed an illegal seizure; i.e., a de facto detention or arrest. If this happens, evidence that was deemed the "fruit" of the illegal seizure will be suppressed. Second, the occupant's consent to enter and search must have been voluntary.

Although these are technically separate issues, it all boils down to this: Did the officers make it clear that they were seeking the occupant's voluntary consent and cooperation? If so, the evidence should be admissible. On the other hand, if the officers conducted themselves in a way that reasonably indicated they were asserting their authority—if they behaved in an "officious and authoritative" manner[11]—the consent will be invalid and any seized evidence will be suppressed.

**GETTING SOMEONE TO OPEN THE DOOR**

In most cases, it is easy for officers to get someone to answer the door—they just knock or ring the doorbell. But if no one responds and the officers continue their efforts, they risk converting a subsequent encounter into an illegal seizure. This is because their persistence may reasonably indicate to the occupants that they *must* open the door. If so, the resulting encounter becomes an illegal seizure because, as the United States Supreme Court explained, a seizure occurs when "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[12]

Such persistence might also result in an illegal *search*. This can happen if, when the door was eventually opened, the officers saw contraband or other evidence in plain view. This would constitute an illegal search because the officers would have utilized their authority to obtain "visual access" to the premises. As the court explained in *U.S.* v. *Conner*:

> [A]n unconstitutional search occurs when officers gain visual or physical access to a [residence] after an occupant opens the door not voluntarily, but in response to a demand under color of authority.[13]

Consequently, the following circumstances are critically important.

**COMMANDS**: An occupant who opens a door in response to a command by officers does not do so voluntarily; e.g., "Police. Open the door."[14]

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[11] See *Orhorhaghe* v. *I.N.S.* (9th Cir. 1994) 38 F.3d 488, 495-6.

[12] *Florida* v. *Bostick* (1991) 501 U.S. 429, 436. ALSO SEE *Kaupp* v. *Texas* (2003) 538 U.S. 626, 629.

[13] (8th Cir. 1997) 127 F.3d 663, 666. ALSO SEE *U.S.* v. *Tobin* (11th Cir. 1991) 923 F.2d 1506, 1512 ["If the circumstances indicate that [the suspect] opened the door in response to a show of official authority, then [he] cannot be deemed to have consented to the agent's obtaining the olfactory evidence indicating the presence of marijuana"].

[14] See *U.S.* v. *Winsor* (9th Cir. 1988) 846 F.2d 1569, 1573, fn. 3 ["[T]he police knocked on the door, identified themselves as police, and demanded that the occupants open the door, and that Dennis Winsor opened the door on command. On these facts, there can be no consent as a matter of law."]; *U.S.* v. *Conner* (8th Cir. 1997) 127 F.3d 663, 665, 666, fn.2 ["Only after two of the officers identified themselves as police and demanded him to 'open up' did he concede to that demand."]; *U.S.* v. *Jerez* (7th Cir. 1997) 108 F.3d 684, 687; *U.S.* v. *Edmondson* (11th Cir. 1986) 791 F.2d 1512, 1515 ["FBI. Open up."].

**POUNDING, REPEATED KNOCKING**: Loud, continuous, or repeated knocking on a door may reasonably indicate to the occupants that the officers are demanding that someone open up. For example, in rejecting an argument that a suspect voluntarily opened the door to his motel room, the Seventh Circuit noted, "[The officers] knocked on the door longer and more vigorously than would an ordinary member of the public. The knocking was loud enough to awaken a guest in a nearby room and to cause another to open her door."[15]

A similar incident occurred in *U.S.* v. *Jerez* where sheriff's deputies went to a motel room in Wisconsin to do a knock and talk. According to the court, the deputies "knocked on the door for several minutes" then, after getting no response, they "took turns knocking." Eventually, one of the occupants opened the door, but the court ruled that, by then, the encounter could no longer be characterized as a consensual knock and talk. Said the court, "The deputies' persistence, in the face of the refusal to admit, transformed what began as an attempt to engage in a consensual encounter into an investigatory stop."[16]

**TIME OF ARRIVAL**: A knock and talk that occurs late at night may be frightening—maybe terrifying—especially if the occupants were asleep. As the U.S. Court of Appeals observed, the law recognizes the "special vulnerability" of people "awakened in the night by a police intrusion at their dwelling place." Thus, said the court, late night knock and talks must be examined "with the greatest of caution."[17]

For example, in one case a knock and talk was deemed a seizure because, among other things, the officers arrived at about 11 P.M., at a time when "the room was quiet; no sounds were heard coming from the room."[18]

