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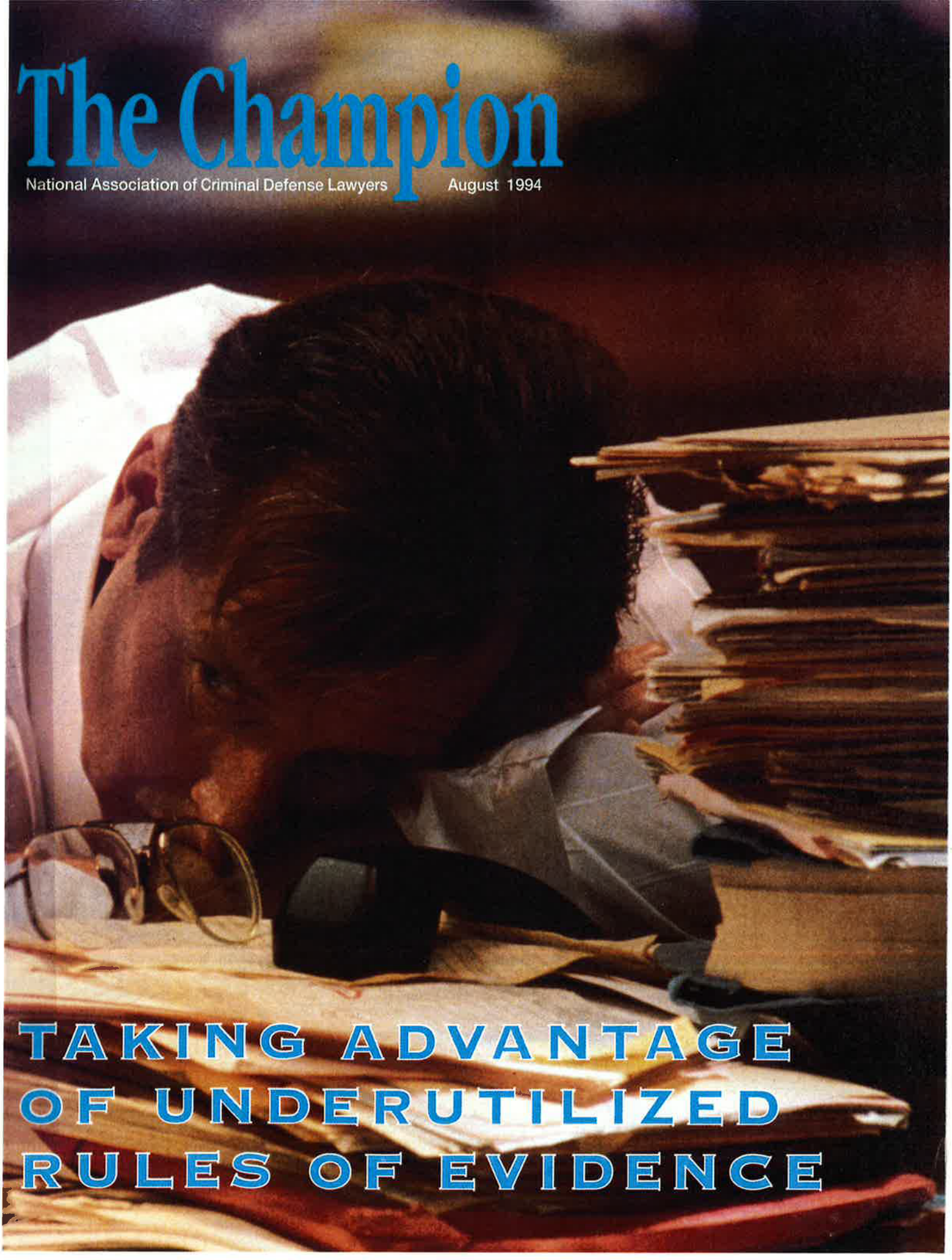
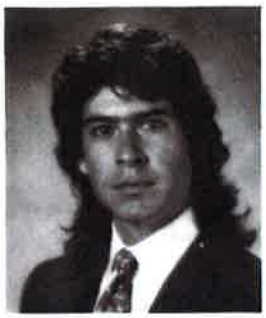


