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IN THE SUPREME COURT OF FLORIDA

State of Florida,
Petitioner,

v.

Earl L. Bamber,
Respondent.

Case No. 79,263

AMENDED
BRIEF OF RESPONDENT ON THE MERITS

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Florida Bar No. 173673

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ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL FOR THE SECOND DISTRICT
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With special appreciation and acknowledgment
to Mr. Charles Garcia, Columbia University
Law School for his extensive contributions

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STATEMENT OF THE CASE AND FACTS

The Respondent respectfully disagrees with the accuracy of the Petitioner's Statement of Facts and therefore, specifies below the main facts upon which there is disagreement.

The State indicates that the warrant issued was a "no knock" warrant. This is not true. Any reading of the search warrant issued reflects that it is entitled "Search Warrant" and is on the standard "fill in the blank" form used in Hillsborough County and contains the standard terminology requiring and allowing the execution of the warrant "as exigencies of the occasion may demand or require". (R 10)

Secondly, the Petitioner's Statement of the Facts fails to state that the affiant's affidavit used to establish probable cause states that, "Bamber regularly stores and distributes cocaine from his residence" without any specificity or indication as to any amounts of drugs kept. The State further fails to point out that the confidential informant was given a specific sum of money by law enforcement with instructions to purchase a set amount of cocaine (R 13) without any effort to instruct the confidential informant to try to ascertain the amount and/or type of drugs available. Thus, the affiant's claimed belief or reason to believe that Mr. Bamber had the immediate ability to destroy or get rid of the "aforementioned narcotics" by the use of bathroom facilities (R 16) was on only a vague and totally subjective allegation but one pre-established by the self-serving design of the Detectives.

The State's "facts" fail to point out that, after obtaining the search warrant, without any specifications or acknowledgment by the Court that the warrant could be executed in violation of Florida Statute §933.09, contrary to what it states on the search warrant itself, Detective Kennedy gave the search warrant to a militaristic "SWAT-type" team to execute the warrant (R 64) and that Detective Kennedy did not go with the "SWAT" team to execute the warrant, but only went to the Bamber home after he was notified by radio that the house had been "secured". (R 67, L.; R 68, L. 7). Furthermore, the State fails to point out that Detective Kennedy admitted that the search warrant could not be read until he arrived at the house, as he claims that he only read it in its entirety after his arrival. (R 67, L. 6-9) It need to be clarified that the State agrees that the warrant was turned over to the "SWAT" team for execution with specific intention not to "knock and announce" or even to attempt to evaluate the circumstances upon their arrival to see if knocking and announcing would be appropriate in executing the search warrant (R 45, L. 4-8). The State's facts fail to point out that the Record before the trial court indicated that when the "SWAT" team arrived for the execution of the search warrant, Bamber's home was a typical residential home (R 38) with four bedrooms and four baths (R 37), in a residential neighborhood, with a nice wooden door (R 38), with no windows boarded up (R 37), but with the appearance of a small amount of home improvement construction work going on at the residence (R 37).

While it is stipulated that the police did not knock and announce before entering the residence (R 45), the State's characterization of the manner in which the search warrant was executed is not quite accurate. The warrant was executed as follows: the "Swat-type" team set off a diversionary bomb which was meant to and did cause a loud explosion. (R 67) Mr. Wilson, who was working at the Bamber's house that day, had opened up the door with two (2) buckets of water in his hands and they (the police) forcibly entered the home putting a gun to Wilson's head throwing him back into the house, and slamming him to the ground where he was not allowed to move his head. (R 48) Additionally, a witness, Mr. Rhodes, testified that he was working on a ladder when he heard the "shot" or "bang" (R 52-53) and was forced to the ground at gunpoint by someone in a military camouflage outfit and who did not announce himself or identify himself as a law enforcement officer. (R 53)

Pam Bamber, the frightened wife of Earl Bamber, testified that she was put on the floor by individuals who were searching her house and had not shown her any papers at that time, leaving her to believe that they were being robbed. (R 59-60) Additionally, Mr. Bamber testified that he was knocked down, his finger was broken, and he was searched prior to any search warrant being read by the men wearing fatigues and without any stated identification. He further confirmed what Mr. Wilson stated, that members of the "SWAT" team ran through his front door, knocked him down and put a gun to the side of his head as they had done to Mr. Wilson. (R

39-41) Eight separate containers weighing approximately 30 grams of cocaine were seized from Earl Bamber's pants pockets. (R 3).

There were five (5) people in the residence, Mr. & Mrs. Bamber, their child and the two construction workers working on their home. (R 40) The testimony of Mr. Wilson, Mr. Rhodes, Mr. Bamber and Mrs. Bamber was never contradicted. Detective Kennedy caused some conflict in the testimony as to which of the "SWAT" team's officers, and at what times, wore vests containing iridescent letters saying "Sheriff", but he admitted that he was not even present at the time of the warrant's execution. (R 65)

The Respondent agrees with the Statement of the Case as contained in the Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

The homes of the people of Florida are still their "castles" in the historic sense of the term as used throughout the centuries of English and American Jurisprudence. The unannounced entry into our homes by arms of the government violates our inalienable constitutional rights to privacy and to be free of unreasonable search and seizures.

In this case, the evidence is clear that the police sought to search a home without having to comply with the "knock and announce" provisions of Florida Statute §933.09 and our Constitution. The warrant, as issued, was void of any stated factual basis upon which a "no knock warrant" could be issued and no such warrant could have been legally issued under the stated facts. Additionally, the warrant was "executed" by a "SWAT-type" team which totally disregarded Florida Statute §933.09 and §933.17. As such, the warrant would be illegally executed unless the State could prove some legitimate exception to F.S. §933.09 existed at the time of entry. The State failed to establish any justification whatsoever for ignoring the "knock and announce" law and the requirement that the warrant be read before the search was conducted, therefore, the suppression motion was properly granted.

The "SWAT" team who initiated the execution of the search warrant began searching the home and individuals prior to the warrant being read. Although this alone is sufficient grounds to affirm the suppression of the evidence, it is highlighted in this

brief as a further example of the lack of "good faith" being used by law enforcement in the execution of the search warrant and total lack of intent to follow F.S. §933.09 regarding its requirements for the execution of a search warrant.

The English common law from as far back as the 1600's, the common law of the United States, the law governing federal law enforcement and the Florida statutory requirements regarding the rights of the people to be free of unreasonable search and seizures have encompassed and today still require that the government announce its presence and purpose before it seeks to enter one's home.

An exception to the "knock and announce" requirement whether it be an objective, reasonable and reviewable exigent circumstance or whether it be because of the "good faith" exception as provided by United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) did not and cannot be shown to exist in this case. As such and because the Florida Supreme court is charged with the duty to uphold the Constitution and laws of Florida for the protection of the rights of the citizens of Florida, the decisions of the trial court and the Second District Court of Appeals in this matter should be affirmed and contrary appearing State precedent should be clarified to ensure these basic human rights protections.

