

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....2

ARGUMENT

    Point 1 - Appellant timely asserted his claim.....3

    Point 2 - The no-knock execution of the search warrant was  
not warranted under the circumstances of this case.....7

    Point 3 - Appellant did not waive his claim.....9

CONCLUSION.....11

CERTIFICATE OF COMPLIANCE AND SERVICE.....13

**TABLE OF AUTHORITIES**

Richards v. Wisconsin, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed 2d 615 (1997).....4, 8

Sawyer v. State, 810 S. W. 2d 536 (Mo. App. E. D. 1991).....11

State v. Curtis, 931 S. W. 2d 493 (Mo. App. W. D. 1996).....10, 12

State v. Galazin, 58 S. W. 3d 500 (Mo. banc 2001).....5

State v. Hamilton, 8 S. W. 3d 132 (Mo. App. S. D. 1999).....7, 9

State v. Newson, 898 S. W. 2d 719 (Mo. App. W. D. 1995).....11

State v. Ricketts, 981 S. W. 2d 657 (Mo. App. W. D. 1998).....7, 9

State v. Stillman, 938 S. W. 2d 287 (Mo. App. W. D. 1997).....10, 12

Wilson v. Arkansas, 514 U.S. 927, 115 S. Ct. 1914, 131 L.Ed 2d 976 (1996).....4

542.296.5(4).....3

## ARGUMENT

**THE TRIAL COURT ERRED IN ADMITTING EVIDENCE SEIZED FROM APPELLANT’S RESIDENCE BECAUSE THIS EVIDENCE WAS THE RESULT OF AN ILLEGAL “NO KNOCK” SEARCH IN THAT EXIGENT CIRCUMSTANCES DID NOT EXIST TO JUSTIFY THE “NO KNOCK” SEARCH. THE APPELLANT TIMELY ASSERTED HIS CLAIM THAT THE POLICE ENGAGED IN AN ILLEGAL “NO KNOCK” SEARCH BY RAISING THE ISSUE OF AN ILLEGAL EXECUTION OF THE SEARCH WARRANT IN HIS PRE-TRIAL MOTION TO SUPPRESS AND ARGUING THE “NO KNOCK” ENTRY IN THE SUPPRESSION HEARING. THE APPELLANT PRESERVED HIS POINT FOR APPELLATE REVIEW BY STIPULATING WITH THE STATE REGARDING THE USE OF A CONTINUING OBJECTION TO RUN THROUGHOUT THE COURSE OF THE TRIAL RELEVANT TO THE MOTION TO SUPPRESS.**

1. Appellant timely asserted his claim

Appellant filed a pre-trial Motion to Suppress Physical Evidence and, among other allegations, contended that there was an illegal execution of the search warrant (LF, 5-6). That contention tracks the language set forth in Section 542.296.5(4) RSMo. Additionally, that statute requires the State to bear the burden of going forward with the evidence and show that the motion should be overruled. Therefore, the State was obligated to prove a valid execution of the search warrant.

Fundamentally, a lawful entry is a necessary component in the valid execution of a

search warrant. Wilson v. Arkansas, 514 U.S. 927, 115 S. Ct. 1914, 131 L Ed 2d 976 (1996). The State should reasonably expect to prove a lawful entry whenever the execution of a search warrant is challenged.

The United States Supreme Court held, that absent exigent circumstances, the Fourth Amendment requirement of reasonableness compels officers to “knock and announce” prior to a residential entry while executing a search warrant. Richards v. Wisconsin, 520 U.S. 385, 117 S. Ct. 1416, 137 L Ed 2d 615 (1997). Therefore, the State must show compliance with the “knock and announce” rule or provide exigent circumstances which would allow the officers to dispense with the rule.

