

**Constitutional Law/Criminal Law—Fifteen to Twenty Seconds
“Reasonable” in Drug Searches—United States v. Banks, 540 U.S. 31 (2003)**

What can you do in fifteen to twenty seconds?¹ Can you dispose of a stash of cocaine in the sink or down the toilet?² In *United States v. Banks*,³ the Supreme Court of the United States considered that question in deciding how long federal law enforcement must wait when executing a search warrant for drugs before forcibly entering a residence.⁴ The Court unanimously held that fifteen to twenty seconds is a reasonable period of time to wait after announcing their presence.⁵

The North Las Vegas Police, along with the Federal Bureau of Investigation in a joint state and federal drug task force (collectively, “Task Force” or “agents”), obtained a warrant to search 1404 Henry Drive, Apartment D, upon the suspicion that the occupant was dealing cocaine.⁶ On July 15, 1998, the Task Force staged the small two-bedroom apartment with agents at the front and rear doors.⁷ At two o’clock that Wednesday afternoon, agents at the front door knocked and announced themselves.⁸ No sounds came from the apartment in response to the announcement.⁹ After fifteen to twenty seconds, agents battered down the front door to find the sole occupant, Lashawn Banks, standing in the hallway “naked, wet and soapy.”¹⁰

1. *Twenty Seconds of Respect*, 174 N.J. L.J. 930, 930 (2003) (questioning possibility of reaching front door in fifteen to twenty seconds from basement or den); see Warren Richey, *Should Police Wait After Knocking?*, CHRISTIAN SCI. MONITOR, Oct. 15, 2003, at *3 (suggesting minimum of thirty seconds to get from bedroom to front door).

2. See *United States v. Banks*, 540 U.S. 31, 39 (2003) (questioning sufficiency of fifteen to twenty seconds for disposing of drug evidence).

3. 540 U.S. 31 (2003).

4. *Id.* at 33 (identifying issue Court considered in *Banks*).

5. *Id.* (holding fifteen to twenty seconds reasonable when executing search warrant for drugs); *infra* notes 43-45 and accompanying text (discussing Court’s reasoning for holding fifteen to twenty seconds reasonable).

6. 540 U.S. at 33; Respondent’s Brief on the Merits at 4, *United States v. Banks*, 282 F.3d 699 (9th Cir. 2002) (No. 02-473) [hereinafter Respondent’s Brief]. A confidential informant raised suspicion that the occupant of the apartment was selling cocaine. *Id.* at 3. After the informant completed a controlled purchase of cocaine from the apartment’s occupant, the Task Force requested a search warrant. *Id.* at 3-4.

7. 540 U.S. at 33 (identifying Task Force’s preparation for executing search warrant).

8. *Id.* (announcing police presence and existence of a search warrant). Agents at the rear door testified that the knock and announcement was loud enough that they heard it. *Id.* Banks, however, testified at trial that he did not hear the knock or the announcement. *Id.* Banks stated that he was in the shower and was only alerted to the agents’ presence when he saw them burst into his apartment through the broken down door. *Id.*

9. *Id.* (noting agents had no indication that anyone in residence); *United States v. Banks*, 282 F.3d 699, 705 (9th Cir. 2002) (observing agents outside did not hear any noise coming from apartment), *rev’d*, 540 U.S. 31 (2003). There were no sounds from the apartment to support the agents’ belief that someone inside heard the knock and announcement. See *Banks*, 282 F.3d at 705.

10. *United States v. Banks*, 282 F.3d 699, 705 (9th Cir. 2002), *rev’d*, 540 U.S. 31 (2003). The police

Agents searching the apartment uncovered weapons, cocaine, and drug dealing paraphernalia.¹¹ Banks was questioned at the scene and made incriminating statements regarding his illegal drug activities.¹² In a pretrial motion to suppress the evidence obtained during the search, Banks argued that the search violated the Fourth Amendment and 18 U.S.C. § 3109 because the agents did not wait a reasonable amount of time before forcibly entering his residence.¹³ The district court denied the motion to suppress.¹⁴ While reserving his right to appeal the district court's decision on the motion, Banks plead guilty to possession of cocaine with intent to distribute and possession of a firearm.¹⁵

