IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
Plaintiff,	)	
	)	
v.	)	ID No. 1003003410
	)	
STEFAN UPSHUR,	)	
	)	
Defendant.	)	

OPINION

Barzilai K. Axelrod, Esquire, Department of Justice, Wilmington, Delaware – Attorney for the State.

Joseph A. Hurley, Esquire, Wilmington, Delaware – Attorney for the Defendant

In this case the court holds that evidence seized pursuant to a valid search warrant is admissible even though the police violated the knock and announce rule when executing that warrant.

FACTS

The Delaware State Police obtained a warrant to search defendant's residence at 1709 Tulip Street in Wilmington after three confidential informants purchased Oxycodone from the defendant. Two of those purchases were made at the defendant's residence. The warrant authorized a search for, and seizure of, illegal prescription narcotics, United States currency and firearms in close proximity to any controlled substances. The State Police viewed this as a high risk warrant because of the defendant's criminal history and the possibility he might be armed. As a result the Special Operations Response Team ("SORT") was designated by the police to execute the warrant.

SORT and State Police Detective Dewey Stout approached the Tulip Street residence in the early hours of March 5, 2010. At 6:05 a.m., State Police Officer Timothy Aube knocked on defendant's front door and announced "State Police. We have a warrant." (or words to that effect). In an interview given to police after he was arrested, defendant stated he was seated in a reclining chair and heard Officer Aube's knock and announcement. Defendant then "came to the door because I was going to open it when I heard the cops and I . . . put my hands up and my first response was to lay down because I didn't want to get shot or stepped

on." Defendant did not open the front door, so Officer Aube forced it open. Photos taken of the front door by defendant at some unspecified time later show no discernable damage to the door.

SORT entered the home and, after securing the premises, conducted, along with Detective Stout, the search authorized by the warrant. They recovered a .45 caliber semi-automatic handgun, 319 Oxycodone tablets, numerous empty medicine bottles labeled for patients other than defendant, four empty prescription bottles for Oxycodone (from four different physicians) on which the defendant was listed as the patient and $3,857 in United States currency.

Defendant does not contest the validity of the warrant nor does he assert that the search exceeded the bounds of the warrant. Instead, he asserts that the knock and announce violated his rights under the Delaware constitution and the common law. He contends that this violation requires this court to exclude the items seized during the search which followed. In particular, Defendant contends that the police did not wait long enough before breaching his front door.

The evidence as to the length of time which elapsed between the knock and the breach of the front door is contradictory. Detective Stout, who was seated in a car down the street from the residence, estimated that at least fifteen seconds elapsed. On the other hand, the breaching officer, Officer Aube, testified that only about three seconds elapsed between his knock and the breach. It is tempting for the court to

disregard Officer Aube's testimony. The court can fairly surmise that Officer Aube, who faced the prospect of an armed and dangerous suspect on the other side of the door, had things on his mind other than counting the seconds between the knock/announce and the breach. Still, it is hard to ignore the breaching officer's testimony. He was the closest witness to the entry and was in the best position to observe when the breach actually occurred. The court emphasizes it will not always assume that the breaching officer's testimony is more accurate than that of other observers. But under the circumstances of this case the court finds that the breach occurred within three seconds of the knock and announce.

ANALYSIS

There are two issues presently before the court. The first is whether the police violated the knock and announce rule before they executed the warrant at Defendant's home. If so, the second issue is the appropriate remedy for that violation.

I. Did the Police Violate the Knock and Announce Rule?

The knock and announce rule requires police officers to announce their presence and purpose before entering a home. The police must wait a "reasonable" amount of time between the knock/announcement and entering the home. The debate over what constitutes a "reasonable" amount of time has spawned considerable litigation on the criminal side of most courts. The Delaware Supreme Court held in one case that a wait

of three to five seconds is *per se* unreasonable. Because of its factual findings, this court is obligated to hold that the wait was unreasonable and the police therefore violated the knock and announce rule in this case.

A. The Knock and Announce Rule

In a nutshell the knock and announce rule can be summarized as follows:

> Prior to the entry of a residence, the police officer is required by the common law, in executing a warrant, to signify the cause of his coming, and to make a request to open the doors . . . [and] the police are required to announce their presence, authority, and purpose in seeking entry.[1]

The roots of the knock and announce rule can be traced back through the English common law at least as far as the 1603 opinion in *Semayne's* case.[2] This rule became the law of Delaware when the state's founders incorporated English common law into the law of Delaware.[3] In 1863 this court described the rule in this fashion:

> As officer with a warrant to arrest a party for a crime or misdemeanor, may not break into a house until he has demanded admittance and been refused. *** Pease officers having legal warrants to arrest for a breach of the peace, may break open doors after due notice and demand of admittance, for in such case the party's own house is no sanctuary for him.[4]

Delaware courts have identified two reasons for the rule:

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[1] *Tatman v. State*, 320 A.2d 750 (Del. 1974) (internal quotation marks and citation omitted).

[2] *Dyton v. State*, 250 A.2d 383, 384 (Del. 1969) citing *Semayne's* case, 5 Coke 91, 77 Eng. Rep. 194.(k.B. 1603) Some historians believe the rule extends as far back as a 1275 English statute which was apparently enacted to codify the then existing common law. *Wilson v. Arkansas,* 514 U.S. 927, 932 n.2 (1995).

[3] *Dorsey v. State,* 761 A.2d 807, 816-7 (2000).

[4] *State v. Oliver,* 2 Houst. 585, 1863 WL 818 (Del. Super. 1863).

> These requirements have the two-fold purpose of protecting the privacy of residents by preventing police entry of the home without reasonable warning; and it reduces the possibility of danger to officer and citizen alike which might result from misunderstanding and misinterpretation of the purpose of the entry.[5]

Over the years exceptions to the rule have developed. For example, if the police officer in good faith believes that knocking and announcing will prompt the occupant to destroy evidence, the officer is excused from having to knock and announce. Similarly, if the officer in good faith believes that a knock and announce will place him or her at risk of harm, the officer is again excused from knocking and announcing.

B. The Police Violated the Knock and Announce Rule

The court's finding that only three seconds elapsed between the knock/announce and the breach ends the inquiry as to whether the police violated the knock and announce rule. Generally speaking, the length of time required between the knock/announce and the breach depends on the circumstances. That is not the case here. If this court were permitted to consider the surrounding circumstances – including Defendant's admission he knew the police were knocking and about to enter – it might conclude that the police did not violate the knock and announce rule. In *Miller v. United States*, the Supreme Court observed that "[i]t may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the [occupant] already knows their purpose so that announcement would

[5] *Tatman*, 320 A.2d at 750.

be a useless gesture."[6] Subsequent cases often apply this "futility exception" to the knock and announce rule.[7]

Under the circumstance presented here, however, this court is not free to consider the surrounding circumstances. In *Gregory v. State*,[8] the Delaware Supreme Court established a *per se* rule that a wait of three to five seconds between the knock/announce and the breach is "per se unreasonable." Later decisions from other courts raise questions about the *per se* approach. For example, the Sixth Circuit Court of Appeals found that "[w]e need not decide whether a wait of five to ten seconds, standing alone, is adequate under the knock and announce rule, because the Fourth Amendment dictates only that the officers' overall actions be reasonable, not that they wait a prescribed length of time before forcible entry."[9] However, if the *per se* rule is to change in this state, that change must come from the Delaware Supreme Court, not here. Therefore, being bound by the holding in *Gregory*, this court must find that the delay of only three seconds in this case is unreasonable and the police violated the knock and announce rule.[10]

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[6] 357 U.S. 301, 310 (1958).

[7] *E.g. United States v. Tracy,* 835 F.2d 1014 (8th Cir.), *cert. denied,* 486 U.S. 1014 (1988).

[8] 616 A.2d 1198, 1202 (Del. 1992).

[9] *United States v. Pinson*, 321 F.2d 558, 567 (6th Cir. 2003); see *United States v. Bonner*, 874 F.2d 822, 824 (D.C. Cir. 1989) (in determining whether occupant has refused admission by failing to respond, "courts employ a highly contextual analysis, examining all the circumstances of the case").

[10] The State argues that the possibility that the defendant may be armed or that he might quickly dispose of Oxycodone pills justified a quick breach. The court agrees that a police officer's belief that he or she will face unnecessary peril or evidence will be lost by a delay in entry, if reasonable under the circumstances, justifies a quick entry or no knock at all before entry. There was no testimony in the instant case, however, that any of the officers held these concerns.

II. What is the Remedy for the Violation?

Having concluded that the police violated the knock and announce rule, the next issue to be addressed is the appropriate remedy. Upshur's state constitutional claim raises several issues. First the court must determine whether knock and announce rule is embodied in the Delaware Constitution. Second the court must determine whether it is foreclosed by the Delaware Supreme Court's opinion in *Dorsey v. State*[11] from determining something other than the exclusionary rule applies. Third it must determine whether the language and history of the Delaware Constitution as well as the policy of this state require application of the knock and announce rule here. Finally it must decide what remedy is appropriate.