In the present case, the State offered no evidence, at the suppression hearing, from any of the officers that initially entered the Appellant’s residence. Instead, the State produced a sole witness who admittedly came on to the scene after the entry and was unaware if anyone knocked before entering the residence (T. Vol 1, p.38, L 6-12; p. 39, L 21-25). The State was never in a position to prove a lawful execution of the search warrant at the suppression hearing.

A lawful entry is a necessary link in the chain of events regarding the execution of a search warrant. If the execution of a search warrant is challenged, the State must prove that the totality of the execution of the search warrant was valid. The State is not afforded the luxury of picking and choosing what links it wants to prove in the chain of events surrounding the execution of the warrant simply because the motion does not specifically allege a no-knock, no-announce entry.

The Respondent seemingly argues that it was not required to prove a legal entry in

meeting the challenge to prove a lawful execution of the search warrant. This argument is based on the fact that the Appellant did not specifically allege a no-knock, no-announce entry in his Motion to Suppress. The Respondent's argument overlooks its basic obligation to prove that the totality of the execution of the search warrant was valid which necessarily includes the entry. Nevertheless, the Respondent concedes that it was aware of the no-knock, no-announce argument within the context of the suppression hearing (Respondent's Substitute Brief, p. 22).

The trial court allowed the Motion to Suppress to be re-opened prior to the trial. (T. Vol 1, p. 159, L 4-15). At that point, the parties stipulated that the defendant had standing to contest the admission of evidence in his Motion to Suppress (T. Vol 1, p. 159, L 16-25; p. 160, L 1-12). In addition, the search warrant was admitted in the suppression hearing (T. Vol. 1, p. 161, L 9-12; p. 162, L 13-15). At that time, the trial court asked for any additional arguments relevant to the motion to suppress. Appellant stated that the State had failed to offer evidence as to the legality of a no-knock, no-announce execution of the search warrant.

Respondent's argument that Appellant waived his claim by not raising it in a timely fashion is without merit. The Appellant raised the issue of an illegal execution of a search warrant in his pre-trial motion and specifically argued a no-knock, no-announce entry within the context of the suppression hearing.

The Respondent cites this Court to State v. Galazin, 58 S.W. 3d 500 (Mo. banc 2001) for the proposition that the burden of proof shifted to the Appellant because the Motion to Suppress "made a simple boilerplate allegation that the warrant was not lawfully executed" and did not specifically raise a claim that the officers did not knock and announce until after the

close of the Motion to Suppress hearing and immediately prior to the commencement of the trial (Respondent's Substitute Brief, p. 22).

In Galazin, supra, the defendant did not file a pre-trial motion to suppress. Clearly, the facts are distinguishable from the present case. But, Galazin does beg the question that if Galazin had filed a pre-trial motion to suppress alleging the unlawfulness of the arrest, would the State have argued that the motion was meaningless because there was no specific attack on the officer's authority to arrest.

Respondent never addresses what it was required to prove when a "boilerplate" allegation is made that the warrant was not lawfully executed. Rather, it contends that there was no requirement to prove a lawful entry within the framework of an execution of a search warrant unless specifically alleged that the entry was unlawful. Further, Respondent continues this argument even though it concedes that it was specifically aware of the no-knock, no-announce entry within the context of the pre-trial Motion to Suppress.

Appellant affirmatively contends that his claim was raised in a timely fashion. It was alleged in the Motion to Suppress and specifically argued in the suppression hearing. The Respondent failed to prove a lawful execution of the search warrant by wholly failing to address the entry at the suppression hearing.

Any evidence relating to "exigent circumstances" which could potentially allow the entry team to dispense with the knock and announce requirement would be highly prejudicial if heard by a jury. In the present case, the Appellant did not testify. The state made no attempt to either re-open the suppression hearing or make an offer of proof. Instead the state tried to

present such evidence during the trial. The Appellant successfully objected to that evidence.

Clearly, evidence relating to the Appellant's character traits or prior conduct which had no relevance to the case-in-chief would be objectionable if offered in front of a jury. Evidence of this nature should have been produced outside of the jury's presence. There is no denial from the Respondent that it had the opportunity to elicit this type of testimony for the trial judge outside of the jury's presence.