ARGUMENT

ISSUE 1

WHETHER THE EXISTENCE OF NORMAL PLUMBING IN ONE'S HOME ALLOWS POLICE TO EXECUTE A "NO KNOCK" WARRANT TO SEARCH FOR SMALL AMOUNTS OF NARCOTICS THAT MAY--IN THEORY--BE FLUSHED DOWN THE TOILET?

A. "NO KNOCK" SEARCH WARRANTS ARE NOT PERMITTED UNDER FLORIDA STATUTORY LAW--THEREFORE THE POLICE ACTED ILLEGALLY.

At common law, and under present state and federal statutes, a police officer, who seeks entry into a home for the purpose of a search, must first identify himself, state the purpose for demanding entry, and allow time for the door to be opened. This is the so called "knock and announce" rule which has long been recognized in Anglo-American common law. 1 Wharton's Criminal Procedure § 165 (13th ed. 1989). In Florida this rule is codified as follows:

> The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of his authority and purpose he is refused admittance to said house or access to anything therein.

Fla. Stat. Ann., § 933.09 (1985) (emphasis added). In Florida, the legislature has not given police the authority to apply for "no knock" warrants. The "knock and announce" rule is codified in absolute terms. Therefore, it is not surprising that the judge who approved the search did not authorize a "no knock" warrant. Detective Kennedy, an officer with sixteen years of service, knew--or should have known--that in the State of Florida "no knock" warrants are illegal. This Court should not allow the police to circumvent clear and unambiguous State law.

Florida courts have consistently held that statutes and rules authorizing searches must be strictly construed, and affidavits and warrants issued pursuant to such authority must meticulously conform to statutory and constitutional provisions. State v. Lopez, 590 So.2d 1045 (Fla. 3rd DCA 1991); Bonilla v. State, 579 So.2d 802 (Fla. 5th DCA 1991); State v. Tolmie, 421 So.2d 1087 (Fla. 4th DCA 1982); see also Gildrie v. State, 94 Fla. 134, 113 So. 704 (Fla. 1927). In summarizing the rationale for this rule, this Court said that:

> The reason for this strict adherence is obvious. Aside from the constitutional ramifications of failure to guard against unreasonable searches, the legislated rules which regulate the issuance of warrants, and the conduct of searches, are intended not only to guarantee those constitutional rights, but to prevent the real and significant specter of police misconduct. To allow any variance from these express legislative mandates would not only flaunt legislative authority to regulate such conduct, but actually encourage misconduct.

Bernie v. State, 524 So.2d 988, 998 (Fla. 1988). Florida law is clear that once this statute is violated, all evidence seized as a result of the ensuing search must be excluded. Benefield v. State, 160 So.2d 706, 711 (Fla. 1964). Additionally, when police actions cannot be shown to be "objectively reasonable", as they can not in this case, the exclusionary rule requires the suppression of evidence "to deter unlawful searches by the police". Massachusetts v. Sheppard, 104 S.Ct. 3424, 468 U.S. 981, 990 (1983).

Recognizing one of the most basic right of the citizens, even before our Revolutionary War, Florida Courts have consistently pointed out, when an officer is authorized to make

an arrest or execute a search warrant in any building, he should first approach the entrance to the building. He should then knock on the door and announce his name and authority and what his purpose is in being there. If he is admitted and has a warrant he may execute it. If he is refused admission he may then enter without permission even if he has to break in. F.S. §901.19 (1985); F.S. §933.09 (1985). Until State v. Bell, 564 So.2d 1235 (Fla. 5th DCA 1990) and Armenteros v. State, 554 So.2d 574 (Fla. 3rd DCA 1991), the only judicially recognized exceptions to the "knock and announce" requirements have been logical and objectively based:

(1) Where the person already knows of the officers' authority or purpose;

(2) Where the officers are justified in the belief that the persons within are in eminent peril of bodily harm;

(3) If the officers' peril would have been increased had he demanded entrance and stated the purpose; or

(4) Where those within were made aware of the presence of someone outside are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is being attempted. Jones v. State, 440 So.2d 570, 573 (Fla. 1983), citing Benefield v. State, 160 So.2d 706 (Fla. 1964); State v. Hume, 463 So.2d 499, 501 (Fla. 1st DCA 1985).

These four exceptions have at least one thing in common: they apply when the officers at the home and at the time of execution see the people inside and those people are aware of the

officers' presence or (2) where the officers at the home and at the time of the execution objectively determine that the purpose of the warrant will likely be thwarted if they "knock and announce", then and only then, may the "knock and announce" requirements be circumvented. Thus, all the exceptions occur at the home and at the time the search is to occur.

The facts, even as presented to this Court in Petitioner's initial brief, do not establish any of the above exceptions to the requirements that the Police knock and announce before they enter the Defendant's private residence. The historical reason for our state law was explained clearly in Benefield. "Entering a person's home without legal authority and neglect to give the occupants notice have been condemned by the law and the common custom of this country and England from time immemorial." 160 So.2d at 709.

In the instant cause, starting with the intentional attempt to circumvent the law, the improper making of the application for a "no knock" search warrant, considering the total absence of any factual basis and continuing right up through the officers' intentional disregard of F.S. §933.09, by their violent entry into Defendant's home, the officers totally ignored every requirement of the law as stated above. Unlike the factual situations in the cases cited by Petitioner, the "king's men" had already determined, before arriving at Defendant's home, that the law would not be followed and they continued with their illegal plan.

At the hearing on Defendant's Motion to Suppress, the police officer and the State Attorney attempted to justify the "Swat" team's violation of the two Florida Statutes (requiring the officers to knock and announce before entering a home) by claiming that they were entitled to the use of an exception to those Statutes as indicated in the fourth exception to the "knock and announce" requirements of F.S. §933.09, as cited in the Benefield decision.

From the outset, when Detective Kennedy went to Judge Lenfestey with his affidavit, the only information given to the Judge, as contained in the affidavit, is that the confidential informant had made purchases of quantities of drugs for unknown amounts of money on two (2) separate occasions and that Mr. Bamber was seen retrieving cocaine from an area within the home that would be near a bathroom. The officer opined in his affidavit for the search warrant application that, in his opinion, Mr. Bamber "could" attempt to destroy the contraband if knocking and announcing was required. Factually, all the officer presented to the Judge in the search warrant application was that Mr. Bamber's home had a bathroom like every other home in a residential neighborhood. There was no indication in the Officer's affidavit and/or application for a search warrant of the amount of contraband expected to be found at the Defendant's residence nor was there any evidence to support the officer's speculative opinion that any such contraband could or much less would be destroyed.

The application for a so-called "no knock" search warrant is in and of itself legally improper. As in the case of an anticipatory search warrant, the law enforcement officers attempted to have the Court rule in advance that exigent circumstances would arise or be present in the future regardless of the actual circumstances and to therefor preapprove a waiver of Florida Statute §933.09.

