Filed 5/14/04; opinion after transfer from Supreme Court

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MILDRED MURPHY, Defendant and Appellant.	D040040 (Super. Ct. No. SCE-217093)

APPEAL from a judgment of the Superior Court of San Diego County, Larrie R. Brainard, Judge. Reversed.

Laurel Nelson Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Quisteen S. Shum and Heather F. Wells, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Mildred Murphy appeals the denial of her motion to suppress evidence (Pen. Code,[1] § 1538.5, subd. (m)) after having pled guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378). Murphy contends that the police, in conducting a probation search of her house, failed to follow knock-notice requirements embodied in California law and, in so doing, violated the Fourth Amendment to the United States Constitution. We conclude that the search violated California knock-notice requirements and the Fourth Amendment, and that the evidence seized during the search must be suppressed.

II.

FACTUAL AND PROCEDURAL BACKGROUND[2]

At approximately 12:45 p.m. on November 7, 2001, following a citizen's complaint, Detective Alberto Santana of the San Diego County Sheriff's Department Street Narcotics Team (team) observed a woman leave Murphy's residence, get into a car and drive away. Santana suspected a drug transaction had taken place. He followed the car and stopped it. The woman admitted she had obtained methamphetamine from

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1 All statutory references are to the Penal Code unless otherwise specified.

2 Because this appeal was taken from a guilty plea and Murphy stipulated in the trial court to the facts as adduced at the preliminary hearing, the factual background set forth in this opinion is drawn from the preliminary hearing transcript, taken in the light most favorable to sustaining the court's findings. (See *People v. Gonzales* (1991) 233 Cal.App.3d 1428, 1434, citing § 1538, subd. (i).)

Murphy. Santana decided to conduct a probation search of Murphy's residence.[3] While Detective John Marlow was conducting surveillance of the residence, Santana developed an operational plan for the search. Santana was familiar with the layout of the house because he had had previous contact with Murphy. Because Santana had observed people coming out of Murphy's converted bedroom in the garage, he decided the search team should enter through the garage.

During the surveillance, Marlow observed Murphy greet a Hispanic male in front of her house. Murphy and the man walked around the side of the house and reappeared a few minutes later. It appeared to Marlow that Murphy and the man were exchanging something. Shortly thereafter, Santana and several other members of the team arrived at Murphy's residence. The team members were all wearing plain clothes, but also had on black bulletproof vests with the word "Sheriffs" on them, and hats marked with the words "Sheriff's Narcotics." Marlow also observed a second, "totally separate person," a white male, near the garage of Murphy's residence. After Santana and the other members of the search team arrived, Marlow motioned to his partners on the team to alert them to this man's presence.

Santana and the other officers approached the white male, who was later identified as Michael Thomaselli. At the time the officers approached him, Thomaselli was located around the corner of the garage. Santana noticed that Thomaselli's hand was clenched.

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[3] It is undisputed that Murphy was on probation on the day in question and that she had consented to warrantless searches of her residence as a condition of that probation.

Santana pointed a gun at Thomaselli and "[i]n a loud voice . . . [a]lmost yelling," said to him, "Sheriff's Department. Probation search. Get on the ground." The other members of the team were yelling, "Sheriff's Department," and they all had their guns drawn. It was later determined that Thomaselli was repairing a fence for Murphy and that he was holding some screws in his hand. At no time did the officers observe any interaction between Murphy and Thomaselli.

As the officers confronted Thomaselli, Santana heard a dog barking loudly from inside Murphy's house. Approximately five to seven seconds after the officers confronted Thomaselli, Santana and other members of the team entered the residence, without knocking. Santana said he did not knock because he feared that "anyone in the residence or in the bedroom would have heard us" yelling at Thomaselli. Santana testified that "seeing the sliding glass window was opened and a dog was barking, we continued in." Santana believed the team was in a "compromise" situation and explained that they entered the house without knocking because they feared persons in the residence might arm themselves, destroy evidence, or flee. Santana testified that he and "about four or five members of his team" entered the house as soon as "everybody was in line ready to go." All of the officers entered the house with their guns drawn.

Upon searching the residence, the law enforcement officers found Murphy at the opposite end of the house from where they had entered, in a bedroom with her bedridden ex-husband. Murphy was read her *Miranda*[4] rights and waived them. Murphy admitted

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4 *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602].

having sold methamphetamine and showed the officers the location of a scale and six baggies that contained methamphetamine. The officers also found several "pay and owe" sheets in Murphy's house.

Thomaselli testified that when he encountered the officers, they ordered him to the ground, at gunpoint. After he was on the ground, the officers asked him whether Murphy was inside the house, and he told them she was. Thomaselli did not see them enter the house.

Murphy testified on her own behalf. She was in a back bedroom with the door shut, caring for her invalid ex-husband when the officers entered her residence. She heard someone calling her name and was disturbed because she did not know who it was. Prior to hearing her name called, she did not believe she had heard anyone say anything about police or probation. After she heard her name called, Murphy opened the bedroom door and found one of the officers standing in the doorway, pointing a gun at her face. He told Murphy to put up her hands.

On November 9, 2001, Murphy was charged with possession of methamphetamine for sale (Health & Saf. Code, § 11378). Murphy pled not guilty. She filed a motion to suppress evidence, pursuant to section 1538.5, in which she claimed that in conducting the search, the officers had violated California knock-notice requirements and the Fourth Amendment. The People filed an opposition. The preliminary examination hearing served also as an evidentiary hearing for the motion to suppress and the probation revocation.

With regard to the motion to suppress, the court found there were no exigent circumstances that would excuse the officers' duty to comply with knock-notice requirements. The court found that at the time the officers entered Murphy's residence, they had no reason to believe drugs were being flushed or otherwise destroyed, or that anyone in the house was arming himself. In addition, they had no reason to believe Murphy was likely to be armed, and they could see she was not attempting to flee.

However, the court determined that the officers' shouting at Thomaselli constituted notice to the occupants of Murphy's residence of the impending search sufficient to satisfy knock-notice requirements. The court observed that the officers' entry occurred "at least five to seven seconds [after they shouted at Thomaselli], I think it was probably longer, certainly from Mr. Thomaselli's testimony." The court opined that this was "plenty of time once that notification is made for someone to come to the door and find out what the heck is going on." The court denied the motion to suppress on the ground that the officers had substantially complied with knock-notice requirements. The court also found the evidence was sufficient to hold Murphy to answer to the methamphetamine charge and revoked her probation.

Murphy filed a motion to set aside the information, pursuant to section 995, on the ground that the law enforcement officers had violated knock-notice requirements. The People filed an opposition. The trial court denied the motion. Murphy then pled guilty to the charge of possession of methamphetamine for sale. The trial court placed Murphy on probation for a period of three years on the condition that she serve 210 days in custody, and fined her $550. The court later determined that Murphy was eligible for electronic

surveillance and revised the 210-day commitment order accordingly. Murphy filed a timely appeal.

On October 6, 2003, this court filed its opinion reversing the judgment. The court concluded that the evidence seized during the search of Murphy's home was obtained in violation of California's knock-notice requirements and the Fourth Amendment, and must therefore be suppressed. On January 22, 2004, the California Supreme Court granted the People's petition for review and directed this court to vacate the opinion and reconsider our decision in light of *United States v. Banks* (2003) ____U.S.____ [124 S.Ct. 521] (*Banks*), which was decided after we filed our opinion in this case.

We vacated our opinion and ordered the parties to file supplemental briefs addressing the impact, if any, of the United States Supreme Court's decision in *Banks* on the appellate issues in this case.

We have reconsidered our decision in this case in light of *Banks*. We conclude that the search of Murphy's residence violated California's knock-notice requirements and the Fourth Amendment, and that the evidence seized during the search must be suppressed.

III.

DISCUSSION

"In reviewing a ruling on a motion to suppress evidence, we defer to the trial court's findings of fact, whether express or implied, if those findings are supported by substantial evidence. We independently determine the relevant legal principles and apply

those principles in evaluating the reasonableness of the search based on the facts as found by the trial court." (*People v. Mays* (1998) 67 Cal.App.4th 969, 972.)

A. The Evidence Was Obtained in Violation of Knock-Notice Requirements

1. Knock-Notice Requirements Apply to Probation Searches

Section 1531 provides that in executing a search warrant, "[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance." (§ 1531.) "The term 'knock-notice' refers to the requirement of section 1531 . . . that a law enforcement officer, before entering a house to execute a search warrant, give notice of his or her authority and purpose and be refused admittance either actually or constructively." (*People v. Mays*, *supra*, 67 Cal.App.4th at p. 973, fn. omitted.)

"In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. [Citations.]" (*People v. Robles* (2000) 23 Cal.4th 789, 795.) In *People v. Constancio* (1974) 42 Cal.App.3d 533, the court held that "probation searches are subject to implied conditions of reasonableness compelled by the provisions of the Fourth Amendment" and, specifically, that section 1531 provides the test by which that reasonableness is measured. (*People v. Constancio, supra*, at p. 542.) It is now well established that "the

knock-notice provisions of sections 844[5] and 1531 apply to searches conducted pursuant to a probation condition." (*People v. Lilienthal* (1978) 22 Cal.3d 891, 900; see, e.g., *People v. Mays, supra*, 67 Cal.App.4th at p. 973, fn. 4 ["courts have consistently held that initial entries into a home by law enforcement officers to conduct a probation . . . search . . . must comply with the knock-notice requirements of section 1531"].)