On appeal, the Court of Appeals for the Ninth Circuit disagreed with the district court's decision after reviewing the agents' entry under section 3109 standards.¹⁶ The appeals court framed its analysis by looking at whether the agents knocked and announced themselves, and whether Banks refused to admit them.¹⁷ Because the facts clearly showed that the agents knocked and announced themselves, the court focused on determining at what point after the announcement agents may have reasonably inferred that they had been refused

officer who executed the knock and announcement testified that he waited at least fifteen seconds before breaking down the door to the apartment down. Respondent's Brief, *supra* note 6, at 4. An officer outside the rear door of the apartment believed the time interval was perhaps twenty seconds. *Id.*

11. 540 U.S. at 33. The agents found a .40 caliber semi-automatic pistol, a .380 caliber semi-automatic pistol, a .22 caliber Beretta pistol, and ammunition in Banks' apartment. Petition for a Writ of Certiorari at 3-4, *United States v. Banks*, 540 U.S. 31 (2003) (No. 02-473) [hereinafter Petition for Certiorari]. Additionally, the agents discovered rock and crack cocaine, a scale, and cash. *Id.* at 4.

12. See *United States v. Banks*, 282 F.3d 699, 702-03 (9th Cir. 2002) (noting interrogation statements intended as evidence against Banks at trial), *rev'd*, 540 U.S. 31 (2003). As a result of the evidence discovered in the search and Banks' statements, he was charged with possession of cocaine with intent to distribute and with being a drug user in possession of a firearm. Petition for Certiorari, *supra* note 11, at 4.

13. 540 U.S. at 33 (outlining Banks' arguments on appeal). Banks' motion to suppress focused on his statement made to agents during the interrogation at his apartment. *United States v. Banks*, 282 F.3d 699, 703 (9th Cir. 2002), *rev'd*, 540 U.S. 31 (2003). Banks supported his motion with the additional grounds that the police obtained his statement in violation of the Fifth Amendment because Banks did not knowingly and voluntarily waive his rights. *Id.* at 703. Additionally, Banks argued that the police violated his *Miranda* rights because Task Force agents continued to question him after he requested a lawyer. *Id.* at 705-06. Banks did not raise the issues of violations of his Fifth and Sixth Amendment rights on appeal, so the Supreme Court did not consider these arguments. See 540 U.S. at 34 (identifying issue as Fourth Amendment question of reasonable waiting period); Respondent's Brief, *supra* note 6, at 5 n.1 (explaining why Fifth and Sixth Amendment arguments not at issue).

14. *United States v. Banks*, 282 F.3d 699, 703 (9th Cir. 2002) (affirming denial of Banks' motion to suppress), *rev'd*, 540 U.S. 31 (2003).

15. 540 U.S. at 33 (laying out procedural history of case); *United States v. Banks*, 282 F.3d 699, 703 (9th Cir. 2002) (identifying charges and district court disposition), *rev'd*, 540 U.S. 31 (2003). As a result of his guilty plea to the drug and weapon charges, the district court sentenced Banks to eleven years and three months in prison. Respondent's Brief, *supra* note 6, at 3.

16. 18 U.S.C. § 3109 (2000) (codifying federal search and seizure law concerning breaking doors or windows during entry or exit); *United States v. Banks*, 282 F.3d 699, 705 (9th Cir. 2002) (holding delay of only fifteen to twenty seconds violated Fourth Amendment protections), *rev'd*, 540 U.S. 31 (2003).

17. *United States v. Banks*, 282 F.3d 699, 703 (9th Cir. 2002) (identifying two critical issues in section 3109 analysis), *rev'd*, 540 U.S. 31 (2003).

admittance.¹⁸ The appeals court required explicit refusal of admittance or a substantial lapse of time before agents could forcibly enter Banks' apartment by breaking down the door.¹⁹ Although the appeals court did not specify what length of time was "substantial," it held that fifteen to twenty seconds was not.²⁰ The appeals court thus reversed the district court, and ordered that evidence from the search be suppressed.²¹

The Fourth Amendment, protecting individuals and their homes from unreasonable search and seizure, sets parameters for law enforcement executing a search warrant in an individual's residence.²² The Supreme Court has

18. *United States v. Banks*, 282 F.3d 699, 703-04 (9th Cir. 2002) (considering constructive refusal of admittance), *rev'd*, 540 U.S. 31 (2003). Neither party contended that Banks affirmatively refused to admit the agents. *See* Petition for Certiorari, *supra* note 11, at 3 (acknowledging agents received no response from apartment after knocking); Respondent's Brief, *supra* note 6, at 4 (same). In the absence of an affirmative refusal, the appeals court relied on precedent that recognized a refusal may be implied when there is no response to the knock and announcement. *Banks*, 282 F.3d at 703 (citing *United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973)); *see also The Warrant Requirement*, 91 GEO. L.J. 18, 32 n.84 (2003) (examining constructive refusal).