The United States Supreme Court in *Hudson v. Michigan*[12] held that the exclusionary rule does not apply to violation of the knock and announce rule under the Fourth Amendment. Knowing this, defendant Upshur has cleverly couched his arguments in terms of the Delaware Constitution. It is useful to examine the Supreme Court's holding in *Hudson* before considering Upshur's state law arguments since resolution of those arguments is influenced by *Hudson.* In *Hudson* the United States Supreme Court held that even though the knock and announce rules was rooted in the Fourth Amendment the exclusionary rule was not the appropriate remedy for its violation. According to the

[11] 761 A.2d 807.
[12] 547 U.S. 586 (2006).

Court, either of two lines of reasoning required this conclusion. First the interests protected by the knock and announce rule are different than the interests which justify application of the exclusionary rule. Violations of the knock and announce rule are simply too attenuated to the seizure of the evidence to warrant suppression of that evidence. Second, the social costs associates with application of the exclusionary rule far outweighed the deterrent effect on future police conduct.

The Supreme Court began its analysis by notice that "[s]uppression of evidence . . . has always been our last resort, not our first impulse."[13] In order to warrant application of the rule, according to the Court, there must be (1) a but-for causal relationship between the constitutional violation and the seizure of the evidence and (2) that causal relationship must not be too attenuated. The *Hudson* Court found that there was no but-for relationship between the violation of the knock and announce rule and the seizure of the evidence because the police had a valid warrant. "Whether that preliminary misstep had occurred *or not* the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." This conclusion alone precludes application of the exclusionary rule. Nonetheless the court further considered whether the link between the constitutional violation and the seizure of the evidence was too attenuated.

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[13] *Id*. at 591.

"Attenuation can occur" according to the Court, "when the causal connection is remote." But "[a]ttenuation also occurs when, even given a direct causal connection the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." The interest protected by the knock and announce rule is limited. Its purpose is to protect the officers serving the warrant and the occupants from violence which may occur when an unannounced intruder (the officers executing the warrant) unexpectedly break into a home. The rule also is intended to protect the building from unnecessary damage which might be caused by breeching the door. The knock and announce rule is not intended, however, to prevent police from seizing evidence pursuant to a valid warrant. "What the knock-and-announce rule has never protected . . . is one's interest in preventing the government from seeing or taking evidence described in a warrant." The *Hudson* Court concluded, therefore, that "[s]ince the interests that were violated in this case had nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."

A second reason precluding application of the exclusionary rule is that the costs of applying that rule far outweigh its benefits in the context of a knock and announce violation. The *Hudson* Court noted that the deterrent effect of the exclusionary rule in this context is negligible because police officers have no incentive to violate the rule. "[I]gnoring the knock and announce can realistically be expected to achieve

absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises – dangers which if there is even a 'reasonable suspicion' *suspend the knock and announce requirement anyway*." On the other hand there are substantial costs to be paid if the exclusionary rule is applied. The Court noted that among these is the possibility of unnecessary litigation as persons accused of crimes assert frivolous knock and announce arguments in the hope of winning the lottery and obtaining a ticket to freedom. Of much greater cost is the potential for allowing those guilty of a crime to go unpunished. On balance, the Supreme Court concluded, the minimal benefit derived from the application of the knock and announce rule here does not justify the high costs incurred by its application.

A. The Knock and Announce Rule is a Delaware Constitutional Right

The analysis must begin with an examination of the language of article I section 6. The Delaware Constitution of 1792 provided:

> Sect. 6. The people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.[14]

This language, which has remained largely unchanged to the present day, closely parallels the Fourth Amendment:

[14] Del. Const. 1792, article I, section 6.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[15]

The Delaware Supreme Court has noted the difference in the language of article I, section 6 and the Fourth Amendment and has cogently observed that if the framers of our state constitution wished to create the same rights in the Delaware Constitution as are found in the Fourth Amendment, they would have opted for the federal rather than the Pennsylvania version. The differences in language, however, are syntactical, and this court could find no Delaware or Pennsylvania case departing from the United States Supreme Court's interpretation of the Fourth Amendment on the basis of the difference in the language between the federal and state constitutions. Rather these departures arise out of an analysis based upon criteria first set forth in a concurring opinion in the New Jersey Supreme Court. Those criteria, and their application to this case, are discussed shortly.

Both the federal and state constitutional provisions contain two clauses. The first clause in the Delaware provision provides that "[t]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures...." [16]This clause and its Federal counterpart have often been referred to as the "unreasonable

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[15] United States Const., Amend. IV.
[16] *Del. Const*. art I, sec. 6.

searches and seizures" clause, and that term will be used throughout this opinion. The remaining language is often referred to as the "warrants clause." As seems obvious, the knock and announce rule must arise (if at all) under the unreasonable searches and seizures clause of article I section 6

With the exception of one opinion, the Delaware Supreme Court has never identified the Delaware Constitution as a source of the knock and announce rule. Rather, it has repeatedly referred to either the common law or the Fourth Amendment as the source of the knock and announce rule. The knock and announce rule made its first appearance in the Delaware Supreme Court in 1969 in *Riley v. State.*[17] Although there was no discussion about the origins of the rule, the cases cited in *Riley* arose out of the Fourth Amendment.[18] A week after it announced its decision in *Riley* our Supreme Court issued its ruling in *Dyton v. State*[19] in which it attributed the rule's origins to the common law, citing *Semayne's* case.[20] The *Dyton* court made no mention of the Delaware Constitution, but instead commented "[w]e have no statute specifically dealing with the subject; the common law rule is accordingly applicable."[21] The next exposition on the source of the knock and

[17] 249 A.2d 863 (Del. 1969).
[18] *Patrick v. State*, 227 A.2d 486 (Del. 1967); *Sabbath v. United States*, 391 U.S. 585 (1968).
[19] 250 A.2d 363 (Del. 1969).
[20] 5 Coke Rep. 91 (1603).
[21] 250 A.2d at 385.

announce rule was in *Tatman v. State*[22] wherein the court linked the rule to both the Fourth Amendment and common law;[23] again the Supreme Court made no reference to the Delaware Constitution. And in *Marvel v. State*[24] the court, without mentioning the state constitution, wrote of the knock and announce rule, "the question is to be decided in accordance with Federal constitutional standards."[25] Cases since then continue to refer to the federal constitution or common law origins of the knock and announce rule without reference to the Delaware Constitution.[26]

It was not until 1991 that the Delaware Supreme Court made its first and only reference to the Delaware Constitution in connection with the knock and announce rule. In *Gregory v. State* the court wrote:

> In *Tatman v. State, Del.Supr. 320 A.2d 750 (1974)*, the Court examined in detail the application of the knock and notice rule. There, the defendant's conviction for possession of hypodermic syringes was reversed because the police's cursory knock on the exterior of a common doorway to a multiple apartment dwelling did not comply with the rule or fall under any one of the judicially exceptions. The Court also recognized the knock and notice rule is a requirement of state and federal constitutional dimensions. See, e.g. *Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963)*; *Dyton v. State, Del.Supr. 250 A.2d 383 (1969)*.[27]

This passing reference to the Delaware Constitution hardly establishes the knock and announce rule as a state constitutional right. There was

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[22] 520 A.2d 750 (Del. 1974).

[23] The court wrote that "[t]he no-knock search here was unreasonable and violative of Fourth Amendment requirements." It continued "the police officer is required by common law, in executing a warrant …." *Id.*

[24] 290 A.2d 641 (Del. 1972), abrogated on other grounds, *Lecates v. State*, 987 A.2d 413 (Del. 2009).

[25] Id. at 644.

[26] *Eg. Potts v. State*, 458 A.2d 1165 (Del. 1983).

[27] 616 A.2d at 1201.

no analysis of the constitution in *Gregory* and none of the three cases cited by the *Gregory* court support the notion that the knock and announce rule is grounded in the Delaware Constitution. Indeed, the Delaware Constitution is not even mentioned in the two Delaware cases – *Tatman* and *Dyton* – and the third authority – *Ker v. California*[28] – is a United States Supreme Court opinion applying the Fourth Amendment.

If *Gregory* were the Supreme Court's last word on the topic, this court would be obliged to follow it, and there would be no need for further analysis. But several years after *Gregory*, the Delaware Supreme Court, again without reference to the Delaware Constitution, identified the common law and the Fourth Amendment as the sources of the knock and announce rule:

> At common law, a police officer in executing a search warrant was required, prior to forceful entry of a residence, to "signify the cause of his coming, and to make a request to open the door." The Fourth Amendment to the United States Constitution requires the police to announce their presence, authority and purpose in seeking entry.[29]

It is fair to say, therefore, that the Delaware Supreme Court has never squarely held that the knock and announce rule is incorporated in article I, section 6.

Because historical evidence shows that article I section 6 was drawn from an identically worded provision of the Pennsylvania

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[28] 384 U.S. 23 (1963).

[29] *Id*. at 265 (footnotes omitted). Lower court opinions generally conclude that the rules origins lie in the common law or federal constitution. *State v. Harper,* 1991 WL 166069 (Del. Super. 1991)("the knock and announce rule in Delaware has its roots in both the common law and federal constitution").