2. There Were No Exigent Circumstances Sufficient to Excuse Compliance with Knock-Notice Requirements

In *Richards v. Wisconsin* (1997) 520 U.S. 385, 394 [117 S.Ct. 1416] (*Richards*), the United States Supreme Court provided the standard for determining whether the failure of law enforcement officers to comply with knock-notice requirements renders a search unreasonable under the Fourth Amendment. The court held, "In order to justify a 'no-knock' entry, the police must have a 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." (*Richards, supra*, at p. 394, italics added.) In so holding, the court expressly rejected the contention that "exigent circumstances justifying a no-knock entry are always present in felony drug cases." (*Id*. at p. 390.) The court

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5 Section 844 is a similar knock-notice provision pertaining to arrests. Although Murphy relies on section 844 in addition to section 1531, the purpose of the entry into her home was to conduct a probation search, not to effectuate an arrest. Accordingly, "the provisions of Penal Code section 844 do not govern the instant situation." (*People v. Constancio, supra*, 42 Cal.App.3d at p. 542, fn. 7 [concluding probation search that resulted in an arrest was governed by principles enumerated in section 1531 rather than section 844].)

further held that, "in each case, it is the duty of a court confronted with the question to determine *whether the facts and circumstances of the particular entry* justified dispensing with the knock-and-announce requirement." (*Id.* at p. 394, italics added.)[6]

Applying this standard, the court in *Richards* found that such circumstances existed in that case. (*Richards, supra*, 520 U.S. at pp. 395-396.) The police had obtained a search warrant to search Richards's motel room for drugs and related paraphernalia. (*Id*. at p. 388.) When the officers initially knocked on the door of the motel room, Richards cracked it open and saw a uniformed officer standing behind an officer dressed as a maintenance man. Richards then slammed the door. The court noted that the trial court had concluded that "the officers could gather from Richards' strange behavior when they first sought entry that he knew they were police officers and that he might try to destroy evidence or to escape." (*Id*. at p. 389.) The *Richards* court agreed with the trial court that, *based on these circumstances*, the officers' decision to enter without first announcing their presence and authority was justified. (*Id*. at p. 396.)

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6 Although not elucidated in the *Richards* opinion itself, the United States Supreme Court in the landmark case of *Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868] explained the essence of the concept of reasonable suspicion in discussing the standard necessary to justify an investigatory stop: "[A] police officer must be able to point to *specific and articulable facts* which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." (*Id*. at pp. 21-22, italics added.)

In *Banks*, the court followed *Richards*, stating that police officers generally must "announce their intent to search before entering closed premises," and that this obligation gives way only when, *under the particular circumstances*, the officers have a reasonable suspicion of exigency. (*Banks, supra*, 124 S.Ct. at p. 525, citing *Richards*, *supra*, 520 U.S. at p. 394.) The issue before the *Banks* court was how to apply the Fourth Amendment's standard of reasonableness to the length of time police officers with a search warrant must wait before entering the premises to be searched, without permission, after knocking and announcing their intent. (*Banks*, *supra*, 124. S.Ct. at p. 524.)

In *Banks,* law enforcement officers went to Banks's apartment to execute a warrant to search for cocaine. Officers posted in front of the apartment called out, "police search warrant" and rapped on the door hard enough to be heard by officers at the back door. After waiting 15 - 20 seconds with no response, the officers broke open the front door and entered the apartment. (*Banks*, *supra*, 124 S.Ct. at p. 523.) In determining that the officers' entry into Banks's apartment was lawful, the *Banks* court held that "it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter," and concluded that "15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine. " (*Id.* at p. 527.)

In reaching this conclusion, the court specifically noted that the police in *Banks* "concededly arrived at Banks's door without reasonable suspicion of facts justifying a no-knock entry." (*Id*. at p. 526.) Thus, *Banks* clearly does *not* hold that the fact that law enforcement officers have probable cause to believe there is disposable contraband in the place to be searched creates an immediate exigency justifying noncompliance with knock-notice requirements. Rather, *Banks* holds that the presence of such contraband is a factor to be considered in determining the reasonableness of the length of time between the officers' knocking and announcing their presence, and their entering without permission. In such a case, an exigency can arise once a sufficient amount of time has passed, *after the officers knock and announce their presence* and receive no response, for the officers to reasonably suspect the imminent destruction of evidence. (*Banks*, *supra*, 124 S.Ct. at p. 526.)

At the preliminary hearing in this case, Santana testified he did not knock before entering Murphy's residence because he believed the encounter with Thomaselli outside Murphy's house had "compromise[d]" the operation, and that "persons in the residence could possibly arm themselves, could possibly destroy evidence or possibly run." However, on cross-examination, Santana could point to no facts to substantiate his fears, and the People presented no other evidence that would have supported such concerns. Significantly, the trial court found there were no facts known to the law enforcement officers that would support a reasonable belief that knocking would have posed a danger to them, that evidence would be destroyed, or that Murphy would attempt to flee.

Accordingly, the trial court determined that no exigent circumstances existed at the time the officers entered Murphy's residence that would excuse their failure to comply with the knock-notice requirement.

The *Banks* decision does not suggest that exigent circumstances existed in the present case sufficient to justify the officers' failure to comply with knock-notice requirements. The issue in *Banks* was not whether or not police officers in a case involving drugs must knock and announce their intentions, but rather, how to apply the Fourth Amendment standard of reasonableness to the length of time the officers must wait before entering without permission, after knocking and announcing their intent. The *Banks* court stated, "[T]he issue comes down to whether it was reasonable to suspect imminent loss of evidence after the 15 to 20 seconds the officers waited" without receiving a response. (*Banks*, *supra*, 124 S.Ct. at p. 526.) The court expressly noted that it was of the view that "*this call is a close one*," but held that after knocking and waiting 15 to 20 seconds, the police could reasonably suspect that drugs would be destroyed if they were to wait any longer. (*Ibid*., italics added).

None of the salient factors upon which the *Banks* court relied in determining that an exigency had arisen in that case exists in this case. Here, the officers neither knocked nor announced their presence, and only five to seven seconds elapsed between the time the officers shouted at Thomaselli and the time they entered Murphy's residence. Even assuming the officers shouting at Thomaselli is equivalent to knocking and announcing

their intent, the five to seven seconds that passed between the officers' shouting at Thomaselli and their entry was not sufficient time, under *Banks*, for an exigency to have ripened based on a reasonable suspicion that evidence would imminently be destroyed. (*Banks*, *supra*, 124 S.Ct. at p. 526.) The *Banks* court stated that a period of 15-20 seconds presented a "close call." (*Ibid.*) Five to seven seconds does not.

On appeal, in arguing that there were in fact exigent circumstances justifying the officers' actions, the People raise the following points: (1) the officers knew Murphy had just been a party to a drug transaction at the residence; (2) the officers' shouting at Thomaselli outside Murphy's house, and the barking dog, served to notify any occupants of residence of the presence of the officers; (3) the officers announced their presence and purpose after they entered the residence; and (4) the officers reasonably believed the occupants of the house had been notified of their presence.

None of these facts, either independently or in combination, constitute exigent circumstances sufficient to justify a no-knock entry under either *Banks* or *Richards*. In *Banks*, as noted above, the court specifically noted that despite the fact that the officers had a search warrant authorizing them to search for cocaine, and there had thus been a judicial determination that there was probable cause to believe cocaine would be found inside the apartment, "the police concededly arrived at Banks's door without reasonable suspicion of facts justifying a no-knock entry . . . ." (*Banks, supra,* 124 S.Ct. at p. 526.) Here, the fact that the officers strongly suspected that there were disposable drugs inside Murphy's residence was similarly not sufficient to constitute an exigency justifying a no-knock entry, and the trial court correctly found there were no other facts known to the

officers that would support a reasonable belief that an exigency existed. In *Richards, supra*, 520 U.S. at pages 395-396, the court concluded that the defendant's slamming a door in the face of police officers could give rise to a reasonable suspicion that drugs might be destroyed in the place to be searched, or that the defendant might try to escape. In this case, in contrast, there were no such facts from which the officers could reasonably infer that anyone inside the house would destroy evidence or attempt to flee. The fact that the law enforcement officers observed Murphy engage in a suspected drug transaction prior to their entering the house does not give rise to an exigency justifying immediate entry. (*Banks, supra,* 124 S.Ct. at p. 526; *Richards, supra*, 520 U.S. at p. 394.)

In reaching the conclusion that there were exigent circumstances justifying a no-knock entry, the dissent takes the position that the situation in this case "can[not] reasonably be distinguished from that in *Richards*. . . ." The dissent continues, "In *Richards* it was in everyone's best interest to act quickly when the suspect recognized they were police officers and shut the door." However, in *Richards*, it was the fact that Richards slammed the door in the face of police officers after recognizing them that gave rise to a reasonable suspicion that he would destroy the drugs or attempt to escape. Here, in contrast, as the trial court found in determining that there were no exigent circumstances to excuse the officers' duty to comply with knock-notice requirements, there were no facts to support a belief that anyone in the house would destroy evidence or

attempt to flee, or that they posed a danger to officers. Thus, the circumstances in *Richards* are clearly distinguishable from those in this case.[7]

The People's last three arguments relate only to when the clock may have started to run in terms of the time it might take someone inside the house to dispose of the drugs, prompted by the knowledge that law enforcement officers would soon be coming in. (*Banks*, *supra*, 124 S.Ct. at p. 526.) Even if the officers shouting at Thomaselli is deemed to have provided sufficient notice to anyone inside Murphy's residence, *Banks* establishes that law enforcement officers must wait a sufficient period of time after knocking and announcing for a reasonable suspicion of exigency to arise before they may enter without permission. The law enforcement officers in this case testified they entered Murphy's house five to seven seconds after they shouted at Thomaselli in the yard. The People acknowledged both in the trial court and in this court that the officers' entry occurred "about five to seven seconds" after they shouted at Thomaselli. Clearly the officers did

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[7] We note that in cases decided since *Banks* in which courts have held that the totality of the circumstances justified a no knock entry, the courts have determined that law enforcement officers had particularized and articulable reasons for dispensing with the knock and notice requirement. For example, in *United States v. Peterson* (9th. Cir. 2003) 353 F.3d 1045, 1049, police had credible information that Peterson's house contained explosives, and Peterson had previously expressed a willingness "to blow some shit up . . . at any time." Similarly, in *United States v. Bynum* (9th Cir. 2004) 362 F.3d 574, the court determined that police officers reasonably suspected Bynum might become violent since, during a recent drug transaction, he had answered the door wearing only a pair of socks, and brandishing a semiautomatic pistol "in a threatening and intimidating manner." (*Id*. at p. 581.) The *Bynum* court concluded that the officers' concerns were based on "particularized, articulable, and reliable information," and stated, "[O]ur holding in this case merely confirms the proposition that the presence of a firearm coupled with evidence that a suspect is willing and able to use the weapon will often justify noncompliance with the knock and announce requirement." (*Id*. at pp. 581-582.)

not wait for a reasonable suspicion of exigency to develop before entering. Rather, because they believed their encounter with Thomaselli had alerted the occupants to their presence, they made a deliberate decision to immediately enter the house.