TAKING ADVANTAGE OF UNDERUTILIZED RULES OF EVIDENCE



FOURTH AMENDMENT FORUM

Banging Down The Doors: Challenging The Execution Of A Search Warrant

By Howard M. Srebnick and Scott A. Srebnick

HOWARD M. SREBNICK *graduated magna cum laude from Georgetown University Law Center in 1989 where he received the Vincent G. Panati Award for Excellence in Criminal Justice. Following law school, he served as a law clerk to Judge Edward B. Davis of the Southern District of Florida and Judge Irving L. Goldberg of the United States Court of Appeals for the Fifth Circuit. In 1992 he joined the Federal Public Defender in Miami, Florida as a trial and appellate attorney.*

SCOTT A. SREBNICK *graduated cum laude from the Harvard Law School in 1990, and was associated with the law firm of Skadden Arps Slate Meagher and Flom until he began a clerkship with United States District Judge Sidney M. Aronovitz in the Southern District of Florida. Since 1992 he has been in private practice concentrating on criminal litigation in state and federal courts.*

One of the problems facing the criminal defense attorney when litigating motions is the presumption of credibility that attaches to a police officer's testimony. Your client remembers events occurring one way; the officers testify that it happened another way. Given the number of officers and their impeccable law enforcement records, credibility determinations rarely go your way. Knowing that, the criminal defense attorney favors a motion that won't come down to a swearing contest, for that is a losing proposition from the get-go.

A challenge to the execution of the warrant is one that can turn less on the competing memories of the officers and defendants. Oftentimes, the relevant facts are well-documented and thus not disputed. The lawyer has the warrant itself as a starting point, in addition to the return on the warrant, inventories, and police reports prepared in anticipation of the warrant and following the search. These materials will provide the salient facts to support a motion: the time and duration of the search, the number and identities of the officers involved, the tools and weapons employed, the items seized, etc.

Three general areas of inquiry arise from the execution of the warrant. The *manner* of entry, the *intensity* of the search, and the *scope* of the seizure. The manner of execution has received recent attention from the courts. The so-called "knock and announce" rule has been the subject of debate because of the difficulty in balancing the privacy and security interests of the occupants of a dwelling with the genuine safety concerns of law enforcement officers.

When officers prepare to execute a search warrant at a home, they ordinarily anticipate the possibility of an armed, hostile response. In a drug case, they consider the possibility that small quantities of drugs can be easily disposed. A quick entry is generally preferred. Federal statutory law requires, however, that officers announce their presence and purpose before entering the premises.[1] Many states similarly impose a knock and announce requirement, either by statute or common law.

The text of the United States Constitution does not speak to the knock and announce requirement, and the Supreme Court has yet to say that it is an implicit component of the Fourth Amendment.[2] Four Justices have expressed their opinion that it is.[3] The federal circuit courts appear to be divided, although all seem to agree that the Fourth Amendment's reasonableness requirement incorporates some notion of knock and announce.[4]

The degree of overlap of the federal statute and the Fourth Amendment becomes significant in federal cases involving state officers executing a state warrant who later turn evidence over to the feds. State officers are presumably not governed by the federal statute, only the U.S. Constitution.[5] Only insofar as a state search violates the Fourth Amendment will the court exclude evidence. Violations of state law alone are rarely cause for federal concern (much less exclusion). So to the extent that the defendant can paint the entry with a federal gloss (e.g., the presence of a federal agent, such as a joint task force agent), he should.

The federal courts, applying the federal statute, 18 U.S.C. section 3109, and the Fourth Amendment's reasonableness requirement have scrutinized the manner of execution of the warrant to insure that officers have provided occupants with a reasonable opportunity to permit entry before forcing their way inside. Officers must ordinarily wait for the occupants to admit them onto the premises; officers may not force entry unless they have been refused admittance or exigent circumstances make an unannounced, forced entry necessary.

Typically, officers are expected to knock, announce their presence loud enough to be heard, and allow a reasonable time for

the occupants to admit them before forcing entry. There is no bright (time) line that tells officers just how long they must wait. Ten seconds or more is generally enough time to expect a response, while five seconds usually is not.[6]

Exigent circumstances will excuse compliance, as when (1) persons inside the dwelling know of the officers' authority and purpose, (2) occupants are in immediate danger, or (3) occupants are attempting to escape or destroy evidence.[7]

The degree of exigency that will excuse compliance varies from court to court and depends on the degree of force used to make entry.[8] The factors that create exigency include: (1) the presence of firearms; (2) what the officers hear as they approach the home; (3) whether the evidence (narcotics) are easily disposed of or are in the process of being destroyed.

In analyzing the exigency claim, look to the warrant. Does it mention any firearms? Does it provide a biography of the occupants, their criminal record, etc.? Do the police reports mention any weapons or historical information about violent confrontations with the occupants? These facts are too important for a police officer to omit mention of, so if he does, his later-stated safety concerns are that much less justifiable.

