FOURTH AMENDMENT — EXCLUSIONARY RULE — CALIFORNIA SUPERIOR COURT HOLDS THAT THE KNOCK-AND-ANNOUNCE REQUIREMENT IS APPLICABLE WHEN AN ABSENT THIRD PARTY HAS CONSENTED TO SEARCH. — *People v. West*, No. CC633123 (Cal. Super. Ct. Aug. 9, 2006).

Last Term, the Supreme Court decided two cases clarifying what constitutes a reasonable Fourth Amendment search of an individual's home. In *Georgia v. Randolph*,[1] the Court held that police cannot enter a home pursuant to the consent of one co-tenant when another co-tenant is present and objects.[2] A few months later, in *Hudson v. Michigan*,[3] the Court ruled that exclusion is not a viable remedy for violations of the knock-and-announce rule.[4] To date, however, the Court has not explicitly dealt with the issue at the intersection of these two cases: to what extent is knock notice required in cases of third-party consent? Recently, in *People v. West*,[5] a California state trial court became perhaps the first in the country to address this question following the issuance of *Randolph* and *Hudson*. The court held that "[w]hen an absent third party gives consent for the search of a residence the knock notice requirement is fully applicable"[6] and granted the defendant's motion to suppress evidence.[7] This ruling ignored the Supreme Court's treatment of knock-and-announce as a limited historical concept, as highlighted in *Hudson*, and failed to recognize that the search in *West* fell squarely within the Court's definition of reasonableness under *Randolph*. This misreading of precedent appears to stem from the court's concern over the amount of protection provided to the defendant in the absence of knock notice.[8] But if the result mandated by the law in this case is problematic, a solution may not be possible without the Supreme Court rethinking the doctrine of third-party consent or a legislature expanding the knock-and-announce rule; the court's decision to stretch the existing rule to cover the facts of this case was improper.

Shortly after midnight on May 30, 2005, Officer Chris Heinrich arrested Frank Lamantia and discovered on his person a small quantity of methamphetamine.[9] Lamantia told Officer Heinrich that he lived

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[1] 126 S. Ct. 1515 (2006).
[2] *See id.* at 1528.
[3] 126 S. Ct. 2159 (2006).
[4] *See id.* at 2168.
[5] No. CC633123 (Cal. Super. Ct. Aug. 9, 2006).
[6] *Id.* at 1.
[7] *Id.* at 5.
[8] *See id.* at 2.
[9] *See* Transcript of Preliminary Examination Proceedings at 41–42, People v. West, No. CC595857 (Cal. Super. Ct. June 13, 2006).

at a certain address in San Jose and gave the officer written permission to search that residence, as well as a key to the front door.[10] Police drove to the residence a few hours later.[11] With Lamantia waiting in a squad car nearby, Officer Heinrich approached the front door and observed lights and movement inside the house.[12] Finding the door locked, Officer Heinrich used the key to enter, without knocking or announcing his presence.[13] Inside, he encountered the defendant, Kenneth West, sitting with another man around a pool table.[14] While speaking with the defendant, Officer Heinrich observed certain symptoms of stimulant use.[15] A search of the house revealed methamphetamine, marijuana, and drug paraphernalia.[16]

At the preliminary examination, the trial judge denied the defendant's motion to suppress the evidence on the grounds of a knock-and-announce violation.[17] On appeal, this decision was reversed, and the charges were dismissed.[18] Two days later, the Supreme Court handed down its opinion in *Hudson v. Michigan*, and the State subsequently refiled the charges against the defendant.[19]

Following a second preliminary examination, Judge Del Pozzo granted the defendant's motion to suppress the evidence and dismissed the charges.[20] The court held that the knock-and-announce rule, under Supreme Court precedent and California Penal Code section 1531, applied fully in cases of absent third-party consent.[21] Judge Del Pozzo noted that knock notice is required for probation searches, and reasoning by analogy, he concluded that it would be "untenable" if the defendant received "less protection than if Mr. Lamantia were on probation."[22]

The opinion went on to state that, "after *Georgia v. Randolph*, an aspect of the privacy right protected by the knock notice rule includes an owner's right to refuse consent."[23] Because it would be "surprising" if the holding in *Randolph* were limited to "those rare instances when