## OBTAINING CONSENT

If an occupant voluntarily opens the door, officers will normally seek consent to enter. If they succeed, they will engage in some preliminary conversation, then request consent to search. As noted earlier, consent to enter and search is invalid if it was involuntary. Thus, any evidence discovered on the premises will be suppressed if the officers obtained consent by utilizing scare tactics or other forms of intimidation.[19] As the court observed in

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[15] *U.S.* v. *Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2. ALSO SEE *Bailey* v. *Newland* (9th Cir. 2001) 263 F.3d 1022, 1030 [the officer knocked "for one and a half to two minutes, while identifying himself as a police officer. Moreover, [the officer] stated that it was his intention to stay at the door until someone answered it."]. COMPARE *U.S.* v. *Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109 ["[The officer] knock on the door for only a short period spanning seconds. . . . Because there was no police demand to open the door, and [the officer] was no unreasonably persistent in her attempt to obtain access to Cormier's motel room, there is no evidence to indicate that the encounter was anything other than consensual."].

[16] (7th Cir. 1997) 108 F.3d 684, 692.

[17] *U.S.* v. *Jerez* (7th Cir. 1997) 108 F.3d 684, 690. ALSO SEE *U.S.* v. *Ravich* (2nd Cir. 1970) 421 F.2d 1196, 1201 [court notes the "peculiar abrasiveness" of intrusions by officers at night].

[18] *U.S.* v. *Jerez* (7th Cir. 1997) 108 F.3d 684, 687. COMPARE *Bailey* v. *Newland* (9th Cir. 2001) 263 F.3d 1022, 1026 [although the knock and talk occurred at 2:15 A.M., "the lights were on in the room"]; *U.S.* v. *Ray* (D. Kansas 2002) 199 F.Supp.2d 1104, 1113 ["Admittedly, [the knock and talk] occurred during the early morning hours, but the officers determined that several persons were inside and awake before knocking."].

[19] See *People* v. *Reyes* (2000) 83 Cal.App.4th 7, 13 [defendant consented to search after he was suddenly confronted by three officers, "two attired in full 'ninja-style' raid gear, including black masks and bulletproof vests].

*U.S.* v. *Miller*, "Ultimately, the knock and talk procedure retains its acceptable legal status only if the occupant gives *voluntary* consent to search his or her residence."[20]

What circumstances are relevant in making this determination? The following are especially important.

**NUMBER OF OFFICERS**: The presence of several officers outside the door would be far more intimidating than, say, two.[21]

**SURROUNDING THE SUSPECT**: It is inherently coercive for officers to encircle or "stand around" the suspect while seeking consent.[22]

**OFFICERS HIDING**: If officer safety is a concern, backup officers will sometimes stay out of sight while others go to the door. But if the consenting person happens to see them, the coercion level will be substantially increased.[23]

**OFFICERS' ATTITUDE**: The officers' attitude toward the consenting person is crucial, as it clearly communicates to him whether they are seeking his assistance or whether they think they have a legal right to insist upon it. As the court observed in *People* v. *Franklin*, "It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not."[24]

For example, in *Orhorhaghe* v. *I.N.S.* the court took special note of an officers' "officious" manner in ruling that a knock and talk had degenerated into an illegal seizure.[25] Similarly, in *People* v. *Boyer*, the court pointed out that "[t]he manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' . . . suggested they did not intend to take 'no' for an answer."[26]

**OCCUPANT'S ATTITUDE**: The consenting person's attitude toward the officers and their requests may indicate whether he was or was not cooperating voluntarily; e.g., "Why are you bothering me?"[27] "Do you have a warrant?"[28]

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[20] (M.D. N.C. 1996) 933 F.Supp. 501, 505. Emphasis added. ALSO SEE *Florida* v. *Bostick* (1991) 501 U.S. 429, 438 ["'Consent' that is the product of official intimidation or harassment is not consent at all."]; *Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 228 ["[Consent must] not be coerced, by explicit or implicit means, by implied threat or covert force."]; *Bumper* v. *North Carolina* (1968) 391 U.S. 543, 550 ["Where there is coercion there cannot be consent."].