The key to this entire case are the specific words cited in the Petitioner's Brief - "at the time of entry". The exception that can on occasion be used to avoid the "knock and announce" provisions of the previously mentioned Statutes is that the evidence sought pursuant to the search warrant is relatively small amounts of disposable contraband, and the Court has been shown that the officers had reason to fear, at the time of entry, the destruction of evidence. State v. Kelly, 287 So.2d 13 (Fla. 1973) (emphasis added). The State seeks to read into Kelly an exception that the Court never created. This court, in Kelly only remanded the case back to the trial court to determine "whether or not there existed good reason to fear at the time of entry the destruction of evidence." Kelly at 17. Although the wording of Kelly is questioned later in this Brief, Kelly's ruling gives no support to the State's position. State v. Avendano, 540 So.2d 920 (Fla. 2nd DCA 1989).

This issue was well addressed in State v. Avendano before this Honorable Court in 1989 where the State attempted to rely on the information that firearms were likely to be present on the

premises to be searched. The Court clearly pointed out in that opinion that the officers' vague testimony in an attempt to support a Benefield exception is not sufficient. The Court went on to state that, if additional information, i.e. articulable facts that the people inside the residence to be searched on the very morning of the execution of the search warrant would be armed with firearms, that type of factual basis could provide a basis for a waiver of the requirement to knock and announce the officers' entrance. However, none of these facts were presented to the issuing Magistrate in this case, nor were any such facts elicited from Detective Kennedy at the hearing on the Motion to Suppress. In fact, Detective Kennedy clearly pointed out that he was not even present for the execution of the search warrant.

Chief Judge Gorshon of the Fifth District Court of Appeals in an opinion filed in September of this year, pointed out the danger in misapplication of State v. Bell, 564 So.2d 1235 (Fla. 5th DCA 1990) (and Armenteros v. State 554 So.2d 574 (Fla. 3rd DCA 1989)), stating Bell renders F.S. §933.09 meaningless. He correctly pointed out this court wisely rejected broadening the "knock and announce" exceptions to include instances where the facts showed the destruction could versus would be immediately destroyed. In recommending the adoption of the reasoning of the Second District Court of Appeals in this case, he would "require evidence of articulable and particularized facts showing more than small quantities of drugs and indoor plumbing" before abandoning F.S. §933.09. Judge Gorshon is right! Our own

Constitution requires more, and so should our Supreme Court. See: State v. Thomas, 17 FLW D2130, 2131 (Fla. 5th DCA Sept. 11, 1992).

B. "NO KNOCK" SEARCH WARRANTS ARE ILLEGAL UNDER FEDERAL LAW.

Execution of search warrants by federal agents is governed by 21 U.S.C. § 3109 (1988), which is virtually identical to Florida's § 933.09, and provides that:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. (emphasis added)

Courts construing the statute have consistently held that an officer cannot break into a house to effect a search, unless he first (1) knocks on the door and identifies himself as a police officer, (2) states his lawful purpose, and (3) is refused admittance. For a detailed list of case authority, see Annotation, What Constitutes Violation of 18 U.S.C. § 3109 Requiring Federal Officer to Give Notice of His Authority and Purpose Prior to Breaking Open Door or Window or Other Part of House to Execute Search Warrant, 21 A.L.R.Fed. 820. Under present federal statutes, "no knock" warrants are illegal.

The knock and announce rule was first enacted as a criminal provision under national emergency conditions in 1917 as part of a controversial bill designed to aid in detection and prosecution of espionage and arms smuggling to enemy forces during World War I. Congress thus was acutely aware of the applicability of the statute

to cases involving weapons and indicated an awareness also of its applicability to cases involving destructible evidence such as opium, liquor and gambling paraphernalia. The legislative history of § 3109 shows that Congress knew the that notice requirement might allow evidence to be destroyed, but did not provide exceptions for "no knock" warrants. See, H.R. 291, 65th Cong., 1st Sess., Cong. Rec. 1,839; 2,070 (1917). In 1923, Florida's counterpart to 18 U.S.C. § 3109, and the predecessor of § 933.09, was enacted in Ch. 9321, § 9, Laws of Fla. (1923).

The rule serves three important purposes: (1) preserving the individual's right to be free from unexpected, frightening, and embarrassing intrusions into the privacy of his home; (2) avoiding the unnecessary violence which frequently accompanies unannounced invasions of private dwellings by alerting the resident that the officer is lawfully on the premises; and (3) preventing the physical destruction of the resident's home by giving the resident the opportunity to admit the officer voluntarily. 2 LaFave, Search and Seizure, §. 4.8(a) (2nd ed. 1987). The underlying policy consideration is that, in each case, the occupants are entitled to a presumption of innocence and to the assumption that they will voluntarily open the door to officers who announce their authority and lawful purpose. It is sad and ironic that the State seeks that our Courts allow circumvention of our laws and Constitution in cases where it claims small amounts of drugs are present when the State knows it cannot even make such a request when more serious crimes are

alleged to be involved.

In the case at bar, both the Petitioners' brief and the decisions of the District Court of Appeals in State v. Bell, 564 So.2d 1235 (Fla. 5th DCA 1990), and Armenteros v. State, 554 So.2d 574 (Fla. 3rd DCA 1991), underscore the weight of a valid search warrant with its inherent finding that probable cause exists to believe that drugs are inside the home. It follows from that, they reason, that the occupants will instantly flush evidence down the toilet or prepare to attack the police as soon as they hear the knock. Logically, they argue, refusal must be assumed when searching for drugs. But the notice requirement presumes the existence of a valid search warrant, yet insists that police first knock and announce their presence. The legislative history shows that, while drug warrant cases definitely occurred at the time of the enactment of § 3109, Congress did not exclude them from the ambit of the statutory requirement.

This Court should not allow police to circumvent clear and unambiguous statutory requirements. As Justice Brandeis said:

> If the Government becomes a lawbreaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the Government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

C. "NO KNOCK" WARRANTS VIOLATE THE FLORIDA AND THE UNITED STATES CONSTITUTIONS.

The District Court of Appeals in Bell, 564 So.2d at 1237, and Armenteros, 554 So.2d at 575, reasoned that a general course of conduct by a particular class of alleged lawbreakers can raise an automatic presumption of exigency. These courts would have judges issue "no knock" warrants on a theory based on general police experience that small quantities of drugs can be, and sometimes are, easily flushed down a toilet on short notice. These decisions, in effect provide for an automatic authorization of police searches for drugs in this state by unannounced entries into the private homes of Florida citizens. Such searches are in violation of the Florida and the United States Constitutions.

Article I, Section 12 of the Florida Constitution provides that rights involving searches and seizures will be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court and that evidence which is not admissible under the Fourth Amendment is not admissible under the Florida Constitution. See Fla. Const., Art. I, § 12 (1983).

