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No-Knock and the Constitution: The District of Columbia Court Reform and Criminal Procedure Act of 1970 (A Critique and Proposed Alterations)

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No-Knock and the Constitution: The District of Columbia Court Reform and Criminal Procedure Act of 1970 [A Critique and Proposed Alterations]

I. INTRODUCTION

In the last year "no-knock" laws—which allow unannounced forcible entries by police into private homes—have been a subject of great concern, engendering constitutional debate among Congressmen[1] as well as apprehension among citizens.[2]

While *Ker v. California*[3] has made it clear that no-knock entries can be constitutional, much ambiguity remains as to the time and manner in which they may be made. The no-knock provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970[4] attempt to reduce that ambiguity in the

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1. *E.g.*, 116 CONG. REC. S. 11,646-66 (daily ed. July 17, 1970) (remarks of Senator Ervin).

2. *E.g.*, *No Knock Drug Bill*, TIME, Feb. 9, 1970, at 11-12; Buckley, *No Knock?*, NATIONAL REV., Feb. 24, 1970, at 220; *Of Plumbing and Privacy*, EBONY, April, 1970, at 154-55.

3. 374 U.S. 23 (1963).

4. Pub. L. No. 91-358 (July 29, 1970), 1970 U.S. CODE CONG. & AD. NEWS 2509-2743 [hereinafter cited to sections of D.C. CODE (Supp. IV, 1971)] contains the following no-knock provisions:

SUBCHAPTER VI—AUTHORITY TO BREAK AND ENTER UNDER CERTAIN CONDITIONS

§ 23-591. Authority to break and enter under certain conditions

. . .

(b) Breaking and entry shall not be made until after such officer or person makes an announcement of his identity and purpose and the officer reasonably believes that admittance to the dwelling house or other building or vehicle is being denied or unreasonably delayed.

(c) An announcement of identity and purpose shall not be required prior to such breaking and entry—

(1) if the warrant expressly authorizes breaking and entry without such a prior announcement, or

(2) if circumstances known to such officer or person at the time of breaking and entry, but in the case of the execution of a warrant, unknown to the applicant when applying for such warrant, give him probable cause to believe that—

(A) such notice is likely to result in the evidence subject to seizure being easily and quickly destroyed or disposed of,

(B) such notice is likely to endanger the life or safety of the officer or another person,

(C) such notice is likely to enable the party to be arrested to escape, or

(D) such notice would be a useless gesture.

SUBCHAPTER IV—ARREST WARRANT AND SUMMONS

§ 23-561. Issuance, form and contents

. . .

(b) (1) . . . If the complaint establishes probable cause to believe

District of Columbia by codifying this area of police procedure. It is the purpose of this Note to review those provisions and inquire whether they are in fact a codification of "existing law," as proponents suggested;[5] and whether they provide adequate safeguards for fourth amendment rights.

II. THE NO-KNOCK PROVISIONS

A. The General Rule

The provisions lay down a general rule,[6] enumerate certain exceptions to that rule (the no-knock exceptions)[7] and specify the procedural contexts in which the exceptions are to operate.[8]

The general rule is that unannounced forcible entries may not be made, unless the officer has announced his identity and purpose and has been denied admittance or admittance has been unreasonably delayed.[9]

B. The Exceptions

Four basic exceptions to this general rule allow entries without a prior statement of identity and purpose. Prior announce-

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that one of the conditions set out in subparagraphs (A) through (D) of section 23-591(c)(2) is likely to exist at the time and place at which such warrant is to be executed, the warrant may contain an authorization that it be executed as provided in section 23-591.

SUBCHAPTER II—SEARCH WARRANTS

§ 23-521. Nature and issuance of search warrants

. . .

(f) A search warrant shall contain . . . (6) where the judicial officer has found cause therefore, including one of the grounds set forth in subparagraph (A), (B), or (D) of section 23-591(c)(2), an authorization that the executing officer may break and enter the dwelling house or other building or vehicles to be searched without giving notice of his identity and purpose. . . .

§ 23-522. Applications for search warrants

. . .

(c) The application may also contain . . . (2) A request that the search warrant authorize the executing officer to break and enter dwelling houses or other buildings or vehicles to be searched without giving notice of his identity and purpose, upon probable cause to believe that one of the conditions set forth in subparagraph (A), (B), or (D) of section 23-591(c)(2) is likely to exist at the time and place at which such warrant is to be executed.

5. *E.g.*, 116 Cong. Rec. S. 11,684-85 (daily ed. July 17, 1970) (remarks of Senator Tydings). "The statutory exceptions to the knock-and-wait rule are strictly limited so as to confine no knocking to those few circumstances where it is already permitted under existing law."

6. D.C. Code § 23-591(b) (Supp. IV, 1971).

7. D.C. Code § 23-591(c)(2)(A)-(D) (Supp. IV, 1971).

8. D.C. Code §§ 23-591(c)(1)-(2), 23-561(b)(1), 23-521(f)(6), 23-522(c)(2) (Supp. IV, 1971).

9. D.C. Code § 23-591(b) (Supp. IV, 1971).

ment is excused where:

> 1. such notice is likely to result in the evidence subject to seizure being easily and quickly destroyed or disposed of [the *destruction of evidence exception*],[10]
>
> 2. such notice is likely to endanger the life or safety of the officer or another person [the *peril exception*],[11]
>
> 3. such notice is likely to enable the party to be arrested to escape [the *escape exception*],[12] or
>
> 4. such notice would be a useless gesture [the *useless gesture exception*].[13]

The exceptions operate in four procedural contexts: no-knock arrest warrants, no-knock search warrants, ordinary arrest and search warrants, and arrests and searches without warrants.

1. *No-Knock Arrest Warrants*

An officer may break a door without prior announcement to execute an arrest warrant if expressly so authorized in the warrant.[14] An arrest warrant may so authorize if there is probable cause to believe it likely that circumstances at the time and place of the warrant's execution will be those described in the destruction of evidence, peril, escape or useless gesture exceptions.[15]

2. *No-Knock Search Warrants*

Prior announcement is excused if expressly so authorized in a search warrant.[16] A search warrant may so authorize if there is probable cause to believe it likely that the circumstances at the time and place of the warrant's execution will be those described in the destruction of evidence, peril or useless gesture exceptions.[17]

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10. D.C. CODE § 23-591(c)(2)(A) (Supp. IV, 1971).
11. D.C. CODE § 23-591(c)(2)(B) (Supp. IV, 1971).
12. D.C. CODE § 23-591(c)(2)(C) (Supp. IV, 1971).
13. D.C. CODE § 23-591(c)(2)(D) (Supp. IV, 1971).
14. D.C. CODE § 23-591(c)(1) (Supp. IV, 1971).
15. D.C. CODE § 23-561(b)(1) (Supp. IV, 1971).
16. D.C. CODE § 23-591(c)(1) (Supp. IV, 1971).
17. D.C. CODE §§ 23-521(f)(6) & 23-522(c)(2) (Supp. IV, 1971).