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[10] *See id.* at 42–48.
[11] *See id.* at 46, 67.
[12] *See id.* at 46, 67–68.
[13] *See id.* at 46–48, 68.
[14] *See id.* at 47.
[15] *See id.* at 51.
[16] *See id.* at 52–58.
[17] *See id.* at 3, 72–76; Defendant's Motion to Suppress, People v. West, No. CC595857 (Cal. Super. Ct. June 13, 2006).
[18] *See* Transcript of Proceedings on Motion to Dismiss at 15, *West*, No. CC595857.
[19] *See* People's Response in Opposition to Defendant's Motion to Suppress Evidence at 2–3, *West*, No. CC633123.
[20] *West*, No. CC633123, at 5.
[21] *Id.* at 1, 3.
[22] *Id.* at 2.
[23] *Id.* at 5.

the co-occupant is present and fortuitously overhears the consent of the third party," the knock-and-announce rule must be used to "give[] a co-occupant the opportunity to exercise [his] own Fourth Amendment rights."[24] Finally, Judge Del Pozzo distinguished *Hudson* on the ground that the existence of a warrant "was central to the high court's analysis and holding."[25] In contrast, because no warrant existed in this case, "if proper knock notice [had been] given the homeowner might [have] exercise[d] his right to refuse admittance under *Georgia v. Randolph*."[26] Judge Del Pozzo concluded that "[w]ere the United States Supreme Court to be 'squarely' presented with [the] facts of this case they would conclude that suppression is required."[27]

This declaration is almost certainly incorrect. The Supreme Court has consistently focused on the historical origins of the knock-and-announce rule and has limited its applicability to a narrow category of entries in which police are authorized to use force should the knock not elicit consent. The limited nature of this paradigm is reflected both in the list of interests protected by knock notice, as specified in *Hudson*, and in statutory codifications of the rule. Precedent demonstrates that cases in which a consenting third party is present when police enter the residence do not fit within this paradigm, and it would be functionally arbitrary to make a distinction in cases of absent third-party consent. Moreover, the Court's treatment of third-party consent in *Randolph* strongly suggests that the entry in this case was reasonable under the Fourth Amendment.

The Supreme Court has repeatedly emphasized the historical origins of the knock-and-announce rule.[28] The modern rule is derived from ancient English common law, which held that, while a man was generally protected within the privacy of his home, the King's sheriff could "break the party's house, either to arrest him, or to do other execution of the K[ing']s process."[29] As a qualification, however, the common law courts required that "before [the sheriff] breaks it, he ought to signify the cause of his coming, and to make request to open doors."[30] Knock notice was thus never conceived of as a universal requirement under which "every entry must be preceded by an announcement."[31] Rather, it was a narrow limitation on a governmental

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[24] *Id.*

[25] *Id.* at 2 (citing Hudson v. Michigan, 126 S. Ct. 2159, 2170–71 (2006) (Kennedy, J., concurring in part and concurring in the judgment)).

[26] *Id.* at 3.

[27] *Id.* at 5.

[28] *See, e.g.*, *Hudson*, 126 S. Ct. at 2162; Wilson v. Arkansas, 514 U.S. 927, 931–34 (1995).

[29] *Wilson*, 514 U.S. at 931 (1995) (alteration in original) (quoting Semayne's Case, (1603) 77 Eng. Rep. 194, 195 (K.B.)).

[30] *Id.* (quoting *Semayne's Case*, 77 Eng. Rep. at 195–96).

[31] *Id.* at 934.

privilege: under certain circumstances, the government could break into your house, but it had to knock first. It follows that this qualification does not apply to cases in which the government does not have authority to "break in." Although what constitutes a "breaking" has expanded over time,[32] the Supreme Court's treatment of knock-and-announce as a historical concept originally tied to violent physical invasions[33] and its insistence that knock notice is not a universal requirement[34] suggest that the knock notice rule applies exclusively to entries for which force is authorized.