19. *United States v. Banks*, 282 F.3d 699, 704 (9th Cir. 2002) (classifying circumstances surrounding types of entries), *rev'd*, 540 U.S. 31 (2003). The appeals court categorized entries based on their circumstances. *Id.* Each category of entry corresponded to a time period that law enforcement must wait prior to entering a residence after announcement. *Id.* The court distinguished between four categories:

(1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time.

Id.

The agents' entry in *Banks* fit under category four because the appeals court found no exigent circumstances and agents had to break open the door to enter. *Id.* Exigent circumstances arise when "there [is] a likelihood that the occupants [will] attempt to escape, resist, destroy evidence, or harm someone within." *Id.* at 704 n.3 (quoting *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984)). In finding that exigent circumstances did not exist, the appeals court highlighted the fact that "there was nothing . . . that triggered the officers' senses" that something was happening inside the apartment and that the agents had no reason to believe that this entry was anything other than routine. *Id.* at 705; *see also supra* note 9 and accompanying text (reporting agents' observation after knocking). Because there were no exigent circumstances, and the Task Force waited only fifteen to twenty seconds, the appeals court held that the delay was insufficient to meet constitutional safeguards. *Banks*, 282 F.3d at 705. Generally, in addition to the category of the entry, the court would consider other factors to determine the overall reasonableness of the search. *Id.* at 704. Other factors that the court acknowledges deserve consideration are: size and location of the residence; distance from the main areas of the residence to the doors; time of day the warrant was executed; nature of the offense; and any special circumstances of which law enforcement may be aware. *Id.* Judge Fisher, in his dissent, pointed out that the majority did not complete a full analysis of the entry and urged the majority to apply its own enumerated factors to the entry. *Id.* at 708-09 (Fisher, J., dissenting). Judge Fisher applied the majority's factors and concluded that the search was reasonable. *Id.* (Fisher, J., dissenting).

20. *United States v. Banks*, 282 F.3d 699, 705 (9th Cir. 2002) (holding search unlawful), *rev'd*, 540 U.S. 31 (2003).

21. 540 U.S. at 34 (holding search unreasonable and reversing district court on section 3109 grounds).

22. U.S. CONST. amend. IV; *see Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (acknowledging Fourth

eschewed a structured test for reasonableness, preferring instead to examine the totality of the circumstances in Fourth Amendment cases.²³ One factor, which has been well-established in the common law, that courts look for to determine reasonableness is “announcement.”²⁴ Historically, the rationale behind requiring announcement was to reduce the risk of injury to law enforcement entering the home, and to preserve the physical integrity and privacy of the home.²⁵ Announcement today is a two-prong requirement: law enforcement

Amendment establishes rules controlling law enforcement’s conduct in searches). The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated” U.S. CONST. amend. IV. Law enforcement agents’ actions must be reasonable. *See Terry v. Ohio*, 392 U.S. 1, 9, 19 (1968) (noting reasonableness of search central to Fourth Amendment inquiry); *Elkins v. United States*, 364 U.S. 206, 222 (1960) (noting Fourth Amendment only prohibits unreasonable searches). One factor that commonly gives rise to a presumption of reasonableness in searching a residence is the existence of a search warrant. *McArthur*, 531 U.S. at 330 (citing *United States v. Place*, 462 U.S. 696, 701 (1983)); *cf. Wilson v. Layne*, 526 U.S. 603, 610-11 (1999) (possessing arrest warrant reasonably entitled police to enter individual’s residence). Simply having a search warrant may not be enough; a search based on a valid warrant may still be unconstitutional if the nature or manner of executing the search is unreasonable. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (concluding that Founding Fathers intended method of entry subject to reasonableness analysis); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (per curiam) (requiring reasonableness in all stages of police stop and frisk); Loly Garcia Tor, Note, *Mandating Exclusion for Violations of the Knock and Announce Rule*, 83 B.U. L. REV. 853, 859-60 (2003) (recognizing method of search factors into overall lawfulness of search).