An unjustified, but sincere, belief that exigent circumstances are present will not excuse compliance with the knock, announce, and wait requirement.[9] There is no good-faith exception. So the officers must objectively justify their decision to dispense with compliance.

Because entry is routinely an intense operation, safety concerns abound, the scenario takes on a familiar look. Officers alight from their vehicles, guns drawn. Several take up a perimeter position. The entry team approaches the door armed and ready. They shout, "Police, open up, search warrant." They know they are going in, one way or the other. The atmosphere is tense. The officers are looking about and listening. They don't like the fact that they are just sitting there waiting.

One Mississippi, two Mississippi, three Mississippi — no answer. Four Mississippi, five Mississippi, six Mississippi — Enough already, Go, Go, Go! The door comes off the hinges.

Even the officers will agree that their objective is to get into the home swiftly and secure the premises. They don't like waiting out there. They feel exposed. The officers harbor concern about their own safety. They came armed, with reinforcements, prepared for a confrontation.

These *subjective* feelings work to the defendant's benefit. The knock and announce rule is designed to protect the privacy of the occupants, the safety of the occupants and the officers, and to avoid the needless destruction of property. By announcing their presence and waiting for an invited entry, the officers insure that the occupants have an opportunity to compose themselves (perhaps they are undressed). It also reduces the risk that the occupants will confuse the search with a home invasion and undertake an armed response. Finally, allowing the occupants to permit entry avoids the unnecessary destruction of property, usually a front door that is helped off its hinges by a crow bar or battering ram. It also reduces the risk of injury to the occupants who may be in the process of answering the door.

Despite the officers' belief, a forced entry, carried out in a raid-like manner, can actually increase the risk of danger to the officers. It certainly increases the risk to the occupants.[10] A calmer, more measured, approach will often prove more effective. No doubt, there are instances when police must keep the element of surprise on their side, as when the officers have particularized basis for expecting a violent confrontation.[11] But such exceptional circumstances cannot be permitted to swallow the rule.[12] ■

NOTES

1. *See* 18 U.S.C.A. § 3109.
2. Ker v. California, 374 U.S. 23, 83 S. Ct. 1623 (1963).
3. *Ker*, 83 S. Ct. 1623, 1635 (1963) (dissenting opinion).
4. *See generally* United States v. Carter, ___ F.2d ___, 1993 WL 193627 (7th Cir. 1993); United States v. Sagaribay, 982 F.2d 906 (5th Cir. 1993).
5. *Sagaribay*, 982 F.2d at 910-11 (5th Cir. 1993).
6. *Compare* United States v. Bonner, 874 F.2d. 822 (D.C. Cir. 1989) (ten second lapse after knock during early evening hours probative of refused admittance); United States v. One Parcel of Real Property, 873 F.2d 7, 8 (1st Cir. 1989) (five-ten seconds enough time where cocaine could be easily destroyed); United States v. Streeter, 907 F.2d 781, 784, 789 (8th Cir. 1990) (20-30 seconds between announcement and forced entry enough time where officer heard suspicious sounds from inside); United States v. Knapp, 1 F.3d 1026, 1030-31 (10th Cir. 1993) (10-12 seconds enough time) with United States v. Lucht, 18 F.3d 541, 551 (8th Cir. Feb. 28, 1994) (3-5 seconds after knocking and announcing not enough time); United States v. Marts, 986 F.2d 1216, 1218 (8th Cir. 1993) (less than five seconds not enough time)
7. *Ker*, 83 S. Ct. at 1636 (dissenting opinion).
8. United States v. Mendosa, 989 F.2d 366 (9th Cir. 1993).
9. United States v. Mendosa, 989 F.2d 366, 370 (9th Cir. 1993).
10. *See, e.g.*, Leatherman v. Tarrant County, 954 F.2d 1054 (5th Cir. 1992), *reversed*, 113 S. Ct. 1160 (1993) (officers killed two dogs during one raid and injured one of the occupants in another).
11. *See, e.g.*, United States v. Nabors, 901 F.2d 1351, 1354 (6th Cir. 1990) (exigent circumstances where occupant was a drug trafficker, a felon in possession of an array of firearms, and habitually wore a bullet-proof vest).
12. *See* United States v. Becker, ___ F.3d ___, 1994 WL 171890 (9th Cir. May 9, 1994) (forced entry without refused admittance violated knock and announce component of Fourth Amendment despite officers' general concerns for safety).