No. 04-1360

In The Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the inevitable discovery doctrine create a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and annuonce" violation?

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ORDERS AND OPINIONS BELOW

The Michigan Court of Appeals' May 1, 2001, order peremptorily reversing the trial court's decision to suppress the evidence found in Petitioner's home is unreported. Pet. App. 4. The Michigan Supreme Court's December 18, 2001, order denying Petitioner's application for leave to appeal from that order is reported as *People v. Hudson*, 639 N.W.2d 255 (Mich. 2001). Pet. App. 5.

The Michigan Court of Appeals' June 17, 2004, opinion affirming Petitioner's conviction is unreported. Pet. App. 1-2. The Michigan Supreme Court's January 31, 2005, order denying Petitioner's application for leave to appeal from that opinion is reported as *People v. Hudson*, 692 N.W.2d 385 (Mich. 2005). Pet. App. 3.

JURISDICTION

The Michigan Supreme Court's order denying Petitioner's application for leave to appeal was entered on January 31, 2005. The petition for writ of certiorari was timely filed on April 4, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

STATEMENT OF THE CASE

On the afternoon of August 27, 1998, approximately seven Detroit police officers arrived at the home of Petitioner Booker T. Hudson, Jr., to execute a search warrant for narcotics. J.A. 4-5, 8. There is no evidence in the record that the officers had any reason to believe that anyone in the home would attempt to destroy evidence, escape, or resist the execution of the warrant. Officer Jamal Good, the first member of the raiding party to enter the house, testified that he did not see or hear any activity inside the home as the officers approached the door. Pet. App. 8.

Upon arriving at the door to Petitioner's home, some of the officers shouted, "Police, search warrant." Pet. App. 7; J.A. 19. The officers did not knock, and they waited only three to five seconds before opening the door and entering. Pet. App. 8-9; J.A. 7-8, 19. Officer Good explained that the brief delay between the announcement and his entry was "[a]bout how long it took me to go in the door," Pet. App. 8, and he characterized the entry after the announcement as "[r]eal fast." J.A. 19. Officer Good confirmed that the officers did not wait to see if anyone would answer the door. Pet. App. 9; J.A. 8, 20.

Immediately upon entering the home, Officer Good found Petitioner seated in a chair in the living room and ordered him to freeze. J.A. 5-6, 18, 20. After walking through the home and encountering several other people, Officer Good returned to the living room and searched

Petitioner. J.A. 6-7, 20. Officer Good found five rocks of crack cocaine in Petitioner's pants pocket. J.A. 6-7.

Based on the cocaine found in Petitioner's pants, as well as additional cocaine and a gun that the police found elsewhere in the house, Petitioner was charged in Wayne County Circuit Court with possession of cocaine with intent to deliver and possession of a firearm during the commission of a felony ("felony firearm"). J.A. 1. Petitioner moved to suppress the evidence found in his home on the ground that the police had violated the Fourth Amendment and Michigan law by failing to knock and announce before entering his home. J.A. 9-12.

While Petitioner's motion to suppress was pending in the trial court, the Michigan Supreme Court held in *People v. Stevens*, 597 N.W.2d 53, 59-62 (Mich. 1999), that evidence found after a Fourth Amendment knock and announce violation is not subject to suppression. According to *Stevens*, suppression is "not an appropriate remedy" because the evidence "would have been inevitably discovered . . . had the police adhered to the knock-and-announce requirement." *Id.* at 62.

At the evidentiary hearing on Petitioner's motion to suppress, Officer Good testified that he and the other officers did not knock and that they waited only three to five seconds after announcing their presence before entering Petitioner's home. Pet. App. 7-9. After this testimony, the prosecutor conceded that the police had violated the knock and announce requirement. Pet. App. 9-10. The trial court suppressed the evidence and dismissed the charges against Petitioner. Pet. App. 10.