The People rely on *People v. Flores* (1982) 128 Cal.App.3d 512 (*Flores*) to support their argument that there were exigent circumstances in this case sufficient to excuse the officers' failure to comply with knock-notice requirements. In *Flores*, one defendant, Flores, engaged in a drug transaction near a house, while a second defendant, Dominguez, who had assisted in the transaction, went back into the house. (*Id*. at p. 518.) After realizing police officers were present, Flores started to run back to the house, at which time the police officers yelled at him to stop and placed him under arrest. (*Ibid*.) A police officer then went to the front door of the house, saw that the screen door was ajar and the front door open, and yelled, "Police officer with a search warrant. Demand an entry," before entering one or two seconds later. (*Id*. at pp. 518-519.) In finding exigent circumstances sufficient to excuse compliance with knock-notice requirements, the *Flores* court relied on two factors, neither of which are sufficient under current law to establish exigency:

> "[T]he specific facts known to [the police officer] included the immediately preceding large heroin sale actively engaged in by Dominguez whom he knew was inside the same house where heroin sales of increasing amounts were completed in four of the past six days and, as the trial court emphasized, the yelling at Flores just outside the open front door which he reasonably could consider as having warned those inside of the officers' presence and purpose." (*Id.* at p. 521.)

With regard to the existence of drug sales, *Banks* and *Richards* establish that the presence of disposable contraband at the place to be searched does not create an immediate exigency justifying noncompliance with knock-notice requirements. Both *Banks* and *Richards* make it clear that the officers' knowledge of drug activity at the place to be searched cannot be the sole basis upon which to justify entering immediately after announcing their presence. Second, to the extent *Flores* can be read to suggest that if the occupants of a place to be searched have been notified of the presence of the police, this constitutes an exigent circumstance, we disagree. Warning those inside of the officers' presence and purpose is one of the purposes of knock-notice requirements, not an exigent circumstance *excusing* compliance. Under *Banks*, an exigency can arise over time once the occupants of the place to be searched are notified of the presence of law enforcement officers by their knocking and announcing their intent. But the notice itself does not create an immediate exigency justifying noncompliance with knock-notice requirements.

Richards lists three circumstances that may justify a no-knock entry: a reasonable suspicion of dangerousness, futility, or the possibility that the effective investigation of the crime might be inhibited by, for example, allowing the destruction of evidence. (*Banks, supra,* 124 S.Ct. at p. 525, citing *Richards, supra*, 520 U.S. at p. 394.) An officer's belief that he may have "compromise[d]" the search operation by possibly giving the occupants five to seven seconds notice before entering is not a basis for a no-knock entry under either *Richards* or *Banks*. Accordingly, we conclude that the police in this case did not have "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." (*Richards, supra*, 520 U.S. at p. 394.)

3. The Law Enforcement Officers Did Not Substantially Comply with Knock-Notice Requirements

The People contend that even if there were not exigent circumstances excusing compliance with knock-notice requirements, the officers in this case "substantially complied" with section 1531.

Section 1531 "requires that two conditions be satisfied before forcible entry is permitted: (1) the officer must announce his authority and purpose, and (2) he must be refused entry. The refusal of entry may be implied, as where an occupant fails within a reasonable time to respond to a police demand that he open the door." (*People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1047.)

The purposes of section 1531 are: "'(1) the protection of the privacy of the individual in his home [citations]; (2) the protection of innocent persons who may also be present on the premises where an arrest is made [citation]; (3) the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice [citations]; and (4) the protection of police who might be injured by a startled and fearful householder.'" (*People v. Peterson* (1973) 9 Cal.3d 717, 723, quoting *Duke v. Superior Court* (1969) 1 Cal.3d 314, 321.) While "[t]he protection of the privacy of the individual in his home . . . is not impinged upon by a probation search at the probationer's place of residence since the probationer has waived his claim to privacy therein . . . the remaining policies and purposes underlying the

statutory knock-notice provisions must be satisfied" in the context of a probation search. (*People v. Constancio*, *supra*, 42 Cal.App.3d at pp. 543-544.)

The California Supreme Court has held that *"*[*s*]*ubstantial compliance* [with knock-notice requirements] . . . can occur only when . . . there has been some attempt to comply." (*People v. Hall* (1971) 3 Cal.3d 992, 998, fn. 3.) Substantial compliance in this context means "*actual* compliance in respect to the substance essential to *every* reasonable objective of the statute, as distinguished from 'mere technical imperfections of form.'" (*People v. Jacobs* (1987) 43 Cal.3d 472, 483 (*Jacobs*), quoting *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 348, first italics in original, second italics added.)

In this case, there was admittedly no attempt on the part of the law enforcement officers to comply with knock-notice requirements, the elements of the requirements were not satisfied, and the purposes of the requirements were not met. Thus, it is clear there was not substantial compliance with knock-notice requirements.

a. There Was No Attempt to Comply with Knock-Notice Requirements

One purpose of the knock-notice requirements is to alert persons inside the place to be searched of the presence of the police and their intent. Here, it is undisputed that the officers did not knock before they entered Murphy's residence. The trial court found that the officers' shouting at Thomaselli outside the residence served to notify the occupants of the presence of the officers and their intent to conduct a search of the residence. However, even if this is correct, there is no evidence that the officers *intended* to provide such notice. In fact, the evidence is to the contrary. Santana testified that he

purposely did not knock before entering Murphy's residence because he feared that "anyone in the residence or in the bedroom would have heard us" yelling at Thomaselli, and that persons in the residence might arm themselves, destroy evidence or flee.

Further, there is nothing to indicate that the officers believed they had been refused admission before they entered Murphy's residence. Rather, as Santana testified, the officers in this case *intentionally* entered without knocking and without being refused admittance because they believed there was a possibility the people in the house had *inadvertently* been given notice of the officers' presence, and that this excused the officers from complying with knock-notice requirements.[8] Thus, the officers did not "attempt to comply" with knock-notice requirements. (*People v. Hall, supra,* 3 Cal.3d at p. 998, fn. 3.)

b. There Was Neither Actual Nor Implied Refusal of Admittance

In the absence of an exigency, after announcing their presence the police must knock and announce their intent, and receive an actual refusal of entry or wait a sufficient period of time to infer one, before they may enter. (*Banks, supra*, 124 S.Ct at p. 529; see also *People v. Uhler* (1989) 208 Cal.App.3d 766, 769 [reviewing cases discussing failure to wait sufficient time after announcement].) In this case, there was neither actual nor implied refusal of admittance. The officers acknowledge that they never knocked on Murphy's door nor requested admittance, and it is undisputed that there was no actual refusal of admittance. As to implied refusal, the People do not attempt to argue that the

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8 See part III(A)(2) for our rejection of this rationale for the entry.

officers waited a sufficient period of time to infer that the occupants of the residence had refused them admittance.

However, the People argue that "to the extent the detectives failed to wait a sufficient amount of time for refusal before entry," that failure was "a minor technicality [that] did not cancel their substantial compliance. . . ." To the contrary, the failure to wait a sufficient amount of time for refusal is not a "minor technicality." Such failures have routinely served as the basis for courts finding that police officers failed to comply with knock-notice requirements. (See *People v. Uhler, supra,* 208 Cal.App.3d at p. 769 [reviewing case law and noting, "Absent exigent circumstances, the Fourth Amendment and article I, section 13 of the California Constitution are generally violated when officers force entry without allowing the occupants the opportunity to admit them"].) Accordingly, we conclude that there was not substantial compliance with the requirement that the officers be refused entry.[9]

c. The Policy Served by Knock-Notice Requirements Was Not Met

In determining whether the police have substantially complied with knock-notice requirements, the California Supreme Court has instructed courts to consider whether the

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9 In that regard, we also reject the People's reliance on *United States v. Bustamante-Gamez* (9th Cir. 1973) 488 F.2d 4 (*Bustamante-Gamez*) in support of their argument that the failure to wait a sufficient amount of time after announcement, but before entry, is "relatively unimportant." Since the decision in *Bustamante-Gamez*, the United States Supreme Court has twice expressly stated that "the opportunity to comply with the law" is an important interest served by knock-notice requirements. (*Richards, supra*, 520 U.S. at p. 393, fn. 5, citing *Wilson v. Arkansas* (1995) 514 U.S. 927, 930-932 [115 S.Ct. 1914].)

policy of "preventing violent confrontations between startled householders and the police" was served by the manner of entry. (*Jacobs*, *supra*, 43 Cal.3d at p. 483.) In *Jacobs*, the California Supreme Court held there was no substantial compliance with knock-notice requirements despite the fact that the officers in that case knocked on the door and entered the residence only after an 11-year-old child had opened the door. (*Jacobs*, *supra*, 43 Cal.3d at p. 476.) After first holding that it was unreasonable for the officers to conclude that the child had either actual or apparent authority to consent to the officers' entry into the house (*id*. at p. 482), the Court held that the policy of preventing potentially violent confrontations embodied in the knock-notice requirements was not met because of "the likelihood that an adult occupant [would] be startled by the apparently unauthorized intrusion and react violently out of concern for the safety of the child." (*Id*. at p. 483.)

