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Constitutional Law: The Requirement of Announcement of Authority and Purpose before Breaking into a Home by Police Officers

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RECENT DECISIONS

Constitutional Law: The Requirement of Announcement of Authority and Purpose Before Breaking into a Home by Police Officers—California law enforcement officers acting on information and observation, substantiated by the word of a reliable informer, arrested George Ker without a warrant for the possession of marijuana in violation of section 11530 of the California Health and Safety Code.

The state officers obtained the pass key to the Ker apartment from the building manager. Proceeding quietly, the officers unlocked and opened the door to the apartment. *After* entrance to the Ker apartment, the officers announced their authority and purpose and placed the defendant under arrest. Proceeding without a search warrant, the officers searched the apartment and discovered various amounts of marijuana.

The defendants were subsequently convicted and the California District Court of Appeals affirmed.[1] The United States Supreme Court granted certiorari,[2] and upheld the decision of the court of appeals by a 5-4 decision. *Ker v. California.*[3]

Eight of the justices concurred in Part I of the opinion written by Justice Clark, which dealt with the standard by which state searches and seizures must be evaluated, reiterating the rule established in *Mapp v. Ohio.*[4] In *Mapp,* the Court specifically held that the rule established in *Boyd v. United States,*[5] which prohibited the use of testimony and papers obtained through unreasonable search and seizures by the Federal Government in a criminal proceeding, was enforceable against the states under the fourteenth amendment. It was pointed out that *Mapp* established no assumption by the Court of supervisory powers over state courts, (a highly unlikely interpretation of the Court's decision), and "did not attempt the impossible task of laying down a fixed formula for the application in specific cases of the constiutional prohibition against unreasonable searches and seizures.[6] Courts will be met with recurring questions as to the reasonableness of searches, and "at any rate reasonableness is in the first instance for the trial court to determine."[7] Only Justice Harlan dissented as to the standard to be applied; he would judge state searches and seizures by the more flexible concept of fundamental fairness and of rights 'basic to a free society,' embraced in the due process clause of the fourteenth amendment. Viewing the case in this manner, he voted to affirm the conviction.

Mr. Justice Clark, in applying the standard laid out in Part I of his

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[1] 195 Cal. App. 2d 246, 15 Cal. Rptr. 767 (1961).
[2] 368 U.S. 974 (1962).
[3] ——U.S.——, 83 Sup. Ct. 1623 (1963).
[4] 367 U.S. 643 (1961).
[5] 116 U.S. 616 (1886).
[6] Ker v. California, *supra* note 1, at 1629.
[7] Mapp v. Ohio, *supra* note 4, at 653.

opinion, found that the federal requirement of reasonableness contained in the fourth amendment was not violated in this case. Justices Black, Stewart and White joined him in this conclusion. Finding that the arrest was based upon sufficient probable cause, the Court concluded that the lawfulness of the arrest was not vitiated by the method of entry. Section 844 of the California Penal Code permits officers to break into a dwelling after demanding admittance and explaining their purpose.[8] Though this requirement was not met, the California court held that the circumstances of the arrest came within the provisions of a judicial exception engrafted upon the statute,[9] to wit, the presence of exigent circumstances which justified non-compliance with the statute. The exigent circumstances in this case were: (1) that through experience, arresting officers had found that announcement of authority and purpose led to the destruction of evidence, and (2) Ker's furtive conduct in eluding the officers shortly before the arrest.[10] The lawfulness of the arrests of state officers is to be determined by reference to state law, in so far as it is non-violative of the Federal Constitution. The Court concluded that no such offensiveness was present.

The dissenting opinion of Justice Brennan, in which Chief Justice Warren and Justices Douglas and Goldberg joined, viewed the arrest of George Ker as illegal owing to the unannounced intrusion of the arresting officers, announcement being a mandate of the fourth amendment. In reviewing the recognized exceptions to the announcement of authority and purpose requirement, the Court concluded that no such circumstances, as would lead to the dispensation of the requirement, were present in this case. Finding the arrest unlawful and violative of the fourth amendment, the minority held that the subsequently seized evidence should have been excluded under the rule of the *Mapp* case.

The requirement that officers announce their authority and purpose before they may lawfully break the door of a house has long been embedded in the tradition of Anglo-American law. Its origin can be traced back some five hundred years to the 13th Yearbook of Edward the IV and was pronounced in 1603 in *Semayne's Case*: "In all cases where the king is a party, the sheriff (if the doors be not open) may break the party's house. . . . But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors."[11] A century later, England's leading commentators on criminal law, Hale and

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[8] CAL. PEN. CODE §844 (1872). "To make an arrest, . . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

[9] People v. Ruiz, 146 Cal. App. 2d 630, 304 P. 2d 175 (1956), People v. Maddox, 46 Cal. 2d 301, 294 P. 2d 6, *cert. denied*, 352 U.S. 858 (1956).