Note that the circumstances of the escape exception have been eliminated as grounds for issuance of a no-knock search warrant. Presumably, this omission reflects the fact that escapes, while problems in arrest situations, do not arise in search proceedings.

The circumstances of the destruction exception have not, however, been omitted as grounds for a no-knock arrest warrant. This is difficult to reconcile with the United States Supreme Court's position that search warrants must be procured whenever reasonably practical. *See* Trupiano v. United States, 334 U.S. 699 (1948). If it is practical to

3. *Ordinary Arrest and Search Warrants*

An officer executing an ordinary arrest or search warrant may make a no-knock entry if circumstances at the time he attempts to execute the warrant give him probable cause to believe that the situation described fits the destruction of evidence, peril, escape or useless gesture exceptions.[18]

The right of an officer to make a no-knock entry to execute an ordinary warrant is conditioned upon his ignorance of the circumstances justifying such entry at the time he applied for the warrant. If he knew of such circumstances he should have applied for a no-knock warrant, thereby allowing prior judicial review of the mode of entry. This condition is intended to establish a statutory preference for prior judicial review of no-knock entries[19] paralleling the preference for prior judicial review which the United States Supreme Court has indicated in regard to arrests and searches generally.[20]

4. *Arrests and Searches Without Warrants*

An officer may make a no-knock entry to arrest or search without a warrant if circumstances at the time of the arrest or search give him probable cause to believe that the situation described fits the destruction of evidence, peril, escape or useless gesture exceptions.[21]

III. CASE LAW BACKGROUND

Proponents of the District of Columbia bill suggested that these provisions constitute no material change in the law, but merely codify existing law.[22] A review of the case law back-

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procure a no-knock arrest warrant, it is difficult to see why a no-knock search warrant might not also be procured. Constitutional rights would thereby be protected by insuring that the judicial review focuses on the search directly rather than as a mere incidental matter in an application for an arrest warrant.

18. D.C. CODE § 23-591(c)(2) (Supp. IV, 1971).

19. *See* 116 CONG. REC. S. 11,570-71 (daily ed. July 16, 1970) (remarks of Senator Tydings). "The bill requires prior judicial review of so-called no-knock entries whenever the officer knows in advance he may have difficulty in executing a search or arrest warrant. The bill provides that, when an officer knows before hand that his life may be in danger or that evidence may be destroyed, he must seek specific authorization from a judge before he can enter the premises to be searched without knocking."

20. *See* Trupiano v. United States, 334 U.S. 699 (1948).

21. D.C. CODE § 23-591(c)(2) (Supp. IV, 1971).

22. *See* note 5 *supra*.

ground of unannounced forcible entries by police in criminal cases will reveal the extent to which this proposition is true.

A. The General (Semayne) Rule

The general rule of the common law first appeared as dicta in *Semayne's Case*[23] where the court observed,

> [i]n all cases when the King is party [i.e., criminal cases], the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . .*[24]

The *Semayne* rule has been observed in subsequent English and American cases.[25]

In *McLennon v. Richardson*[26] the defendant officers forcibly entered plaintiff's house to quell a breach of the peace without first demanding admittance. In the ensuing trespass action the court held that defendant's answer was insufficient because it failed to allege that a demand for admittance had preceded the entry. In most English and American cases, however, the necessity of prior announcement to validate the arrest or search appears only in dicta,[27] because in most cases the officers made such an announcement but were refused admittance. The issue of an

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23. 77 Eng. Rep. 194 (K.B. 1603). The opinion also refers to the general rule respecting execution of *civil* process; to wit, that forcible entries cannot be made, even after a demand and refusal. *Id.* at 198.

24. *Id.* at 195 (emphasis added).

25. The *Semayne* rule, moreover, is embodied in the statutes of many states, in two 1961 District of Columbia statutes and in 18 U.S.C. § 3109 (1969). *See* Sonnenreich & Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 St. John's L. Rev. 626, 654-59 (1970).

26. 81 Mass. (15 Gray) 74 (1860).

27. A typical dictum appears in the English case of Burdett v. Abbot, 104 Eng. Rep. 501 (K.B. 1811), where officers executing an arrest warrant for the offense of libel broke doors after an announcement, a demand of entry and a refusal of admittance. *See also* Case of Richard Curtis, 168 Eng. Rep. 67 (K.B. 1757); Launock v. Brown, 106 Eng. Rep. 482 (K.B. 1819).

Similar dicta are presented in the American cases of Barnard v. Bartlett, 64 Mass. (10 Cush.) 501 (1852), and Bell v. Clapp, 10 Johns. 263 (N.Y. Sup. Ct. 1813). In *Barnard* the officers broke doors after an announcement, demand and refusal to execute the criminal arrest warrant of a Justice of the Peace. *See also* Jacobs v. Measures, 79 Mass. (13 Gray) 74 (1859); Commonwealth v. McGahey, 77 Mass. (11 Gray) 194 (1858); State v. Shaw, 1 Root. 134 (Conn. 1789). In *Bell* the officers, after an announcement, demand and refusal, broke doors to execute a search warrant. *Bell* is said to be the earliest American case to consider the question of forcible entry in the execution of a search warrant. Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 507 (1964).

"unannounced" entry therefore rarely is presented by the facts.[28]

One case stands in sharp contrast to those above. Its language suggests that a prior announcement before breaking is never necessary to execute criminal process. The court in *Hawkins v. Commonwealth*[29] felt that such formalities "would in many cases defeat the very object in view, by giving the offender notice of his danger, and an opportunity of effecting his escape."[30] Whether these remarks pertain to an issue presented by the facts or are merely dicta cannot be determined, as the Kentucky Court of Appeals presents no statement of facts whatsoever.