[21] See *People* v. *Michael* (1955) 45 Cal.2d 751, 754 ["[T]he appearance of four officers at the door may be a disturbing experience."]; *U.S.* v. *Washington* (9th Cir. 2004) 387 F.3d 1060, 1068 ["Washington was confronted by six officers"]; *Orhorhaghe* v. *I.N.S.* (9th Cir. 1994) 38 F.3d 488, 494 [four officers]; *U.S.* v. *Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2 ["Four police officers were positioned at or near the door."]; *State* v. *Ferrier* (Wash. 1998) 960 P.2d 927, 928 [four officers]. BUT ALSO SEE *People* v. *Munoz* (1972) 24 Cal.App.3d 900, 905 ["The fact there were four officers does not in itself carry an implied assertion of authority"]; *U.S.* v. *Cruz* (D. Utah 1993) 838 F.Supp. 535, 543 ["Only two officers were present when consent was given."].

[22] See *U.S.* v. *Washington* (9th Cir. 2004) 387 F.3d 1060, 1068; *Orhorhaghe* v. *I.N.S.* (9th Cir. 1994) 38 F.3d 488, 494, fn. 8.

[23] See *Orhorhaghe* v. *I.N.S.* (9th Cir. 1994) 38 F.3d 488, 494 [When [the suspect] left his apartment, he reasonably expected to meet a single bank investigator, Muth. However, in the hallway he met four people, one of whom identified himself as an INS agent."].

[24] (1987) 192 Cal.App.3d 935, 941. ALSO SEE *U.S.* v. *Tobin* (11th Cir. 1991) 923 F.2d 1506, 1512 ["[The officer] phrased his words in the form of a request."].

[25] (9th Cir. 1994) 38 F.3d 488, 495-6.

[26] (1989) 48 Cal.3d 247, 268.

[27] See *U.S.* v. *Miller* (M.D. N.C. 1996) 933 F.Supp. 501, 503.

[28] See *Orhorhaghe* v. *I.N.S.* (9th Cir. 1994) 38 F.3d 488, 496 ["[B]y inquiring about a warrant, Orhorhaghe expressed his preference to bring the encounter with the agents to a close."].

**COMMANDS, REFUSING REQUESTS**: A knock and talk quickly loses its consensual character if officers assert their authority by requiring an occupant to do something or by refusing a reasonable request; e.g., "Come back in ten minutes."[29]

**CLAIMING A RIGHT TO SEARCH**: Consent is involuntary if it was given after officers said or implied they had a warrant or some other legal right to conduct an immediate search.[30] Consent may also be involuntary if the officers claimed they could automatically obtain a warrant if consent was refused; e.g., "Okay, if you won't consent, then we'll get a warrant."[31] On the other hand, consent is not involuntary if the officers merely said they would "apply for," "seek," or "try to get" a warrant if consent was refused.[32]

**THREATS**: Consent to enter or search will not be deemed voluntary if it resulted from an officer's threat. This occurred in U.S. v. Washington when an officer kept reminding the consenting person that he was arrestable for failing to register as a felon. This tactic, said the court, was obviously intended "to convey to Washington that he could be arrested if he did not cooperate."[33]

**ACCUSATIONS**: Accusing the suspect of having committed the crime under investigation is apt to result in a seizure.[34] Similarly, consent will likely be deemed involuntary if the officer had told the consenting person that he would interpret a refusal to consent as an admission of guilt.[35]

**"FREE TO DECLINE"**: Telling an occupant that he is free to decline the officers' request is a circumstance that tends to indicate the knock and talk remained consensual.[36]

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[29] See *U.S.* v. *Washington* (9th Cir. 2004) 387 F.3d 1060, 1069 ["[The officers] refused to heed Washington's request to shut the door."]; *Keenom* v. *State* (Ark. 2002) 80 S.W.3d 743, 747 ["[Keenom's] request that the officers leave and come back in ten minutes was refused. . . . This persistence by the officers would strongly convey to a reasonable person the officers' intention not to desist."].

[30] See *Bumper* v. *North Carolina* (1968) 391 U.S. 543, 550 ["When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion-albeit colorably lawful coercion."].
; *Lo-Ji Sales, Inc.* v. *New York* (1979) 442 U.S. 319, 329 [consenting person was told that officers possessed a warrant]; *People* v. *Challoner* (1982) 136 Cal.App.3d 779, 781; *People* v. *Baker* (1986) 187 Cal.App.3d 562, 564; *People* v. *Byrd* (1974) 38 Cal.App.3d 941, 944.

[31] See *People* v. *Rupar* (1966) 244 Cal.App.2d 292, 298; *People* v. *McClure* (1974) 39 Cal.App.3d 64, 69; *People* v. *Ruster* (1976) 16 Cal.3d 690, 701 [disapproved on other grounds in *People* v. *Jenkins* (1980) 28 Cal.3d 494, 503, fn.9].