23. *Mapp v. Ohio*, 367 U.S. 643, 653 (1961) (acknowledging no “fixed formula” for reasonableness); *see also Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (noting no formula exists to determine if search reasonable); Brent P. Reilly, *Wilson v. Arkansas and the Knock and Announce Rule: Giving Content to the Fourth Amendment*, 13 N.Y.L. SCH. J. HUM. RTS. 663, 668 (1997) (describing the reasonableness inquiry as involving ad-hoc balancing of interests). In *Mapp v. Ohio*, the Court admitted that the Fourth Amendment did not contain a formula or specific test for reasonableness. 367 U.S. at 653. The Court acknowledged that it would continue to revisit the question of what constitutes a reasonable search because the answer is extremely fact-specific. *Id.* at 653; *see also Go-Bart Importing*, 282 U.S. at 357 (suggesting individual facts and circumstances decide cases).

24. *Miller v. United States*, 357 U.S. 301, 313 (1958) (discussing announcement as well established part of Fourth Amendment analysis). “Announcement” requires that law enforcement state their authority and purpose. *Id.* at 308. Announcement is also commonly referred to as the “knock and announce” rule. *See Wilson v. Arkansas*, 514 U.S. 927, 929 (1995). Announcement was first required of the King’s sheriff in the early Seventeenth Century in *Semayne’s Case*. *Semayne’s Case*, 77 Eng. Rep. 194, 195 (K.B. 1603); *see also Miller*, 357 U.S. at 308-09 (adopting announcement in American jurisprudence and tracing its history). In *Miller*, the Court noted that “[t]he requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage.” 357 U.S. 301, 313 (1958); *see also Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (quoting *Miller*, 357 U.S. at 313) (acknowledging announcement imbedded in Anglo-American law).

25. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 905 (2002) (discussing purpose behind announcement rule). Announcement minimizes the danger to law enforcement that they will be mistaken for a burglar and attacked. *Ker v. California*, 374 U.S. 23, 58 (1963); *Miller v. United States*, 357 U.S. 301, 313, 314 n.12 (1958); *see United States v. Ramirez*, 523 U.S. 65, 69 (1998) (describing entry with no prior announcement resulting in occupant shooting at police). Announcement also protects the physical home, the doors and windows, from damage caused by a forcible entry, a protection that the Court recognizes is not inconsequential. *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997). *But see Ramirez*, 523 U.S. at 71 (requiring no consideration of destruction of property necessary for entry). The third rationale for requiring announcement arises out of “overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.” *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (quoting *Payton v. New York*, 445 U.S. 573, 601

must state its purpose and authority, and must wait a reasonable period after doing so before entering a residence.²⁶ Circuit courts have been free to define a reasonable waiting period because the Supreme Court has not had occasion to set a standard.²⁷

While recognizing that announcement is a central part of a Fourth Amendment reasonableness analysis, the Court in *Wilson v. Arkansas*²⁸ cautioned that the “knock and announce” requirement yields under certain circumstances.²⁹ In the face of exigent circumstances, law enforcement may lawfully enter a residence without announcing themselves.³⁰ The Court has found that exigent circumstances exist where announcement would be futile, increase the risk of danger to law enforcement, or result in the destruction of evidence.³¹ The Court, however, has attempted to distance itself from creating a per se rule dispensing with announcement in any category of cases.³² In

(1980)); *Miller*, 357 U.S. at 313 (declaring reverence for home’s privacy). Because of the strong feelings of privacy and sanctity attached to the home, “[i]nnocent citizens should not suffer the shock, fright and embarrassment attendant upon an unannounced police intrusion.” *Ker*, 374 U.S. at 57; see Richey, *supra* note 1, at *3 (cautioning no remedy for emotional harm of law enforcement’s intrusion). The announcement rule gives recognition to the common law principle that a man’s home is his castle. See *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

26. Reilly, *supra* note 23, at 687-88 (discussing elements of “knock and announce” rule); see Tor, *supra* note 22, at 860 (failing to wait for reasonable time after announcement violates knock and announce rule).