B. Exceptions to the *Semayne* Rule

Exceptions to the *Semayne* rule of announcement were not recognized by early English text writers. East observed that

> in every case, whether criminal or civil, where doors may be broken open in order to make an arrest, there must be a previous notification of the business and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity.[31]

American criminal cases, however, have recognized five basic categories of exceptions:

1. *The Destruction of Evidence Exception*

Prior announcement is unnecessary where evidence is being destroyed within. This exception is a recent California "judicial exception,"[32] in cases where "exigent circumstances"[33] are present, to one of California's *Semayne* rule statutes.[34] Although some commentators[35] suggest this rule arose in *People v. Mad-*

28. *See generally* Blakey, *supra* note 25, at 500-08; Sonnenreich & Ebner, *supra* note 25, at 627-29; Annot., 5 A.L.R. 263 (1919).

29. 53 Ky. (14 B. Mon.) 395 (1854).

30. *Id.* at 397.

31. 1 East, Pleas of The Crown 324 (1806 ed.). *See* 1 Hale, Pleas of The Crown 459 (1778 ed.); 2 Hawkins, Pleas of The Crown, c. 14, s.1 (1762 ed.). The English courts later recognized an exception in a civil case. In Aga Kurboolie Mahomed v. Queen, 13 Eng. Rep. 293 (P.C. 1843), the court held that where officers, having entered plaintiff's home through an open door to execute an arrest warrant on civil process and having been thrown out by plaintiff, forcibly reentered without announcement, such lack of announcement was permissible because plaintiff "full well knew the purpose for which they returned . . . ." *Id.* at 296.

32. *See* Ker v. California, 374 U.S. 23, 37 (1963).

33. *Id.* at 39.

34. Cal. Penal Code § 844 (West 1969).

35. *See* Blakey, *supra* note 25, at 515; Sonnenreich & Ebner, *supra* note 25, at 631.

dox,[36] the California Supreme Court in *People v. Gastello*[37] indicated that its holding in *Maddox* was extended to allow unannounced entries to prevent the destruction of evidence only in later cases.[38] The *Gastello* court clarified both the circumstances in which the destruction of evidence exception is applicable and the constitutional requirements attending its application. The officers in that case made a no-knock entry into defendant's apartment to prevent the destruction of evidence of the narcotics violations of which defendant was suspected.[39] The California Attorney General argued that a specific showing that destruction was actually attempted in this particular case was unnecessary. He sought to justify the entry on the grounds that police experience suggested that narcotics violators tend to destroy their easily disposable evidence when confronted by police. In rejecting this contention, the court observed that neither it "nor the United States Supreme Court has held that unannounced forcible entries may be authorized by a blanket rule based on the type of crime or evidence involved."[40]

With respect to the fourth amendment, the court said:

> Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard—the requirement of particularity—would be lost. *Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen.*[41]

The court expressly disapproved of cases in which entries made to prevent destruction of evidence were justified by the mere fact that easily destructible evidence was involved.[42]

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36. 46 Cal. 2d 301, 294 P.2d 6 (1956). *See also* notes 53-56 *infra*.

37. 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967).

38. The *Gastello* court indicated that only "[l]ater cases have included the prevention of destruction of evidence as an additional ground for noncompliance with section 844. (People v. Covan (1960) 178 Cal. App. 2d 416, 2 Cal. Rptr. 811; People v. Morris (1958) 157 Cal. App. 2d 81, 320 P.2d 67.)" *Id.* at 587-88, 432 P.2d at 707-08, 63 Cal. Rptr. at 11. People v. Ruiz, 146 Cal. App. 2d 630, 304 P.2d 175 (1956) might also have been included.

39. The most frequent application of the destruction of evidence exception has occurred in narcotics cases, because narcotics are easily destroyed, for instance, by rinsing down a drain or flushing down a toilet.

40. 67 Cal. 2d at 588, 432 P.2d at 708, 63 Cal. Rptr. at 12.

41. *Id.* at 588-89, 432 P.2d at 708, 63 Cal. Rptr. at 12 (emphasis added).

42. *Id.* at 589, 432 P.2d at 708, 63 Cal. Rptr. at 12.

The rule of the *Gastello* court has been strictly adhered to in subsequent California cases.[43] In *People v. Marquez*[44] the court held that sufficient particularity was not achieved by (1) the officer's experience with the propensity of narcotics violators to flush evidence and (2) information from an informant that this suspect intended to flush the narcotics if police appeared. Noncompliance with California's *Semayne* rule statute[45] was therefore not permissible.

Similar rules have been established by courts of other jurisdictions,[46] while others appear to sanction the blanket rule which the *Gastello* court disapproved.[47]

2. *The Peril Exception*

Prior announcement of authority and purpose are unnecessary when the life of the officer would be imperiled by such notice. *Read v. Case*[48] has often been cited as the origin of this exception.[49] In *Read* a bail sought to arrest his principal, who took refuge in his house and threatened to resist arrest with a firearm. The bail gained admittance by subterfuge and opened the door to police officers who were authorized to arrest the principal. The officers entered without prior announcement. The court stated that

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43. Some maintain that in People v. Carrillo, 64 Cal. 2d 387, 412 P.2d 377, 50 Cal. Rptr. 185 (1966), the court "retreated slightly from the strict position it had assumed in *Gastello*. . . ." Sonnenreich & Ebner, *supra* note 25, at 632. This contention is erroneous. The court can hardly be said to have "retreated" in the 1966 case of *Carrillo* from the position it was not to assume until 1967 in *Gastello*.

44. 273 Cal. App. 2d 341, 77 Cal. Rptr. 907 (1969). *See also* People v. De Santiago, 71 Cal. 2d 18, 453 P.2d 353, 76 Cal. Rptr. 809 (1969). *Cf.* People v. Rosales, 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968), where particularity was required to justify application of the escape exception.

45. CAL. PENAL CODE § 844 (1969).

46. *See* Meyer v. United States, 386 F.2d 715 (9th Cir. 1967); United States ex. rel. Ametrane v. Gable, 276 F. Supp. 555 (E.D. Pa. 1967); State v. Mendoza, 104 Ariz. 395, 454 P.2d 140 (1969); Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968).