[32] See *People* v. *Gurtenstein* (1977) 69 Cal.App.3d 441; *People* v. *Ward* (1972) 27 Cal.App.3d 218; *People* v. *Goldberg* (1984) 161 Cal.App.3d 170, 188.

[33] (9th Cir. 2004) 387 F.3d 1060, 1069 ["[The officer] thrice repeated that Washington faced an arrestable charge of failing to register with the RPD."].

[34] See: *Wilson* v. *Superior Court* (1983) 34 Cal.3d 777 ["Common sense suggests to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer."]; *People* v. *Lopez* (1989) 212 Cal.App.3d 289, 292 ["[T]he degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention."].

[35] See *Crofoot* v. *Superior Court* (1981) 121 Cal.App.3d 717.

[36] See *U.S.* v. *Mendenhall* (1980) 446 U.S. 544, 559 ["[T]he fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive."]; *People* v. *Profit* (1986) 183 Cal.App.3d 849 ["[T]he delivery of such a warning weighs heavily in favor of

**CONSENT FORMS**: It is, of course, relevant that the consenting person signed a form in which he acknowledged his consent was voluntary.[37] But such an acknowledgment will have little or no weight if it appeared it was coerced or if there were circumstances that cast doubt on the voluntariness of the consent.[38]

**RECORDING KNOCK AND TALKS**: In many cases, the occupants will dispute the officers' version of what was said and done. For this reason, and because so much depends on the officers' choice of words (and even their tone of voice), it is a good idea to secretly record knock and talks.

## WHEN THE UNEXPECTED HAPPENS

Knock and talks do not always go according to the script, which means that officers must sometimes improvise. Although any number of things might happen, the following seem to be the most common.

**FLIGHT**: In some cases, the officers' arrival at the front door will prompt the occupants to run out the back. The question arises: Can officers detain them? Like any other situation, it depends on whether the officers have reasonable suspicion. And, while flight alone will not justify a detention, flight plus virtually any additional suspicious circumstance ought to suffice. Thus, it is possible that flight combined with the information that prompted the knock and talk would justify a detention.[39]

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finding voluntariness and consent."]; *People* v. *Daugherty* (1996) 50 Cal.App.4th 275, 280; *Wilson* v. *Superior Court* (1983) 34 Cal.3d 777, 791; *People* v. *James* (1977) 19 Cal.3d 99, 118; *People* v. *Gravatt* (1971) 22 Cal.App.3d 133, 137; *People* v. *Ramirez* (1997) 59 Cal.App.4th 1548, 1559; *People* v. *Strawder* (1973) 34 Cal.App.3d 370, 377. **ALSO SEE** *United States* v. *Washington* (1977) 431 U.S. 181, 188 ["Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."]. COMPARE *Orhorhaghe* v. *I.N.S.* (9th Cir. 1994) 38 F.3d 488, 496 ["[A]t no point during the encounter did any of the four agents advise him that he was free to decline their instructions and to terminate the encounter. We have previously held that officers' failure to provide such a warning weighs in favor of finding a seizure."]. **NOTE**: The Washington Supreme Court has ruled that officers who conduct knock and talks must provide such a warning per Washington's constitution. *State* v. *Ferrier* (1998) 960 P.2d 927, 928 ["[B]ecause Ferrier had heightened privacy rights in her home, she should have been informed that she need not consent to the search."].

[37] See *North Carolina* v. *Butler* (1979) 441 U.S. 369, 373; *People* v. *Avalos* (1996) 47 Cal.App.4th 1569, 1578. **NOTE re refusal to sign**: A refusal to sign is not likely to affect the court's determination of voluntariness if the prosecution has otherwise established the consent was voluntary. *North Carolina* v. *Butler* (1979) 441 U.S. 369, 373; *People* v. *Ramirez* (1997) 59 Cal.App.4th 1548, 1558; *U.S.* v. *Castillo* (9th Cir. 1989) 866 F.2d 1071, 1082.

[38] See *Haley* v. *Ohio* (1947) 332 U.S. 596, 601 ["Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."]; *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 579 ["[A]n assertion that no promises are being made may be contradicted by subsequent conversation."].