Accordingly, the Court's ruling in *Hudson* demonstrates that the essence of a "breaking" is a situation in which the government has such authority that it may enter regardless of the will of the tenant.[35] In *Hudson*, the Court discussed knock-and-announce as a rule that "gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry."[36] In addition to the prevention of surprise and needless destruction of property, the Court specified a sort of "dignity" interest in being allowed to "pull on clothes or get out of bed" before the police enter.[37] These interests relate exclusively to cases in which the police are going to enter a man's house, whether he likes it or not. As such, Judge Del Pozzo was right that the presence of a warrant was critical to the Court's analysis in *Hudson*;[38] however, this fact means not that *Hudson* is limited to cases that involve warrants,[39] but rather that the knock-and-announce rule is limited to cases in which police have authority to enter forcibly.

Legislative enactments also support this understanding of the knock-and-announce rule. Modern statutes codify three types of entries for which knock notice is required: entries made for the purposes of executing a search warrant, executing an arrest warrant, and con-

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[32] *Compare Semayne's Case*, 77 Eng. Rep. at 197 (noting that "[i]n all cases when the door is open the sherriff may enter" and this is not a breaking), *with* People v. Jacobs, 729 P.2d 757, 762 (Cal. 1987) (noting that even a peaceful entry, through an unlocked or open door, might be deemed a breaking). At a minimum, the concept now covers those "entries that would be considered breaking as that term is used in defining common law burglary." People v. Rosales, 437 P.2d 489, 492 (Cal. 1968).

[33] *See Wilson*, 514 U.S. at 935–36 (noting that the common law rule was justified in part by a desire to avoid the needless destruction of property entailed in breaking into a house).

[34] *See id.* at 934.

[35] *See* Hudson v. Michigan, 126 S. Ct. 2159, 2162–63, 2165 (2006).

[36] *Id.* at 2165 (quoting Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997)) (internal quotation marks omitted).

[37] *Id.* (quoting *Richards*, 520 U.S. at 393 n.5).

[38] *See West*, No. CC633123, at 2.

[39] *See In re* Frank S., 47 Cal. Rptr. 3d 320, 324 (Ct. App. 2006) (holding that *Hudson* applied to a probation search because "[t]he rule turns on the nature of the constitutional violation at issue, not the nature of the police's authority for entering the home").

ducting an arrest without a warrant.[40] What these three situations have in common is that they represent cases in which the government possesses such authority that it may enter a person's home regardless of his consent. It is not accidental that warrantless searches are not included within knock-and-announce statutes: the need to search does not presumptively confer on the government the right to break into a house.[41]

The *West* court thus demonstrated a fundamental misunderstanding of knock-and-announce when it applied California Penal Code section 1531, which covers the execution of search warrants, to *West*.[42] A warrantless search can be executed only with consent, and a consensual entry is inapposite to the paradigm of a breaking for which knock notice is required. The essential interest involved in a consensual entry is a tenant's right to prevent the government from entering his home; as Judge Del Pozzo noted, this was the interest asserted by the defendant in *West*.[43] But as the Supreme Court stated in *Hudson*, this is not an interest protected by the knock-and-announce rule.[44] The fact that the defendant could have stopped Officer Heinrich at the door and refused his entry[45] demonstrates that the entry was not a "breaking" and therefore that knock notice was not required.

This understanding demonstrates why the court erred in analogizing the facts of this case to a probation search.[46] Although the right to conduct a probation search may be based in some sense on the probationer's prior consent,[47] an entry into a house pursuant to a probation search is fundamentally different from a consensual entry because the probationer's status gives the government the authority to enter re-

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[40] The federal knock notice statute, 18 U.S.C. § 3109 (2000), refers only to the execution of a search warrant. This statute was extended by the Supreme Court in *Sabbath v. United States*, 391 U.S. 585 (1968), to cover arrests as well. *Id.* at 588–89. In California, one statute, CAL. PENAL CODE § 844 (West 1985 & Supp. 2006), deals with all legal arrests, while a separate statute, CAL. PENAL CODE § 1531 (West 2002), applies to the execution of search warrants.

[41] *See* Payton v. New York, 445 U.S. 573, 586 (1980). Of course, the police may break in to perform a search under exigent circumstances, but this issue may be bracketed because knock notice is not required in cases of exigency. *See* Wilson v. Arkansas, 514 U.S. 927, 935–36 (1995).