Constitution, courts of this state frequently look to the courts of Pennsylvania for guidance in interpreting article I, section 6. In 1991 the Pennsylvania Supreme Court in *Commonwealth v. Chambers*[30] held that article I section 18 of the Pennsylvania Constitution encompassed the knock and announce rule. This court respectfully suggests that it is unclear precisely why the *Chambers* court reached that conclusion. There is no discussion in *Chambers* of the historical context of that rule nor is there an attempt to link the history of that knock and announce rule to the Pennsylvania Constitution. Its analysis was limited to the following:

> The fundamental, constitutional concern implicated by the police officers' failure to comply with the "knock and announce" rule is the prohibition against unreasonable searches and seizures under Article I, § 8 of the Pennsylvania Constitution.
>
> As we stated earlier, the prohibition against unreasonable searches and seizures applied to the manner of the execution of a warrant. Rule 2007 is a procedural formulation of the common law rule requiring an officer to state his identity and purpose, but its genesis lies in this constitutional prohibition. The warrant was executed in an unreasonable manner in this case.
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> We hold that the forcible entry without waiting a reasonable amount of time under the circumstances of this case violated Article, I § 8 of the Pennsylvania Constitution[31]

This court believes, therefore, that the reasoning in *Chambers* does not shed light on the Delaware Constitution.

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[30] 598 A.2d 539 (Pa. 1991).
[31] *Id*. at 410.

The best source to search for the history and meaning of the unreasonable searches and seizures clause in the Delaware Constitution is not the Pennsylvania courts but rather the federal courts. Although the Delaware Supreme Court, in *Jones v. State*, labeled the Pennsylvania Constitution a "precursor" to the federal Bill of Rights, it is beyond dispute that the text of the federal bill of rights was widely known even before the Pennsylvania constitutional convention was convened. James Madison introduced the Bill of Rights in Congress on Monday, June 8, 1789[32], and Congress sent them to the states for ratification on September 25, 1789. It was not until November, 1789 that the Pennsylvania Assembly called for a state constitutional convention. On March 11, 1790 Pennsylvania ratified the Bill of Rights, including what is now the Fourth Amendment[33] – six months before it enacted the Pennsylvania Constitution. The unreasonable searches and seizures clause in the proposed federal amendment must have had some role in shaping the Pennsylvania Constitution. The Declaration of Rights contained in the 1776 Pennsylvania Constitution did not contain an "unreasonable searches and seizures" clause, and therefore it is reasonable to conclude that this clause in the 1790 Pennsylvania

[32] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 440. Madison's legislation, and the amendments referred by Congress to the states, contained twelve amendments. In addition to the Bill of Rights as we now know them, there was a proposed amendment concerning apportionment of the House of Representatives which was never ratified. There was an amendment relating delaying any pay increases Congress approved for itself until after one election of the House of Representatives had intervened which was not ratified in 1791. Two hundred years later it was ratified and became the 27th amendment.

[33] Annals, Appendix 2036.

Constitution was influenced by, and drawn from, what is now the Fourth Amendment. By extension, the unreasonable searches and seizures clause in article I section 6 of our constitution was shaped at least in part by the Fourth Amendment. Thus, the United States Supreme Court's treatment of that clause provides perhaps the best insights into its meaning and purpose.

Until 1995 the United States Supreme Court had never expressly decided whether the knock and announce rule amounted to a right protected by the federal constitution. In *Wilson v. Arkansas*,[34] it was finally presented with that question. The *Wilson* court examined the protections of privacy as they existed at the time of the nation's founding and concluded that the knock and announce rule was among them. The court deduced that the founders were well aware of the rule at the time the Bill of Rights was written and intended to include its protections within the unreasonable searches and seizures clause.

> Our own cases have acknowledged that the common law principle of announcement is "embedded in Anglo-American law," but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.[35]

[34] 514 U.S. 927 (1995).
[35] *Id*. at 934.

Accordingly a unanimous court held that the unreasonable searches and seizures clause encompassed the knock and announce rule.

For the reasons expressed in *Wilson*, this court concludes that the knock and announce rule falls within article I section 16 of the Delaware Constitution. From the beginning, Delaware has incorporated English common law[36], except as modified by the Constitution or enactments of the General Assembly. This alone, as the *Wilson* court points out in the federal context, justifies the conclusion that the common law knock and announce rule is part of the fabric of the unreasonable searches and seizures clause of our state Constitution. Moreover, the Delaware Supreme Court has repeatedly taught that the guarantees in the Delaware Constitution relating to searches and seizures are broader than those in the Fourth Amendment. [37] It is way too late in the game to hold that the framers of our state Constitution wanted *fewer* protections than those provided in the Fourth Amendment.[38] Therefore, this court holds that the knock and announce rule is a right guaranteed by the Delaware Constitution.

B. The Exclusionary Rule and the Delaware Constitution

1. The Delaware Supreme Court's decision in *Dorsey v. State* is not dispositive.

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[36] *Dorsey v. State*, 761 A.2d 807, 815 (Del. 2000).

[37] *E.g., Curtis v. State* 2011 WL 825827 *2 (Del.)(The "Delaware Constitution provides broader guarantees with respect to searches and seizures than the United States Constitution provides").

[38] Indeed, the State does not make such an argument here.

In *Dorsey v. State*, a divided Delaware Supreme Court held that a police officer's seizure of evidence based upon a warrant which was issued without a showing of probable cause violated article I section 6 of the Delaware Constitution and that "exclusion is the constitutional remedy for a violation of the search and seizure protections set forth in Article I Section 6 of the Delaware Constitution."[39] The question arises, then, whether *Dorsey* establishes a blanket rule applicable to all violations of article I section 6. This court, of course, must faithfully adhere to the edicts of the Supreme Court, but a fair reading of *Dorsey*, the authorities it cites and the Delaware Supreme Court's opinions following *Dorsey* all suggest that the *Dorsey* court never intended such a blanket application of the exclusionary rule under the state constitution. This court therefore shows no disrespect to the Supreme Court when it considers whether the Delaware Constitution requires exclusion of evidence seized after any violation of the knock and announce rule.

a. The limited scope of Dorsey

The language of the majority opinion in *Dorsey* can reasonably be read as not extending the scope of the exclusionary rule beyond the constitutional violation then before it. Specifically, the majority wrote that the issue before the Court was the appropriate remedy "when items are seized pursuant to a search warrant that was issued without probable cause":

[39] *Dorsey*, 761 A.2d at 821.

> The issue on appeal relates to very specific language in the Delaware Constitution: "no warrant to search any place ... shall issue ... unless there be probable cause supported by oath or affirmation." In this case, the *absence* of probable cause is not an issue. Instead, the real dispute between the majority and the minority **turns on whether the Delaware Constitution provides a remedy when items are seized pursuant to a search warrant that was issued without probable cause**.[40]

The *Dorsey* court had no reason to consider whether the exclusionary rule applied to violations of the knock and announce rule, and it is readily apparent from the above language that it did not intend to hold that it does.

b. The authority cited in Dorsey does not require suppression here.

The *Dorsey* majority drew its conclusion about the exclusionary rule from the Delaware Supreme Court's decision in *Rickards v. State.*[41] According to the *Dorsey* majority:

> That question is not an issue of first impression. Fifty years ago, in *Rickards,* this Court held that a violation of the Delaware Constitution's right not to be searched pursuant to a warrant that was issued without probable cause required a constitutional remedy-exclusion of the illegally seized items from evidence at trial. The majority has concluded that *Rickards* was correctly decided and has applied that venerable construction of the Delaware Constitution to this case.[42]

But *Rickards* does not require exclusion of evidence seized following a violation of the knock and announce rule. Rather, it applies only when there is a causal connection between the constitutional violation and the seizure of the evidence:

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[40] *Id.* at 820 (italics in the original, bold added).
[41] 77 A.2d 199 (Del. 1950).
[42] 761 A.2d at 820 (footnote omitted).

> [T]he rule now followed in the Federal Courts is that evidence **obtained illegally as a result of the violation** of a Federal Constitutional guarantee may be objected to at trial and excluded from evidence. * * * The proper rule to be applied in the criminal courts of this state is that evidence **obtained by a violation** of constitutional guarantees is inadmissible at the trial of the person whose guarantees have been violated, if timely objection is made hereto.[43]

In the case at bar, unlike that in *Dorsey* and *Rickards*, there is no causal connection between the violation of the knock and announce rule and the seizure of the drugs and weapons in Upshur's home. Those items were seized as a result of a concededly valid warrant. At most the constitutional violation here hastened the seizure by a few seconds.[44] *Rickards* itself would, therefore, not require that the evidence be excluded.

c. Opinions following Dorsey suggest there is no blanket rule.

Finally, opinions of the court following *Dorsey* reaffirm that the exclusionary rule does not invariably require exclusion of evidence seized in violation of the Constitution. In its 2008 opinion in *Lopez-Vazquez v. State*,[45] the Delaware Supreme Court cataloged several exceptions to the exclusionary rule: "the independent source doctrine, the inevitable discovery doctrine, the exigent circumstances doctrine and the attenuation doctrine." Those exclusions all presuppose a seizure in

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[43] *Rickards v. State,* 77 A.2d 199, 204-5 (Del. 1950) (emphasis added).

[44] *See Cook v. State,* 374 A.2d 264 (1977) (holding evidence admissible when constitutional violated "had the effect of simply accelerating the discovery.")(quoting Comment, The Inevitable Discovery Exception to the Constitutional Exclusionary Rules, 74 Col. L. Rev. 88, 91 (1974)).

