

## NO KNOCK SEARCH WARRANTS IN GEORGIA

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No knock search warrants are issued frequently in Georgia nowadays, and such warrants have "simply become customary in ... drug cases." *Adams v. State*, 201 Ga. App. 12, 410 S. E. 2d 139, 141 (1991). But is the legality of such warrants firmly established in Georgia? In my opinion, the legal authority for these warrants is shaky, and I believe the Georgia Supreme Court, which has never passed on the validity of the warrants, can be persuaded to hold that no knock warrants are illegal. Alternatively, I think the Georgia Court of Appeals can be persuaded to overrule its inadequately reasoned, unpersuasive precedents upholding no knock warrants.

Georgia has no statute specifically authorizing a magistrate to issue no-knock search warrants. Yet the prevailing view in the United States is that no knock warrants may not be issued absent specific statutory authorization. 2 W. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* 621 (3d ed. 1996). Accord: *State v. Bamber*, 630 So. 2d 1048, 1050 (Fla. 1994) (holding that no knock search warrants are invalid in Florida because they have not been authorized by statute; "[n]o-knock warrants are disfavored under the law and limited largely to those states that have enacted statutory provisions authorizing their issuance"). Nor have the courts of Georgia advanced compelling reasons for permitting, despite the absence of statutory authority, no knock warrants; the caselaw which allows such warrants solely on the basis of judge-made law is unpersuasive and vulnerable to overruling.

Since 1972 there have been 30 reported Georgia appellate decisions--all in the Georgia Court of Appeals--involving the actual issuance of a no knock search warrant by a magistrate, and in not one of these cases did the Court hold that inclusion of a no knock provision in the warrant required suppression of evidence. (These 30 decisions--one in the 1970's, 10 in the 1980's, and 19 thus far in the 1990's--are listed in chronological order in the Appendix.)

In only three of these decisions, however, did the Court of Appeals actually examine the issue of the validity of no knock search warrants. In *Jones v. State*, 127 Ga. App. 137, 193 S. E. 2d 38 (1972), the first Georgia appellate case involving a no knock warrant, the Court held a no knock provision in a search warrant was valid because the affidavit for the warrant stated that (1) according to informers the subject whose residence was to be searched had threatened to shoot the next police who entered his residence, and (2) the affiant felt that giving the subject notice would permit him to flush the evidence. The Court's opinion contains no analysis or discussion, and the cases cited in support of its holding that judges may, without statutory authorization, issue no knock warrants are inapposite. It was nine years before the Court decided another case involving a no knock warrant. In *Cox v. State*, 160 Ga. App. 199, 286 S. E. 2d 482 (1981), the no knock clause had been inserted into a warrant for gambling paraphernalia based on a GBI agent's generalized, conclusory allegations about gambling operations. Again citing an inapposite case, and without mentioning *Jones*, the Court held that the clause was reasonable, permissible, and legal. Finally, in *Hout v. State*, 190 Ga. App. 700, 380 S. E. 2d 330 (1989), the Court held that, where giving notice of authority and presence would increase the peril of the officers executing

the warrant, a no knock provision in the warrant is authorized. The only authority cited by the Court was an inapposite Georgia Supreme Court case.

More recently, in *State v. Smith*, 219 Ga. App. 905, 467 S. E. 2d 221, 222 (1996), the Court, citing Jones, stated: "A search warrant with a no-knock provision may be issued where the facts set out in the affidavit demonstrate exigent circumstances." This statement was dicta, however, because the search warrant at issue did not have a no-knock clause.

In none of these four cases did the Court even acknowledge the general rule that judges lack the power to issue no knock warrants except where statutorily authorized; nor did the Court give any good reasons why Georgia judges should, simply by judicial fiat, assume the power to issue such warrants. In none of the cases did the Court properly analyze the public policy considerations at issue; in particular, there was a total failure to recognize the "staggering potential [of no knock warrants] for violence to both occupants and police," *State v. Bamber*, 630 So. 2d 1048, 1050 (Fla. 1994). Georgia caselaw on no knock warrants is therefore weak at best.