[42] *See West*, No. CC633123, at 3.

[43] *See id.*

[44] *See* Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006) (describing the interests protected by the knock-and-announce rule as "quite different" from those at stake when "excluding the fruits of unlawful warrantless searches" because the former "do not include the shielding of potential evidence from the government's eyes").

[45] *See West*, No. CC633123, at 3.

[46] *See id.* at 1–2 ("[T]he consent search in this case is conceptually indistinguishable from a probation search.").

[47] *But see* Samson v. California, 126 S. Ct. 2193, 2199 n.3 (2006) ("[W]e decline to rest our holding today on the consent rationale.").

gardless of consent.[48] Thus, a probation search fits within the paradigm of an entry for which force is authorized in the absence of consent and for which knock notice is therefore required.[49]

Entries made pursuant to third-party consent, however, are fundamentally different because the consent of one tenant does not give the police the authority to enter against the wishes of an objecting co-tenant.[50] Thus, a California court held in *People v. Hoxter*[51] that knock notice was not required in a case in which police were invited into the defendant's house, through an open door, by his daughter.[52] Since this entry "was made with valid consent . . . the officers did not commit a breaking . . . and were under no obligation to announce their purpose before entering."[53] Similarly, knock notice was apparently not required in *Illinois v. Rodriguez*,[54] in which a former co-tenant let police into the defendant's home by opening the door from the outside.[55] As the Court noted later in dicta, the defendant in *Rodriguez* was sleeping within "and the police might have roused him with a knock on the door."[56] However, lack of knock notice did not appear to affect the Court's determination about the validity of the search.[57]

One might argue that the logic of these cases is distinguishable because the consenting co-tenant in both *Hoxter* and *Rodriguez* was present at the door when police entered, whereas Lamantia was a number of feet away, inside a police car, when Officer Heinrich entered the defendant's residence.[58] Indeed, *West*'s ruling is technically limited to cases of "absent" third-party consent.[59] This distinction, however, would be very difficult to uphold in light of *Hudson*: with regard to

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[48] *See id.* at 2202; United States v. Knights, 534 U.S. 112, 119–20 (2001) (holding that the defendant had a "significantly diminished . . . reasonable expectation of privacy" in his apartment by virtue of his status as a probationer).

[49] *See In re* Frank S., 47 Cal. Rptr. 3d 320, 323–24 (Ct. App. 2006).

[50] *See* Georgia v. Randolph, 126 S. Ct. 1515, 1526 (2006).

[51] 89 Cal. Rptr. 2d 259 (Ct. App. 1999).

[52] *See id.* at 262.

[53] *Id.* at 266.

[54] 497 U.S. 177 (1990).

[55] *Id.* at 180.

[56] Georgia v. Randolph, 126 S. Ct. 1515, 1527 (2006).

[57] *See Rodriguez*, 497 U.S. at 188–89.

[58] *See* Transcript of Preliminary Examination Proceedings, *supra* note 9, at 46–48.

[59] *West*, No. CC633123, at 1. Such a distinction might be supported by the California Supreme Court's holding in *Duke v. Superior Court*, 461 P.2d 628 (Cal. 1969). In that case, police entered a man's home after receiving permission from his wife earlier that night at the stationhouse. *Id.* at 630. The court held that knock notice was required because "[t]he absent spouse could not waive the right to privacy of her husband who was then occupying the premises." *Id.* at 633. However, the reasoning in *Duke* is based on an understanding of privacy and consent that is outdated in light of the Supreme Court's subsequent ruling in *United States v. Matlock*, 415 U.S. 164, 169–72 (1974), which held that one co-tenant could consent to a search when the other tenant was absent.

the interests that knock notice is intended to protect, there is no functional difference between the entries permitted in *Hoxter* and *Rodriguez* and the one in *West*. It stands to reason that his daughter's consent in no way rendered the defendant in *Hoxter* any less surprised by, or any more prepared for, the officers' entry into his home; nor was the defendant in *Rodriguez* granted any greater dignity or opportunity for preparation because his former co-tenant, rather than the officer next to her, turned the doorknob. In terms of the prevention of surprise, the preservation of dignity, and the protection of property, what would have been the difference if the consenting co-tenants in either of these cases had been twenty feet outside the residence, rather than directly outside the threshold, or directly within it? Extending knock notice to apply in the present case would thus be arbitrary in light of the interests protected by the rule. Whether the consenting co-tenant is present or absent, entries made by virtue of third-party consent are not backed by the authority to use force and therefore do not fall within the paradigm of cases in which the knock-and-announce requirement applies.

