"Knock and Talks"

Consensual encounters may also take place at the doorway of a home.[1]

While most consensual encounters or "contacts" occur on the streets as a spontaneous response to a situation or circumstance, they may also take place at the suspect's home. Commonly known as "knock and talks," these types of contacts are usually employed when officers have reason to believe that a resident is involved in some sort of criminal activity but they lack any other effective means of confirming or dispelling their suspicion. So they visit him at home for the purpose of asking some questions and oftentimes seeking consent to search the premises.[2] As the Supreme Court observed, "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."[3]

The main thing to remember about knock and talks is that, like all contacts, they must be voluntary, meaning that officers can neither expressly nor impliedly assert their authority. As the Fifth Circuit put it:

> The purpose of a "knock and talk" is not to create a show of force, nor to make demands on occupants, nor to raid a residence. Instead, the purpose of a "knock and talk" approach is to make investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupants' consent to search.[4]

Although knock and talks have been described as a "reasonable investigative tool"[5] and a measure that is "firmly rooted" in Fourth Amendment jurisprudence,[6] the courts are somewhat leery of them because they take place inside a residence—the most private of all structures protected by the Fourth Amendment. "[W]hen it comes to the Fourth Amendment," said the Supreme Court, "the home is first among equals."[7]

Just as important, the courts are concerned that knock and talks may take on the character of the "dreaded knock on the door" that is prevalent in totaliltarian and police states. Addressing this subject, the Sixth Circuit observed that 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."[8]

Thus, officers who conduct knock and talks must not only understand the rules that cover all types of contacts (which we covered in the lead article), they must also be aware of the additional restrictions that are unique to these sensitive operations.

Making Contact

The manner in which officers make contact with the suspect at the front door is often crucial as it may reasonably be interpreted to mean that he was being detained; i.e., that he "was not at liberty to ignore the police presence and go about his business."[9] Accordingly, the courts are especially alert to the following:

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[1] *People v. Rivera* (2007) 41 Cal.4th 304, 309.
[2] See *Kentucky v. King* (2011) __ U.S. __ [131 S.Ct. 1849, 1860].
[3] *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227.
[4] *U.S. v. Gomez-Moreno* (5th Cir. 2007) 479 F.3d 350, 355.
[5] *U.S. v. Jones* (5th Cir. 2001) 239 F.3d 716, 720. ALSO SEE *People v. Michael* (1955) 45 Cal.2d 751, 754 ["it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes"]; *U.S. v. Lucas* (6th Cir. 2011) 640 F.3d 168, 174 [knock and talks are a "legitimate investigative technique"]; *U.S. v. Roberts* (5th Cir. 2010) 612 F.3d 306, 310 ["knock and talk" is "an accepted investigatory tactic"].
[6] *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146. ALSO SEE *People v. Jenkins* (2004) 119 Cal.App.4th 368, 372 ["However offensive the [trial] court may have found the 'knock and talk' procedure, we can find no basis in law to support its conclusion that the practice is unconstitutional."].
[7] *Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 1414].
[8] *U.S. v. Morgan* (6th Cir. 1984) 743 F.2d 1158, 1161.
[9] See *Florida v. Bostick* (1991) 501 U.S. 429, 436.

POLITE VS. PERSISTENT KNOCKING: When officers knock on the door or ring the doorbell they must do so in a manner consistent with an ordinary visitor—not as someone who is asserting a legal right to speak with the occupants. This means that continuous or repeated knocking may be deemed a command to open the door which will render the resulting encounter a seizure.[10] Thus, in *U.S. v. Reeves* (admittedly an extreme example) the court ruled that a "reasonable person faced with several police officers consistently knocking and yelling at their door for twenty minutes in the early morning hours would not feel free to ignore the officers' implicit command to open the door."[11]

Similarly, in *U.S. v. Jerez*[12] sheriff's deputies in Wisconsin decided to conduct a knock and talk at a motel room occupied by Jerez, a suspected drug trafficker. But no one answered the door, so they "took turns knocking" for about five minutes. Still no response. So while one deputy began knocking loudly on the window, another "shone his flashlight through the small opening in the window's drapes, illuminating Mr. Jerez as he lay in the bed." Eventually, Jerez opened the door and consented to a search which netted cocaine. But the court ruled the entry was not consensual because "[t]his escalation of the encounter renders totally without foundation any characterization that the prolonged confrontation was a consensual encounter."