47. *See* Henson v. State, 236 Md. 518, 204 A.2d 516 (1964). Note however, that this case was decided before the clarification of the destruction of evidence exception in *Gastello*. *See also* People v. DeLago, 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965), *cert. denied*, 383 U.S. 963 (1966), in which a no-knock warrant was justified by blanket rules.

48. 4 Conn. 166 (1822).

49. *See* Ker v. California, 374 U.S. 23, 54-55 (1963); Miller v. United States, 357 U.S. 301, 309 (1958); People v. Maddox, 46 Cal. 2d 301, 306, 294 P.2d 6, 9 (1956).

> [u]nder these circumstances, he [the principal] was not within the reason and spirit of the rule requiring notice; nor was the bail obliged by law to make a demand, that would probably issue in the destruction of his life.[50]

The officers' entry was justified because they were assistants of the bail. The court in *People v. Smith*[51] found the peril exception applicable where an officer made an unannounced entry into the apartment of a defendant who was reported over police radio to have just shot and killed two policemen.

3. *The Escape Exception*

Prior announcement is not necessary when an escape is being attempted by the party to be arrested. The escape exception, like the destruction of evidence exception, arose in California as a judicial exception to California's *Semayne* rule statute[52] where exigent circumstances are present.[53] In *People v. Maddox*[54] officers making an arrest without a warrant on suspicion of narcotics violations knocked on defendant's door. Hearing a male voice say "wait a minute" and retreating footsteps, they broke in the doors without further announcement and arrested the defendant. The court held the entry lawful, observing that

> since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose.[55]

The court cited *Read v. Case* and RESTATEMENT OF TORTS § 206, comment *d* as authority for this proposition. While *Read* does stand for the peril exception,[56] the "or the arrest frustrated" language is derived solely from the rather loose phraseology of the reporter's comment *d* to section 206. The court concluded that because of the "wait a minute" and the retreating footsteps, the officers' belief that their peril would have been increased or that the defendant would escape was reasonable. Noncompliance with the *Seymane* statute was therefore said to have been permissible.

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50. 4 Conn. at 170.

51. 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966). *See also* People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

52. CAL. PENAL CODE § 844 (West 1969).

53. Ker v. California, 374 U.S. 23, 27 (1963).

54. 46 Cal. 2d 301, 294 P.2d 6 (1956).

55. *Id.* at 306, 294 P.2d at 9. The court in *People v. Gastello* subsequently stated that this was the holding of *Maddox*. People v. Gastello, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967).

56. *See* text accompanying notes 48-50 *supra*.

Noncompliance was not excused in the later case of *People v. Rosales*,[57] where defendant was arrested as a parole violator. The court found that the facts were insufficient to warrant application of the escape exception since the officers were already stationed at defendant's front and back door, precluding the possibility of an escape. The court also noted that the officers were in visual contact with the defendant and saw no suspicious movements suggesting an imminent escape attempt.

The *Rosales* court emphasized the *Gastello* viewpoint respecting particularity,[58] noting that a belief that an escape would be attempted "cannot be justified by a general assumption that certain classes of persons subject to arrest are more likely than others to resist arrest, attempt to escape, or destroy evidence."[59]

4. The Useless Gesture Exception

Prior announcement is unnecessary when the officer's presence, authority and purpose are already known to those within. Although this exception has been articulated in a number of ways—useless gesture, senseless ceremony, fresh pursuit—its common feature in most cases is that those within are already aware of the officer's presence, authority and purpose. The court in *Allen v. Martin*[60] held that it would be a "senseless ceremony"[61] to make an announcement where an officer in "pursuit" of an escaped arrestee breaks a door to retake him. In *Miller v. United States*[62] the United States Supreme Court said,

> [i]t may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture.[63]

The court in *Hiller v. State*[64] held that where officers approaching the premises to execute a search warrant saw a woman (defendant's wife) appear at and then disappear from the door, formal announcement was not necessary. Her behavior in those circumstances indicated an awareness of the officers' identity and purpose and implied a refusal of admittance.

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57. 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).
58. *See* text accompanying notes 37-44 *supra*.
59. 68 Cal. 2d at 305, 437 P.2d at 493, 66 Cal. Rptr. at 5.
60. 10 Wend. 300 (N.Y. Sup. Ct. 1833).
61. *Id.* at 303.
62. 357 U.S. 301 (1958).
63. *Id.* at 310. *See* Wittner v. United States, 406 F.2d 1165 (5th Cir. 1969).
64. 190 Wis. 369, 208 N.W. 260 (1926). *Cf.* Lehrer v. State, 183 Wis. 339, 197 N.W. 729 (1924).

One court applied the useless gesture exception in circumstances where the defendant was unaware of the presence of officers. In *Bosely v. United States*[65] the United States Court of Appeals for the District of Columbia Circuit permitted an unannounced, non-forcible entry through an open door after officers had seen the defendant sleeping within and were unable to wake him by knocking. The court found that "[s]ince appellant had not been awakened by their knocking, the officers could reasonably have concluded that further knocking or verbal announcement would be a 'useless gesture.' "[66] No case authority is cited for this extension of the useless gesture exception although extensive authority is cited for the proposition that it had theretofore been applied only where those within already knew of the officer's presence, authority and purpose.

5. *The Unoccupied Premises Exception*

Prior announcement is unnecessary in the execution of a search warrant if the premises to be searched are unoccupied. This exception has been recognized in cases interpreting *Semayne* rule statutes. In *Jones v. State*[67] the court indicated that strict compliance with such a statute is not necessary when executing a search warrant for illegal alcoholic beverages where the premises to be searched are unoccupied. Dicta in *Goodman v. State*,[68] where the legality of a search to seize betting paraphenalia was tested, indicates that a demand before breaking doors is necessary only where some person is found in charge of the buildings to be searched.

C. SUMMARY

The case law respecting unannounced forcible entries by police in criminal cases can be summarized as follows:

The General (Semayne) Rule: Unannounced entries can never be made. Doors can be broken only after a prior announcement of authority and purpose and a refusal of admittance.[69]

65. 426 F.2d 1257 (D.C. Cir. 1970).
66. *Id.* at 1263.
67. 4 Ala. App. 159, 58 So. 1011 (1912).
68. 178 Md. 1, 8, 11 A.2d 635, 638-39 (1940). *Accord*, Henson v. State, 236 Md. 518, 522, 204 A.2d 516, 519 (1964). *See also* People v. Johnson, 231 N.Y.S.2d 689 (G.S. 1962); Collins v. State, 184 Tenn. 356, 199 S.W.2d 96 (1947). For cases dealing with "temporarily unoccupied" buildings *see* Annot., 33 A.L.R.2d 1430 (1952).
69. *See* text accompanying notes 23-30 *supra*.

