

## **ADMISSION OF EVIDENCE AND KNOCK AND ANNOUNCE FOURTH AMENDMENT “KNOCK AND ANNOUNCE” UNDER THE MICROSCOPE**

Two recent court decisions may impact how Vermont law enforcement officers conduct searches pursuant to court-issued search warrants. The first decision, *Hudson v. Michigan* 546 U.S. \_\_\_ (2006), issued by the U.S. Supreme Court, found that under the Fourth Amendment to the U.S. Constitution, evidence found by law enforcement officers who fail to knock and announce their presence in serving a search warrant should not be suppressed. This is a departure from the common law rule requiring suppression of evidence where law enforcement has failed to knock and announce prior to “breaking a house.” In contrast, the Essex County, Vermont district court, in *State of Vermont v. Ellen Sheltra* Docket No. 96-12-05 (July 7, 2006), found that the Vermont Constitution holds law enforcement officers to a higher standard, and thus requires that evidence be excluded from court proceedings if it was found during a search in which police failed to knock before entering a home.

In *Hudson*, the police obtained a search warrant to search for drugs and firearms at Hudson’s home. In executing the warrant, the police announced their presence, but waited only about three to five seconds before opening the unlocked door to Hudson’s home. (The case law requires that officers must follow a “reasonable wait time,” typically in the twenty-second range, depending on the situation.) They discovered crack cocaine, as well as a loaded gun lodged between the seat cushions of the chair in which Hudson was sitting. Hudson was convicted of drug possession and appealed on the grounds that the premature entry violated his Fourth Amendment rights. After winding its way through the court system, Hudson’s conviction was upheld by the U.S. Supreme Court.

The high court’s decision is a fairly sharp turn in precedent. Over the years, the court has generally adhered to the “knock and announce” rule, requiring law enforcement officers to knock to announce their presence prior to entering a home to search it pursuant to a court-issued search warrant. Failure to adhere to this rule would result in the suppression of evidence found during the officers’ search of the home, regardless of whether it would have been discovered during an otherwise lawful search. The principle behind this rule is that the constitution protects a man’s home as his castle, and permits the resident to dress himself or get out of bed prior to the disruptive government search. The rule also allows citizens to display acquiescence to police in searching the home, de-escalating the situation for all involved. In departing from mandatory suppression for failure to knock and announce, the Supreme Court is not changing the rules by which law enforcement officers will be required to operate; rather, the remedy for failing to operate under the rule is different. Now, under federal constitutional law, evidence found after failing to knock and announce will not be suppressed. However, the failure to knock and announce may still result in civil liability under 42 U.S.C. § 1983 for violation of the resident’s Fourth Amendment rights. The media have asserted that police no longer must knock to announce their presence, which is not true. The police must still do so, but failure to do so may not result in the suppression of evidence.

Nevertheless, a Vermont trial court, examining exactly the same issue, has come to a different conclusion. While Vermont court precedent concerning the Fourth Amendment has traditionally been “coterminous” with federal court precedent, here the jurisprudence diverges, and the Vermont Constitution requires the suppression of evidence found after a failure to knock and announce. The issue in *Sheltra* is the same as that in *a Hudson*: Should evidence be suppressed for failure of law enforcement to knock and announce prior to entering a home to serve a search warrant? In *Sheltra*, state police obtained a search warrant to search a home in Island Pond, seeking illegal marijuana as well as other related drugs, paraphernalia, and information. The warrant was executed by members of the Vermont Drug Task Force, who placed themselves in front of the door to the residence, about to form a “stack” prior to entering

the home. The stack allows officers to assemble in front of a door and squeeze the shoulder of the officer in front of them, so that once the squeeze reaches the officer in front of the door, that officer knows the others are ready. The officers claim the door to the home opened unexpectedly prior to the stack being fully assembled, which prompted the lead officer to yell, "State Police with a search warrant" and enter the home. Upon entering the home, the police apparently found and seized drug evidence, though this was never explicitly stated in the written ruling.

As the State's prosecution began, the defendants moved to suppress the drug evidence, claiming their rights under the Vermont Constitution had been violated by the "no-knock" search. Judge Bent considered the U.S. Supreme Court's opinion in *Hudson v. Michigan*, but concluded that Vermont jurisprudence should depart from federal jurisprudence, stating, "The practical remedy of exclusion serves as a restraint on violations of law by law enforcement personnel without the need for secondary litigation (such as the lawsuit under 42 U.S.C. § 1983 mentioned above)." Because this search was so tainted by the no-knock seizure, "Evidence obtained in violation of the Vermont Constitution, or as the result of a violation, cannot be admitted at trial as a matter of state law. Introduction of such evidence at trial eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct."

While the *Sheltra* case is not binding on a statewide basis – a trial court decision really only applies to the county in which that court is located – Vermont law enforcement officers should continue to be extremely wary in conducting searches, whether authorized by warrant or not. There is certainly an unresolved question as to whether a no-knock search will result in the suppression of evidence, one that will most likely be appealed to the Vermont Supreme Court. Even if this question is resolved such that evidence will not be excluded, law enforcement officers may still be held liable under § 1983 – not a welcome prospect. As a best practice, VLCT recommends continuing to knock to announce police presence, followed by a "reasonable wait time." Additionally, it would be wise to consult with colleagues and law enforcement experts in updating your municipal law enforcement protocols. We'll keep you posted as *Sheltra* winds its way through the courts.

- Brian Monaghan, VLCT Staff Attorney

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