The United States Supreme Court squarely considered the "knock and announce" rule in 1958 in Miller v. United States, 357 U.S. 301, 306-310, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). In Miller, the trial court refused to suppress certain narcotics following a forceful entry by officers who had announced: "Police!" but had failed to state their purpose. In reversing,

Justice Brennan, wrote:

> Congress, codifying a tradition embedded in Anglo-American law, has declared in § 3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Id. at 313.

The "knock and announce" rule dates back to as early as 1603. In Semayne's Case, 5 Co. Rep. 91a, 11 E.R.C. 629, 77 Eng. Repr. 194 (1603), the Court stated:

> In all cases where the King is party, 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 this coming, and to make request to open doors . . . ."

Id. (emphasis added.)

Since the Semayne's Case, the requirement that an officer must announce his authority and purpose before forcefully entering a private home has received widespread support from the commentators, has been judicially accepted by the courts of this country, and has been enacted into law by a majority of the state legislatures. For a detailed list of case authority, see Annotation, What Constitutes Compliance With Knock And Announce Rule in Search of Private Premises--State Cases, 70 A.L.R.3d 217. The United States Supreme Court has recognized that the requirement has become so "deeply rooted in our heritage" that it "should not be given grudging application." Miller, 357 U.S. at 313. In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 1332 (1963), the Supreme Court's next major opportunity to

consider its holding in Miller, the Court again noted that the notice requirement was developed "in order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person." Id. at 484.

Up to 1963, "the knock and announce" requirement itself had not yet been stated as a Constitutional requirement. Prior holdings had been based on common law, state law, § 3109, and various combinations of these authorities. However, the Constitutional underpinnings of the knock and announce rule were clearly recognized by the Supreme Court in Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). In Ker, eight justices agreed that a police officer's failure to knock and announce is a violation of the Fourth Amendment. Since Ker, the federal circuit courts have followed this holding. United States v. Mueller, 902 F.2d 336, 343 (5th Cir. 1990) (citing cases). It follows then that a statutory violation of Florida's "knock and announce" rule is also a constitutional violation of the Fourth Amendment's prohibition against unreasonable search and seizure and mandates use of the federal exclusionary rule.

Under both the Federal and State Constitutional provisions dealing with searches and seizures there exists a requirement that the police knock and announce their authority before conducting a search of a home. It is equally apparent, however, that certain exigent circumstances confronting the police at the time of the search may excuse the police from announcing their presence. This is the question that the Supreme Court confronted in Ker v.

California.

Justice Brennan and the three justices concurring in his opinion would not have allowed an unannounced entry under the facts presented in Ker. Rather Justice Brennan listed the three traditional common law exceptions, which each require some type of activity at the actual scene of the search to justify the unannounced entry. Ker, 374 U.S. at 47. Justice Clark and the three justices joining with him, on the other hand, found the entry in this case permissible under the "particular circumstances" of the case. Ker 374 U.S. at 40-41. Justice Clark, however, agreed that an exception exists only when the police become aware of exigent circumstances immediately prior to a search, "[W]ithout the benefit of hindsight and ordinarily on the spur of the moment the officer must decide these questions in the first instance." Ker, 374 U.S. at 40, quoting People v. Maddox, 46 Cal.2d 301, 294 P.2d 6 (Cal. 1956).[1] Justice Clark

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[1] Justice Clark quoted extensively, stating approval of Maddox. In Maddox, Justice Traynor had noted that the sound of retreating footsteps created a good faith belief that evidence would be destroyed. After that case, however, the appellate courts of California upheld unannounced entrances of police searching for narcotics on no more basis than general experience that evidence could be easily destroyed. The abuse which was occurring under this judicially created "no knock" exception led the California Supreme Court to abruptly halt the growth of such a standard. In People v. Gastelo, 67 Cal.2d 586, 432 P.2d 706 (Cal. 1967), Chief Justice Traynor, speaking for a unanimous court, held that compliance with California's knock and announce requirement would not be excused by an automatic blanket rule authorizing police to make unannounced entries into private homes just because evidence could be easily destroyed. Only where particular circumstances give rise to a reasonable belief that immediate action is necessary to prevent destruction would an unannounced entry be held lawful. Id. at 588-89. Later, in People v. Dumas, 512 P.2d 1208 (Cal. 1973), the California Supreme Court expanded the approach taken in

focused on the furtive conduct of the defendant prior to the time of the search which seemed to indicate he was aware of the presence of the police. The exceptions under both approaches can only be justified by certain particular circumstances known to the police.

In Ker, Justice Brennan presented the definitive statement of the recognized exceptions to the knock and announce rule:

> [T]he Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, 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."

372 U.S. at 47 (emphasis added). The phrases "imminent" and "is being attempted" indicate that these exceptions rest upon the facts existing when the police undertake to execute the search warrant, and not upon a mere suspicion which the officer may state to the issuing judge based on general experience.

One year after Ker, the Supreme Court of Florida, citing both Miller and Ker, held that, even if probable cause exists to arrest the suspect, the knock and announce rule is violated unless "those within made aware of the presence of someone

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Gastelo to the police safety exception by announcing that police knowledge that a suspect possesses a firearm will not itself justify unannounced entry. There must be "specific facts," not merely "broad unsupported presumptions," that justify the officers' belief that the weapon will be used against them if they proceed with ordinary announcements. Id. at 1213.

outside are then engaged in activities which justify the officers in the belief that...destruction of evidence is being attempted". Benefield v. State, 160 So.2d 706, 710 (Fla. 1964) (emphasis added). The court, quoting Miller, 357 U.S. at 313, also adopted the "virtual certainty" test articulated by Justice Brennan in Miller. Benefield, 160 So.2d at 711. Under this test, an exception to the knock and announce rule is valid only when the facts known to the police "justify them in being virtually certain" that a suspect will destroy evidence. Id.

In Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968), the Court again dealt with an unannounced entry. The government argued that the lack of announcement was excused by the risk of peril, but the Court dismissed that argument as having no factual basis in the record. Id. at 591. The Court did note that the common law exceptions recognized in Justice Brennan's opinion in Ker should be recognized as exceptions to § 3109 because the statute codified the common law. Id. at 591 n.8. Finally, the Court held that police officers need a "substantial basis" for not complying with the knock and announce rule. In narcotics cases, the police generally must testify to hearing some suspicious noises on the other side of the door which create a substantial basis to believe that the residents were destroying the contraband. Specific knowledge about the suspect's propensity for destruction of evidence could also be adequate in certain cases if factually and properly presented in an objectively reviewable framework. See Note,

Announcement in Police Entries, 80 Yale L.J. 139, 159 (1970) (failure to knock and announce based solely on police experience with a particular kind of offense is unconstitutional). Since Sabbath, the Supreme Court has not had occasion to directly speak to the "knock and announce" rule again, but the Court strongly inferred that before it would consider the application of the "good faith" exception it would require "of course, that the officers property executed the warrant". United States v. Leon, 468 U.S. 897, 918, 104 S.Ct. 3405 (1984). No United States Supreme Court case has required less.