[10] Ker v. California, *supra* note 1, at 1633.

[11] Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rpr. 194 (1603).

Hawkins, reaffirmed the principle recognized in *Semayne's Case.*[12]

This common law principle was carried over to the colonies and today is reflected in the provisions of 18 U.S.C. section 3109,[13] as well as in the statutes of a large number of states,[14] and in the American Law Institute's proposed Code of Criminal Procedure, section 28.[15] Exceptions to this general requirement have been recognized by a few states, though there appear to be no English decisions which clearly recognize any exceptions. The two leading state cases are *Read v. Case,*[16] which allowed officers to dispense with the requirement of announcement when they, in good faith, believe that they or someone within, are in peril of bodily harm, and *People v. Maddox,*[17] which held that announcement was not required when the person to be arrested is fleeing or attempting to destroy evidence. The earliest recognized exception appears to deal with the cases of an escape after arrest for a felony, when the officer is in fresh pursuit.[18]

The only previous Supreme Court case which had concerned itself with the requirement of authority and purpose by officers was *Miller v. United States.*[19] In the *Miller* case, the Court dealt with an arrest without a warrant by a metropolitan officer of the District of Columbia for violation of a federal narcotics law. Local officers were required to make an announcement of authority and purpose under a rule laid down in *Acarino v. United States.*[20] In *Miller,* the Court, in dealing with a situation which appeared to require the application of a local rule of law, stated that the validity of the entry to execute the arrest must be tested by criteria identical with those embodied in 18 U.S.C. section 3109, which deals with entry by federal officers to execute a search warrant. The Court proceeded to give the common law history of the requirement of announcement of authority and purpose embodied in provisions of section 3109. In emphasizing the historical importance of the rule dealing with unannounced entries, the Court stated that "the

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[12] 1 HALE, PLEAS OF THE CROWN 583 (1736); see also 2 HAWKINS, PLEAS OF THE CROWN §1 (6th ed. 1787).

[13] 18 U.S.C. §3109 (1948). "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."

[14] ALA. CODE tit. 15, §155 (1958); KAN. GEN. STAT. §62-1819 (1868); MINN. STAT. ANN. §629.34 (1927); WYO. COMP. STAT. §10-309 (1876).

[15] CODE OF CRIM. PROC. §28 (1930). *"Right of officer to break into building.* An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in section 21, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose."

[16] 4 Conn. 166 (1822).

[17] Note 9 *supra.*

[18] Wilgus, *Arrest Without a Warrant,* 22 MICH. L. REV. 541, 798, 804 (1924).

[19] 357 U.S. 301 (1958).

[20] 179 F. 2d 456 (D.C. Cir. 1949).

requirement of prior notice of authority and purpose before forcing entrance into a home is deeply rooted in our heritage and should not be given grudging application."[21]

The broad language utilized by the Court in *Miller* would lead one to believe that the Court was not in fact applying a local rule of law, but extending the requirements of the provisions of section 3109 to cover arrests, as well as the execution of search warrants, and holding that any evidence obtained in violation of the criteria embodied in the statute would be excluded from federal courts through the exercise of the Supreme Court's supervisory powers over federal courts. This interpretation of the *Miller* case has been adopted by at least one lower federal district court.[22] The *Ker* case appears to leave little doubt that the Court in *Miller* through the exercise of its supervisory powers, laid down the rule that evidence obtained through an unannounced entry into a home by officers in making an arrest or in executing a search warrant, would be excluded by federal courts. Justice Clark, in the majority opinion of *Ker,* states (obiter) that *Miller* required the exclusion of evidence because of the violation of a federal statute (section 3109). Since *Miller* was concerned with an arrest without a warrant by local officers, section 3109 could not have been violated unless the Court was extending its scope under its supervisory powers. In the dissent in *Ker,* Justice Brennan, who wrote the majority opinion in *Miller,* states that *Miller* rested upon an exercise of the Court's supervisory powers. The Court in *Miller* refused to pass upon whether the unqualified requirements of the rule would admit of an exception due to exigent circumstances.