Here, the officers did not knock or request admittance. Instead, four or five law enforcement officers suddenly invaded Murphy's home with their guns drawn. Clearly the policy of "preventing violent confrontations between startled householders and the police" (*Jacobs, supra*, 43 Cal.3d at p. 483) was not served by the manner of entry in this case.

Because neither the elements nor the purposes of the knock-notice requirements were met by the manner of the police officers' entry into Murphy's residence, we conclude that the law enforcement officers in this case did not substantially comply with knock-notice requirements.

B. The Officers' Failure to Comply with Knock-Notice Requirements Renders the Search Unconstitutional Under the Fourth Amendment; All Evidence Seized Must Be Suppressed

"In *Wilson v. Arkansas* [1995,] 514 U.S. 927 [115 S.Ct. 1914], [the United States Supreme Court] held that the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry." (*Richards, supra*, 520 U.S. at p. 387.) Similarly, both the California Supreme Court and the California Court of Appeal have concluded that "an entry effected in violation of the provisions of . . . section 1531 renders any subsequent search and seizure 'unreasonable' within the meaning of the Fourth Amendment." (*Duke v. Superior Court, supra*, 1 Cal.3d at p. 325; see also e.g., *Jacobs*, *supra*, 43 Cal.3d at p. 484, *Jeter v. Superior Court* (1983) 138 Cal.App.3d 934, 938; *People v. Neer* (1986) 177 Cal.App.3d 991, 997 [all applying *Duke*'s holding that failure to comply with knock-notice requirements constitutes a violation under the Fourth Amendment].)

In this case, there was neither actual nor substantial compliance with knock-notice requirements, and there were no exigent circumstances excusing compliance. For these reasons, we conclude that the search was unreasonable under the Fourth Amendment.

1. Evidence Obtained as a Result of the Failure to Comply with Knock-Notice Requirements Must Be Suppressed

The failure to comply with knock and notice requirements nullifies the subsequent search and requires the exclusion of the evidence obtained as a result of the search. (*Duke v. Superior Court, supra*, 1 Cal.3d at p. 325; *People v. Gastelo* (1967) 67 Cal.2d 586, 589.)

After a scholarly and lengthy analysis, the court in *Neer* concluded that notwithstanding "the enactment of California Constitution article I, section 28, subdivision (d) by Proposition 8 in June 1982,[10] a section 1531 violation still calls for the exclusion of the evidence obtained." (*People v. Neer*, *supra*, 177 Cal.App.3d at p. 997.) The year after *Neer* was decided, the California Supreme Court held in a post-Proposition 8 case that "[n]oncompliance with [Penal Code] section 844 renders any search and seizure following the entry unreasonable within the meaning of the Fourth Amendment (*Duke v. Superior Court, supra*, 1 Cal.3d at p. 325)," and that the evidence obtained in violation of knock-notice requirements should be suppressed. (*Jacobs*, *supra*, 43 Cal.3d at p. 484, fn. omitted.) Thus, Proposition 8 did not undermine the California Supreme Court's repeated holdings that federal law requires that evidence obtained as a result of a failure to comply with knock-notice requirements violates the Fourth Amendment and must be suppressed. (See, e.g., *People v. Tacy* (1987) 195 Cal.App.3d 1402, 1413-1414 ["conclud[ing] that *Duke v. Superior Court, supra*, 1 Cal.3d 314, 325, retains its vitality despite the advent of Proposition 8"].)

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10 That provision provides in pertinent part: "relevant evidence shall not be excluded in any criminal proceeding. . . ." (Cal. Const., art. I, § 28, subd. (d).) The California Supreme Court has held that this provision cannot affect exclusionary rule provisions mandated by federal law. (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.)

2. The Evidence Is Not Admissible Under the Inevitable Discovery Exception to the Exclusionary Rule

The People argue that even if the search in this case was unlawful, the evidence seized from Murphy's residence should not be suppressed, pursuant to the inevitable discovery exception to the exclusionary rule.

> "Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.'" (*People v. Robles, supra*, 23 Cal.4th at p. 800, quoting *Murray v. United States* (1988) 487 U.S. 533, 539 [108 S.Ct. 2529].)

It is the prosecution's burden to "establish by a preponderance of the evidence that the information would have been discovered by lawful means," in order for the doctrine to apply. (*Nix v. Williams* (1984) 467 U.S. 431 [104 S.Ct. 2501] (*Nix*).) In this case, the People did not raise the inevitable discovery argument below. Notwithstanding this omission, "the inevitable discovery doctrine . . . may be applied on appeal if the factual basis for the theory is fully set forth in the record." (*People v. Robles*, *supra*, 23 Cal.4th at p. 801, fn. 7.)

The People argue that even if the law enforcement officers in this case failed to comply with knock-notice requirements, the evidence seized would inevitably have been discovered, based on Murphy's Fourth Amendment waiver. They contend that "its discovery was the product of a valid Fourth Amendment waiver, not the detectives' mode of entry." The essence of the People's argument is that a per se inevitable discovery

exception applies to *any* probationary search in which a knock-notice violation occurs. This contention involves a pure question of law, and Murphy does not maintain that the People have waived the issue by failing to raise it below. We exercise our discretion to consider the issue. (See, e.g., *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 398 ["The rule that the appellate court will not consider points not raised below . . . does not apply to . . . [a] [q]uestion of [l]aw."].)

In support of the argument that the inevitable discovery doctrine applies in this case, the People rely principally on *Nix*, *supra*, 467 U.S. 431. In *Nix*, the police violated the defendant Williams's Sixth Amendment right to counsel by improperly interrogating him outside the presence of his attorney. During the unlawful interrogation, the police learned from Williams the location of the body of a young girl he had murdered. Williams's first conviction was reversed due to the Sixth Amendment violation. (*Nix, supra*, 467 U.S. at pp. 435-437.) At a suppression hearing held before the second trial, the prosecution presented evidence that police and 200 volunteers had initiated a systematic search for the child's body prior to Williams's interrogation. The search was terminated when Williams led police to the body. (*Id*. at pp. 448-449.) At the second trial, the prosecution was allowed to present evidence concerning the condition of the body as it was found, based on the trial court's conclusion that the prosecution had established that if the search had continued, the body would have been discovered within a short time, in essentially the same condition in which it was found. (*Id*. at pp. 437-438.)

After reviewing the evidence of the independent search, the United States Supreme Court concluded, "[I]t is clear that the search parties were approaching the actual location of the body, and we are satisfied . . . that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found." (*Nix, supra*, 467 U.S. at pp. 449-450.) Under such circumstances, the *Nix* court held that the "evidence was admissible under the inevitable discovery exception to the exclusionary rule." (*Id*. at p. 450, fn. 7.)

A majority of courts that have considered whether the inevitable discovery doctrine announced in *Nix* should apply in the context of a knock-notice violation have rejected its application. (See, e.g., *State v. Lee* (Md. 2003) 821 A.2d 922, 937 (collecting cases); *Kellom v. State* (Fla.App. 2003) 849 So.2d 391, 396 (collecting cases); see also *United States v. Dice* (6th Cir. 2000) 200 F.3d 978, 984-985; *United States v. Holmes* (D.Me. 2002) 183 F.Supp.2d 108, 111.)[11] In reaching the conclusion that the exception does not apply in cases of knock-notice violations, courts have relied on the fact that *Nix* requires the prosecution to show that the evidence "would inevitably have been discovered without reference to the police error or misconduct" (*Nix, supra*, 467 U.S. at p. 448), and that such a showing cannot usually be made in the context of a knock-notice violation. (See, e.g., *United States v. Dice, supra*, 200 F.3d at p. 986 [concluding

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11 The United States Supreme Court declined to address the issue of the potential application of the inevitable discovery doctrine in *Wilson* because the issue had not been addressed by the court below and was not within the scope of the question on which it had granted certiorari. (See *Wilson v. Arkansas*, *supra*, 514 U.S. at p. 937, fn. 4.)

inevitable discovery doctrine did not apply to knock-notice violation because government did not show "'that the evidence inevitably would have been obtained from lawful sources in the absence of the illegal discovery'"], quoting *United States v. Leake* (6th Cir. 1996) 95 F.3d 409, 412; *United States v. Gonzalez* (D. Mass. 2001) 164 F.Supp.2d 119, 123, fn. 2 [rejecting inevitable discovery exception application to knock-notice violation because "there was only one search, and no other independent means of discovery appeared on the horizon."].)