Furthermore, since 1972, when the use of no knock warrants was first upheld in Georgia, there has been an important advance in Fourth Amendment doctrine concerning forcible entries to execute search warrants. When *Jones*, *Cox*, and *Hout* were handed down in 1972, 1981, and 1989 respectively, OCGA §17-5-27, which requires that generally officers executing a search warrant must give or attempt to give verbal notice of their purpose and authority to the occupants of a building before making a forcible entry, was deemed to "represent ... the common law rule," *Barclay v. State*, 142 Ga. App. 657, 236 S. E. 2d 901 (1977), but not necessarily to involve a Fourth Amendment requirement. However, in *Wilson v. Arkansas*, 514 U. S. 927 (1995), a unanimous U. S. Supreme Court held that the common law knock and announce principle forms part of the reasonableness inquiry required by the Fourth Amendment. Although the Supreme Court did not hold that all no knock entries are forbidden, the Court's decision obviously casts new light on the issue whether Georgia courts should permit the issuance of no knock warrants when the General Assembly has declined to do so.

Recently, the Georgia Supreme Court has displayed an admirable respect for Fourth Amendment values, on several occasions reversing Court of Appeals decisions validating a search and seizure. See, e.g., *Davis v. State*, 262 Ga. 578, 422 S. E. 2d 546 (1992) (reversing Court of Appeals decision that search based on third-party consent was valid); *Gary v. State*, 262 Ga. 573, 422 S. E. 2d 426 (1992) (overruling numerous Court of Appeals decisions finding a good faith exception to the exclusionary rule in Georgia). In view of (1) the unconvincing caselaw permitting no knock warrants, (2) the public policy arguments not yet addressed by the Georgia courts, and (3) the recent extension of the Fourth Amendment to entries to execute search warrants, it is submitted that the Georgia Supreme Court should and can be persuaded to overrule Georgia Court of Appeals caselaw allowing, in the absence of legislative authorization, state magistrates to issue no knock warrants.

Moreover, even if the Supreme Court declines to decide the issue of the legality of no knock warrants, it might be possible, for the reasons stated above, to persuade the Georgia Court of Appeals, en banc, to overrule its own precedents and to leave to the legislature, where it properly belongs, the decision as to whether state judges should have the power to issue warrants allowing

police to crash into people's homes without first giving notice to the occupants. Recently, for example, the en banc Court of Appeals overruled its own precedents permitting conditional guilty pleas. *Hooten v. State*, 212 Ga. App. 770, 442 S. E. 2d 836 (1994).

#### Appendix

1. *Jones v. State*, 127 Ga. App. 137, 193 S. E. 2d 38 (1972)
2. *Cox v. State*, 160 Ga. App. 199, 286 S. E. 2d 482 (1981)
3. *State v. Scott*, 176 Ga. App. 887, 339 S. E. 2d 276 (1985)
4. *Ridgeway v. State*, 187 Ga. App. 381, 370 S. E. 2d 216 (1988)
5. *Collins v. State*, 187 Ga. App. 430, 370 S. E. 2d 648 (1988)
6. *State v. Hawkins*, 187 Ga. App. 826, 371 S. E. 2d 668 (1988)
7. *Bonds v. State*, 188 Ga. App. 135, 372 S. E. 2d 448 (1988)
8. *Louis v. State*, 188 Ga. App. 435, 373 S. E. 2d 231 (1988)
9. *Jackson v. State*, 188 Ga. App. 834, 374 S. E. 2d 777 (1988)
10. *Hout v. State*, 190 Ga. App. 700, 380 S. E. 2d 330 (1989)
11. *Hilliard v. State*, 191 Ga. App. 253, 381 S. E. 2d 320 (1989)
12. *State v. Anderson*, 195 Ga. App. 793, 395 S. E. 2d 50 (1990)
13. *Benham v. State*, 196 Ga. App. 241, 395 S. E. 2d 658 (1990)
14. *Hunt v. State*, 196 Ga. App. 694, 396 S. E. 2d 802 (1990)
15. *Ivory v. State*, 199 Ga. App. 283, 405 S. E. 2d 90 (1991)
16. *In re A. H.*, 199 Ga. App. 178, 404 S. E. 2d 341 (1991)
17. *Adams v. State*, 201 Ga. App. 12, 410 S. E. 2d 139 (1991)
18. *Bell v. State*, 201 Ga. App. 528, 419 S. E. 2d 729 (1992)
19. *Cooper v. State*, 206 Ga. App. 292, 424 S. E. 2d 896 (1992)
20. *Williams v. State*, 207 Ga. App. 782, 429 S. E. 2d 153 (1993)
21. *Lowe v. State*, 208 Ga. App. 49, 430 S. E. 2d 169 (1993)
22. *State v. Goodrich*, 209 Ga. App. 280, 433 S. E. 2d 390 (1993)
23. *Claffey v. State*, 209 Ga. App. 455, 433 S. E. 2d 441 (1993)
24. *Atkins v. State*, 211 Ga. App. 712, 440 S. E. 2d 476 (1994)
25. *State v. Crank*, 212 Ga. App. 246, 441 S. E. 2d 531 (1994)
26. *Anderson v. State*, 212 Ga. App. 529, 442 S. E. 2d 268 (1994)
27. *McGibbons v. State*, 216 S. E. 2d 389, 455 S. E. 2d 293 (1995)
28. *Lamar v. State*, 216 Ga. App. 513, 455 S. E. 2d 316 (1995)
29. *Stewart v. State*, 217 Ga. App. 45, 456 S. E. 2d 693 (1995)
30. *Imperial v. State*, 218 Ga. App. 440, 461 S. E. 2d 596 (1995)