[45] 956 A.2d 1280 (Del. 2008).

violation of the constitution. The following year it applied two of those exceptions in *Norman v State:*

> Two closely-related exceptions to the exclusionary rule flow from the premise that, although the government ought not profit from its own misconduct, it also should not be made worse off than it would have been had the misconduct not occurred. First, where the challenged evidence has an independent source, exclusion would put the police in a worse position than they would have been absent any error or violation. Thus, under the "independent source doctrine," even if police engage in illegal investigatory activity, evidence will be admissible if it is discovered through a source independent of the illegality. Second, exclusion of evidence that would inevitably have been discovered would similarly put the government in a worse position, because the police would have obtained that evidence even if no misconduct had occurred. Thus, under the "inevitable discovery doctrine," a court may admit illegally obtained evidence if the evidence would inevitably have been discovered through independent, lawful means. [46]

Although *Lopez-Vazquez* and *Norman* both involved application of rights guaranteed by the federal constitution, logic requires that these holdings apply with equal force to article I section 6. The Supreme Court, of course, does not automatically examine article I, section 6 every time it is confronted with a search and seizure issue.[47] Nonetheless, it is safe to say that if the *Dorsey* court had intended that that the remedy for violations of article I, section 6 was invariably exclusion, there would never have been a need to consider exceptions to the exclusionary rule under the Fourth Amendment in *Lopez-Vasquez* and *Norman* because the

[46] 976 A.2d 843, 858 (Del. 2009). In *Norman* the court was writing about the Sixth Amendment right to the assistance of counsel. The Delaware Constitution also contains a right to counsel. *Del. Const.,* art. I, sec. 7.

[47] *See Hall v. State,* 981 A.2d 1106 (Del. 2009)(Court refused to consider state constitutional argument not raised below.): *Monroe v. State.* 2010 WL 5050863 (Del.)(Court refused to consider state constitutional argument presented in perfunctory manner).

evidence would have been suppressed under the Delaware Constitution notwithstanding those federal exceptions. This court is confident that the Supreme Court did not intend to undertake a meaningless analysis in *Lopez-Vasquez* and *Norman* and, therefore, concludes that the exceptions in those cases apply with equal force to violations of the state constitution.

2. The Delaware Constitution does not suggest that the exclusionary rule is the required remedy for knock and announce violations.

No where in the Delaware Constitution is there a reference to the exclusionary rule.[48] Nor does article I, section 16 mention any remedy for violations of its terms. Given this silence, it is necessary for the court to interpret that document.

The Delaware Supreme Court has mandated consideration non-exhaustive guidelines for use in determining whether a state constitutional guarantee is broader in scope than its federal counterpart. In *Jones v. State,*[49] the court employed a series of criteria first appearing in a concurring opinion in the New Jersey Supreme Court[50] when deciding whether a warrantless search of a suspect's pockets by a police officer violated article I, section 6. Those criteria were:

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[48] This is not the least bit surprising because the exclusionary rule did not make its first appearance in search and seizure cases until almost two decades following the adoption of the last state constitution. *Weeks v. United States,* 232 U.S. 383 (1914). Prior to *Weeks* there was "no barrier to the introduction in criminal trials of evidence obtained in violation of the [Fourth] Amendment." *Stone v. Powell,* 428 U.S. 465, 482 (1976).

[49] 745 A.2d 856 (Del. 1999).

[50] *State v. Hunt,* 450 A.2d 952, 962 (N.J. 1982) (Handler, J. concurring).

(1) Textual Language-A state constitution's language may itself provide a basis for reaching a result different from that which could be obtained under federal law. Textual language can be relevant in either of two contexts. First, distinctive provisions of our State charter may recognize rights not identified in the federal constitution....
Second, the phrasing of a particular provision in our charter may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis . . . .

(2) Legislative History-Whether or not the textual language of a given provision is different from that found in the federal Constitution, legislative history may reveal an intention that will support reading the provision independently of federal law . . . .

(3) Preexisting State Law-Previously established bodies of state law may also suggest distinctive state constitutional rights. State law is often responsive to concerns long before they are addressed by constitutional claims. Such preexisting law can help to define the scope of the constitutional right later established.

(4) Structural Differences-Differences in structure between the federal and state constitutions might also provide a basis for rejecting the constraints of federal doctrine at the state level. The United States Constitution is a grant of enumerated powers to the federal government. Our State Constitution, on the other hand, serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence, the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them.

(5) Matters of Particular State Interest or Local Concern-A state constitution may also be employed to address matters of peculiar state interest or local concern. When particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law. Moreover, some matters are uniquely appropriate for independent state action . . . .

(6) State Traditions-A state's history and traditions may also provide a basis for the independent application of its constitution . . . .

> (7) Public Attitudes-Distinctive attitudes of a state's citizenry may also furnish grounds to expand constitutional rights under state charters. While we have never cited this criterion in our decisions, courts in other jurisdictions have pointed to public attitudes as a relevant factor in their deliberations.[51]

Later opinions have made it clear that consideration of the *Jones* criteria is an essential element of any determination whether a provision of the Delaware Constitution is broader than its federal counterpart.[52]

Not all of these criteria are useful in every case, and it strikes the court that many of them are not pertinent here. Two – the history of the of the constitutional provision and Delaware policy issues –provide an insight: the knock and announce rule has been, at most, of secondary importance in protecting the privacy of Delaware citizens.

a. The pertinent constitutional history

Although the Delaware Supreme Court has produced some scholarly analyses of the common law as it relates to our state constitution, it can be a risky business for judges to take on the role of historian, particularly when the antecedents in English common law of our Bill of Rights are concerned. Indeed, scholars who specialize in this

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[51] 745 A.2d at 864-5 (footnotes omitted).

[52] *Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009)(" To present properly an alleged violation of the Delaware Constitution, a defendant must discuss and analyze one or more of the following non-exclusive criteria [as set forth in *Jones*] 'textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes.' ")

sort of thing often disagree–the original intent and meaning of the Fourth Amendment has been a particular focus of scholarly debate.[53] The amount of scholarly research on the origins and meaning of the Fourth Amendment is staggering. One scholar, William J. Cuddihy, wrote a monumental dissertation on the history of English and colonial search and seizure law which Justice O'Connor described as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken."[54] Cuddihy's tome, titled *The Fourth Amendment: Origins and Original Meaning 602 – 1791*, consumes 940 pages in its printed form.[55] But even with the benefit of voluminous scholarly research, historical analysis of legal issues – particularly at the state and local levels – is made difficult because key information has often been lost to history. For example, despite the herculean efforts of Claudia Bushman and her colleagues,[56] it is possible to reconstruct only a portion of the debates leading to the Delaware Constitution of 1776.[57]

As tempting as it might be to avoid the briar patch of legal history, it is often not possible to do so when resolving Fourth Amendment issues. In referring to the Fourth Amendment, Justice Frankfurter wrote

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[53] Clancy, *The Role of History,* 7 Ohio State Journal of Criminal Law 811 (2010)(discussing debates among scholars as to the meaning and intent of the Fourth Amendment).

[54] *Verona School Dist. 47J v. Acton,* 515 U.S. 1, 15 (1995)(O'Connor, J. dissenting).

[55] Oxford University Press 2009.

[56] Claudia L. Bushman et al., *Proceedings of the Assembly of the Lower Counties on Delaware 1770-1776, of the Constitutional Convention of 1776, and of the House of Assembly of the Delaware State 1776-1781* 198-215 (1986).

[57] The contemporaneous Delaware materials still available to us do not contain any indication of discussion of the knock and announce rule.

"these words are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to these words."[58] Later jurists have repeated the necessity of understanding the history of searches and seizures before applying the guarantees relating to them.[59] The court, with some trepidation, must therefore briefly step into the thicket.

The history of article I section 6 can be said to have begun with the British use of writs of assistance and general warrants. "The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws."[60] A general warrant authorized the crown's agents to search for anything in any place at any time.

Stirrings against the writs began well before the revolution. In February, 1761 James Otis participated in a debate in Boston in which he passionately denounced writs of assistance, labeling them "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer."[61] Years later John Adams, who was in attendance when Otis delivered his impassioned plea, wrote "then and there was the

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[58] *United States v. Rabinowitz,* 339 U.S. 56, 69-70 (1950)(Frankfurter, J, dissenting).
[59] See e.g. *Oliver v. United States*, 466 U.S. 170, 181 (1984).
[60] *Stanford v. Texas,* 379 U.S. 476, 481 (1965).
[61] Quoted in *Boyd v. United States,* 116 U.S. 616, 625 (1886).

first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of independence was born."[62]

Not long thereafter the colonists received support from an unlikely source – the Chief Justice of Common Pleas in London. In 1762 Lord Halifax issued a warrant directing several of the King's messengers "to make a strict and diligent search for . . . the author . . . of very seditious papers entitled 'The Monitor or British Freeholder.'" On November 11 Nathan Carrington and three other King's messengers broke into the London home of John Entick under the authority of Halifax's writ and seized his personal papers. Entick brought suit which was heard before Charles Pratt, Earl of Camden and Chief Justice of the Common Pleas. In a judgment which reverberated in the colonies across the Atlantic, Lord Camden ruled that the seizure of Entick's papers was illegal:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges,

[62] *See Davis v. United States*, 328 U.S. 582, 604 (1946); *Payton v. New York*, 445 U.S. 573, 621 n.21 (1980); *Mason v. State*, 534 A.2d 242, 246 (Del. 1987).