In discussing whether the inevitable discovery doctrine should generally apply to knock-notice violations, many courts have also noted that *Nix* was premised upon the rationale that the application of the exception "must not significantly weaken Fourth Amendment protections." (*United States v. Gonzalez*, *supra*, 164 F.Supp.2d at p. 123, fn. 2.) These courts have reasoned that *Nix* should not apply in the knock-notice context, since "application of the inevitable discovery doctrine . . . would read the knock and announce requirement of the Fourth Amendment out of the Constitution. . . ."[12] (*State v. Lee*, *supra*, 821 A.2d at p. 946.) In *United States v. Shugart* (E.D.Tex. 1995) 889 F. Supp. 963, 977, affirmed (5th Cir. 1997) 117 F.3d 838, the court explained:

> "If the [inevitable discovery] exception were to apply [to knock notice violations], officers could obviate their obligation to provide notice of their authority and purpose prior to entering a person's household whenever they had a valid warrant authorizing the search of the home. In those situations, officers would know their misconduct would have no unfavorable consequences, and simply stated, the exception would swallow the rule."

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12 Respected commentators agree. (See 5 LaFave, Search and Seizure: A Treatise on the Fourth Amendment (2003 supp.) § 11.4, pp. 46-48.)

This observation applies with equal force to probation searches where there is a Fourth Amendment waiver.

In *Nix*, there was an actual, independent search taking place contemporaneously with the illegal interrogation of Williams, and the Court concluded that the search team would inevitably have found the girl's body even without the illegally obtained statements. Here, in contrast, there is no evidence that a lawful search of Murphy's home would ever have actually taken place. In the absence of such evidence, the inevitable discovery exception to the exclusionary rule cannot apply.[13]

We acknowledge that some courts have applied the inevitable discovery doctrine to knock-notice violations. (See, e.g., *United States v. Langford* (7th Cir. 2002) 314 F.3d 892; *People v. Stevens* (Mich. 1999) 597 N.W.2d 53; see also *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1212 [Morrison, J. concurring].) These courts have reasoned that: (1) tort remedies are available to deter searches conducted in violation of knock-notice requirements; (2) the inevitable discovery doctrine should apply where the prosecution is put neither in a better nor worse position by the illegal search; and (3) the evidence would inevitably have been discovered because the police had the right to conduct the search.

We find these reasons unpersuasive. First, tort remedies are available to deter any kind of unlawful search; the existence of the exclusionary rule presupposes that civil

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13 Contrary to the dissent's assertion, we are not adopting a "blanket refusal to apply the inevitable discovery doctrine to knock and notice cases." Rather, we conclude merely that *where there are no grounds for believing that the evidence would have been discovered through lawful means*, the inevitable discovery exception cannot apply.

remedies alone are inadequate to deter unlawful conduct by the police. Second, applying the inevitable discovery doctrine in this context would put the prosecution in a better position by allowing it to benefit from the fruits of an unreasonable search where there is no evidence that the evidence would otherwise have been discovered through lawful means. Finally, the fact that law enforcement officers had the right to conduct a search lawfully cannot justify application of the inevitable discovery doctrine. If that were the case then, as discussed above, the exception would eviscerate the knock-notice requirement.

In the context of a knock-notice violation where there is no evidence that a subsequent search would have been conducted, to apply the inevitable discovery doctrine one would have to find that a hypothetical search would have been undertaken, and that it would have been executed in a lawful manner.[14] We are unwilling to assume that the officers in this case would have conducted the search of Murphy's residence lawfully, if they had not in fact conducted it unlawfully. (See *United States v. Dice*, *supra*, 200 F.3d at pp. 986-987; *United States v. Espinoza* (7th Cir. 2001) 256 F.3d 718, 731 (Wood, J. dissenting) [inevitable discovery doctrine should not apply where "officers . . . spell out

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14 The Ninth Circuit and the California Supreme Court have both recently rejected a similar attempt to extend the inevitable discovery doctrine to cases in which the police could have, but did not, seek a warrant where one was required. "To excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment." (*U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986, 994-995; see *People v. Robles*, *supra*, 23 Cal.4th at p. 801 [inevitable discovery doctrine would not serve to excuse warrantless search of residence].)

after the fact a hypothetical scenario by which they could have properly obtained the evidence"].) To apply the inevitable discovery exception in this manner would effectively eliminate knock-notice requirements from the Fourth Amendment. We decline to do so.

IV.

CONCLUSION

The evidence was obtained in violation of California's knock-notice requirements and the Fourth Amendment to the United States Constitution and must be suppressed.

V.

DISPOSITION

The judgment is reversed.

CERTIFIED FOR PUBLICATION

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AARON, J.

I CONCUR:

_____

O'ROURKE, J.

BENKE, Acting P. J.

I respectfully dissent. Under the reasonable suspicion standard we are required to apply, exigent circumstances existed in this case justifying an entry without knocking and giving notice. I also conclude that, under the circumstances, the officers substantially complied with the announcement rule. Finally, while these conclusions make it unnecessary to do so, I address inevitable discovery since I believe the doctrine precludes suppression of the evidence seized.

A. *Exigent Circumstances*

In this case we must determine whether law enforcement officers, who are suddenly faced with a chaotic and dangerous confrontation during the staging of a Fourth Amendment waiver search for drugs, may enter a residence without knocking and waiting for a response from within. My colleagues conclude that even where such a dangerous confrontation occurs at the doorstep, the police may not consider the impact of the confrontation on the occupants of the residence. Rather, they find that unless the officers can point to specific facts—exclusive of the confrontation itself—which support a belief the occupants would then be a safety risk, would destroy evidence or flee, the officers are required to knock, announce their presence and purpose, and wait an undefined period of time for the drug dealers within to come to the door. With all due respect, the result my colleagues reach imposes a far higher burden on law enforcement than the reasonable suspicion standard articulated in *Richards v. Wisconsin* (1997) 520 U.S. 385 [117 S.Ct. 1416] (*Richards), United States v. Arvizu* (2002) 534 U.S. 266 [122

S.Ct. 744] (*Arvizu*) and reiterated recently in *United States v. Banks* (2003) ___ U.S. ___ [124 S.Ct. 521] (*Banks*).

1. The reasonable suspicion standard of *Richards* and the significance of *Banks*

The *Richards* opinion was the result of repeated attempts by the government to obtain judicial approval of a blanket no-knock exception in drug cases. In an earlier decision, *Wilson v. Arkansas* (1995) 514 U.S. 927 [115 S.Ct. 1914], the Supreme Court held that while the method of an officer's entry into a dwelling is relevant to the reasonableness of a search or seizure, the Constitution does not mandate a rigid rule of announcement that ignores "countervailing law enforcement interests." (*Id*. at p. 934.) The court left to the lower courts the task of determining what those relevant countervailing factors might be, but noted in remanding that factors such as a reasonable belief officer safety might be imperiled or that easily disposable narcotics might be destroyed could constitute such countervailing factors. (*Id*. at pp. 936-937.)

Two years later, in *Richards*, the court provided additional guidance on when in the course of drug investigations, countervailing law enforcement interests allow officers to enter dwellings without complying with announcement requirements.[1] The history of *Richards* is instructive.

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[1] One year after *Richards* in *United States v. Ramirez* (1998) 523 U.S. 65, the Supreme Court stated that the relatively undemanding test for when an unannounced entry was constitutionally applied not only when entry would result in little if any property damage but also when a forcible entry was required. (*Id*. at pp. 69-70.)

In *Richards* the officers obtained a warrant allowing the search of a hotel room from which they believed drugs were being sold. In the early morning an officer dressed as a maintenance man approached the hotel room door followed by several plainclothes officers and at least one uniformed officer. After knocking, the officer at the door responded to a query from within by stating he was a maintenance man. The door with its security chain still in place was opened. Seeing the uniformed officer, defendant immediately closed the door. The officers waited two or three seconds, announced themselves as police officers, knocked down the door and entered. In the room the officers found drugs and arrested the defendant. (*Richards, supra,* 520 U.S. at pp. 388-389.)

The trial court refused to suppress the evidence seized, holding that based on the defendant's behavior the officers could reasonably conclude he was aware of their identity and if entry was not immediately made he might destroy evidence or escape. (*Richards, supra,* 520 U.S. at p. 389.)

The Wisconsin Supreme Court took a more direct route to denying suppression. That court was disinterested in the particular facts of the unannounced entry. Instead, it noted that the officers had probable cause to believe drugs were being sold from the room. It concluded based on judicial opinions and other authoritative sources that all felony drug crimes involve a high risk of injury or death to the police as well as a high potential for the destruction of evidence prior to entry. As a result of these concerns, the court concluded that in felony drug cases, exigent circumstances justifying entry without announcement *always exist.* The court stated the invasion of privacy occasioned by such

entry was minimal since the officers had the right to enter without permission. It noted similar per se rules existed in other states. (*Richards, supra,* 520 U.S. at pp. 389-390.)

In a unanimous opinion the United States Supreme Court rejected Wisconsin's per se unannounced entry rule for drug cases. However, while rejecting categorical rules based on the general risks inherent in drug investigations, the court set the following standard for unannounced entries in such cases: "In order to justify a 'no-knock' entry, the police must have a 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. This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." (*Richards, supra,* 520 U.S. at p. 394.)

The court in *Richards* pointed out that the reasonable suspicion standard "is not high." (*Richards, supra,* 520 U.S. at p. 394.) While *Richards* does not fully define the reasonable suspicion standard, other cases do. Thus, it has been noted that reasonable suspicion is established with less information, and less reliable information than is required to meet the test of probable cause, and can be established by considerably less than proof of wrongdoing by a preponderance of the evidence. (*United States v. Sokalow* (1989) 490 U.S. 1, 7 [109 S.Ct. 1581]; *Alabama v. White* (1990) 496 U.S. 325, 330 [110 S.Ct. 2412]; see also *People v. Souza* (1994) 9 Cal.4th 224, 230-231.)