In *Ker,* the Court was dealing with an arrest by state officers and the use of the evidence obtained therefrom in a state prosecution. The majority, in finding no violation of constitutional standards, failed to clarify the basis for their decision. Since California has a statute requiring announcement of authority and purpose before breaking,[23] the majority could have decided the case merely with reference to state law by finding that the application of the state law was not violative of constitutional standards. This logic prevents the conclusion that announcement of authority and purpose before making arrests will be required of all state officers, especially where the state law has no statutory requirement prohibiting unannounced entries. The other possible basis for the decision expressed by Justice Clark is that the California statute complies with the commands of the fourth amendment, and that the exigent circumstances recognized by the California court, which justify noncompliance with the California statute, would also justify noncompliance with the dictates of the fourth amendment. Justice Clark's

[21] Miller v. United States, *supra* note 19, at 313.
[22] United States v. Barrow, 212 F. Supp. 837 (E.D. Penn. 1962).
[23] CAL. PEN. CODE §844, *supra* note 8.

discussion of the common law exceptions to the requirement lends force to the latter interpretation. If the majority were deciding the case purely with reference to state law, such a discussion would not be required and the Court would merely have had to look to the pertinent California decisions on the question. If this is in fact the foundation of the Court's decision, it would appear that the recognized exceptions to an "unqualified" rule, as it was termed in *Miller,* would take force and vitality from such rule. The past experience of an officer as to destruction of evidence would then lead to a complete dispensation of the requirement in all such future cases. The furtive conduct of Ker in eluding the officers, referred to by the majority, was a turnabout he made while being followed by the officers. A turnabout certainly seems to be ambiguous conduct under the circumstances, since there was a complete absence of any indication that Ker knew he was being followed. It is hardly a firm basis for the invoking of the "fresh pursuit" exception to the requirement.

The minority, in holding that an unannounced entry is violative of the fourth amendment, emphasized the importance of the privacy of the home, which has traditionally been protected. Justice Brennan enunciates three exceptions to the general requirement: (1) where the persons within already know of the presence of the officers and their purpose, (2) where there is a justifiable belief that persons within are in peril of great bodily harm, and (3) where those within, who are aware of the presence of officers, are engaged in activity which would lead to a reasonable belief that evidence was being destroyed. None of these exceptions violate the rationale of the doctrine, which seeks to protect citizens from unannounced intrusions, since the intrusions are not in effect "unannounced"—the occupant being aware of someone's presence and intent to enter.

Strong policy arguments would militate against further extension of the exceptions recognized by Justice Brennan. In allowing previous experience and ambiguous conduct to serve as a basis for dispensing with the requirement of announcement of authority and purpose, violence would be done to the presumption of innocence with which an accused is cloaked. "Indeed, the violence is compounded by another assumption, also necessarily involved, that a suspect to whom an officer first makes known his presence will further violate the law."[24] Practical hazards involved in law enforcement would also contradict a relaxation of the announcement requirement. Cases of mistaken identity and misinformation as to an address could lead to fright and embarrassment on the part of householders. Danger to the life of the police officer himself militates against a lax rule. In *Miller,* the Court pointed out that compliance with the federal notice statute "is also a safeguard for

[24] Ker v. California, *supra* note 1, at 1641.

the police themselves who might be mistaken for prowlers and be shot down by fearful householders."[25] Such a requirement apparently has not been a millstone around the neck of federal officers, nor would it appear to create serious obstacles to law enforcement.

In summary, *Ker* seems to clarify the basis for the Court's decision in *Miller*. It now appears that evidence obtained in violation of the provisions of section 3109, extended to cover arrests, whether by federal or state officers, will lead to the exclusion of that evidence in a federal court proceeding. Whether all state officers will be required to give announcement of authority and purpose before making arrests, in order to utilize subsequently obtained evidence in a state prosecution, is still unclear. If the majority in the future clearly states that announcement of authority and purpose is required by the fourth amendment, the Court will still be evenly divided as to the circumstances which would justify a non-compliance with the announcement requirement. Justice Harlan, utilizing a completely independent test of 'fundamental fairness,' prevents, for the time being, a clear cut decision of the Court in this troubled area.

WYLIE A. AITKEN

Bankruptcy: Title of a Trustee to a Bankrupt's Cause of Action for Personal Injuries—Stephen LeRoy Buda, while a passenger in an automobile, sustained personal injuries as a result of an accident. Without commencing an action against his tortfeasor, he filed a voluntary petition in bankruptcy three months after the accident. Buda's personal injury claim was settled by his attorney, with the stipulation of the trustee, for $1,200.00, which, after expenses were paid, left a balance of $560.00. The referee, interpreting section 70a(5) of the Bankruptcy Act, held that the bankrupt's cause of action did not vest in the trustee. The referee's decision was affirmed in the district court and by the circuit court of appeals.[1] Section 70a of the Bankruptcy Act states:

> The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (1) . . . (2) . . . (3) . . . (4) . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* That rights of action ex delicto for libel, slander,

[25] Miller v. United States, *supra* note 19, at 313.
[1] *In re* Buda, CCH BANKR. L. REP. §60,954 (1963).