Exceptions to the Semayne Rule: Prior announcement is excused where:

1) evidence is being destroyed within,[70]
2) the life of the officer would be imperiled by such notice,[71]
3) the party sought is attempting an escape,[72]
4) the officer's presence, authority and purpose are already known to those within,[73] or
5) in the execution of a search warrant, the premises to be searched are unoccupied.[74]

IV. NO-KNOCK AND THE CONSTITUTION

Although state and lower federal courts have passed upon the constitutional problems attending no-knock entries,[75] they have received little attention from the United States Supreme Court. While it has often decided issues of statutory construction in no-knock cases,[76] *Ker v. California*[77] is the only case in which the constitutional dimensions of no-knock were directly at issue.

In *Ker* the officers had probable cause to believe that defendant possessed illegal narcotics. While they were following him by car he made a sudden U-turn. Having lost contact with defendant, the officers found his apartment by tracing his auto license number. Proceeding without a warrant, they obtained a passkey from the manager and entered defendant's apartment quietly, making no demand of admittance or notification of authority and purpose before entering. Inside they seized evidence of narcotics violations lying in plain sight. The California District Court of Appeals held that the entry came within the destruction of evidence exception to California's *Semayne* rule statute[78] and that therefore the entry was legal and the evidence ad-

70. *See* text accompanying notes 32-47 *supra*.
71. *See* text accompanying notes 48-51 *supra*.
72. *See* text accompanying notes 52-59 *supra*.
73. *See* text accompanying notes 60-66 *supra*.
74. *See* text accompanying notes 67-68 *supra*.
75. *See, e.g.*, Meyer v. United States, 386 F.2d 715 (9th Cir. 1967); State v. Mendoza, 104 Ariz. 395, 454 P.2d 140 (1969).
76. The most conspicuous example of such cases is Miller v. United States, 357 U.S. 301 (1958). Even though it was decided under 18 U.S.C. § 3109, some maintain that it is of "constitutional status." Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 505-06. *See* Sabbath v. United States, 391 U.S. 585 (1968) and Wong Sun v. United States, 371 U.S. 471 (1963) for other cases under 18 U.S.C. § 3109.
77. 374 U.S. 23 (1963).
78. CAL. PENAL CODE § 844 (West 1969).

missible.[79] The United States Supreme Court affirmed, five to four.

Justice Clark, writing for the majority,[80] held that the easily destructible evidence and defendant's furtive conduct prior to arrest (the U-turn) indicating that he was expecting police, were sufficient to bring the entry within the destruction of evidence exception to the *Semayne* rule statute. Rejecting petitioner's constitutional argument, he held that in the

> particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment.[81]

Justice Brennan's dissenting opinion[82] said that even though there was probable cause to arrest, the arrests were nevertheless illegal because the unannounced entry in these circumstances violated the fourth amendment.[83] While Justice Clark was brief in his treatment of the no-knock issue, Justice Brennan embarked upon an extensive review of unannounced entries, and examined the history of the *Semayne* rule, its exceptions and the constitutional issues which no-knock presents.[84] Justice Brennan took the restrictive approach that all exceptions but the peril exception must be predicated upon an awareness of the officer's presence.[85] This narrow position is further demonstrated by his enumeration of exceptions to the *Semayne* rule. He would find a fourth amendment violation except

> (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.[86]

Although Justice Brennan noted these exceptions, he afforded extensive treatment only to the destruction of evidence exception. This is unfortunate because questions concerning his other exceptions might have been resolved by fuller discussion. His peril

79. 195 Cal. App. 2d 246, 15 Cal. Rptr. 767 (1961).
80. Justices Black, Stewart, and White concurred in this opinion. Justice Harlan concurred only in its result.
81. 374 U.S. at 40-41.
82. Chief Justice Warren, Justice Douglas and Justice Goldberg concurred in the dissenting opinion.
83. 374 U.S. at 46-47.
84. *Id.* at 47-64.
85. *Id.* at 55.
86. *Id.* at 47.

exception, in applying only where the persons within are in peril and not where the officers themselves are in peril, is clearly different from the *Read* peril exception.[87] Moreover, Justice Brennan does not mention the escape exception, although this is somewhat understandable because *Ker* was decided before the *Gastello* court's clarification of that exception.[88]

In demonstrating why he felt that the majority's application of the destruction of evidence exception is erroneous Justice Brennan gives that exception full exposition. He finds the exception inapplicable here because the "minimal conditions" for its application, "activity within the apartment"[89] which justifies the officers in the belief that destruction of evidence was being attempted, are absent. Justice Brennan notes that grounds for its application are not established by general police experience that narcotics suspects frequently destroy evidence when confronted by police.[90] Such a

> subjective judgement of the police officers cannot constitutionally be a substitute for what has always been a necessarily objective inquiry, namely, whether circumstances exist in the *particular* case which allow an unannounced police entry.[91]

The consequence of *Ker* is that while several issues respecting no-knock entries are clearly settled, only general constitutional principles are available to resolve others. It is, for example, settled that "the rule of announcement is a constitutional requirement implicit in the fourth amendment proscription against unreasonable searches and seizures."[92] Also apparently settled is a constitutional exception to the rule of announcement where the destruction of evidence is being attempted. Both Justices Clark and Brennan admitted the existence of the exception but disagreed as to whether the *Ker* facts warranted its application. Justice Clark found that the defendant possessed easily destructible evidence and that his conduct (the U-turn) indicating that he was expecting police was sufficient.[93] Justice Brennan,

87. *See* text accompanying notes 48-50 *supra*.

88. *See* text in note 55 *supra*. The complete omission of the escape exception is strange because Justice Brennan did mention it in the Court's opinion in Miller v. United States, 357 U.S. 301, 309 (1958).

89. 374 U.S. at 61.

90. *Id.* at 63.

91. *Id.* at 63. Note the "particularity" theme which was later given great emphasis by the *Gastello* court. *See* text accompanying notes 37-42 *supra*.

92. Sonnenreich & Ebner, *No-knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 643 (1970). *See also* Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States, and Ker v. California*, 112 U. PA. L. REV. 499, 507 (1964).