[39] See *U.S.* v. *Lane* (6th Cir. 1990) 909 F.2d 895 [flight by several occupants of an apartment house known for drug trafficking, plus an anonymous tip of drug dealing]. ALSO SEE *People* v. *Souza* (1994) 9 Cal.4th 224, 236, 239 ["Time, locality, lighting conditions, and an area's reputation for criminal activity all give meaning to a particular act of flight, and may or may not suggest to a trained officer that the fleeing person is involved in criminal activity."]; *U.S.* v. *Lane* (6th Cir. 1990) 909 F.2d 895, 899 ["While the informant's tip and the officers' knowledge about the apartment building are important background facts, the suspects' [flight] is essential to complete the whole picture."].

**EVIDENCE IN PLAIN VIEW**: As the suspect opens the door, officers will sometimes see drugs or other evidence of a crime. If so, they may usually enter the premises and seize it so long as it appears that at least one of the occupants was aware that the evidence had been spotted. This is because it is usually reasonable for the officers to believe the evidence would be destroyed or removed if they did not immediately secure it.[40]

For example, in *U.S.* v. *Scroger*[41] officers in Kansas City, Kansas, having received reports of "drug activity" at a certain house, went there at about 11 A.M. to conduct a knock and talk. As they were walking up to the front door, they heard someone say "go out the back," followed by the sounds of "someone running." While two officers went around to the back, two others went to the front door and knocked. Scroger answered the door, and it was immediately apparent that he had been cooking up methamphetamine as he was holding a hot plate; his fingertips were stained with a "rust-colored residue"; and the officers saw glassware and detected a "strong odor," both of which they associated with methamphetamine manufacturing. Just then, Scroger tried to slam the door shut, but the officers pushed their way in and took him into custody. After securing the residence, they obtained a warrant to search it. In the course of the search, they found "a large number of items commonly associated with the clandestine manufacturing of methamphetamine."

Scroger argued that the evidence should have been suppressed because he had not consented to the officers' entry. It didn't matter, said the court, because they were facing an exigent circumstance. As the court pointed out, "[I]t is highly likely that the evidence would have been destroyed or moved if the officers had waited to apprehend Scroger until they had obtained a warrant."

Note that if officers decide to seek a warrant to search further, they may secure the residence pending issuance of the warrant.[42]

**FABRICATED EXIGENCIES**: Even though there was a real threat that evidence would be destroyed, a warrantless entry will not be upheld under an exigent circumstances theory if the exigency was fabricated; i.e., a so-called "do-it-yourself" exigency. As a general rule, a fabricated exigency results if the following three circumstances existed:

(1) **PROBABLE CAUSE**: When the officers arrived, they had probable cause to believe that destructible evidence was on the premises. Note that one court has suggested that the "knock and talk" procedure is inappropriate where officers have probable cause for a warrant.[43]

(2) **DELIBERATE ALERT**: The officers deliberately took action outside the premises that was both, (a) unnecessary, and (b) would have alerted the occupants that they had arrived.

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[40] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 332 ["[T]he police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant."].

[41] (10th Cir. 1997) 98 F.3d 1256.

[42] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 332; *In re Elizabeth G.* (2001) 88 Cal.App.4th 496, 504-5.

[43] *U.S.* v. *Coles* (3d Cir. 2006) 437 F.3d 361, 370 ["[T]his case does not present the situation where the police reasonably attempted to utilize the "knock and talk" investigative tactic. Having knowledge of criminal activity inside [Coles' room] the police had no legitimate reason to utilize the "knock and talk" procedure. . . . At the very least, the actions of the officers at this time demonstrated that the police had no intention of merely investigating matters further or perhaps obtaining consent to search."].

(3) **NO MOTIVE**: The occupants would have had no motive to destroy the evidence if the officers had not alerted them.[44]

**WHEN TO SEEK A WARRANT**: If officers discover evidence, they may keep searching unless the suspect withdraws consent. If that happens, they should secure the premises until a warrant is issued. The fact that evidence was found may be included in the affidavit so long as it was discovered lawfully. POV

[44] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 332; *Vale* v. *Louisiana* (1970) 399 U.S. 30, 34; *Richards* v. *Wisconsin* (1997) 520 U.S. 385, 391; *People* v. *Bennett* (1998) 17 Cal.4th 373, 384; *U.S.* v. *Coles* (3d Cir. 2006) 437 F.3d 361, 371 ["[T]he record reveals no urgency or need for the officers to take immediate action, prior to the officers' decision to knock on Coles's hotel room door and demand entry."]; *Ewolski* v. *City of Brunswick* (6th Cir. 2002) 287 F.3d 492, 504 [created-exigency may result "if the police controlled the timing of the encounter giving rise to the search."].