> who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.[63]

Because of this decision and his later opposition to taxation of the colonies, Lord Camden became immensely popular among the colonists, who in appreciation named several sites after him, among them Camden, New Jersey,[64] Camden, S.C.,[65] what is now Camden Yards in Baltimore,[66] Camden, Maine[67] and (perhaps) Camden, Delaware.[68]

Despite the ruling in *Entick*, the use of writs of assistance and general warrants continued in the colonies, and the founders' hatred of them remained unabated. At the outbreak of the revolution, many of the colonies enacted declarations of rights and constitutions, which, as our Supreme Court points out,[69] spawned the Bill of Rights. If they are any guide, the concerns of the newborn nation had little to do with the knock and announce rule. Rather, these early provisions were a response to Great Britain's use of general warrants.

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[63] *Entick v. Carrington,* 19 Howell's State Trials 1029 (1765). It is difficult to overstate the significance of *Entic* in England. The United States Supreme Court labeled *Entick* a "monument of English freedom." *Boyd v. United States,* 116 U.S. 616, 626 (1886). And one scholar wrote that the writ issued by Lord Halifax "produced the first and only major litigation in the English courts in the field of search and seizure." T. Taylor, *Two Studies in Constitutional Interpretation I26 (1969)*.

[64] http://www.ci.camden.nj.us/history/townsites.html.

[65] www.historic-camden.net.

[66] A. Amar, *Forward*: *Lord Camden Meets Federalism—Using State Constitutions to Counter Federal Abuses,* 27:4 Rutgers L. Journal 845 (1996).

[67] G. Varney, History of Camden Maine from *A Gazetteer of the State of Maine* (1886); http://history.rays-place.com/me/camden-me.

[68] http://historiccamdende.org/camden-history-dyer.php, Dyer, Patrick, *A History of the Town of Camden*, 2010 (stating that the roots of the town's name are unknown and that the name "Camden" first appeared in a 1788 deed).

[69] *Jones v. State,* 745 A.2d 856 (Del. 1999) .

The earliest of these was the Virginia Declaration of Rights, published before the Declaration of Independence, which provided in pertinent part:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not names, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.[70]

Shortly after publication of the Virginia Declaration of Rights, North Carolina echoed the same sentiment:

> The general warrants – whereby an officer or messenger may be commanded to search suspected places, without evidence of the fact conmlittecl (sic), or to seize any person or persons, not names, whose offences are not particularly described, and supported by evidence – are dangerous to liberty, and ought not to be granted.[71]

Maryland also condemned general warrants:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants - to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special – are illegal, and ought not to be granted.[72]

Pennsylvania' declaration of rights likewise proscribed general warrants:

> That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to

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[70] Virginia Declaration of Rights, art. X (June 12, 1776).
[71] North Carolina Declaration of Rights, art. XI (Dec. 18, 1776).
[72] Maryland Declaration of Rights, art. 23 (July 11, 1976)

> seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted[73]

Vermont's declaration was worded similarly to Pennsylvania's:

> That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted[74]

Finally, and most importantly for present purposes, Delaware's Declaration of Rights was also directed at general warrants:

> SECT. 17. That all warrants without oath to search suspected places, or to seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend all persons suspected, without naming or describing the place or any person in special, are illegal and ought not to be granted.

These early documents show that the knock and announce rule played no prominent role in the development of the Fourth Amendment. Indeed, none of early constitutions or declarations of rights made mention of common law knock and announce rule. There is little debate that warrantless searches and general warrants were the primary motivation behind the Fourth Amendment. In *Chimel v. California*[75] the Supreme Court wrote that the Fourth Amendment "was in large part a reaction to the general warrants and warrantless searches that so alienated the colonists and helped speed the movement for

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[73] Pennsylvania Declaration of Rights, art. X (1776).
[74] Vermont Const. art XI (July 8, 1777).
[75] 395 U.S. 752 (1969).

independence."[76] In more recent cases the Supreme Court has referred to writs of assistance and general warrants as the "principal target"[77] and elsewhere as the "immediate object"[78] of the Fourth Amendment.

What later became the Fourth Amendment was likely conceived by George Mason of Virginia. Mason, who attended the constitutional convention in Philadelphia, was opposed to the constitution because it contained no declaration of rights. After the constitutional convention Mason became a key figure in Virginia's ratification convention. He persuaded the ratification convention to urge adoption of amendments to the constitution expressly guaranteeing certain rights, including the right to be free from unreasonable searches and seizures and warrantless searches. New York, North Carolina and Rhode Island included similar requests, taken almost *verbatim* from Mason's work, in their ratification messages. In 1789 the Congressman James Madison introduced 17 proposed amendments taken largely, if not entirely, from the Virginia ratification document. The Senate later reduced these to twelve which were submitted to the states for ratification on September 25, 1789.[79]

To be sure, the scope of the Fourth Amendment extends beyond general warrants and warrantless searches,[80] but the conclusion is inescapable that its primary purpose was the prohibition of general

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[76] *Id.* at 761.
[77] *Groh v. Ramierez,* 540 U.S. 551 (2004).
[78] *Virginia v. Moore* 553 U.S. 164, 168 (2004).
[79] R. Carter Pittman, *Our Bill of Rights: How it came to be,* http://rcarterpittman.org/essays/Bill_of_Rights
[80] *Payton v. New York*, 445 U.S. 573, 584 (1980).

warrants and warrantless searches. There is little or no local history showing that anything other than fear of warrantless searches fostered the enactment of article I, section 6. Indeed the Pennsylvania Supreme Court has noted that "at the time the Pennsylvania Constitution was drafted in 1776, the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen."[81] The court concludes, therefore, that the knock and announce rule played, at most, a minor role in the enactment of article I, section 6.

b. Delaware policy issues

The courts of this state have long recognized that ultimate arbiter of public policy in this state is the General Assembly.[82] The enactments of that body provide an insight here: the knock and announce rule takes a back seat to the requirements of and a search warrant based on probable cause.

Unlike most other states[83], the General Assembly has not seen the need to codify the knock and announce rule. In 1951[84] the General Assembly enacted what now appears as chapter 23 of title 11. The purpose of this enactment was "to implement Article 1 Section 6 of the Delaware Constitution".[85] The chapter contains statutes concerning a myriad of matters relating to searches and seizures, but not one word is

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[81] *Commonwealth v. Edmunds,* 596 A.2d 887, 897 (Pa. 1991).
[82] *Ames v. Wilmington Hous. Auth.*, 233 A.2d 453, 456 (Del. 1967).
[83] *Commonwealth v. Newman*, 240 A.2d 795, 797 n.1 (Pa. 1968) (A majority of other states have specific announcement statutes").
[84] 48 Del. Laws c. 303.
[85] *State v. Phillips*, 366 A.2d 1203, 1207 (Del. Super. 1976).

mentioned about the knock and announce rule. Elsewhere the Delaware Code contains provisions relating to the arrest and seizure of suspects.[86] Again, there is nary a mention of the knock and announce rule. It is manifest, therefore, that the General Assembly has, unlike other aspects of search and seizure, never viewed the knock and announce rule of such significance as to warrant legislative attention.

c. Case law from other jurisdictions

Reference to other states' interpretation of their respective constitutions can sometimes provide guidance in interpreting our own. "Horizontal federalism permits the states to look to the jurisprudence of sister states in defining the sovereign powers that have been reserved for state governments."[87] After the initial argument on this matter, the court brought to the attention of the parties some opinions from other states interpreting their respective constitutions and asked for supplemental submissions discussing these and any other pertinent decisions from other states. A close examination of the opinions upon which either side relies (including those first raised by the court) shows that none of them provides any meaningful guidance in interpreting the Delaware Constitution.

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[86] 11 *Del.C.* c.19.
[87] *Jones v. State,* 745 A.2d 856, 867 (Del. 1999).

Pennsylvania

Defendant relies upon the Pennsylvania Supreme Court's holding in *Commonwealth v. Chambers*[88] for the proposition that exclusion is the only appropriate remedy for violation of the knock and announce rule law. In *Chambers* the court wrote:

> The Commonwealth argues that the evidence should not be suppressed because exclusion of evidence is not automatically warranted for a violation of Rule 2007. While the exclusion of evidence will not be automatically applied as a remedy for every violation of the Pennsylvania Rules of Criminal Procedure concerning searches and seizures, exclusion of evidence may be appropriate where the violation "implicates fundamental, constitutional concerns, is conducted in bad faith or has substantially prejudiced the defendant." Commonwealth v. Mason, 507 Pa. 396, 406-407, 490 A.2d 421, 426 (1985); Commonwealth v. Morgan, 517 Pa. 93, 96, n. 2, 534 A.2d 1054, 1056, n. 2. The fundamental, constitutional concern implicated by the police officers' failure to comply with the "knock and announce" rule is the prohibition against unreasonable searches and seizures under Article I, § 8 of the Pennsylvania Constitution.
>
> As we stated earlier, the prohibition against unreasonable searches and seizures applies to the manner of the execution of a warrant. Rule 2007 is a procedural formulation of the common law rule requiring an officer to state his identity and purpose, but its genesis lies in this constitutional prohibition. The warrant was executed in an unreasonable manner in this case.
>
> We hold that the forcible entry without waiting a reasonable amount of time under the circumstances of this case violated Article I, § 8 of the Pennsylvania Constitution. Exclusion of evidence is the appropriate remedy for this violation.[89]

[88] 598 A.2d 539 (Pa. 1991).
[89] *Id*. at 542.