PAGE(s) MISSING

> the purpose of the arrest and seizure. Unannounced entry under such circumstances is lawful and does not violate the constitutional rights of any person.

Id. at 795. However, in Earman v. State, 265 So.2d 695 (Fla. 1972), this Court overturned the Fourth District Court of Appeals, holding that:

> An appellate court is not justified in concluding there was such an exception as a matter of law when the record is devoid of any testimony by police officers or other competent evidence showing they had reason to fear *at time of entry* the destruction of evidence. . . .Essential to such proof in this case is testimony by the arresting officers or other competent evidence that they had reasonable grounds to believe the marijuana within the house would be immediately destroyed if they announced their presence. Absent such evidence, the fruits of any search conducted pursuant to such arrest must be considered illegally obtained.

Id. at 697. A year later, in State v. Kelly, 287 So.2d 13 (Fla. 1973), this Court revisited Earman and Clarke, and in a 4-3 decision and appeared to change the Benefield destruction of evidence exception from "belief [that] the destruction of evidence is being attempted" to "good reason to fear at the time of entry the destruction of that evidence." Kelly, 287 So.2d. at 16. As the Kelly court stated:

> Since those judicial exceptions [to the knock and announce rule] include only instances where activities indicate that destruction of evidence "is being attempted", they do not appear to cover the facts in the case at bar, where there was no reason to believe that evidence was being destroyed but only that it "would be" destroyed if the officers announced their presence.

Id. at 15-16.

The net effect of this wording in the decision is that it appears to weaken the requirements of the knock and announce rule as articulated in its prior rulings and to be in conflict with the United States Supreme Court in Ker, 372 U.S. at 47. By doing this, the State and the District Court of Appeals in Bell, 564 So.2d 1235, and Armenteros, 554 So.2d 574, improperly rely on State v. Kelly, 287 So.2d 13, to defeat the Fourth Amendment analysis of the United States Supreme Court. If the Petitioner's reading of Kelly is correct, Kelly is no longer controlling legal precedent in Florida because it does not survive the conformity amendment to Article I, Section 12 of the Florida Constitution. Bernie v. State, 524 So.2d 988 (Fla. 1988). That amendment provides that the people of Florida's right to be free of unreasonable searches and seizures shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. The Petitioner misreads and improperly relies on Kelly.

E. OTHER STATES ALSO PROHIBIT POLICE FROM DISREGARDING KNOCK AND ANNOUNCE RULE WHEN SEARCHING FOR SMALL AMOUNTS OF DRUGS.

In People v. Gastelo, 432 P.2d 706 (Cal. 1967), the Attorney General of California argued before the Supreme Court of California that unannounced forcible entry to execute a search warrant is always reasonable in narcotics cases, on the ground that drug dealers normally are on the alert to destroy the easily disposable evidence quickly at the first sign of an officer's presence. Rejecting this argument, Chief Justice Traynor,

speaking for a unanimous court, wrote: "Neither this court 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." Id. at 708. The court held:

> 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 reasons to enter at all, so must they have some particular reason to enter in the manner chosen.

Id. at 708 (emphasis added). The rule of the Gastelo court has been strictly adhered to in subsequent California cases.

The Supreme Court of Massachusetts has followed a similar rule:

> We decline to adopt the blanket rule that invokes the destruction of evidence exception whenever the objects named in the search warrant are by their nature amenable to ready disposal or destruction. The police must have probable cause to believe that the evidence will be destroyed, based on other factors uniquely present in the particular circumstances.

Commonwealth v. Scalise, 439 N.E.2d 818, 823 (Mass. 1982).

The Supreme Court of Arizona in State v. Bates, 587 P.2d 747 (Az. 1978), concluded *en banc* that:

> The mere fact that this search warrant was executed for the purpose of discovering narcotics does not necessarily create an exigent circumstance justifying immediate entry. . . . [S]tanding by itself, the easy destructibility of narcotics evidence is insufficient to provide reasonable cause for officers to believe that announcement of the purpose of their entry would frustrate the search. . . .

> There must be 'substantial evidence' to cause the police to believe evidence would be destroyed.

Id. at 749.

The Supreme Court of Virginia, held in Heaton v. Commonwealth:

> We are unwilling, however, to extend the privilege of making a "no knock" entry to every case where a search for drugs is involved. We decline to extend this privilege to cases where the only exigent circumstance is the readily disposable nature of the contraband that is the object of the search. (cites omitted) The police did not know where in Heaton's apartment the drugs would be found. They were not familiar with the interior arrangement of the apartment. They saw no drugs in the possession of any of the occupants as they were seated in the living room. They saw no firearms and had no reason to believe that any would be used by the occupants to the greater peril of the officers if they announced their presence. They had no reason to believe that the occupants were destroying or planning to destroy evidence or that they could have destroyed evidence if the officers had demanded entry before breaking down the door.

207 S.E.2d 829 (Va. 1974).

In State v. Cleveland, the Wisconsin Supreme Court held that:

> We reject a blanket approach in narcotics cases that the nature of the evidence itself--without more--allows the unannounced entry. The mere fact that drugs fall into a general category of materials that are by their nature capable of destruction does not justify unannounced entry to execute a search warrant. We conclude that law enforcement officers are justified in dispensing with the rule of announcement only if they have particular grounds in the given case to give them reasonable cause to believe that the drugs will be destroyed. The essence of fourth amendment protection against unreasonable searches and seizures is that there must be a specific showing to justify state intrusion into a private dwelling.

348 N.W.2d 512 (Wis. 1984).

F. AT THE TIME THE SEARCH WARRANT WAS EXECUTED NO EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE POLICE FROM DISPENSING WITH THE KNOCK AND ANNOUNCE REQUIREMENT OF § 933.09.

There is no evidence in this case indicating that Earl Bamber acted in a furtive manner, or that he knew of the presence of the police outside, or that he was in the process of attempting to destroy the evidence which the police sought. The State wants this Court to hold that the mere fact that the police were searching for drugs, plus that this family had a toilet and a dog, justified an unannounced entry. Such an exception to the "knock and announce" requirement would be overly broad and would be based on the type of evidence sought, rather than on the particular circumstances approach followed by all of the eight justices in Ker. The mere fact that there are drugs involved in the search cannot be held to create a *per se* exception to the announcement requirement. Exceptions to the entry requirement must be founded on particularity and not on generality. Miller v. United States, 357 U.S. 301 (1958); Ker v. California, 374 U.S. 23 (1963); Benefield v. State, 160 So.2d 706 (Fla. 1964).