93. Justice Clark may in effect be saying that the facts here establish grounds for the useless gesture exception, which facts, when taken

on the other hand, found such facts insufficient because they did not indicate "activity within" the apartment which suggested that destruction was actually being attempted.

More extensive or precise guidelines unfortunately are not presented by Justice Clark, but the Brennan opinion indicates certain principles which suggest constitutional guidelines for the other exceptions. Similar principles have been enunciated by the Supreme Court of California in *Gastello* and *Rosales*.[94] These principles find their origin in the fourth amendment. That amendment prohibits "unreasonable" searches and seizures,[95] but allows, conversely, those which are reasonable. The test of reasonableness is satisfied by a showing of probable cause. "Probable cause," in the many contexts in which it operates, is said to exist when facts and circumstances of the particular case are sufficient to warrant a man of reasonable caution to believe that the intrusion—e.g., an arrest without warrant,[96] a search without warrant,[97] a "stop and frisk"[98]—is, under the particular circumstances, appropriate.[99] "Mere suspicion"[100] is insufficient to establish probable cause; specific facts of the particular case must justify the intrusion.

Justice Brennan and the *Gastello* court, in essence, require a showing of "probable cause" to justify a no-knock entry under the destruction of evidence exception. That is, they require that a showing of specific facts and circumstances of the particular case justifies a no-knock entry and denied that a "blanket rule" based on a category of crime or type of evidence is such a justification.[101] While both spoke only to the destruction of evidence exception, the constitutional requirement of probable cause should be applicable to all the no-knock exceptions. Indeed, the

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with the presence of easily destructible evidence, provide grounds for the destruction of evidence exception. Justice Brennan's allusion to a " 'fresh pursuit' exception which . . . Justice Clark apparently seeks to invoke . . ." 374 U.S. at 60, seems to pick up this theme. Justice Brennan, however, felt that grounds for such a fresh pursuit exception were lacking because the facts were insufficient to show that defendant knew the police were about to visit him.

94. *See* text accompanying notes 40-44 & 56-58 *supra*.

95. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

96. Wong Sun v. United States, 371 U.S. 471, 479 (1963).

97. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

98. Terry v. Ohio, 392 U.S. 1, 22 (1968); Sibron v. New York, 392 U.S. 40, 64 (1968).

99. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

100. Mallory v. United States, 354 U.S. 449, 454 (1957).

101. *See* text accompanying notes 40-44, 57-59 & 90-91 *supra*.

California Supreme Court in *People v. Rosales*[102] suggested this in indicating that application of the peril, escape and destruction of evidence exceptions "must be based on the facts of the particular case."[103] Therefore, specific facts (such as the "wait a minute" and retreating footsteps in *Maddox*[104]) must justify the officers in their belief that an escape is being attempted. Similarly, specific facts (for instance, that the defendant had just killed two policemen as in *People v. Smith*[105]) must justify the officers in their belief that prior announcement would imperil them. Presumably, specific facts must also justify the officers in their belief that the occupants "already know" of their authority and purpose, thereby rendering an announcement a "useless gesture."

V. CRITIQUE OF THE DISTRICT OF COLUMBIA PROVISIONS

A. Proposed Alterations

Congress clearly intended that the no-knock provisions be a codification of the already existing law[106] and that they contain sufficient safeguards for constitutional rights.[107] The case law background and constitutional requirements respecting no-knock entries suggest that the provisions of the District of Columbia Act partially achieve both goals. Certain alterations, however, would promote greater understanding of when no-knock entries may be made and would reduce the chance of unconstitutional application of the provisions.[108]

1. *Probable Cause Requirement*

Congress clearly recognized that an unannounced entry must be justified by probable cause because a showing of "probable cause" appears as operative language in the provisions for all four procedural contexts.[109] However, the frequent use of the

102. 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).
103. *Id.* at 305, 437 P.2d at 493, 66 Cal. Rptr. at 5.
104. *See* text accompanying notes 54-55 *supra.*
105. 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966).
106. *See, e.g.*, 116 Cong. Rec. S. 11,684-85 (daily ed. July 17, 1970) (remarks of Senator Tydings); H.R. Rep. No. 1,303, 91st Cong., 2d Sess. 236 (1970).
107. *See, e.g.*, 116 Cong. Rec. S. 11,570-71 (daily ed. July 16, 1970) (remarks of Senator Tydings).
108. An amended version is submitted in the Appendix.
109. *See* notes 5, 15, 17 and 18 *supra.* Note that while probable cause is in all cases required there appears to have been some disagree-

words "is likely to"[110] greatly weakens this requirement. For instance, joining the clauses pertaining to no-knock entries without warrant with the clause pertaining to the destruction of evidence exception indicates that "*probable cause* to believe that . . .[111] such notice *is likely to* result in the evidence subject to seizure being easily and quickly destroyed . . ."[112] constitutes justification for the entry. Another instance appears where the standards for issuance of a no-knock arrest warrant are joined with the destruction of evidence exception to yield a two-fold dilution of probable cause. It appears that the bill's probable cause requirement for the issuance of a no-knock arrest warrant[113] will be satisfied if it can be shown before a magistrate that a situation in which "notice *is likely to* result in the evidence subject to seizure being easily and quickly destroyed . . ."[114] "*is likely to* exist at the time and place at which such warrant is to be executed . . ."[115] is sufficient for issuance of a no-knock arrest warrant.

Probable cause is satisfied by facts sufficient in themselves to warrant a man of reasonable caution in the belief that a certain state of affairs *exists*, not that it is "likely to exist" or "likely to be likely to exist." It is submitted, therefore, that the words "is likely to" be deleted in all instances and in lieu thereof the word "will" be inserted, so that the requirement of probable cause be unambiguous.

2. *Grounds for Warrant Issuance*

The section dealing with "nature and issuance of search warrants" provides that a search warrant may contain a no-knock authorization "where the judicial officer has found *cause* therefor, *including* the grounds set forth in subparagraph (A), (B), or (D) of section 23-591(c)(2) . . . ."[116] The section dealing with

ment between the House and Senate respecting the kinds of facts which would establish it. The language of the provisions was a compromise; the issues of detail in dispute are left for the courts to resolve. *See* 116 CONG. REC. S. 11,853 (daily ed. July 21, 1970) (remarks of Senator Tydings and excerpt from the Senate Conference Report).