In *United States v. Cortez* (1981) 449 U.S. 411, 417-418, the court further explains that "the essence of all that has been written" about the reasonable suspicion standard "is that the totality of circumstances—the whole picture—must be taken into account. . . . [¶] . . . [¶]The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as fact finders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

The United States Supreme Court recently revisited the concept of reasonable suspicion and its relationship to exigency. In *Banks, supra,* ___ U.S. ___ [124 S.Ct. 521] the court found exigency existed where officers possessing a search warrant for cocaine, knocked at a residence door and entered without permission after 15 seconds elapsed without a response from the occupant. My colleagues conclude the *Banks* decision is of limited assistance in the present case because the issue in *Banks* was not whether the officers needed to knock and notice their intentions, but rather how long officers must

wait before entering without permission, after knocking and announcing their intent. (Maj. opn, pp. 12-13.) I do not take such a restrictive view of *Banks*.

Although the specific issue presented in *Banks* was the length of time the officers needed to wait after knocking, the court expressly noted the controlling criteria bear on when officers can dispense altogether with a knock and announcement. The court thus began its decision "with a word about standards for requiring or dispensing with a knock and announcement." (*Banks, supra,* ___ U.S. ___ [124 S.Ct. at p. 524].) As the court thereafter makes clear, exigency may ripen along a continuum of law enforcement activity. It might exist *at the time the warrant is issued,* resulting in a no-knock warrant. (*Banks, supra,* ___ U.S. ___ [124 S.Ct. at p. 525]; *Richards, supra,* 520 U.S. at p. 396, fn. 7.) It may develop at the door *after* the officers have knocked and announced their presence. (*Banks, supra*, ___ U.S. ___ [124 S.Ct. at p. 526].) If circumstances support a reasonable suspicion of exigency *when the officers arrive at the door* they may go straight in. (*Id.* at p. 525.)

Once the officers identify the point in time that exigency is claimed to have ripened, their decision to enter unannounced is assessed in terms of the totality of circumstances, including all of the factual details known to them. Referring us to its recent opinion in *Arvizu*, the court in *Banks* provides direct guidance as to how the totality of facts is to be examined. *Arvizu* emphasizes the facts supporting reasonable suspicion must be analyzed completely in light of the case at hand and through the eyes of the officers involved. (*Arvizu, supra,* 534 U.S. at p. 276.) *Arvizu* further rejects any attempt to "distort the 'totality of the circumstances' principle, by replacing a stress on

revealing facts with resort to pigeonholes" (*Banks, supra,* ___ U.S. ___ [124 S.Ct. at p. 528]) and cautions against analysis of facts in isolation from each other, noting such treatment of the circumstances confronting officers is the very type of "divide and conquer analysis" prohibited by established authority. While each dissected fact might alone not constitute reasonable suspicion, collectively the facts might amount to reasonable suspicion. (*Arvizu, supra,* 534 U.S. at pp. 274-276; also see *People v. Ledesma* (2003) 106 Cal.App.4th 857.)[2]

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2 Addressing the reasonable suspicion standard in the context of the protective sweep of a probationer's residence, the court in *People v. Ledesma, supra,* 106 Cal.App.4th at pages 863-864, has observed: "The high court has repeatedly held that in determining the existence of reasonable suspicion, courts must evaluate the ' "totality of the circumstances' " on a case-by-case basis to see whether the officer has ' "a particularized and objective basis" ' for his or her suspicion. [Citation.] The court has emphasized the importance of allowing the officers on the scene 'to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." [Citations.]' [Citation.] In addition, the court has been sharply critical of lower court decisions precluding police reliance on facts consistent with an innocent as well as a guilty explanation. [Citation.] The court has cautioned against restricting the range of facts considered in the calculus of reasonable suspicion. [Citations.] It has embraced the notion that 'reasonable suspicion' is an abstract concept, not a ' "finely-tuned standard[]" ' [citations] and deliberately avoided encumbering its determination with a ' "neat set of legal rules." ' [Citations.] Finally, the court has warned lower courts to avoid the 'unrealistic second-guessing' of police officers acting 'in a swiftly developing situation . . . . [Citation.] A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. . . . [Citation.] The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.' [Citation.]" (*Ibid.*)

Reliance on the judgment of officers in the field is particularly appropriate where they are operating on their "adversary's turf" and where that turf is the site of ongoing narcotics activity which they may have reason to believe contains firearms, "one of the tools of the trade." (*People v. Ledesma, supra,* 106 Cal.App.4th at pp. 864-865.)

Whether exigency exits in this case rises or falls on the facts known to Santana at the time he decided to enter without knocking or waiting. That decision was made in the mix of events surrounding the confrontation with Thomaselli. We are obligated to consider every fact and nuance, every inference and conclusion reached by Santana, an experienced narcotics detective, during the physical encounter just outside the open door. My colleagues reject the encounter with Thomaselli as a factor in determining whether exigency existed. Rather, Santana's perceived urgency following the encounter with Thomaselli is treated as unimportant in the chain of events, and indeed is barely discussed by my colleagues.

Finding no significance in the encounter with Thomaselli, my colleagues conclude a knock and announcement was necessary and, attempting to fit this case within their view of *Banks,* they conclude all of the events which occurred prior to the officers' arrival at the door become part of the evaluation not of exigency but of how long officers must wait before entering. (Maj. opn., pp. 14-17.) They approach the task not as an analysis of the totality of circumstances but as a segmented response to arguments offered by the People. Respectfully, this not only misses the point of *Banks*, but is the very type of divide and conquer analysis expressly disapproved in that case and in *Arvizu*.

The significance of *Banks* is not that it creates a method to determine wait periods. It is a case describing and reinforcing the analysis to be employed in determining exigency, wherever it is claimed to have matured. In *Banks* it happened to mature after the officers knocked. Here, the exigency is claimed to have arisen at the time of the encounter with Thomaselli, not at the door. The question before us is therefore whether

considering the experience of the officers, the nature of the crimes involved, the location of events and the circumstances rapidly unfolding around them, these officers were justified in concluding their drug investigation was somehow compromised and immediate entry was necessary following their encounter with Thomaselli.

2. The facts of this case support a finding of exigency.

I recite the facts here because, with all due respect, I believe the majority's statement of facts does not adequately discuss the situation confronting Santana. I note that the majority more than once seems to suggest that there was or should have been some doubt in the minds of the officers as to whether drug trafficking was taking place in Murphy's home. (Maj. opn., pp. 14-15.) The record rebuts this suggestion. At approximately 12:45 p.m. the narcotics team here, led by Santana, an experienced narcotics detective, was called to the scene of appellant's house because a neighbor complained of ongoing suspicious activity at the residence. As Santana watched the residence, he saw a woman leave under circumstances suggesting a drug sale. This woman was stopped as the car in which she was a passenger left the scene. Seeing the officers, she attempted to throw methamphetamine out the window. When confronted, the woman stated she had just purchased the drug from appellant inside appellant's house. The woman was arrested. Santana and other officers then returned to the sheriff's substation to develop a plan. Officer Marlow was left to watch the residence for any further trafficking. Santana was familiar with appellant's prior felony history, her probationary status and the layout of her house. Prior to returning to appellant's house, he

decided to conduct a search pursuant to her Fourth Amendment waiver. He chose to have his narcotics team approach the house from the point people were exiting.

At about 1:30 p.m., as Santana and other officers were returning, Marlow saw appellant appear to engage in what his experience indicated was yet another drug transaction, this time with an Hispanic male in the driveway of her house. As that man, "Sammy," drove off, he too was stopped and, while the circumstances are not clear from the record, he too was arrested when he was found to possess methamphetamine.

Thus, at the point in time that Santana and his team returned and approached appellant's house, they fully understood they were walking toward a residence where drug transactions were then taking place. The officers were dressed in safety clothing, black ballistics vests displaying the word "sheriffs" and black caps stating "sheriff's narcotics." Unlike my colleagues, I am comfortable concluding the officers justifiably believed they were in a potentially volatile situation which went beyond generalized fear or mere suspicion of drug trafficking.

When Santana and the rest of the team arrived, Marlow drove his vehicle down a private drive adjacent to appellant's house. When he got out of his car, he saw movement at the back of the garage and saw a man, later identified as Thomaselli. Marlow saw Santana and the search team approaching the house along the garage and motioned to them that there was a person in the area.

As Santana and his unit rounded a corner of the house, they came "face to face" with Thomaselli, who appeared to be walking from the open sliding glass door, clenching something in his fist. Unable to immediately determine who Thomaselli was and what he

might have in his hand, Santana and all six members of his team subdued him just outside the open sliding glass door. Santana loudly instructed: "Sheriff's Department. Probation Search. Get on the ground." All of the officers were yelling the same instructions. All had their weapons drawn. At the same time the confrontation was occurring, a dog inside began to bark. Unable to see inside through the glass on the sliding door because of reflecting sunlight, Santana lined up his officers and then within five to seven seconds, perhaps longer,[3] entered the residence.

As courts have clearly recognized, it is reasonable to conclude the occupants of houses from which drugs are sold may be armed and are prepared to immediately destroy those drugs. (*Banks, supra,* at p. 527; *Ledesma, supra,* at p. 865.) These assumptions applied to appellant's house. Against these assumptions, Santana and his team observed contemporaneous drug activity. Two purchasers were arrested as the officers watched the house. When they walked toward appellant's house and into this adrenaline-charged scenario, they had a surprise encounter with Thomaselli just outside an open door. They had no idea who Thomaselli was. He had an unknown object in his fist. What followed was a loud chaotic encounter with guns drawn. These circumstances reasonably led Santana to believe a controlled approach to the residence was no longer possible and his safety and that of his officers was compromised. These factors, and the possible destruction of methamphetamine packaged for sale, reasonably led him to conclude he

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3 Relying on Thomaselli's testimony he was on the ground for a minute or so before he heard voices inside the house, the judge concluded that probably more than five to seven seconds passed.

should make an immediate entry without stopping, knocking and reflecting upon preceding events while waiting for a drug seller to come to the door.