Note, however, that the Supreme Court has ruled that neither loud knocking nor a loud announcement will *automatically* convert the encounter into a seizure. This is mainly because, said the Court, a "forceful knock may be necessary to alert the occupants that someone is at the door" and, unless the officers make a loud announcement, the occupants "may not know who is at their doorstep."[13]

COMMAND TO OPEN DOOR: An encounter at the doorway is plainly not consensual if officers *ordered* the residents to open the door. As the California Supreme Court put it, "The right to seek interviews with suspects at their homes does not include the right to demand that a suspect open his door."[14] Similarly, the Fifth Circuit observed, "When officers demand entry into a home without a warrant, they have gone beyond the reasonable 'knock and talk' strategy of investigation."[15]

For example, in ruling that a knock and talk was involuntary, the Ninth Circuit said in *U.S. v. Winsor*, "[T]he police knocked on the door, identified themselves as police, and demanded that the occupants open the door, and [Winsor] opened the door on command. On these facts, there can be no consent as a matter of law."[16]

TIME OF ARRIVAL: The time of the officers' arrival is significant if it occurred late at night, especially if the lights were out and it appeared the residents were asleep. That is because of the "special vulnerability" of people "awakened in the night by a police intrusion at their dwelling place,"[17] and the "peculiar abrasiveness" of such intrusions.[18] For this reason, the courts "have recognized that nocturnal

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[10] See *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2 [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."]. COMPARE *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["a single, polite knock on the door"]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109 [the officer "knocked on the door for only a short period spanning seconds"]; *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 951 [the encounter "began with a polite knock on the door"].

[11] (10th Cir. 2008) 524 F.3d 1161, 1169.

[12] (7th Cir. 1997) 108 F.3d 684, 690.

[13] *Kentucky v. King* (2011) __ U.S. __ [131 S.Ct. 1849, 1861].

[14] *People v. Shelton* (1964) 60 Cal.2d 740, 746. ALSO SEE *U.S. v. Reeves* (10th Cir. 2008) 524 F.3d 1161, 1167 ["Opening the door to one's home is not voluntary if ordered to do so under the color of authority."]; *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2 ["Open up"]; *U.S. v. Edmondson* (11th Cir. 1986) 791 F.2d 1512, 1515, ["FBI. Open up."].

[15] *U.S. v. Gomez-Moreno* (5th Cir. 2007) 479 F.3d 350, 355-56.

[16] (9th Cir. 1988) 846 F.2d 1569, 1573, fn.3.

[17] *U.S. v. Jerez* (7th Cir. 1997) 108 F.3d 684, 690. COMPARE *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425 ["The time was not unusual (about 5:30 P.M.)]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["The encounter occurred in the middle of the day"]; *U.S. v. Abdenbi* (10th Cir. 2004) 361 F.3d 1282, 1288 [officers arrived at about 6:15 A.M. "because they hoped to speak to [the suspect] before he left for work."].

[18] *U.S. v. Ravich* (2nd Cir. 1970) 421 F.2d 1196, 1202. BUT ALSO SEE *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1026 [although the time was 2:15 A.M., "the lights were on in the room"].

encounters with the police in a residence (or a hotel or motel room) should be examined with the greatest of caution."[19] For example, in *U.S. v. Jerez* (discussed earlier) another reason the knock and talk was deemed unlawful was that the officers had arrived at about 11 P.M. and it appeared the residents had gone to bed; i.e., "the room was quiet; no sounds were heard coming from the room."[20]

LOITERING ON THE PROPERTY: Like any other visitor, officers may walk to the front door via normal access routes, then knock or otherwise announce their presence. But if no one answers the door within a reasonable time, they cannot loiter on the property or explore the grounds because such conduct is outside the scope of any implied consent. As the Supreme Court explained, officers are impliedly authorized "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[21]

NUMBER OF OFFICERS: There is no rule that a maximum of two officers may attempt a knock and talk. But it's a good rule of thumb. That's because the more officers at the front door, the more the situation might appear to be a display of police authority.[22] As the California Supreme Court observed in *People v. Michael*, "[T]he appearance of four officers at the door may be a disturbing experience."[23] For example, in *U.S. v. Gomez-Moreno* the court ruled that officers did not engage in a "proper" knock and talk but instead "created a show of force when ten to twelve armed officers met at the park, drove to the residence, and formed two groups—one for each of the two houses" with a helicopter overhead."[24]

To avoid such problems but still address officer-safety concerns, some officers may stay hidden. But if a resident happens to see them, the coercion level may increase substantially.[25]

The Greeting

The manner in which officers greeted the suspect or other person who answered the door is crucial because a cordial and respectful attitude may communicate to him that the officers are merely seeking his cooperation. In contrast, an overbearing or officious attitude will likely be interpreted to mean the officers have a legal right to obtain answers to their questions or conduct a search. For example, in *People v. Boyer* the court said that "[t]he manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' . . . suggested that they did not intend to take 'no' for an answer."[26]

Conducting the Investigation

For a discussion of how officers must conduct themselves while questioning the suspect or seeking his consent to search, see "Conducting the Investigation" which begins on page eight in the lead article.