The fact that the object of this search was drugs is not sufficient by itself to excuse the police from announcing their authority and giving the inhabitants a reasonable opportunity to respond as is required by the Constitution. The method of entry in executing a search warrant which has evolved from our common law and which is contained in the definition of reasonable searches and seizures required by the Constitution compels great respect from both the police and the courts. "The requirement of

prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application." Miller, 357 U.S. at 313. While it is apparent that such a rule would allow for certain exceptions, to allow an exception which would ignore any reason to demonstrate a particular necessity for not following the rule would effectively reduce the exigent circumstances standard to that of subjective speculation. Once the police possessed a search warrant, they would have a green light to batter down the suspect's door. Such a rule would render § 933.09 into a nullity, increase the potential for physical violence, infringe on citizens right to privacy and result in needless destruction of private property. As this Court held in Traylor v. State, 596 So.2d 957, 963 (Fla. 1992):

> Special vigilance is required where the fundamental rights of Florida citizens suspected of wrongdoing are concerned, for here society has a strong natural inclination to relinquish incrementally the hard-won and stoutly defended freedoms enumerated in our Declaration in its effort to preserve public order. Each law-abiding member of society is inclined to strike out at crime reflexively by constricting the constitutional rights of all citizens in order to limit those of the suspect--each is inclined to give up a degree of his or her own protection from government intrusion in order to permit greater intrusion into the life of the suspect. The framers of our Constitution, however, deliberately rejected the short-term solution in favor of a fairer, more structured system of criminal justice..."

G. PRIOR EXPERIENCE AND STRONG PUBLIC POLICY CONSIDERATIONS DICTATE AGAINST A BLANKET DRUG EXCEPTION TO THE KNOCK AND ANNOUNCE RULE

In 1970, the Nixon administration declared a "War on Drugs." The government, urging stricter drug control laws, argued that prior notice of a warrant allows suspects to dispose of evidence thus frustrating the police officers' search. In response to popular sentiment, members of the Ninety-first Congress enacted legislation permitting "no knock" entries. The Comprehensive Drug Abuse, Prevention, and Control Act, Pub. L. No. 91-513, § 509(b), 84 Stat. 1236, 1274 (1970)(repealed in 1974), authorized federal "no knock" warrants when the issuing magistrate found probable cause that notice endangered the safety of the executing officer or that notice might allow suspects to destroy evidence. Congress also enacted a broader provision authorizing "no knock" warrants for the District of Columbia. For a detailed discussion, see Note, Unannounced Entry to Search: The Law and the "No Knock" Bill, 1970 Wash. U.L.Q. 205 (1970). These "no-knock" warrants were so disruptive that Congress finally repealed them in 1974. This Court should heed these lessons and ask why the Hillsborough police "SWAT" team needs "no knock" warrants when officers from the U.S. Customs, DEA, and FBI--who deal with many of the world's most dangerous drug dealers manage without the use of "no knock" warrants.

During the 1970 debates on the bill, many members of Congress argued that the "no knock" provision of the Act would greatly increase those circumstances in which unannounced entries would

be permitted, thereby violating the Fourth Amendment's protection from unreasonable search and seizure. They feared that such a statute would violate the individual's right of privacy, increase violence, and serve as a prototype for national legislation that could be used to suppress dissent. The minority view in the House Report was that:

> The "no knock" provision into homes of private citizens by policemen is a radical, unwarranted departure from existing law. Its need has been undocumented, its grant of authority too extensive, its language unconscionably vague, its standards undefined and its safeguards illusory. If enacted, it will effectively render Fourth Amendment guarantees against "unreasonable searches and seizure" null and void.

H.R. Rep. No. 907, 91st Cong. 2d Sess., at 202 (1970).

During the debate, Senator McGovern argued that:

> The no knock proposal is couched in terms of prevention of violence. But think for a moment what will occur when policemen charge into citizens' homes, any time, day or night. Consider the deadly weapons and attack dogs available to many residents, and the likely response of an average citizen when someone he probably would not know, breaks into his home in the middle of the night. No knock means extreme physical danger to all of us, including the police.

116 Cong. Rec. 25,201 (1970).

Senator Sam Ervin, a former North Carolina Supreme Court Justice who led the effort to repeal the "no knock" warrant provision of the Act as unconstitutional, directed the Congress to the Fourth Amendment and noted that:

> I would emphasize, above all things, that the amendment says that "no warrants shall issue, but upon probable cause." Probable cause necessarily relates to facts existing at the time the search warrant is applied for. But these "no knock" provisions, which my amendment seeks to strike, are based entirely upon facts which the official prophesies are going to exist at the time he undertakes to execute the search warrant, and not upon facts known to the

> applying officer at the time he seeks to obtain the search warrant. Ironically, the Supreme Court has never considered the constitutionality of either of these "no knock" statutes. However, I am confident that it would strike down any warrant based upon the prophesy of a law enforcement officer. It has already held in the case of Nathanson v. United States, 290 U.S. 41 (1933), that mere suspicion is not sufficient to constitute probable cause for the issuance of a search warrant.

120 Cong. Rec. 22,884 (1974).

The "no knock" experience lasted four years and demonstrated that many of the dangers foreseen in 1970 came to pass. During this four year period, over a hundred newspaper articles were reproduced in the Congressional Record describing repeated instances of terrified citizens thinking they were being subjected to burglary or more frightening acts, only to find they were being "searched" by law enforcement officers who entered their homes without notice. For example, reprinted in the record is an eight-week investigation by *The New York Times*, consisting of interviews with victims of "no knock" raids. In Virginia, a terror-stricken innocent woman, a previous burglary victim, heard someone breaking into her house and grabbed her .32-caliber revolver and shot through the door as it burst open. The bullet pierced the chest of a 22-year-old policeman who was the son of the head of the Norfolk Police Department's narcotics squad. In California one innocent father was shot through the head as he sat in a living room cradling his infant son. In Miami complaints of police harassment during drug searches were so frequent that the Legal Services of Greater Miami could no longer handle the caseload. 120 Cong. Rec. 22,886-88 (1974); see also,

116 Cong. Rec. 24,739-44; 25,199-25,212; 33,639-67; 35,523-39 (1970); 119 Cong. Rec. 15,170-76; 23,242-58 (1973); 120 Cong. Rec. 22,881-22,907; 26,874; 34,445-46; 35,641-42 (1974).

In 1974 the United States Senate voted by a 2-1 margin to repeal the 1970 Act, once again making "no knock" warrants illegal under § 3109. Giving police the blanket authority, when searching for small quantities of drugs, to execute a "no knock" search warrant was bad public policy in 1970, and is bad policy today.

ISSUE 2

SEARCHES ARE ILLEGAL UNTIL SEARCH WARRANT IS READ

The testimony of Pamela Bamber, Earl Bamber, the construction workers at their home, are in agreement that the police forcibly entered the residence and their testimony clearly indicated that the warrant executing "SWAT" team began searching before the arrival of Detective Kennedy with the search warrant. This amounts to another clear violation of Florida Statute §933.09 and reflects the total lack of concern for the proper execution of a search warrant and requires the suppression of the evidence before the court. State v. Riley, 462 So.2d 800 (Fla. 1984) and State v. Henderson, 253 So.2d 158 (4th DCA 1971). This undisputed factual basis alone requires affirmance of the trial court's decision and is another example of the executing "SWAT" team's intentional disregard of long-standing legal requirements.