27. See Reilly, *supra* note 23, at 687-88 (summarizing disparity in waiting periods); see also *United States v. Banks*, 282 F.3d 699, 709 (9th Cir. 2002) (Fisher, J., dissenting) (observing reasonable time periods set by other circuits), *rev’d*, 540 U.S. 31 (2003). Circuits vary on how long law enforcement must wait in a situation similar to *Banks*, with the results ranging from five to twenty seconds. See, e.g., *United States v. Granville*, 222 F.3d 1214, 1218-19 (9th Cir. 2000) (five seconds); *United States v. Lucht*, 18 F.3d 541, 549 (8th Cir. 1994) (twenty seconds); *United States v. Knapp*, 1 F.3d 1026, 1031 (10th Cir. 1993) (ten to twelve seconds); *United States v. Spriggs*, 996 F.2d 320, 322-23 (D.C. Cir. 1993) (fifteen to twenty seconds).

28. 514 U.S. 927, 934 (1995).

29. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (emphasizing announcement not “a rigid rule”). In *Wilson*, the police were executing a search warrant for drugs. *Id.* at 929. The police had information that the occupants kept guns on the premises, and based on the threat of potential violence, law enforcement announced themselves while entering the premises. See *id.* at 929-30. The Court acknowledged that the threat of violence to the officer could be a sufficient exigent circumstance to dispense with announcement prior to entry. *Id.* at 937.

30. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (allowing exigent circumstances to justify immediate entry). The Court maintains the delicate balance of the Fourth Amendment by requiring a reasonable suspicion of exigent circumstances for law enforcement’s needs to trump an individual’s right to privacy. *Id.* In *Richards*, law enforcement agents were executing a search warrant on a hotel room looking for drugs. *Id.* at 388. An undercover officer knocked on the front door and identified himself as a maintenance man. *Id.* When Richards opened the door, he saw the disguised maintenance man and slammed the door. *Id.* Uniformed law enforcement immediately broke down the door, and entered Richard’s hotel room while identifying themselves as the police. *Id.* Acknowledging that there was no proper knock and announcement, the Court held that it would have been futile because Richards likely saw the other officers outside his door and further delay would have given him an opportunity to dispose of the drug evidence. *Id.* at 391, 395.

31. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (highlighting exigent circumstances); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (identifying exigent circumstances). In considering the reasonableness of the exigent circumstances, the courts will evaluate the circumstances at the time law enforcement acted. *Richards*, 520 U.S. at 395.

32. See *Richards v. Wisconsin*, 520 U.S. 385, 395 (1997) (condemning blanket exception to knock and

Richards v. Wisconsin,³³ the Court affirmed the holding in *Wilson* that exigent circumstances will excuse announcement, but condemned a blanket exception to the knock and announce rule when executing a search warrant for drugs.³⁴ *Richards* reinforced the rule that the circumstances of each individual search must be reviewed for reasonableness.³⁵

Often invoked along with the Fourth Amendment, 18 U.S.C. § 3109 sets forth how law enforcement may enter a residence to execute a federal search warrant.³⁶ The statute provides that law enforcement may forcibly enter a residence pursuant to a valid search warrant if they are refused admittance after announcement.³⁷ The plain language of the statute, requiring that law enforcement knock and announce, codifies the age-old common-law announcement requirement.³⁸ Broadening the scope of the statute through case law, the Court has held that section 3109 embraces all the common-law exigent circumstance exceptions to the announcement rule.³⁹ Therefore, if announcement would be futile, increase the risk of harm to law enforcement, or allow for the destruction of evidence, section 3109, like the Fourth Amendment, would not require law enforcement to knock and announce prior to entry.⁴⁰ Due to the similarities in the Court's interpretation of section 3109 and the Fourth Amendment, the lawfulness of a search reviewed under either

announce rule for drug searches).

33. 520 U.S. 385 (1997).

34. *Richards v. Wisconsin*, 520 U.S. 385, 394-95 (1997) (striking down blanket exception to knock and announce rule).

35. *Richards v. Wisconsin*, 520 U.S. 385, 392 (1997) (declaring case-by-case analysis indispensable); *see also supra* note 23 and accompanying text (expounding Court's preference for case analysis based on individual circumstances).

36. *See* 18 U.S.C. § 3109 (2000).

37. 18 U.S.C. § 3109 (2000). 18 U.S.C. § 3109 reads:

The 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 a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Id.