110. *See* D.C. Code §§ 23-591(c)(2)(A)-(C), 23-522(c)(2) & 23-561(b)(1) (Supp. IV, 1971).

111. D.C. CODE § 23-591(c)(2) (Supp. IV, 1971) (emphasis added).

112. D.C. CODE § 23-591(c)(2)(A) (Supp. IV, 1971) (emphasis added).

113. D.C. CODE § 23-561(b)(1) (Supp. IV, 1971).

114. D.C. CODE § 23-591(c)(2)(A) (Supp. IV, 1971) (emphasis added).

115. D.C. CODE § 23-561(b)(1) (Supp. IV, 1971) (emphasis added).

116. D.C. CODE § 23-521(f)(6) (Supp. IV, 1971) (emphasis added).

application for such warrants requires a showing of *probable cause* to believe that the conditions described in paragraphs (A), (B) or (D) will exist when the warrant is executed.[117] This discrepancy should be eliminated by rewording the former section to read "where the judicial officer has found *probable* cause to believe that one of the conditions set out in subparagraph (A), (B), (D) or (E)[118] of section 23-591(c)(2) will exist at the time and place at which such warrant is to be executed." Such a change would clarify the necessity of probable cause and would also remove any ambiguity as to grounds for issuance of the warrant.

3. *Alterations in Exceptions*

Alterations in the phraseology of the destruction of evidence, escape and useless gesture exceptions would more closely conform them to existing law and would, in addition, provide more adequate safeguards against unconstitutional application. In addition, the suggested revised wording more aptly describes the circumstances in which the exceptions can be applied, to the aid of policemen and magistrates whose understanding of the provision is essential to their effective yet temperate implementation.

a. The Destruction of Evidence Exception

The present wording—"being easily and quickly destroyed"[119]—suggests that a mere showing that easily destructible evidence is involved will be sufficient grounds for application of the exception. This is not the better view manifested by the California Supreme Court[120] and Justice Brennan's dissent in *Ker*.[121] Ease of destruction, while a necessary fact, is not sufficient in itself. Other facts and circumstances must be present—for instance, shouts, noises from within, retreating footsteps, behavior indicating an awareness of police (such as the U-turn in *Ker*)—to indicate that destruction is in fact being attempted. It is submitted that this exception should read where "the destruction of evidence subject to seizure is being attempted within." This wording more clearly indicates that an attempted destruc-

117. D.C. CODE § 23-522(c)(2) (Supp. IV, 1971).
118. The presence of exception (E) corresponds to the suggestion for its inclusion. *See* text accompanying note 129 *infra*.
119. D.C. CODE § 23-591(c)(2)(A) (Supp. IV, 1971).
120. *See* text accompanying notes 40-44 & 57-59 *supra*.
121. *See* text accompanying notes 89-91 *supra*.

tion of evidence and not mere destructibility of evidence is required.

b. The Escape Exception

The circumstances in which this exception has been applied in the cases would be more clearly reflected by changing its present wording—"such notice is likely to enable the party to be arrested to escape . . ."[122]—to "an escape is being attempted by the party to be arrested." In *Maddox*[123] a voice saying "wait a minute" coupled with retreating footsteps was sufficient to justify the unannounced entry. In *Rosales*,[124] on the other hand, the entry was unjustified where the facts did not indicate that the defendant was contemplating an escape. The recommended change in wording better indicates that the eminence of an attempt to escape puts this exception into operation and more adequately suggests the particular nature of the facts which must be shown to satisfy the requirement of probable cause.

c. The Useless Gesture Exception

The present wording—"such notice would be a useless gesture"[125]—gives no hint of the circumstances where this exception may be applied. The case law background of this exception[126] indicates that it is based upon the occupant "already knowing" of the officer's presence, authority and purpose, in which event an announcement would be a "useless gesture" or "senseless ceremony." It appears, however, that Congress also intended to adopt the *Bosely v. United States*[127] extension of the useless gesture exception.[128] In *Bosely* the officers were unable to make defendant aware of their presence because he was asleep and could not be awakened by their knocking. It is suggested that the wording be changed so as to reflect the factual circumstances in which the useless gesture exception is intended to be applicable. The addition to the act of the words "because the officer's presence, authority and purpose are already known to those within or because the officer is unable to make those within aware of his presence" would accomplish this result.

122. D.C. CODE § 23-591(c) (2) (C) (Supp. IV, 1971).
123. 46 Cal. 2d 301, 294 P.2d 6 (1956).
124. 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).
125. D.C. CODE § 23-591(c) (2) (D) (Supp. IV, 1971).
126. *See* text accompanying notes 60-65 *supra*.
127. 426 F.2d 1257 (D.C. Cir. 1970).
128. *See* H.R. REP. No. 1,303, 91st Cong., 2nd Sess. 237 (1970).

d. The Unoccupied Premises Exception

Since Congress presumably intended to codify all existing law respecting exceptions to the rule of announcement, no reason is apparent for the omission of the unoccupied premises exception.[129] It is therefore suggested that this exception be included to permit officers executing a search warrant to forego prior announcement where the premises to be searched are unoccupied.

4. *Post Entry Announcement Provision*

To bring the District of Columbia Act closer to the spirit of the fourth amendment and the policies of the case law which Congress intended to codify, a clause should be added which would require an officer who has made a no-knock entry to identify himself and state his purpose as soon as practical.[130]

B. PROVISIONS RETAINED

No change in the present *peril exception*[131] appears necessary, because it is a fair statement of the case law exception[132] that announcement is unnecessary when the life of the officer would be imperiled by such notice. The District of Columbia provision also allows the exception to be applied when the life of "another person" would be imperiled. This "person" is presumably the one "aiding an officer" in making an arrest or executing a search warrant, to whom reference is made in other parts of the provisions.[133]

The District of Columbia Act's general rule of announcement[134] is a close paraphrase of the *Semayne* rule[135] and many state *Semayne* rule statutes.[136] No change in wording appears necessary. The words "unreasonably delayed" should present a question of fact in each case where unreasonable delay is asserted. An unreasonable delay in the form of "silence" after an announcement has been considered equivalent to a refusal of ad-