2. The no-knock execution of the search warrant was not warranted under the circumstances of this case.

In the execution of a search warrant, it is necessary to prove that "exigent circumstances" exist in order to dispense with the knock and announce requirement. State v. Ricketts, 981 S. W. 2d 657 (Mo. App. W.D. 1998). The term "exigent circumstances" conveys a sense of urgency or emergency. A no-knock entry can not be justified unless law enforcement officers have reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. State v. Hamilton, 8 S. W. 3d 132 (Mo. App. S.. 1999).

At trial, Officer Houston, a member of the entry team, testified that the team members were worried about possible gunfire coming from the residence and that Appellant was possibly dangerous (Vol. 2, p. 281, L 1-3; p. 296, L 21-23). There was no testimony offered to support those generalized concerns with specific facts. It was because of those types of general concerns that the State of Wisconsin created a statute which dispensed with the knock and

announce requirement in felony drug cases. The Supreme Court of the United States declared Wisconsin's statute to be unconstitutional because it was an attempt to create a blanket exception to the knock and announce requirement without a showing of specific facts pointing to exigent circumstances. Richard v. Wisconsin, supra. Similarly, Officer Houston's testimony that "We've had dealings with Gary (defendant) several times" offers nothing to suggest exigent circumstances (T. Vol. 2, p. 299, L 12-13).

Appellant strongly suggests that the analysis of exigent circumstances should be examined from the point of view provided by the entry team, not from concerns expressed by others who were not involved in the entry and whose concerns were not shown to be shared to the entry team. Nonetheless, Officer Wingo testified at the suppression hearing that he thought that Appellant may have brandished weapons to citizens. (Vol. 1, p. 49, L 11-14; p. 77, L 25; p. 78, L 1-23). This testimony offers no specific facts as to the source of the information, the time frame of the conduct or, if true, how that conduct would suggest that the Appellant would use weapons against law enforcement officials.

For the sake of argument, it would seem to be relevant to know if Appellant did, in fact, brandish weapons to citizens, whether that action occurred in the recent past or twenty years ago. Likewise, the context in which Appellant brandished weapons to citizens would seem relevant.

In the present case, Officer Wingo offered no evidence as to Appellant's past criminal record nor did he possess information that weapons were at Appellant's residence (Vol. 1, p. 77, L 4-8).

Officer Wingo testified that he believed Appellant had a violent, erratic, paranoid behavior and that Appellant's behavior was odd. (Vol. 1, p. 77, L 21-24; p. 79, L 9-11). However, he offered no examples of the Appellant's behavior or how that behavior justified a no-knock entry. Again, no context or framework of reference was provided to allow a fair determination that this behavior justified an urgency relating to the entry of Appellant's residence on the date in question. Moreover, Officer Wingo was not a member of the entry team nor did he testify that his beliefs were shared to or by the entry team.

The potential for abuse is readily apparent if courts allow generalized conclusions as to behavior, absent specific references, to be sufficient to show "exigent circumstances". To be sure, the hurdle to cross is not high but the bar should not be lowered so far as to be merely walked across trampling the Fourth Amendment in the process. See Ricketts, *supra*, Hamilton, *supra*.

3. Appellant did not waive his claim.

In the present case, Appellant filed his pre-trial Motion to Suppress alleging an illegal execution of the search warrant. At the suppression hearing, Appellant argued the illegality of the no-knock entry. Prior to the admission of evidence, Appellant specifically addressed the court concerning the mechanics of a continuing objection regarding the admission of evidence objected to in his Motion to Suppress (T. p. 164, L 9-25; p. 165, L 1-5). The trial court specifically stated that it would allow a continuing objection only if the State agreed to its use. The State voluntarily entered into an agreement with the Appellant relating to the use of a continuing objection and the court approved the procedure. The Appellant re-stated his

objections to the evidence in his Motion for New Trial (L. F. p. 24-26).