Ordinarily Pennsylvania opinions are significant because article I, section 6 was drawn directly from the Pennsylvania Constitution.[90] But *Chambers* is not of assistance in the present task because that court did not undertake an analysis of the Pennsylvania Constitution in order to reach its conclusion. A dozen years before *Chambers*, Justice Larsen of the Pennsylvania Supreme Court observed that "this Court has never fully considered whether the Pennsylvania Constitution itself compels exclusion of evidence in violation thereof."[91] Apparently, no full consideration was undertaken in the years intervening between Justice Larsen's comment and *Chambers*. The previously quoted passage from *Chambers* shows that the court did not consider the language or history of the Pennsylvania Constitution but instead relied upon only two opinions – *Commonwealth v. Mason*[92] and *Commonwealth v. Morgan*[93] – for the proposition that the Pennsylvania Constitution mandates suppression as the remedy for a knock and announce violation. Neither opinion, however, supports that proposition. In *Mason*, the Pennsylvania Supreme Court was confronted with the question whether violation of a procedural rule required exclusion. In reaching its decision about the

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[90] *Jones v. State,* 745 A.2d 857, 866 (Del. 1999)("We reach the same conclusion [as the Pennsylvania Supreme Court] with regard to the search and seizure provision in the Delaware Constitution based upon its historical convergence for more than two hundred years with the same provision in the Pennsylvania Constitution").

[91] *Commonwealth v. DeJohn*, 403 A.2d 1283, 1294 (Pa. 1979) (Larson, J., concurring in part and dissenting in part).

[92] 490 A.2d 421 (Pa. 1985).

[93] 534 A.2d 1054 (Pa. 1987).

procedural rule, the Mason court expressly disavowed any opinion as to whether the Pennsylvania Constitution required exclusion:

> We express no opinion at this time, however, as to whether the Pennsylvania Constitution itself, Article I Section 8, would compel the exclusion of evidence obtained in violation thereof, nor as to whether a state constitutional exclusionary rule would be applied in a manner co-extensive with its federal counterpart.[94]

The only other authority cited in *Chambers* – *Commonwealth v. Morgan* – is likewise of no help here. The Pennsylvania Supreme Court in *Morgan* found no violation of the knock and announce rule and made no reference whatsoever to the Pennsylvania Constitution in its opinion.

New Mexico

Defendant asserts that the New Mexico Court of Appeals held in *State v. Ulibarri*[95] that the New Mexico constitution required application of the exclusionary rule when the police violate the knock and announce rule. An examination of the genealogy of the cases cited by the court of appeals shows that *Ulibarri* is not helpful in applying the Delaware constitution. The *Ulibarri* court simply quoted *State v. Vargas,*[96] in which the New Mexico Supreme Court wrote in dictum[97] that:

> [a] failure to comply with this [knock and announce] requirement may result in a determination that the search was constitutionally unreasonable, and application of the exclusionary rule to any evidence seized as a result of such search.[98]

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94 *Mason*, at 425, n.2.
95 240 P.3d 1050 (N.M. 2010).
96 910 P.2d 950 (N.M. App. 1996).
97 The *Vargas* court found no violation of the knock and announce rule and thus had no occasion to consider the appropriate remedy for a violation of that rule.
98 *Vargas*, 910 P.2d at 953.

The *Vargas* court in turn cited to only the United States Supreme Court's opinion in *Wilson v. Arkansas*[99] and the New Mexico Supreme court's opinion in *State v. Attaway.*[100] As might be expected, *Wilson* arose from a criminal prosecution in Arkansas; the sole issue in that case was whether the knock and announce rule was embodied in the Fourth Amendment of the federal constitution. In *Attaway,* the New Mexico Supreme court merely decided that the knock and announce rule was embodied in the New Mexico constitution. Neither of these cases even considered the appropriate remedy for violation of the knock and announce rule, much less whether any such violation required the exclusion of the evidence seized. In sum, none of the New Mexico cases contains an exegesis of the application of the exclusionary rule to violation of New Mexico's state constitutional knock and announce rule.

Indiana

Defendant also refers to *Lacey v. State*,[101] a decision from an intermediate court of appeals in Indiana. The Indiana Supreme Court has agreed to hear that case,[102] and, in accordance with the Indiana Rules of Appellate Procedure, the opinion in *Lacey* has been vacated.[103] But even if the court were to consider the vacated opinion in *Lacey*, it

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[99] 514 U.S. 927 (1995).
[100] 870 P.2d 103 (N.M. 1999).
[101] 931 N.E. 2d 378 (Ind. App. 2010).
[102] 940 N.E. 2d 828. The Indiana Rules of Appellate Procedure provide for a discretionary "transfer" to the Indiana Supreme Court. *Ind. R. App. Proc. 57*. This Process appears to be similar to a petition for a writ of certiorari to the United States Supreme Court.
[103] Ind. R. App. Proc. 58(A).

would not find it helpful because there were certain key elements in *Lacey* which are not present in the instant case. For example, unlike Delaware, Indiana has a statute authorizing magistrates to issue no-knock warrants. The *Lacey* court found that the Emergency Service Team which executed the warrant routinely and systematically executed warrants in a no-knock manner without first obtaining the approval of a neutral magistrate. It is apparent that regular unilateral decisions to ignore the no-knock warrant statute drove the decision to impose exclusion as the remedy. According to the *Lacey* court:

> Here, we are not concerned with a decision to disregard the "knock and announce" requirement predicated upon emerging exigent circumstances. Rather, we are concerned with an emergency response team policy that authorizes a unilateral decision to enter into a home without knocking when there has been no independent determination regarding the circumstances. As such, we find that suppression is the appropriate remedy for dealing with this Indiana constitutional violation.

In the present case there is no claim, nor is there any evidence, that police have, as a matter of practice, ignored the knock and announce rule. The only evidence here is of a single, highly technical, violation of the rule in which no harm occurred as a result. The court is unwilling to imprint on the Delaware Constitution a drastic remedy on the basis of a rule born in a vacated opinion in another state under such radically different circumstances.

Florida

Defendant points to the Florida Supreme Court's opinion in *State v. Cable*[104] in which it refused to apply *Hudson v. Michigan* to Florida's statutory codification of the knock and announce rule. In 1964 the Florida Supreme Court held in *Benefield v. State*[105] that the remedy for violation of Florida's statutory knock and announce rule was exclusion of the evidence seized. At issue in *Cable* was whether Florida should "recede" from *Benefield* in light of *Michigan v. Hudson*. The *Cable* court looked to traditional Florida criteria in deciding whether to recede from *Benefield*:

> Before overruling a prior decision of this Court, we traditionally have asked several questions, including the following. (1) Has the prior decision proved unworkable due to reliance on an impractical legal "Fiction"? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?[106]

It found that none of those criteria was satisfied. The *Cable* court further justified its decision not to recede from *Benefield's* application of the Florida knock and announce statute because in the fifty years since that decision there had been no legislative response to it:

> The fact that *Benefield* has been the law since 1964 and the fact that the statute has not been amended by the Legislature to prohibit the remedy of exclusion are further

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[104] 51 So. 3d 434 (Fla. 2010).
[105] 160 So. 2d 706 (Fla. 1964).
[106] 51 So. 3d at 422 (quoting *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003)).

> considerations in favor of not receding from *Benefield*. As we have observed, long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction.[107]

In short, *Cable* has everything to do with *stare decisis* and little to do with constitutional interpretation. Consequently it is not helpful here.

Maryland

The State refers the court to *Ford v. State,*[108]which is not helpful because Maryland courts have held that the Maryland Constitution does not provide for an exclusionary rule arising from the Maryland Constitution. Because the Delaware Supreme Court's held in *Dorsey*[109] that the exclusionary rule has a state "constitutional dimension," the reasoning in *Ford* is not helpful here.

Illinois

The State points to the Illinois Court of Appeals' decision in *People v. Glorioso*[110] which found that an Illinois constitutional provision similar to article I, section 6 does not require suppression of evidence seized after violation of the knock and announce rule. The *Glorioso* court held that "[w]ith limited exceptions, our supreme court has construed article I, section 6 [of the Illinois Constitution], in 'lockstep' with the Supreme Court's construction of the fourth amendment."[111] The Delaware Supreme Court has a much different

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[107] 51 So. 3d at 443 (internal quotation marks omitted).
[108] 967 A.2d 210 (Md. App. 2009.)
[109] 761 A.2d 807 (Del. 2000).
[110] 924 N.E.2d 1153 (Ill. App. 2000).
[111] *Id.* at 1154

view: "Delaware judges cannot faithfully discharge the responsibilities of their office by simply holding that the Declaration of Rights in Article I of the Delaware Constitution is necessarily in 'lock step' with the United States Supreme Court's construction of the federal Bill of Rights."[112] The opinion in *Glorioso* is therefore not of assistance here.