ISSUE 3

WHETHER THE LEON "GOOD FAITH" EXCEPTION APPLIES TO VALIDATE AN ILLEGAL EXECUTION OF AN ATTEMPTED "NO KNOCK WARRANT?

There could be no good faith justification for Detective Kennedy giving the issuing Magistrate no factual basis upon which to base the need for an anticipatory or prior approved "no knock" warrant. Detective Kennedy gave no evidence to the Court nor to the "SWAT" team to justify their total disregard of F.S. §901 and §933, so as to relieve them of their wrongdoing. United States Supreme Court's efforts to eliminate the penalty of suppression of evidence when officers apply for a warrant and attempt to execute it in good faith as in U.S. v. Leon does not apply in this case. Nowhere in Leon did the Supreme Court urge that its good faith exception be allowed to be used for the disregard for, if not intentional, circumvention of State Statutes pertaining to the execution of search warrants. In fact, the Court said it "assumes, of course, that the officers properly executed the warrant". Leon at 918, 919. (emphasis added)

The factually baseless statements in the affidavit regarding (i) the possibility of harm to the occupants and police officers; and (ii) the possibility that evidence might be destroyed are "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon at 925. Since the State cannot demonstrate the existence of objective good faith on the part of the police. In this case, the "good faith exception" is not applicable.

Any law enforcement officer who is authorized to wear the

badge, much less a 16-year reasonably well-trained officer, would understand that he is authorized within the four corners of the signed warrant and Florida State law. Wilson v. Quigg, 17 So.2d 697 (Fla. 1946) and Carter v. State, 199 So.2d 324 (2nd DCA 1967) (Fla. 1946). The Magistrate authorizes only the search specified in the warrant itself--a police officer may not rely on the authorizing signature on the face of the warrant to provide carte blanche empowerment to engage in any other activities not specifically authorized on the face of the search warrant. Ibid., Shedd v. State, 358 So.2d 1117 (Fla. 1st DCA 1978).

Furthermore, there is a fundamental distinction between a search warrant and the underlying or supporting affidavit, and the affidavit is not necessarily either part of the warrant nor available for defining the scope of the warrant. Bloom v. State, 283 So.2d 134 (Fla. 4th DCA 1973).

In the present case, the search warrant does not authorize a "no knock" entry. Instead, the request for such an entry is at the end of Exhibit B (R 15), which is described as an attachment which supposedly established the probable cause for the search itself. It is unreasonable for a well-trained police officer to engage in the sort of wishful thinking which led Detective Kennedy to assume that he was authorized to use "no knock" entry in violation of Constitutional and statutory authority when the face of the search warrant itself contains no mention of it nor was even "bare bones" probable cause included in the warrant affidavit for a judge to approve such an application. Since the issuing judge initialed every page of the affidavit, it may be

reasonable for Detective Kennedy to conclude that the Judge read his request--but reading the request, and approving the request, are two different matters. Any reasonable police officer would know that, when a judge in the State of Florida authorizes police to disobey the Constitution and the statutory "knock and announce" requirements of §933.09, that the judge will make that authority explicit in the face of the search warrant. However, the issuing judge in this case did not make any annotation in the fact of the warrant approving the requested "no knock" warrant. (R 10) For Detective Kennedy, a police officer with 16 years of service, to hastily assume that he had objective "no knock" approval is completely unreasonable and lacks any evidence of "good faith". Leon's "good faith" exception is inconsistent with closing one's mind to the possibility of illegality. Leon at 920, n. 20, and U.S. v. Peltier, 422 U.S. 531, 542 (1975).

Permitting officers to engage in willful blindness of state law would set an ominous precedent for future police conduct in other situations and nullify the protections of §933.09, Article I, §12 of the Florida Constitution and the Fourth Amendment of the United States Constitution. Of course, it is foreseeable that police officers like Detective Kennedy, would much rather send in militaristic SWAT teams for all drug searches while waiting blocks or miles away from the scene until the police "neutralize" the Florida citizens who happen to be in the area to be searched. This Court should note that, on the mere assumption that Mr. Bamber had a home with a toilet and a dog, Detective Kennedy chose to intentionally circumvent the Constitutional

"knock and announce" rule embodied in §933.09 and send in a military-style "SWAT" team to search for a small amount of drugs. The effect of such a bad faith disobedience of §933.09 was the terrorizing of innocent Florida citizens such as: Mr. Rhodes, the construction worker in the Bamber home who testified that "it was like we were in Vietnam" (R 55); the frightened Pamela Bamber who testified that she thought it was a robbery (R 59-60), the Bamber's minor son who saw his mother risk her life to save his dog from being slaughtered by machine gun toting intruders (R 58) and finally, Earl Bamber, who received a broken finger in the raid. (R 39, 41).

Any reasonably well-trained police officer would also be aware of the tenuous legal position of such a search in Hillsborough County, Florida.

The State argues that the search warrant itself granted blanket advance permission for the police to disobey the "knock and announce" rule of §933.09 (apparently this would be the case even if the Rottweiller were visiting the veterinarian or was old and toothless and the respondent was observed by the police in the back yard immobilized in a body cast). Even assuming arguendo that the State is correct, it simply is not objective good faith for a police officer to presume that, because a Magistrate signed a warrant permitting the police to disobey the "knock and announce" rule of §933.09, that such a search magically became legal in the jurisdiction.

The actual "search warrant" issued by Judge Lenfestey on August 18, 1989, in this case specifically contained the standard

wording that the warrant was to be executed "as exigencies of the occasion may demand or require." (R 10) Obviously, any intelligent reading of the warrant would include an understanding that the requirements of F.S. §933.09 were to be applied.

Perhaps this case was an attempt by the police to experiment with the outer boundaries of the Ker and Benefield exceptions in Hillsborough County. If it was, this Court should take notice that Earl Bamber, his family, and the construction workers at his home were unwilling participants in this experiment and object to this unconstitutional exercise. A reasonable, well-trained officer would have been aware of the boundaries of Florida's long standing "no knock" law, and would understand that blanket advance judicial applications for "no knock" searches are unreasonable and illegal in the State of Florida, even if one could have been obtained.

The State's claim of a Leon "good faith" exception fails for another reason--the justification cited in the affidavit to support a "no-knock" search warrant are "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon 468 U.S. at 923. It should be obvious that an inquiry into the factors which support an exception to §933.09 is different from an inquiry into probable cause to issue the warrant by the Magistrate.