Beyond this, the question raised by the court is an interesting one: why should a person receive "less protection" in some cases of consensual entry than he would in the case of an entry for which force is authorized?[60] The court's question, however, is incorrectly framed. The proper inquiry is not the amount of "protection" received by the defendant, but rather whether the entry as a whole was reasonable. While warrantless searches are unreasonable per se, the Supreme Court has "jealously and carefully drawn [an] exception"[61] that "recognizes the validity of searches with the voluntary consent of an individual possessing authority."[62] The reasonableness of third-party consent is drawn from "widely shared social expectations, which are naturally enough influenced by the law of property."[63] A person who accepts a co-tenant assumes certain risks — namely, that his roommate "might permit the common area to be searched"[64] — and thereby reduces his reasonable expectation of privacy. This is "an assumption of risk[] on which police officers are entitled to rely."[65]

In *Georgia v. Randolph*, the Supreme Court stated explicitly that the reasonableness of an entry pursuant to third-party consent is not dependent on the police "tak[ing] affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already

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60 *West*, No. CC633123, at 2.

61 *Randolph*, 126 S. Ct. at 1520 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)) (internal quotation marks omitted).

62 *Id.* (citing *Rodriguez*, 497 U.S. at 181).

63 *Id.* at 1521.

64 *Id.* (quoting *Matlock*, 415 U.S. at 171 n.7) (internal quotation mark omitted).

65 *Id.* at 1522 (internal quotation marks omitted).

received."[66] Judge Del Pozzo's assertion that *Randolph* should not be interpreted as being limited to "those rare instances when the co-occupant is present and fortuitously overhears the consent of the third party"[67] is thus somewhat curious. Far from "eviscerating" *Randolph*,[68] the narrower interpretation follows directly from the plain language of the Court's opinion.[69] Because doing otherwise would be impractical, and would "needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field," the Court chose a bright line rule: "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the [other] co-tenant's permission does not suffice for a reasonable search," but if the "potential objector" is "nearby but not invited to take part in the threshold colloquy, [he] loses out."[70] What happened in *West*, essentially, was that the defendant — like the hypothetical co-tenant in *Randolph* — lost out. This result is a function of the risks assumed in accepting a co-tenant. Judge Del Pozzo's attempt to extend knock notice to obviate this risk, such that it "gives a co-occupant the opportunity to exercise [his] own Fourth Amendment rights,"[71] thus contradicts the Supreme Court's language in *Randolph*.

To the extent that the *West* court was uncomfortable with this result,[72] it would appear that the problem is inherent in the current doctrine of third-party consent. It might reasonably be proposed, for example, that the Court's rulings on third-party consent will have a disproportionately negative effect on indigent persons, who are more likely to live in co-occupancy situations and therefore to "assume" the risk of reduced privacy. If this effect is problematic, then perhaps the Supreme Court should rethink the definition of reasonableness with regard to entries made pursuant to third-party consent.[73] Alternatively, a legislature may deem it desirable from a policy perspective to address these issues by creating a new, expanded knock-and-announce rule that covers all consensual entries. These considerations may well have been beyond the scope of Judge Del Pozzo's authority, but so too was his expansion of the existing rule to fit the facts of this case.

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[66] *Id.* at 1527.

[67] *West*, No. CC633123, at 5.

[68] *Id.*

[69] *See Randolph*, 126 S. Ct. at 1527 ("This is the line we draw, and we think the formalism is justified.").

[70] *Id.*

[71] *West*, No. CC633123, at 5.

[72] *See id.* at 2.

[73] *See generally* Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 58–64 (1974) (suggesting that consent generally should not be used as a basis for justifying searches). The Court could also shift its analysis from a historical reading of knock notice, as in *Hudson*, to some broader balancing test if it desires a different outcome.