C. The Remedy

The issue here is relatively straight forward: Is the exclusionary rule the appropriate remedy and, if not what is?

1. The exclusionary rule is not an appropriate remedy here

There are at least three reasons why the exclusionary rule is not an appropriate remedy for violations of the knock and announce rule. First, it is contrary to the framers' intent. Second, in this context the social costs it exacts far outweigh its value. Third, there is an

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[112] *Dorsey v. State,* 761 A.2d 807, 814 (2000).

Despite the language in *Dorsey,* the Delaware Supreme Court recently appeared to apply the lockstep rule to the due process clause in the state constitution.. In *Sheehan v. Oblates of St. Francis de Sales,* 2011 WL 592186 *7 (Del.) the Court observed:

> Historically, the due process clause of the Delaware Constitution has substantially the same meaning as the due process clause contained in its federal counterpart The expression "due process of law, as it appears in the Constitution of the United States, and the expression 'law of the land' as used in the Delaware Constitution, have generally been held to have the same meaning." When considering "a case of due process under our Constitution we should ordinarily submit our judgment to that of the highest court of the land, if the point at issue has been decided by that Court."

See also, In re 1982 Honda, 681 A.2d 1035, 1038 (Del. 1996)("Since the two clauses [the double jeopardy clauses of the federal and Delaware constitutions] contain substantially identical language, they should be interpreted consistently.") (internal quotation marks omitted).

insufficient nexus between the violation and the evidence seized to justify application of the rule.

a. The exclusionary rule in this context is contrary to the framers' intent

Application of the exclusionary rule to the knock and announce rule would be contrary to the intent of the framers of our state constitution. In *Dorsey v. State*[113] the majority of the Delaware Supreme Court wrote that "[i]n our view, it is logical to infer that by specifically adopting the existing common law of England, the framers of Delaware's first Constitution and Declaration of Rights contemplated that there would be a remedy for the violation of the right to be free from illegal searches and seizures."[114] This does not mean, however, that suppression is the remedy for violation of the knock and announce rule. The exclusionary rule was unknown at common law. In *Olmstead v. United States*[115] the United States Supreme Court noted in 1928 that the "common-law rule is that the admissibility of evidence in not affected by the illegality of the means by which it was obtained." Seventy years later, the Third Circuit stated that "the exclusionary rule was not part of the common law."[116] Thus it is not possible to ascribe an intent to the

[113] 761 A.2d 807 (Del. 2000).
[114] *Id.* at 816-7 (footnotes omitted).
[115] 277 U.S. 438 (1928), *overruled on other grounds, Katz v. United States,* 389 U.S. 347 (1967).
[116] *Hector v. Watt,* 235 F.3d 154, 156 (3d Cir. 2000); *United States v. Rodriguez*, 596 F.2d 169, 173, n. 9 (6th Cir. 1979) ("The exclusionary rule did not exist at common law."); *Ford v. State*, 967 A.2d 210 (Md. 2009)(same).

framers that evidence seized in violation of the knock and announce rule be suppressed.

The Delaware Supreme Court concluded in *Jones* that the exclusionary rule has a state "constitutional dimension," but extending that constitutional dimension beyond the holding in *Jones* to a realm clearly not contemplated by the framers—suppression for violation of the knock and announce rule – requires something more than abstract references to the right of privacy. "[A] doctrine that has been accepted as the law for more than a hundred years [and] finds some support in the practice of the English courts prior to the adoption of the Constitution will not lightly be reconsidered or disturbed."[117] This is not to say that the Delaware Constitution is written in stone. The framers of article I section 6 could not even have dreamed of technological developments such as computers, sophisticated wire tap devices and global position systems. Thus the interpretation and application of article I section 6 must have sufficient flexibility to accommodate changes. But the remedy that defendant asks this court to apply is not a response to technological changes. Thus this court must look twice before leaping from the framers' intent.

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[117] *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 458 (1996); *Accord*, *Washington v. Glucksburg,* 521 U.S. 702, 720 (1997) ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field"); *Payton v. New York* 445 U.S. 573, 600 (1980) ("A longstanding, widespread practice is not immune from constitutional scrutiny. But neither is it to be lightly brushed aside.").

b. The social costs of the rule in this context far outweigh its benefit

(1.) The remedy should be the least drastic one which protects the interests at issue.

The draconian nature of the exclusionary rule requires that it be viewed as the remedy of last resort. "Because of the inherent trustworthiness of seized tangible evidence and the resulting social costs from its loss through suppression, application of the exclusionary rule has been carefully restricted to those areas where its remedial objectives are thought most efficaciously observed."[118]

The idea that the courts do not reflexively opt for the exclusionary rule is also found in Delaware's jurisprudence. In *Harris v. State,*[119] the Delaware Supreme Court was required to determine the appropriate remedy for an unnecessarily suggestive show-up. In the course of its analysis the court quoted with approval the following passage from the Seventh Circuit's opinion in *Kirby v. Sturges:*[120]

> 'Since the constitutional error that the rule is intended to avoid is an unfair trial, rather than merely an unfair identification, **before an inflexible exclusionary rule is adopted it is appropriate to consider less drastic methods of avoiding the danger of unfairness.** It is important to remember that identification testimony normally has some probative significance even if the identification procedure was unnecessarily suggestive. The risk of unfairness stems from the danger that juries may attach more weight to the evidence than it actually warrants. That danger can be minimized by appropriate

[118] *Illinois v. Gates.* 462 U.S. 213, 254 (1983) (internal quotation marks omitted).
[119] 350 A.2d 768 (Del. 1975).
[120] *United States ex rel. Kirby v. Sturges,* 510 F.2d 397 (7th Cir.) *cert. denied* 421 U.S. 1016 (1975).

> cautionary instructions. A rule which invariably required the exclusion of evidence, no matter how slight the danger that the particular trial was actually unfair, would be at odds with our well-settled interpretation of the due process clause as providing **'an elastic, flexible standard which varies with the attendant circumstances**[121]

When determining the efficacy of the exclusionary rule courts weigh the benefits of deterrence against the social costs of the rule. "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial costs."[122] The rule is applied only when "the benefits of deterrence outweigh the costs."[123]

(2.) There is little benefit to be derived from application of exclusionary rule here.

When considering whether the exclusionary rule should be applied to knock and announce cases, one thing immediately comes to mind—the knock and announce rule fulfilled its purpose for 350 years without the benefit of an exclusionary rule. This history of fulfilling its purpose can be explained by the fact that the exclusionary rule has little deterrent value in the context of the knock and announce rule.

(a). There is no incentive for the police to violate the rule and a police officer's concern over his or her own safety provides an overwhelming incentive to comply with it

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[121] *Harris*, 350 A.2d at 773 (emphasis added).
[122] *Illinois v. Krull* 480 U.S. 340, 352 (1987).
[123] *Herring v. United States,* 555 U.S. 135 (2009).

The Delaware Supreme Court has stated that the primary purpose of the exclusionary rule is to deter future police misconduct.[124] The same is true in the federal courts. "The rule is calculated to prevent, not repair."[125]The exclusionary rule adds little deterrence to that which is inherent in the knock and announce rule itself. First, as the *Hudson* court concluded, there is little incentive for a police officer to ignore the knock and announce rule. The officer, armed with a warrant, is entitled to enter the house whether the occupant consents or not. The officer is assured, therefore, that compliance with the rule will not impede his or her ability to seize the evidence or make the arrest.[126]

(b.) The purpose of the rule provides its own incentive for police to comply with the rule.

Just as importantly, police officers already have an incentive for compliance with the rule which far exceeds any incentive the exclusionary rule might provide. An oft-repeated justification for the knock and announce rule is that it protects police officers and inhabitants from violent confrontations precipitated by the inhabitant's

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[124] E.g., *Norman v. State,* 976 A.2d 843, 858 (Del. 2009). The Supreme Court has also observed that the exclusionary rule under the state constitution is "correlative . . . to preserving the integrity of the judicial system in Delaware." *Jones v. State,* 745 A.2d 856, 873 (1999). Neither party to the instant dispute argues that this requires exclusion of the evidence here.

[125] *Brown v, Illinois*, 422 U.S. 590, 604 (1975). The exclusionary rule is wholly inadequate as a mechanism to repair constitutional violations. Suppose the police raid the wrong house and violate the knock and announce rule in doing so. The exclusionary rule provides nothing to the hapless occupant because nothing was seized from him. On the other hand, it would likely provide Upshur a get out of jail free card even though he suffered no injury as a result of the violation.

[126] In the event the officer has a good faith belief that compliance with the knock and announce rule will frustrate his or her ability to make the arrest or seize the evidence, the officer is free to dispense with compliance with the rule. *State v. Backus,* 2002 WL 31814777 (Del. Super.)

uncertainty as to who is entering his house. It is a reasonable assumption that a police officer has an instinctive and compelling interest in his or her safety and is, therefore, likely to comply with the knock and announce rule as a matter of self preservation.

(c.) Police officers are better trained than they were fifty years ago during the heyday of the exclusionary rule.