The first mention that the Appellant had waived his claim was made by Respondent on appeal. This issue was never presented to the trial court for consideration.

Appellant contends that parties to a criminal proceeding should be able to rely on court approved stipulations regarding objections to evidence without fear that either party may, intentionally or unintentionally, unilaterally withdraw from their agreement without court approval.

Appellant does not contest the validity of the long line of cases cited by Respondent which hold that stating “no objection” when evidence is introduced constitutes a waiver of appellate review. However, none of those cases involve the use of a continuing objection as found in the present case. This issue is not one of first impression in Missouri. The Court of Appeals, Western District, in State v. Stillman, 938 S. W. 2d 287 (Mo. App. 1997) and in State v. Curits, 931 S. W. 2d 493 (Mo. App. 1996) reviewed cases involving almost identical procedural facts and allowed a review on the merits. The Court of Appeals reasoned that the trial court and opposing counsel understood that defendant’s counsel did not intend to waive the continuing objection and “to now rule a waiver of this point and a denial of review would be a hypertechnical application of the requirement of renewing the objection at every stage”.  
Id.

In the present case, the continuing objection related to arguments raised in Appellant’s Motion to Suppress, not to all possible objections regarding admissibility. See Sawyer v. State, 810 S. W. 2d 536 (Mo. App. E. D. 1991); State v. Newson, 898 S. W. 2d 710 (Mo. App. W. D.

1995). By stating “no objection” Appellant was advising the Court that he had no further objections regarding admissibility other than the continuing objection which was running through the case.

The Court of Appeals, Southern District, in its review of the present case, found that “if trial counsel states ‘no objection’, while purportedly meaning ‘no objection other than what has been stated’, counsel is creating an untenable ambiguity for the trial court and the reviewing court. To hold otherwise would cause unnecessary confusion in this area.”

In the present case, the trial court was obviously not confused in the least bit. In fact, the trial court took the continuing objection throughout the case and entered its supplemental findings at the conclusion of the matter (LF p. 34). Clearly, the trial court’s supplemental findings show that it considered the entire record made both at the suppression hearing and during trial. Moreover, the supplemental findings provide an excellent avenue for judicial review.

### **CONCLUSION**

The trial court erred in admitting evidence seized from Appellant’s residence because “exigent circumstances” were not shown to dispense with a knock and announce entry. The Appellant timely asserted his claim by challenging the execution of the search warrant in his Motion to Suppress and by specifically arguing a “no knock” search in the suppression hearing. The Appellant preserved his point for appellate review by stipulating with the state regarding the use of a continuing objection and did not waive his objection pursuant to Stillman, supra and Curtis, supra.

Appellant renews his arguments set forth in Points II, III, IV and V of Appellant's brief.

For the reasons set forth above, Appellant respectfully requests this court to discharge the Appellant, or in the alternative, to remand the case to the trial court for a new trial.

Respectfully Submitted  
**LAW OFFICE OF DONALD W. PETTY**

BY

-----  
-----  
DONALD W. PETTY #26830  
14 South Main  
Liberty, MO 64048  
(816) 792-4400  
FAX (816) 792-1817  
ATTORNEY FOR APPELLANT

### **CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains \_\_\_\_\_ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this reply brief, containing a copy of this reply brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached reply brief, and a floppy disk containing a copy of this reply brief, were mailed, postage prepaid, this 9<sup>th</sup> day of September, 2002 to:

Jeremiah W. (Jay) Nixon  
Attorney General

Karen L. Kramer  
Assistant Attorney General  
PO Box 899  
Jefferson City, MO 65102

-----  
DONALD W. PETTY            #26830  
14 South Main  
Liberty, MO 64068  
(816) 792-4400  
FAX (816) 792-1817  
Attorney for Appellant