38. 18 U.S.C. § 3109 (2000); *United States v. Ramirez*, 523 U.S. 65, 73 (1998) (holding § 3109 codifies common-law announcement requirement); *Sabbath v. United States*, 391 U.S. 585, 591 n.8 (1968) (reviewing statute's background and acknowledging codification of common-law requirement); *Miller v. United States*, 357 U.S. 301, 308-09 (1958) (noting statute reflects common-law announcement requirement). Excluding exigent circumstances, law enforcement must be affirmatively or constructively denied admittance before forcibly entering. 18 U.S.C. § 3109 (codifying requirement); *The Warrant Requirement, supra* note 18, at 31 n.84 (examining constructive refusal in statute).

39. *United States v. Ramirez*, 523 U.S. 65, 72-73 (1998) (setting forth expanse of section 1309 exceptions). Touching on the issue in *Sabbath v. United States*, the Court found no reason why the common-law exigency exceptions to announcement that are a part of the Fourth Amendment would not also apply to section 3109. 391 U.S. 585, 591 n.8 (1968). The Court directly considered the issue in *Ramirez*, holding that section 3109 codifies all the common-law exceptions to the announcement rule. *Ramirez*, 523 U.S. at 73.

40. *See United States v. Ramirez*, 523 U.S. 65, 73 (1998) (announcing section 3109 codifies common-law exceptions to announcement requirement); *supra* note 39 and accompanying text (discussing adoption of exigent circumstances exception to announcement in section 3109).

law will yield the same result.⁴¹

In *United States v. Banks*, the Supreme Court granted certiorari to determine how long law enforcement agents must wait after announcing themselves before forcibly entering a residence to execute a search warrant.⁴² The reasonableness of the delay in *Banks*, the Court noted, turns on the existence of exigent circumstances.⁴³ At the point where Banks could have been alerted to the Task Force's presence by the announcement, the Court held it was reasonable for the agents to believe that Banks would start moving to destroy evidence.⁴⁴ Because of the possibility that Banks would destroy evidence, the Court's decision about how long the agents needed to wait focused on how long it would take Banks to destroy the evidence—not how long it would take Banks to come to the door.⁴⁵ The Court held that fifteen to twenty seconds would be a constitutionally reasonable delay, noting that waiting longer could result in the evidence being completely destroyed.⁴⁶ Similarly, fifteen to twenty seconds would satisfy section 3109 where exigent circumstances were present.⁴⁷

The Court stressed that the reasonableness analysis requires an examination of all the circumstances of the entry.⁴⁸ Thus, a search for a stolen piano would yield a different result from a search for illegal drugs.⁴⁹ The Ninth Circuit's categorical approach was condemned for failing to take into account the different circumstances of each entry and search.⁵⁰ Further, the Court

41. *United States v. Ramirez*, 523 U.S. 65, 72-73 (1998) (holding search reasonable under section 3109 and Fourth Amendment).

42. 540 U.S. at 34 (identifying issue presented).

43. 540 U.S. at 38 (discussing exigent circumstance). The Court distinguishes the instant case from a situation where law enforcement announced themselves and no exigent circumstances were present. *Id.* at 39. When no exigent circumstances are present, the Court acknowledges that "the reasonable wait time may well be longer when police make a forced entry, since they ought to be more certain the occupant has had time to answer the door." *Id.* at 41.

44. *Id.* at 41 (discussing basis for exigent circumstances determination). The Court does not point to any specific facts which could have lead to this suspicion by police, other than that the drugs identified in the search warrant were easily disposable. *See id.*

45. *Id.* at 40 (focusing on how quickly Banks could destroy evidence). In determining how long law enforcement should wait before entering, the Court reasoned that the search was executed during the day, presuming that any occupants of the apartment would be up and around. *Id.* Further, the Court considered that prudent drug dealers typically keep their drugs near the kitchen or bathroom, typically in the interior of an apartment. *Id.* If law enforcement waited a reasonable amount of time for the occupant to reach the front door, a drug dealer wanting to dispose of the evidence would likely already be flushing it down the toilet. *See id.*

46. *Id.* at 38 (holding fifteen to twenty seconds reasonable).

47. 540 U.S. at 42-43 (holding identical result under Fourth Amendment and statute).

48. *Id.* at 41 (discussing appeals court's distortion of totality of circumstances principle).