I do not see how this situation can reasonably be distinguished from that in *Richards* where the officers' drug investigation was also thwarted. In *Richards* it was in everyone's best interest to act quickly when the suspect recognized officers were present and shut the door. Ultimately, this recognition of the officers and the easily disposable nature of the drugs excused compliance with the requirements of announcement. As the Ninth Circuit recently noted in another case involving exigency arising during the staging of a search warrant, "the SWAT team knew that [appellant's] residence very likely contained methamphetamine. Once the occupants knew police were outside, the suspected presence of drugs—the quintessential disposable contraband—provided yet another justification for the no-knock entry." (*U. S. v. Peterson* (9th Cir. 2003) 353 F.3d 1045, 1050; see also *United States v. Bynum* (9th Cir. 2004) 362 F.3d 574.)

Here, the trial court expressly found appellant would have heard the commotion and loud law enforcement announcements outside. We are bound by this factual finding, which is amply supported by the circumstances surrounding the Thomaselli confrontation. (*People v. Mays* (1998) 67 Cal.App.4th 969, 972.) Appellant's knowledge, coupled with the chaos and presence of methamphetamine packaged for sale, is analogous to the facts in *Richards* and *Peterson*.

Not only would knocking and waiting for a response from occupants have been futile and risk destruction of drugs, in this case the officers' staging plan was in disarray, their attention necessarily diverted from appellant and entering her house to the chaos of

dealing with events outside. While the majority would fault the officers for the loss of this control, I am not willing to do so any more than I would be willing to fault the officers in *Richards* for using a ruse that went awry. Moreover, as the United States Supreme Court reminds us, we are not at liberty to substitute our views on how the officers *should* have responded, but rather we are obligated to view the reasonableness of their actions through *their* eyes at the time they are confronted with the alleged exigency. Under the chaotic circumstances here, it was reasonable for Santana to choose a course of action that preserved the safety of the officers.

The majority would have these officers, in the midst of the commotion and drug dealing around them, with guns drawn, stand at a partially opened sliding glass door they could not see through (but presumably through which they could be seen by those inside). There they would be required to knock and count the seconds, somehow reflecting individually or as a group upon preceding events to determine how long they should wait. This is not realistic. Nor is it a result contemplated by existing law.

3. This court's opinion in *People v. Flores* is consistent with the reasonable suspicion standard set by *Richards.*

The majority expressly disapproves this court's opinion in *People v. Flores* (1982) 128 Cal.App.3d 512, concluding it is an opinion which relies on factors no longer sufficient under current law. (Maj. opn., pp. 17-18.) I disagree.

The facts in *Flores* are essentially identical to those here. The officers in *Flores* possessed a warrant for a residence where heroin sales were then taking place. The officers were actively involved in observing the defendants around the house and

observing the drug sales. Before the warrant could be served, they were recognized and one defendant ran back toward the house. The officers ordered him to stop and went to the open screen door of the house. They announced their presence and purpose and, after one or two seconds, entered thinking any more heroin inside might be destroyed. We concluded the entry was proper.

While it is true there are no facts in *Flores* which suggest any remaining occupants of the house were then attempting to destroy drugs, arm themselves or flee, there is no doubt our court found an emergency existed which allowed for an immediate entry. The question is whether that emergency would allow an immediate entry under *Richards* and *Banks*. I believe it would. In *Flores*, a heroin investigation was unraveling around the police and a defendant was in flight. He was stopped outside the residence. The officers had a reasonable belief the occupants remaining in the house were still in possession of heroin and inferentially knew there were officers outside about to arrest them. It seems to me that the effective investigation of the crime was, in the terminology of *Richards*, "inhibited." Indeed, I would respectfully suggest that had contemporaneous sales of methamphetamine and a sudden physical confrontation outside the front door replaced the peaceful approach and announcement in *Banks*, a wait time of less than 15 seconds would have been deemed appropriate. Those facts are, of course, what we have in *Flores* and this case.

B. *Substantial Compliance*

I also disagree with my colleagues on the issue of substantial compliance. The majority finds a lack of substantial compliance because the officers did not intend to

comply with knock and notice requirements and because, in any case, they did not wait a sufficient time between any announcement given and entry.

1. The Law of Substantial Compliance

Mere technical violations of knock and notice requirements do not offend the Fourth Amendment such that suppression of evidence is appropriate. The Constitution is satisfied if there is substantial compliance with those requirements. Substantial compliance has been described as " ' "*actual* compliance in respect to the substance essential to every reasonable objective of the [Fourth Amendment announcement requirement]," as distinguished from "mere technical imperfections of form." ' " [Citation.] The essential inquiry is whether under the circumstances the policies underlying the knock-notice requirements were served. [Citation.]' [Citation.]" (*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1208.) Stated more simply: "When police procedures fail to conform to the precise demands of the [Fourth Amendment] but nevertheless serve its policies we have deemed that there has been such substantial compliance that technical and, in the particular circumstances, insignificant defaults may be ignored." (*People v. Peterson* (1973) 9 Cal.3d 717, 723.)

We require announcement before entry to avoid violence and to protect privacy. (*People v. Peterson, supra,* 9 Cal.3d at p. 723; *People v. Hoag, supra*, 83 Cal.App.4th at p. 1203.) In light of this policy, substantial compliance is achieved when, while there is some omission or defect in the announcement provided, the circumstances are such that the risk of violence or violation of privacy is no greater than it would have been had full technical compliance occurred. In dealing with the issue of substantial compliance the

inquiry remains one under the Fourth Amendment. The ultimate question, therefore, is the reasonableness of the officers' conduct in light of the policy bases for the announcement requirement under the circumstances in which the officers act. (See generally *Wilson v. Arkansas, supra,* 514 U.S. at p. 930; *People v. Hoag, supra*, 83 Cal.App.4th at p. 1209.)

2. Discussion

a. Attempt to comply

The majority asserts substantial compliance can only occur when there has been some attempt to comply with knock and notice requirements. The majority notes that after the officers' loud confrontation with Thomaselli next to the open door of appellant's house, a confrontation in which they identified themselves as sheriff's deputies and stated they were conducting a probation search, they entered the house within seconds without further notice. It is certainly the case that until they had entered the house, the officers did not intend to, nor after the confrontation attempt to, give additional notification of their authority and intention. This is understandable since at that point they believed exigent circumstances existed allowing immediate, unannounced entry. The officers' lack of intent and attempt to give notice, however, is irrelevant because the law of knock and notice is ultimately concerned with whether notice was given, not what the officers intended.

The majority cites footnote 3 in *People v. Hall* (1971) 3 Cal.3d 992, 998, for the proposition that a lack of intent to give notice is determinative. (Maj. opn., p. 20.) Footnote 3 of *Hall* states: "[Substantial compliance] can occur only when, as in the

instant case, there has been some attempt to comply. [Excused compliance] can occur in cases wherein the attempt to comply falls short of substantial compliance and also in cases . . . wherein there has been no attempt to comply. [Citation.]"

The court in *Hall* was not pronouncing an inclusive rule or using closely tailored language; it was simply describing a difference between two types of entries. Because excused compliance entries normally involve no attempt at announcement and because the excused compliance cases cited by the court were of that type, the court, understandably, made its point by stating that in substantial compliance cases there had to be some attempt at compliance. Certainly, the court did not mean that in situations where in light of events the occupants of a house are on notice that officers are present to lawfully conduct a search or make an arrest and where the policies of the announcement rule, under the circumstances, are fully served, exclusion is required simply because the officers did not intend to or attempt to give additional notice. Such a rule would not only be illogical but would ignore the policy basis of the announcement rule which is, after all, supposed to guide our analysis.

b. Chance to Admit Officers

Ultimately, for the majority this case turns on the failure of the officers to wait more than five to seven seconds after their loud and informative confrontation with Thomaselli outside a door and open window before going through the sliding glass door of appellant's house.

In general, the announcement rule requires that after officers give notice they must wait a reasonable period of time under the circumstances to allow occupants the chance

to admit them. (See *Wilson v. Arkansas, supra,* 514 U.S. at pp. 931-936; *People v. Hoag, supra*, 83 Cal.App.4th at pp. 1206-1207; Brunn, Cal. Judges Benchbook: Search and Seizure (Cont. Ed. Bar 2d ed. 2002) Opportunity to Surrender Premises, § 2.102, pp. 117-119.)

Courts have held that this requirement does not serve the avoidance of violence policy supporting the announcement rule because, if officers have a lawful basis for entry, the occupants have no right to refuse admittance. Once the officers announce their authority and occupants know they are present and why they are present, there is no reasonable danger the occupants will violently resist entry because they fear a criminal intrusion. (*People v. Hoag, supra*, 83 Cal.App.4th at pp. 1211-1212; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1227; *People v. Uhler* (1989) 208 Cal.App.3d 766, 770.)

The rule then must implicate the protection of privacy aspect of the announcement requirement. However, the right of privacy in this context is a limited one. In every announcement case the officers have the right to enter. Admittance may not be refused. As we use the term "privacy" in such cases, the right is less ethereal and more practical, i.e., allowing occupants to get out of bed or get dressed and thus see who is at the door. (See *Richards, supra,* 520 U.S. at p. 393.)