Warrantless Entry to Seize Evidence

There are two situations in which officers who are conducting a knock and talk may enter the premises without a warrant for the limited purpose of seizing or securing evidence.

EVIDENCE IN PLAIN VIEW FROM OPEN DOOR: While speaking with a resident at the front door, officers will sometimes see drugs or other evidence in plain view. Can they enter and seize it without a warrant? The answer is yes if both of the following circumstances existed: (1) they had probable cause to believe the item was evidence of a crime; and (2) an occupant had opened the door voluntarily, not in response to a show of authority. In other words, the officers must not have discovered the evidence—i.e., they must not have obtained "visual access" to it—by means of coercion. Said the Fourth Circuit:

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[19] *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110.

[20] (7th Cir. 1997) 108 F.3d 684, 687. ALSO SEE *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670 [officers "roust[ed] the Quinteros from sleep"].

[21] *Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 1415].

[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; *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2. 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."].

[23] (1955) 45 Cal.2d 751, 754.

[24] (5th Cir. 2007) 479 F.3d 350, 355.

[25] See *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068.

[26] (1989) 48 Cal.3d 247, 268. COMPARE *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110 [the officer "never spoke to Cormier in an authoritative tone or led him to believe that he had no choice other than to answer her questions"].

> [A] a search occurs for Fourth Amendment purposes when officers gain visual or physical access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority.[27]

On the other hand, if the door was opened voluntarily, a warrantless entry to seize the evidence would be permitted for at least two reasons: (1) an occupant cannot reasonably expect privacy as to something that is obviously evidence of a crime and that he knowingly and voluntarily exposed to the view of officers,[28] and (2) the officers might reasonably believe that the suspect would realize they had seen the evidence and that he would immediately attempt to dispose of it if given a chance.[29]

For example, in *U.S. v. Scroger*[30] officers in Kansas City, having received reports of drug activity at a certain house, went there at 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 to the back, two others went to the front door and knocked. Scroger answered the door, and it was apparent he had been cooking methamphetamine. Among other things, the officers saw "glassware" and detected a "strong odor"—both of which they associated with methamphetamine production. Just then, Scroger tried to slam the door shut, but the officers pushed their way in and took him into custody. After securing the house, they obtained a warrant and ultimately found "a large number of items commonly associated with the clandestine manufacturing of methamphetamine."

Scroger argued that the evidence should have been suppressed because the officers had no right to enter without a warrant or consent. Citing exigent circumstances, however, the court said "[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."

EXIGENCY BASED ON REASONABLE INFERENCE: Before knocking on the door, officers will sometimes see or hear something that provides them with probable cause to believe the suspect had been alerted to their presence and had started—or would immediately start—to destroy any evidence on the premises. If this happens, the "destruction of evidence" exception to the warrant requirement would apply, in which case the officers could forcibly enter the premises for the limited purpose of securing it pending issuance of a search warrant.[31]

There is, however, an exception to this rule. Specifically, a warrantless entry will not be permitted if a court finds that the threat to the evidence was fabricated by the officers themselves. How can the courts make this determination? In the past, it was often difficult because the courts would try to determine the officers' subjective intent. But in 2011 the United States Supreme Court ruled in *Kentucky v. King* that a threat will be deemed fabricated only if, upon arrival, the officers said or did something that would have caused an occupant of the premises to reasonably believe that the officers were about to enter or search the premises in violation of the Fourth Amendment.[32]

This means, among other things, that a threat will not be deemed fabricated merely because the officers had somehow alerted the occupants to their presence, even though that might have caused the occupants to attempt to destroy any evidence on the premises. As the Supreme Court observed in *King*:

> [W]henever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them.

But the Court added that such a possibility will not constitute a fabricated exigency unless the officers had expressly or impliedly threatened to enter the premises without a warrant. POV

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[27] *U.S. v. Mowatt* (4th Cir. 2008) 513 F.3d 395, 400. ALSO SEE *People v. Shelton* (1964) 60 Cal.2d 740, 747; *U.S. v. Winsor* (9th Cir. 1988) 846 F.2d 1569.
[28] See *Illinois v. Andreas* (1983) 463 US 765, 771; *People v. Haugland* (1981) 115 Cal.App.3d 248, 257; *U.S. v. Huffhines* (9th Cir. 1992) 967 F2 314, 319.
[29] See *Kentucky v. King* (2011) __ U.S. __ [[131 S.Ct. 1849, 1862].
[30] (10th Cir. 1997) 98 F.3d 1256.
[31] See *Kentucky v. King* (2011) __ U.S. __ [131 S.Ct. 1849, 1856].
[32] (2011) __ U.S. __ [131 S.Ct. 1849, 1862].