Another factor weighing against application of the exclusionary rule is the increased professionalism of the police. The Supreme Court held as much in *Hudson*:

> Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to "assume" that unlawful police behavior would "be dealt with appropriately" by the authorities, but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers." Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There is also evidence that the increasing use of various forms of citizen review can enhance police accountability.[127]

The Delaware General assembly has mandated training for police officers. Delaware law prohibits persons who have not graduated from

[127] 547 U.S. at 598-9.

an accredited police training program from serving as a police officer in this state.[128] In 2008 the General Assembly created the Delaware Police Accreditation Commission, the purpose of which is to develop a statewide police accreditation plan.[129] The State Police, New Castle County Police and Wilmington Police Department all operate rigorous training academies lasting several months which include academic training on criminal procedure matters, including search and seizure. Smaller police agencies send their recruits to one of these academies and police officers throughout the state attend continuing education courses and receive regular instruction on legal issues and developments.

(d.) The threat of internal discipline also acts as a deterrent.

Police officers are subject to discipline for misconduct. Typically allegations of misconduct are investigated by an internal affairs department. The larger police departments in the state maintain their own such units.[130] These units do not issue rubber stamp approvals of an officer's conduct. In 2009 the internal affairs unit of the state police investigated 45 alleged violations of state police rules and regulations; 38 of them were substantiated. And, in 2010 the University of Delaware substantiated 6 of 18 complaints filed against its officers.[131] Most likely law enforcement officers do not believe that substantiated complaints of

[128] 11 *Del. C.* § 8405.
[129] 11 *Del. C.* ch. 93.
[130] Smaller law enforcement agencies in the state use the services of the State Police for internal affairs matters.
[131] www.udel.edu.PublicSafety .

violation of regulations in their personnel file is a career enhancing development.

c. *The exclusionary rule exacts a high social cost.*

The lack of meaningful deterrent value of the exclusionary rule here is, by itself, dispositive of the question whether it should be applied. Where "the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted."[132] Nonetheless, the court will consider the other side of the balance beam–the substantial social costs exacted by the exclusionary rule. The exclusionary rule "deprives juries of probative evidence of a crime; and by depriving juries of probative evidence, the exclusionary rule often works at odds with society's interest in prosecuting and punishing criminals."[133] There is little, if any, dispute on this point. "Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest of law enforcement by proscription of what concededly is relevant evidence."[134] Benjamin Cardozo, while sitting on the New York Court of Appeals, put it succinctly: "the criminal is to go free because the constable blundered."[135]

This case underscores the high toll exacted by the exclusionary rule. Upshur literally suffered no injury—he knew the police were at his door

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[132] *United States v. Janis*, 428 U.S. 433, 454 (1976).
[133] *United States v. May,* 214 F.3d 900, 905-6 (7th Cir. 2000).
[134] *United States v. Janis, supra* at, 448-9 (1976).
[135] *People v. Defore,* 150 N.E. 585, 587 (N.Y.), cert. denied 270 U.S. 657 (1926).

and positioned himself on the floor in anticipation of their entry. On the other hand, if the exclusionary rule is applied, Upshur, a previously convicted felon and a person prohibited, will likely walk free despite the fact that a loaded firearm, drugs and drug paraphernalia were seized from his home pursuant to a valid warrant. This is surely what the Supreme Court had in mind when it wrote "Application of the rule thus deflects the truthfinding process and often frees the guilty. *The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.*"[136]

3. The seizure of the evidence is too attenuated from the constitutional violation to justify application of the exclusionary rule.

Application of the exclusionary rule requires, at a minimum, that there be some causal connection between the constitutional violation and the seizure of the evidence sought to be suppressed. In *Wong Sun v. United States*[137] the Court wrote

> We do not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that

[136] *Stone v. Powell,* 428 U.S. 465, 490 (1976) (emphasis added).
[137] 371 U.S. 471 (1963).

> illegality or instead by means sufficiently distinguishable to be purged of the primary taint. [138]

The necessity of a causal connection between the constitutional violation and the seizure is a long-standing one. In 1984, the Supreme Court observed that "[i]t has been well established for more than 60 years that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint.[139] Importantly, the existence of a causal connection, by itself, does not justify exclusion:

> [E]xclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not,* the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.' Rather, but-for cause, or causation in the logical sense alone, can be too attenuated to justify exclusion.[140]

An example from *Hudson* well illustrates the point. Suppose a suspect accused of shooting a police officer is brought to a station house for questioning. He is severely beaten by the police, and immediately thereafter "waives" his constitutional right to remain silent and gives the police a statement. A court would not hesitate to suppress that

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138 *Id.* at 486-7.
139 *Segura v. United States*, 468 U.S. 796, 805 (1984).
140 *Hudson v. Michigan,* 547 U.S. 586, 592 (2006) (internal citations omitted).

statement because the constitutional violation directly led to the police obtaining the statement. Suppose instead that the same suspect was brought to the stationhouse and gave a voluntary statement after proper administration of his *Miranda* warnings. Assume further that after the interrogation was concluded the suspect was set upon by police officers who beat him. No one seriously argues that the statement should be excluded because of the later beating because there was no causal connection between the constitutional violation and the police obtaining the statement.

Delaware has accepted and applied the so-called attenuation doctrine. Its most commonly appears in the form of the inevitable discovery doctrine, which was adopted by the Delaware Supreme Court in 1974. In *Cook v. State*[141]the Court upheld the admission of currency seized during a search which the Court assumed to be unreasonable. Quoting from a treatise, the Court summarized the rule as follows:

> The majority of the cases employing the inevitable discovery exception involve instances in which the illegal police conduct occurred while an investigation was already in progress and resulted in the discovery of evidence that would have eventually been obtained through routine police investigatory procedure. The illegalities in such cases, therefore, had the effect of simply accelerating the discovery. In general, where the prosecution can show that the standard prevailing investigatory procedure of the law enforcement agency involved would have led to the discovery of the questioned evidence, the exception will be applied to prevent its suppression.[142]

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[141] 374 A.2d 264 (Del. 1977)

[142] *Id.* at 268 (quotation marks omitted)

Defendant questions the vitality of *Cook*. Any such question has been put to rest by recent opinions from the Supreme Court applying the same rule.[143]

The present case is a classic example of inevitable discovery. SORT had a valid warrant to search Mr. Upshur's residence. It was therefore inevitable that they would discover the drugs, currency and weapon found in his home. Thus the constitutional violation is far too attenuated to justify exclusion of the seized evidence.

4. The appropriate remedy is a civil lawsuit

The appropriate remedy is the same one which apparently served the knock and announce rule in good stead for 50 years – a civil lawsuit for damages. This remedy is consistent with the intent of the authors of the Delaware constitution, is consistent with remedy under the federal constitution and provides a better remedy for aggrieved citizens than the exclusionary rule.

As discussed earlier, the exclusionary rule was unknown to the framers of our constitution and it is therefore highly unlikely that they intended the remedy for violation of the knock and announce rule to be suppression of the evidence seized. Rather it is almost certain that they intended the common law – a suit for damages – to apply. Surely the landmark case of *Entick v. Carrington* – Which was a civil suit for

[143] *Thomas v. State,* 8 A.3d 1195 (2010); *Hardin v. State,* 844 A.2d 982 (2004)

damages arising from an illegal search – was still on their minds when the Constitution of 1792 was drafted.

The Delaware Supreme Court has often repeated that the Bill of Rights may contain broader rights than those found in the United States Constitution and has held that judges in our state are forbidden from simply interpreting the Delaware Constitution in lockstep with its federal counterpart. What the Delaware Supreme Court has *never* said, of course, is that judges interpret those constitutions differently simply for the sake of divergence. In this instance this court believes there is much to be said for consistency with the United States Supreme Court's opinion in *Hudson*.

Even aside from its short-comings as a deterrent, the exclusionary rule is a poor remedy for violations of the knock and announce rule. Consider the hapless homeowner whose home is raided by the police because they are at the wrong address. The exclusionary rule provides him no remedy at all. On the other end of the spectrum are individuals like Mr. Upshur who stand to win a get out of jail free card even though he suffered no injury whatsoever as a result of the knock and announce violation.

Upshur scoffs at the prospect that an attorney would be willing to represent a victim of a knock and announce violation. His point may have been well taken when the Supreme Court first applied the exclusionary rule to the states. But things have changed since then. In

2000, Congress enacted the Civil Rights Attorneys Fees Act which provided for the award of attorneys fees to prevailing plaintiffs in civil rights actions.[144] This statute was intended to address the purported unwillingness of attorneys to take on civil rights cases because of the poor prospect of a fee. The prospect of an attorney recovering fees is not merely a fanciful notion—in 2002, for example, the Eastern District of Pennsylvania awarded $34,660 in attorneys fees for the prosecution of a civil rights suit based in part on a violation of the knock and announce rule.[145]

It is no answer, as Upshur suggests, that police officers are insured and, therefore, are indifferent about lawsuits. It is an open question whether officers are, in fact, insured. Further, just as in the case of substantiated internal affairs complaints, a successful lawsuit against even an insured officer is likely a detriment to career advancement.

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For the foregoing reasons, the court finds that a civil suit for damages is more consistent with the intent of the framers of our constitution and is a more workable remedy for violation of the knock and announce rule than the exclusionary rule. The motion to suppress is therefore **DENIED**.

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[144] 42 *U.S.C.* §1988.
[145] *Buss v. Quigg,* 2002 WL 312 62060 (E.D. Pa.).

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John A. Parkins, Jr.

Dated: April 13, 2011

oc: Prothonotary