If the State desires to create an advance, blanket "no knock" search warrant, certainly the police must provide a substantial, objective, as well as factual, supporting affidavit to justify it

seeking such an entrance. Nowhere does the State suggest exactly what the indicia of support might be in the affidavit which underlies the "no knock" warrant request. In the present case, the conclusory statements of the police in the affidavit as to (i) the possible destruction of evidence and (ii) the alleged safety of the occupants and officers satisfy no standard of factually based reasonableness that may be objectively reviewed. The only statements offered in the affidavit is the existence of plumbing facilities in the Bamber home--a statement that applies to nearly all residences in Florida. What if a citizen in Florida has a sink, bathtub, garbage disposal, or fireplace? Does this also authorize militaristic SWAT teams to set of diversionary bombs, batter down front doors in residential neighborhoods, thrust people to the floor at gunpoint to execute a warrant searching for drugs or other similarly seized evidence sought? If so, are the Courts not for all practical concerns judicially repealing F.S. §933.09 and §933.17, as well?

This Court in Benefield and Earman, and the United States Supreme Court in Ker, have held that there must be specific reasons, at the time of entry, to fear destruction of the evidence if police knocked and announced their presence. As the Second District Court of Appeals said in this case, State v. Bamber, 592 So.2d 1129, 1133 (Fla. 2nd DCA 1991), "[t]here clearly are facts and circumstances under which the police can reasonably decide, at the time they serve a warrant, that a household presented an unusual risk concerning the destruction of

evidence." The court then said in this case that there was nothing to "suggest that the occupants had prior criminal records, had attempted to destroy evidence in the past, were known to be violent, had expressed an intention to destroy evidence, or had unusual sophistication concerning the destruction of evidence." Id.

Detective Kennedy asserted that the safety of the occupants and officers would be "greatly enhanced" by executing a "no knock" warrant. (R 15). How so? The affidavit is devoid of the mentioning of any weapons and the naked conclusion that the Bamber's family dog posed a safety threat is both patently absurd and unsubstantiated. Upon hearing the police knock on the door, will the dog turn on its owners and attack them? If it was a guard dog, when the SWAT team barges in through the front door, the dog's natural instinct will be to protect its owners. Ironically, in this case, Pamela Bamber risked her life, placing herself between the police and her son's dog, to protect the animal from being slaughtered by the machine gun toting SWAT team. (R 58). In fact, the Bamber family and their guests were exposed to much greater harm (both physical and emotional) from the SWAT team "take down" of the residence, including broken bones, threats with weapons, and the frightening of children, than could possibly have been encountered in an announced search.

As for protection of the police, upon knocking, the owners could have easily restrained the dog. Additionally, it is difficult to conceive what type of harm a family dog could cause

a team of men armed with machine guns, explosives and SWAT team apparel that included leather boots, body armor, helmets, gloves and flack jackets.

The mere ratification of generalized suspicions that evidence may be destroyed is patently ridiculous and assertions about an imagined danger to inhabitants and the officers could not lead a reasonably objective police officer to conclude that cause existed for the execution of a "no knock" warrant. Furthermore, the issued warrant never authorized Detective Kennedy's request for a "no knock" warrant execution and, even if it had, a reasonably trained officer would have questioned its legality. The combination of these factors show that Detective Kennedy's actions lacked "good faith" and the evidence should be excluded to deter further police disobedience of Florida's "knock and announce" law, as articulated in §933.09.

Any reading of Leon clearly reflects that the United States Supreme Court has recognized that "[their] decision to deny the exclusion of evidence obtained in reasonable reliance on a subsequently invalidated warrant required the officers to be in objective "good faith" and "assumed", of course "that the officers properly executed the warrant... ." Mass v. Sheppard, 989 n.6 Leon at 918. (emphasis added) In this case, we are not dealing with the negligent or inadvertent actions of the police officers, but the officers' specific intentions not to comply with F.S. §933 and §901, which cannot be, in any way, classified as good faith compliance with State law. State v. Robinson, 565

So.2d 730 (Fla. 2nd DCA 1990), Rev. Dism, 574 So.2d 143. Therefore, Leon provides no help to the State in this case.

Ker, Miller, Leon and Mass v. Sheppard, all require compliance with §933.09, unless objectively reviewable probable cause is found at the time of the sought entry to justify the allowance of a Ker, Miller and Benefield, §933.09 exception. Here, the "good faith" exception is inapplicable.

BURDENS OF PROOF AND PRESUMPTIONS

In the evidence of this case, it is undisputed that the officers violated the "knock and announce" provisions as established by F.S. §933.09 in Benefield. Failure to follow Florida Statutes renders the search illegal. This places on the State a burden of presenting evidence to prove an exception to the requirements of "knocking and announcing" by presenting evidence at the suppression hearing that the officers, at the time they were attempting to execute the warrant, had evidence that the Appellant was or would have attempted to dispose of the contraband if the officers announced their presence. Since the State presented no such evidence, the State has failed to meet its burden of proof and the trial Court's order must be affirmed. Nank v. State, 406 So.2d 1282 (Fla. 2nd DCA 1981).

The obvious primary issue before the trial court was the issue of the improper execution of the search warrant obtained by Detective Kennedy. Unlike the question of the legality of the search warrant (which was not reached by the court below), the issue of whether police officers have violated the statutes prohibiting illegal entry into a citizen's residence either in the execution of a search warrant or to accomplish a felony arrest, is a factual question. State v. Dominguez, 367 So.2d 651 (Fla. 2nd DCA 1979). The trial court heard testimony pro and con concerning the facts in this case. The testimony from the State's one witness was brief, vague and not factually helpful to the State's position; the four (4) witnesses called by the

defense were largely uncontradicted.

It is further respectfully submitted, that the trial court's ruling comes to this Court with the same presumption of correctness that attaches to jury verdicts and final judgments. DeConingh v. State, 433 So.2d 501 (Fla. 1983). Our Florida Supreme Court has stated that a reviewing Court should defer to the fact finding authority of the trial Court and should not substitute its judgment for that of the trial court. DeConingh, 433 So.2d at 504. The Petitioner has failed to present any legal or factual basis to overcome this presumption. As there is competent and substantial evidence to support the trial court's findings, the trial court should be affirmed. Dominquez at 717.

CONCLUSION

Based on the foregoing arguments and citations of authority, it is respectfully submitted that the trial Judge's Order Granting Appellee's Motion to Suppress is correct both factually and legally. The trial court's rulings are fully in accord with all legal principles enunciated in the State of Florida, and the United States Constitution and further, is based on competent substantial evidence in the Record before this Court and as such, the trial court's order should be affirmed and all conflicting or misconstrued existing precedent specifically overruled or sufficiently clarified to provide proper guidance for law enforcement officials and to protect the rights and property of our citizenry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Brenda S. Taylor, Assistant Attorney General, Westwood Center, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607, this 16th day of December, 1992.

DOUGLAS L. GROSE, ESQUIRE