An insufficient delay period is not in itself conclusive on the question of whether an occupant's limited privacy right has been violated. In order to determine whether such a violation of privacy has taken place, we are required to examine the circumstances surrounding the entry, including such factors as the time of day, size of the house, the occupant's knowledge of the presence and purpose of the officers and whether there is

movement and lack of response to a known announcement. (See *People v. Hoag, supra,* 83 Cal.App.4th at pp. 1211-1212; *People v. Tacy* (1987) 195 Cal.App.3d 1402, 1421-1422; *People v. Uhler, supra,* 208 Cal.App.3d at pp. 768-770; *People v Trujillo, supra,* 217 Cal.App.3d at p. 1228.)

In the present case officers were aware that even during their mid-day arrival, appellant was up and about, selling drugs from her house and was engaged in drug-related conduct as she talked to an individual in the driveway area. She was on probation subject to a Fourth Amendment waiver. In confronting Thomaselli, the six officers loudly and collectively announced they were sheriff's deputies present to conduct a probation search. Given the location and intensity of their actions, the judge at the preliminary hearing concluded the officers made an effective announcement of their identity and intention to conduct a search and appellant would have heard them and could have responded. As the court noted, the duration and volume of the commotion served the same purpose as a knock. Moreover, having been selling drugs, appellant could not have been surprised by their presence. I would conclude any violation of appellant's privacy was minimal at best.

Under all the circumstances of this case, the interests of safety and privacy central to the announcement rule were served by the circumstances by which the officers entered.

C. Inevitable Discovery

While application of either exigency or the substantial compliance doctrine offers a sufficient basis for affirming the judgment, I believe it necessary to comment on my colleagues' inevitable discovery analysis.

The majority elects to address whether the inevitable discovery rule applies to cases involving knock and notice violations.[4] In so doing, my colleagues hold (1) the showing necessary for inevitable discovery to apply can seldom be made in the context of knock and notice violations, (2) the inevitable discovery doctrine should not apply to knock and notice violations because it would swallow the knock-notice rule and (3) the inevitable discovery doctrine cannot be applied on the facts of this case. (Maj. opn., pp. 26-32.)

There are courts that hold inevitable discovery can seldom be established where there has been a knock and notice violation because the required showing "cannot usually be made in the context of a knock-notice violation." (Maj. opn., pp. 28-29.) However, a cursory review of two of those cases relied upon by the majority reveals that they base this conclusion on the erroneous belief that inevitable discovery requires an *independent*, untainted investigation. (*U. S. v. Dice* (6th Cir. 2000) 200 F.3d 978, 984-985, and cited with apparent approval in *State v. Lee* (Md. 2003) 821 A.2d 922.)[5] The majority cites with approval the faulty reasoning of *Dice* and *Lee.* (Maj. opn. pp. 26-27.) Of course *Nix (Nix v. Williams* (1984) 467 U.S. 431), and the courts of this state, hold inevitable

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4 Although the preliminary hearing judge briefly mentioned the inevitable discovery in his ruling, the People did not rely on the doctrine and the issue was not addressed or briefed by the parties at either the section 1538.5 hearing or the preliminary hearing.

5 *Dice* reaches this conclusion by in part failing to quote the entirety of a passage in *U. S. v. Leake* (6th Cir. 1996) 95 F.3d 409, which states inevitable discovery applies where there has been *either* an independent untainted investigation " '*or* other compelling facts establishing that the disputed evidence inevitably would have been discovered.' " (Compare *id*. at p. 412, and *U. S. v. Dice, supra,* 200 F.3d at pp. 986-987.)

discovery may exist where, in the *same investigation*, alternative legal means would have led to the same evidence. (*People v. Thierry* (1998) 64 Cal.App.4th 176, 180; *People v. Saam* 1980) 106 Cal.App.3d 789, 797; see also 5 LaFave, Search and Seizure (1996) § 11.4, pp. 234-253.)

I also disagree with my colleagues' conclusion that application of inevitable discovery in knock-notice violations would eviscerate the knock-notice protections.

As the majority notes, a split of authority exists on the question of whether the doctrine of inevitable discovery should, as a policy matter, apply where there has been a violation of the knock and notice requirement. The majority, like other courts, is unwilling to apply inevitable discovery to knock-notice violations because it concludes that its application would permit the police to entirely ignore the knock and announcement requirements of the Fourth Amendment. (Maj. opn., p. 29; *United States v. Shugart* (E.D. Tex. 1995) 889 F.Supp. 963, 976.) In particular, it rejects the deterrent impact of administrative discipline and civil liability. In doing so, however, my colleagues part company with the *Nix* majority which addressed and dismissed their concerns.

In rejecting the appellant's argument that inevitable discovery should only be applied if the officers acted in good faith, the court in *Nix* stated: "[W]hen an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious 'shortcuts' to obtain the evidence. Significant disincentives to obtaining evidence illegally—*including the possibility of departmental discipline and civil liability*—also

lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. [Citation.] In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce." (*Nix v. Williams, supra,* 467 U.S. at pp. 445-446, italics added.)

The *Nix* rationale is applicable to knock-notice violations. Armed with a warrant or its functional equivalent, and in the absence of circumstances which excuse compliance, police officers have little at all to gain by failing to knock and announce their presence. Indeed, where compliance is not excused by the exigencies of the situation and discovery is inevitable, failing to knock and notice will only make the officer's life more difficult and give any occupant who resists the officer not only a civil remedy but a potential defense to any criminal charge growing out of the resistance. (See *People v. Stevens* (Mich. 1999) 597 N.W.2d 53, 64; see also *U. S. v. Langford* (7th Cir. 2002) 314 F.3d 892; *People v. Hoag, supra,* 83 Cal.App.4th at p. 1212 (Morrison, J., concurring.)

Moreover, a blanket refusal to apply the inevitable discovery doctrine to knock and notice cases leads to unreasonable results. For example, one can easily envision a situation where there have been multiple entries into a residence. At the front door the police violate the knock-notice rule and upon entry search and discover methamphetamine. At a second door the police encounter an individual who permits them to enter and search. The *Shugart* rationale adopted by the majority combined with the requirement of an independent investigation would hold the evidence must be suppressed even though the evidence would have been inevitably discovered by virtue of

the entirely proper police procedures at the second door. The same result would occur if the police enter in violation of knock and notice rules and, based on information obtained prior to the entry, began the process of obtaining a warrant which would have resulted in discovery of the evidence.

Unlike my colleagues, I proceed on the assumption law enforcement officers obey the law and I see no impediment to application of the inevitable discovery doctrine in knock-notice cases.

Finally, I believe the evidence in this case would have been inevitably discovered. In cases that reject application of the doctrine to knock-notice violations, the definition of "inevitable discovery" has at times been severely limited to instances where the prosecution can establish proper and predictable investigatory procedures would have been utilized such that law enforcement *would* have acquired the evidence. (See *State v. Lee, supra,* 821 A.2d at pp. 939-940.) I am not convinced such a restrictive definition is appropriate.

The term "inevitable discovery" is a misnomer. (Brunn, Cal. Judges Benchbook: Search and Seizure (Cont. Ed. Bar 2d ed. 2002) Basic Principles, § 160, pp. 39-40.) The doctrine does not require inevitability or certainty but rather requires "reasonable probability." (*People v. Boyer* (1989) 48 Cal.3d 247, 278; *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 681.) In determining whether reasonable probability of discovery is present, significant factors to be examined include whether the police were involved in a broad-based investigation at the time the illegality occurred and whether there were in place "usual and commonplace police investigative procedures"

which would have led to the evidence irrespective of the Fourth Amendment violation. (Brunn, Cal. Judges Benchbook: Search and Seizure (Cont. Ed. Bar 2d ed. 2002) Basic Principles, § 160, pp. 39-40; see also *People v. Saam, supra,* 106 Cal.App.3d at p. 797.)

Inherent in the inquiry as well is the temporal aspect of the seizure: whether there is a causal connection between any tainted knock and notice entry and the discovery of the evidence seized. (See *People v. Stevens, supra,* 597 N.W.2d at p. 60.)

It is possible officers who enter with knowledge of a Fourth Amendment waiver, and obtain entry by violating knock and notice requirements, may find evidence that is directly related to the illegal entry. This might be the case, where, for example, officers in search of drugs enter by violation of knock-notice and in plain view see a computer screen with illegal pornography displayed. The discovery of the pornography is a direct and sole result of the illegal entry. That situation differs from our case. Here, the officers knew not only of appellant's search waiver, but independently observed drug activity outside the house. They arrested an individual who admitted just purchasing methamphetamine from appellant in her house. A second suspected purchaser was detained and then arrested.

Because of appellant's Fourth Amendment waiver, she was required to allow a search of her residence. Having viewed the drug activity and having made an arrest, it is reasonable to expect the officers were not going away. Indeed, the preliminary hearing judge made such a finding. Sooner or later, they were going to interrogate or arrest appellant, and it is reasonable to assume that when confronted with the evidence observed by the officers, appellant would have told them the same information and directed them

to the same drugs inside the house. In such a situation the entry is not the sole cause of the discovery of evidence. (See *Green v. Superior Court* (1985) 40 Cal.3d 126, 137; *Wayne v. United States* (D.C. Cir. 1963) 318 F.2d 205, 209, cert. den. 375 U.S. 860.)

I conclude the inevitable discovery doctrine asks whether there would probably have been discovery of the evidence by an untainted means. I would further find such probability exists where, as here, law enforcement officers would have under all possible circumstances interrogated or arrested the defendant, and thus the knock and notice violation was not the sole cause of discovery of the evidence.

For the reasons stated I would find there is no basis upon which to suppress the evidence in this case. I would affirm the judgment.

CERTIFIED FOR PUBLICATION

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BENKE, Acting P. J.