49. *Id.* (noting different circumstances change reasonableness determination).

50. *Id.* Establishing categories is problematic because it may ignore or over-emphasize characteristics in a given case. *Id.* at 525. The Court also noted that the categories blatantly disregard *Ramirez* by basing waiting periods in part on whether law enforcement must destroy property to enter the residence. *Id.* at 36. One article commenting on the *Banks* opinion suggested that the main thrust of the Court's decision was a rejection of the Ninth Circuit's categories. *See Twenty Seconds of Respect, supra* note 1, at 930. Disagreeing with the Ninth Circuit was the only facet of the *Banks* opinion that all members of the Court squarely supported. *See id.*

disapproved of the Ninth Circuit's vague waiting periods that give law enforcement little guidance.⁵¹

The *Banks* decision reaches a conclusion that is at odds with precedent and the Court's own discussion of the Fourth Amendment in this case.⁵² While the Court has repeatedly relied on the totality of the circumstances to determine whether a search was reasonable, the ultimate effect of *Banks* is to create a rule that in drug searches conducted pursuant to a warrant, a fifteen to twenty second delay constitutes a per se reasonable search.⁵³ This rule emerges because the Court fails to focus on the particular circumstances of *Banks*' situation: the Court does not differentiate the circumstances of this entry from any other drug search.⁵⁴ Moreover, the Court's analysis of how the agents developed a reasonable suspicion that *Banks* was disposing of evidence—and therefore that exigent circumstances existed—is noticeably absent from the opinion.⁵⁵ The result is that in *any* search for drugs, once law enforcement agents knock and announce they can assume that someone inside is rushing to destroy the drugs and, under the guise of exigent circumstances, can forcibly enter the residence after fifteen to twenty seconds.⁵⁶

Although arguably awry, the Court's decision has one clearly positive

51. 540 U.S. at 41 (suggesting ambiguity in instructions for law enforcement).

52. Compare *id.* at 33 (setting reasonableness standard in drug searches at fifteen to twenty seconds), with *id.* at 36 (emphasizing totality of circumstances consideration for reasonableness), and *Richards v. Wisconsin*, 520 U.S. 385, 395 (1997) (refusing per se reasonableness in drug searches).

53. See 540 U.S. at 36 (noting well-established practice of reasonableness based on totality of circumstances).

54. See *id.* at 38 (discussing exigent circumstances in drug searches); see also *infra* note 55 and accompanying text (reviewing Court's exigent circumstance determination).

55. See 540 U.S. at 38 (discussing general suspicion of disposal of drug). The facts indicate no particular reason for agents to believe that *Banks* was moving to destroy evidence. See *supra* note 9 and accompanying text. This presents a question of whether it was reasonable to determine that exigent circumstances existed. See *supra* note 19 (noting appeals court did *not* find exigent circumstances). Undisputedly, there was no noise coming from the apartment, no footsteps, no sounds of the toilet flushing, and no sounds indicating any one was at home. *Supra* note 9 and accompanying text; see *supra* note 19. Without exigent circumstances hastening agents through the door, the Court acknowledges that the fifteen to twenty second delay would be insufficient. *Supra* note 43 and accompanying text; see *supra* note 19 and accompanying text.

In intimating that a reasonable suspicion comes simply from law enforcement announcing their presence, the Court has not met its burden of showing a truly reasonable suspicion. See 540 U.S. at 37-38. The argument that prudent drug dealers would dispose of the drugs when alerted to the presence of law enforcement is not the basis for a reasonable suspicion that *Banks*, in this situation, was attempting to destroy evidence. Cf. *supra* note 31 and accompanying text. The Court has long recognized that individuals are innocent until proven guilty, and that not everyone suspected of wrongdoing is in fact guilty. See *Ker v. California*, 374 U.S. 23, 58 (1963). Furthermore, the Court recognizes that "not everyone who is in fact guilty will forcibly resist arrest or attempt to escape or destroy evidence." *Id.* This statement in *Ker* implies that it requires more than just anecdotal evidence to show destruction of evidence to create an exigency and shortstop the Fourth Amendment's requirements. See *id.*