See also *State v. Smith*, 219 Ga. App. 905, 467 S. E. 2d 221 (1996); *Williams v. State*, 199 Ga. App. 404 S. E. 2d 296 (1991); *Hunter v. State*, 198 Ga. App. 41, 400 S. E. 2d 641 (1990); *Neal v. State*, 173 Ga. App. 71, 325 S. E. 2d 457 (1984).

## CASELAW UPDATE

MARCH 4, 2004

1. *Poole v. State*, 266 Ga. App. 113, 596 S. E. 2d 420 (2004) (armed with a search warrant, about a dozen law enforcement officers from the Clayton County and Fayette County Drug Enforcement Task Force teams went to Poole's apartment; the leading officer yelled, "Sheriff's office, search warrant," and breached the door; once inside, officers seized less than one gram of cocaine, fifteen and a half grams of marijuana, \$200 in cash, scales, a handgun, and ammunition; Poole and another person were inside the apartment and were arrested; Poole was charged with possessing cocaine, possessing marijuana, and possessing marijuana with the intent to distribute; where a search warrant is illegally executed, the subsequent course of events is tainted; OCGA § 17-5-27 requires a law enforcement officer entering an occupied residence for the purpose of executing a search warrant to give or attempt to give verbal notice of his authority and purpose and permits a forceful entry if the person inside either refuses to admit him or refuses to acknowledge and answer the verbal notice; the notice requirement of that Code section may be dispensed with, however, by a no-knock provision in the warrant or by the presence of exigent circumstances; exigent circumstances exist where the police have reasonable grounds to believe that forewarning would either greatly increase their peril or lead to the immediate destruction of the evidence; a search warrant with a no-knock provision may be issued where the facts set out in the affidavit demonstrate exigent circumstances; the warrant in this case did not contain a no-knock provision, and Poole maintains that no exigent circumstances excused the officers' forceful entry; it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement; the U. S. Supreme Court has rejected a blanket exception to a knock-and-announce requirement for felony drug investigations because it overgeneralized the risks of danger in drug investigations and because it might be applied to support blanket exceptions; in order to justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence; in this case, the only information received by the officers in immediate proximity to the time the warrant was being executed was that, before they could make an announcement, a person inside the residence had looked out of and then left a window; but there is no evidence that Robinson, who had placed Poole under surveillance, believed that the person who peered through the window was Poole and not some person unconnected with the suspected drug activity; there is no evidence that Poole or the individual who peered through the window had a history of violence or that either had threatened violence if law enforcement officers entered; there is no evidence that Poole had packaged or located the drugs in the apartment for quick disposal; the only reference in the record to harm to the officers or destruction of the evidence is Robinson's testimony regarding a "possibility" of such based only on the fact that someone looked out a window and then left the window; while the reasonableness standard for a forceful entry is not high, that testimony is simply inadequate to establish reasonable grounds to believe that, in this case, forewarning would have either greatly increased the officers' peril or led to the immediate destruction of the evidence; moreover, had Robinson, an experienced and trained drug investigator, believed that circumstances of this case made it essential for the officers to

reach the threshold of Poole's residence undetected, he could have set forth in his affidavit any facts that he believed demonstrated the need for an element of surprise as a necessary precaution in executing the search warrant and sought approval from the neutral magistrate for a no-knock provision; Robinson did not do so; to find exigent circumstances in this case would amount to the adoption of a per se rule that once law enforcement officers realize that an occupant of the premises to be searched for drugs has discovered the officers' presence outside the premises, the notice requirement is excused; because no exigent circumstances excused the officers' failure to comply with OCGA § 17-5-27, the trial court erred in denying Poole's motion to suppress)