129. *See* text accompanying notes 67-68 *supra.*
130. *See* Appendix, § 23-591. This provision is adopted from S. 3246 (The Controlled Dangerous Substances Act of 1970) which passed the Senate January 28, 1970. *See* 116 CONG. REC. S. 813 (daily ed. Jan. 28, 1970) for this provision as it passed the Senate.
131. D.C. CODE § 23-591(c)(2)(B) (Supp. IV, 1971).
132. *See* text accompanying notes 48-51 *supra.*
133. *See* D.C. CODE §§ 23-591(a) & 23-591(c)(2) (Supp. IV, 1971).
134. D.C. CODE § 23-591(b) (Supp. IV, 1971).
135. *See* 77 Eng. Rep. 194, 195 (K.B. 1693).
136. *See* Sonnenreich & Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem,* 44 ST. JOHNS L. REV. 626, 654-59 (1970).

mittance.[137]

No suggestion is made that the provisions for no-knock warrants be eliminated, although Senate opponents of the bill firmly maintained that these warrants will result in an unconstitutional broadening of the escape and destruction of evidence exceptions. The basic thrust of their argument was the circumstances which ordinarily allow application of the escape and destruction of evidence exceptions—for instance, noises or shouts from within an apartment, retreating footsteps, behavior indicating an awareness of police—can be known *only* by the officer at the scene. They are therefore unknown at the time of application for a warrant, and consequently are not susceptible of prior judicial review. The danger of permitting prior judicial review and issuance of no-knock warrants is that in the necessary absence of such facts the magistrate will rely on "blanket rules" based on categories of crime or types of evidence (e.g., narcotics), against which the *Gastello* court and Justice Brennan in *Ker* cautioned. Once a warrant is issued, they argued, the magistrate may have sanctioned a search that proves to be unconstitutional. Therefore the practical effect of allowing no-knock warrants may be that the grounds for no-knock entries will be unconstitutionally broadened from "specific facts" to "blanket rules."[138]

While this argument is of some force, it fails to acknowledge that specific facts can sometimes be available for prior judicial review. With respect to the destruction of evidence exception, for instance, a justification might be based on *specific facts* indicating that *this particular suspect* designedly keeps narcotics in a place where he can quickly destroy them (such as a bathroom). In a case raising the escape exception, justification could be based on a showing that the place where the suspect is to be arrested affords him a unique opportunity to escape—for instance, a house that has exits which cannot be guarded.

Since showing of specific facts and circumstances can be made to a magistrate, the retention of the no-knock warrant provisions seems the better approach. The benefits of prior judicial review can thereby be realized in at least some cases. Abuse of the warrant provisions can best be avoided by making clear to magistrates the kinds of specific facts and circumstances necessary to justify a no-knock entry. Emphasis of the requirement

137. *See* Morales v. State, 44 Wis. 2d 96, 170 N.W.2d 684 (1969).

138. *See, e.g.*, 116 CONG. REC. S. 11,646-66 (daily ed. July 17, 1970) (remarks of Senator Ervin); 116 CONG. REC. S. 11,844-45 (daily ed. July 21, 1970) (remarks of Senator McGovern).

of probable cause and reference to the case law of unannounced police entries provide the necessary guidelines in this respect.

VI. CONCLUSION

This note consists of an examination of (1) whether the no-knock provisions of the District of Columbia Act are an accurate codification of the case law and (2) whether they adequately safeguard fourth amendment rights. The answer to the second inquiry is affirmative, because the provisions require a showing of probable cause to justify a no-knock entry in all instances. The answer to the first inquiry is substantially affirmative, although certain revisions are recommended. The Appendix contains a revised version of the no-knock provisions of the District of Columbia Act, which suggests changes in phraseology. These changes more clearly describe the factual circumstances constitutionally necessary before the no-knock exceptions are applicable. An additional exception and a new clause of general application are also suggested.

APPENDIX

The no-knock provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (proposed alterations appear in italics):

SUBCHAPTER VI—AUTHORITY TO BREAK AND ENTER UNDER CERTAIN CONDITIONS

§ 23-591. Authority to break and enter under certain conditions

. . .

(b) Breaking and entry shall not be made until after such officer or person makes an announcement of his identity and purpose and the officer reasonably believes that admittance to the dwelling house or other building or vehicle is being denied or unreasonably delayed.

(c) An announcement of identity and purpose shall not be required prior to such breaking and entry—

(1) if the warrant expressly authorizes breaking and entry without such a prior announcement, or

(2) if circumstances known to such officer or person at the time of breaking and entry, but, in the case of the execution of a warrant, unknown to the applicant when applying for such warrant, give him probable cause to believe that—

(A) *The destruction of evidence subject to seizure is being attempted within,*

(B) such notice *will endanger* the life or safety of the officer or another person,

(C) *an escape is being attempted by the party to be arrested,*

(D) such notice would be a useless gesture *because the officer's presence, authority and purpose are already known to those within or because the officer is unable to make those within aware of his presence, or*

(E) in the case of the execution of a search warrant, that the premises to be searched are unoccupied.

Provided, that after an entry without prior announcement of identity and purpose, the officer shall, as soon as practical thereafter, identify himself and give the reasons and authority for his entrance upon the premises.

. . .

SUBCHAPTER IV—ARREST WARRANT AND SUMMONS

§ 23-561. Issuance, form, and contents

. . .

(b) (1) . . . If the complaint establishes probable cause to believe that one of the conditions set out in subparagraphs (A) through (D) of section 23-591(c)(2) *will* exist at the time and place at which such warrant is to be executed, the warrant may contain an authorization that it be executed as provided in section 23-591.

SUBCHAPTER II—SEARCH WARRANTS

§ 23-521. Nature and issuance of search warrants

. . .

(f) A search warrant shall contain . . .

. . .

(6) where the judicial officer has found *probable cause to believe that one of the conditions set out in subparagraph (A), (B), (D) or (E) of section 23-591(c)(2) will exist at the time and place at which such warrant is to be executed,* an authorization that the executing officer may break and enter the dwelling house or other building or vehicles to be searched without giving notice of his identity and purpose . . . .

§ 23-522. Applications for search warrants

. . .

(c) The application may also contain . . .

. . .

(2) A request that the search warrant authorize the executing officer to break and enter dwelling houses or other buildings or vehicles to be searched without giving notice of his identity and purpose, upon probable cause to believe that one of the conditions set out in subparagraph (A), (B), (D) or (E) of section 23-591 (c) (2) will exist at the time and place at which such warrant is to be executed.