56. See 540 U.S. at 38 (allowing law enforcement to forcibly enter residence once exigent circumstances matured). Knocking, however, by itself, does not create an exigent circumstance. But see *id.* Based on the *Banks* Court's rationale, exigent circumstances exist anytime law enforcement announces themselves when searching for drugs, hastening law enforcement through the door. See *id.* The rule is contrary to the focus on the totality of the circumstances that the Court had long promoted. See *supra* note 23 and accompanying text.

attribute: a decisive and easily administrable rule.⁵⁷ Across the country, there were as many different waiting periods for the same situation as courts to decide them.⁵⁸ By establishing one clear standard, the Court harmonizes the circuits.⁵⁹ One unambiguous standard will help law enforcement carry out their job lawfully.⁶⁰ Law enforcement officers executing warrants surely have difficulty determining which actions are lawful based on an amorphous “reasonableness” standard.⁶¹ Here, the Court has given law enforcement a clear rule that they must wait fifteen to twenty seconds after announcement when executing a search warrant for drugs.⁶²

This case raises the question of whether the Court has swung too far on the side of law enforcement and become too concerned with law enforcement’s ability to uncover evidence and make a case.⁶³ The Court in *Banks* decided how long agents must wait based on how quickly the drugs could be destroyed, specifically denying consideration for how long it may take Banks to come to the front door to avoid having it broken open.⁶⁴ Once there was a suspicion that evidence could be destroyed, the Court dispensed with the concerns for the physical structure and integrity of the home—the basis of the Fourth Amendment—and allowed agents to break down the door.⁶⁵ The Court has previously admitted that in looking at Fourth Amendment reasonableness, it was well aware of the difficulty law enforcement has in doing their job.⁶⁶ With the *Banks* decision elevating the importance of preventing drug evidence destruction, the Court has placed criminal investigations ahead of the interests

57. 540 U.S. at 33 (adopting fifteen to twenty seconds).

58. See *supra* note 27 and accompanying text (summarizing several circuits’ differing waiting periods).

59. See 540 U.S. at 33 (adopting fifteen to twenty second standard).

60. Richey, *supra* note 1, at *2 (noting police unclear on which search tactics violate constitutional protections). Law enforcement cannot avoid violations of the Fourth Amendment if they do not know which actions will avoid a constitutional violation. See Reilly, *supra* note 23, at 688-89.

61. Reilly, *supra* note 23, at 688 (criticizing inconsistent application of reasonableness); see *supra* notes 22-23 and accompanying text (discussing nebulous Fourth Amendment reasonableness standard).

62. 540 U.S. at 33 (determining waiting fifteen to twenty seconds reasonable).

63. See *infra* note 66 and accompanying text (observing tendency to favor law enforcement over protection of home).

64. 540 U.S. at 39 (neglecting to consider amount of time necessary to come to front door).

65. *Id.* (holding agents’ actions reasonable). “Once the exigency had matured, of course, the officers were not bound to learn anything more or wait any longer before going in, even though their entry entailed some harm to the building.” *Id.* That is, once law enforcement reasonably suspects that an exigent circumstance exists, law enforcement has an unfettered pass to forcibly enter the residence. See *id.* Under *Banks*, there is no further consideration for any door or window in the way, or if the innocent-until-proven-guilty person inside is en route to the door to admit the officers. See *id.* But see *supra* note 25 and accompanying text (highlighting protection of home as Fourth Amendment consideration).

66. *Elkins v. United States*, 364 U.S. 206, 222 (1960) (discussing Court’s tendency in Fourth Amendment cases). The Court admitted that “there are those who think that some of the Court’s decisions have tipped the balance too heavily against the protection of that individual privacy which it was the purpose of the Fourth Amendment to guarantee.” *Id.* While not specifically denying those views, the Court implied that the proffered collection of Fourth Amendment cases did not demonstrate a history that was far enough on the side of law enforcement to cause concern. See *id.*

of the home.⁶⁷

The Court in *United States v. Banks* considered the reasonable amount of time between announcement and breaking down the door to a residence when executing a search warrant for drugs. When the circumstances give rise to the suspicion that evidence could be destroyed, fifteen to twenty seconds is all that is necessary to wait before breaking down the door. Why must the Court draw a line that errs on the side of infringing the sanctity and privacy of the home? The Court's emphasis on preserving evidence improperly drowns out the fundamental Fourth Amendment concerns of privacy and protection of an individual's home.

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67. 540 U.S. at 38 (holding fifteen to twenty seconds delay reasonable when executing drug search warrant).