Respondent appealed to the Michigan Court of Appeals and moved for peremptory reversal of the trial

court's order. In its brief, Respondent agreed that the officers "may have violated . . . the Fourth Amendment" but, relying on *Stevens*, argued that the evidence found after the violation was not suppressible. J.A. 13-14. Petitioner responded by arguing that *Stevens* was contrary to the decisions of this Court. J.A. 15-16. On May 1, 2001, the Michigan Court of Appeals peremptorily reversed the suppression order on the basis of *Stevens* and *People v. Vasquez*, 602 N.W.2d 376 (Mich. 1999), in which the Michigan Supreme Court reaffirmed *Stevens*. Pet. App. 4.

Petitioner then filed a timely application for leave to appeal to the Michigan Supreme Court in which he argued that *Stevens* and *Vasquez* were wrongly decided. On December 18, 2001, the Michigan Supreme Court denied Petitioner's application by a vote of five to two. Pet. App. 5. In its order, the Michigan Supreme Court reaffirmed its decisions in *Stevens* and *Vasquez* while acknowledging that the Sixth Circuit had reached a contrary conclusion in *United States v. Dice*, 200 F.3d 978 (6th Cir. 2000). Pet. App. 5.

Petitioner's case then returned to the Wayne County Circuit Court for trial. After a two-day bench trial, the judge found that the prosecution had failed to prove that Petitioner possessed the gun or most of the cocaine found in the home and therefore acquitted him of the charged offenses of felony firearm and possession of cocaine with intent to deliver. J.A. 21-22. The judge did, however, find Petitioner guilty of the lesser offense of possession of less than 25 grams of cocaine, based on the five rocks of cocaine found in his pants. J.A. 22. The judge sentenced Petitioner to probation for that offense. J.A. 23-24.

Petitioner appealed his conviction and again argued that the evidence found in his home should have been suppressed because of the knock and announce violation. The Michigan Court of Appeals affirmed Petitioner's conviction on June 17, 2004, observing that it was bound to uphold the admission of the evidence both by *Stevens* and *Vasquez* and by the law of the case doctrine. Pet. App. 1-2.

Petitioner then filed a timely application for leave to appeal to the Michigan Supreme Court in which he again argued that *Stevens* and *Vasquez* were wrongly decided. On January 31, 2005, the Michigan Supreme Court denied Petitioner's application by a vote of six to one. Pet. App. 3.

Petitioner filed a petition for writ of certiorari on April 4, 2005, and this Court granted the petition on June 27, 2005.

SUMMARY OF ARGUMENT

The evidence seized in a home following a knock and announce violation should be suppressed because the evidence is the fruit of an illegal entry. In fact, the Court has itself twice ordered the suppression of evidence found in homes following knock and announce violations. In those two cases and several others, the Court has specifically recognized that an entry is illegal when the police, without justification, violate the knock and announce requirement.

Given that an entry is illegal when the police violate the knock and announce requirement, the evidence found inside following such an entry is the direct and suppressible fruit of

the illegality, just as evidence must be suppressed following other forms of illegal police entry. Therefore, the Michigan Supreme Court erred in concluding that lawful authority to enter and search a home is a source of the evidence independent from the illegal entry into the home.

Since there was no independent process, there was no inevitable discovery. The inevitable discovery doctrine requires that the prosecution identify a source that would have produced the evidence by means independent of the tainted source that actually produced it. In Petitioner's case, there was no independent process and therefore no inevitable discovery because the police who violated the knock and announce requirement immediately barged into his home and seized the evidence.

The Michigan Supreme Court's version of the inevitable discovery doctrine would swallow the exclusionary rule. Under this version of inevitable discovery, a court cannot suppress evidence if doing so would place the prosecution in a worse position than it would have enjoyed had the police acted lawfully instead of unlawfully. This version of inevitable discovery is directly contrary to many cases in which this Court has excluded evidence and thereby placed the prosecution in a worse position than it would have been in had the police acted lawfully. Instead, the proper test is whether the police inevitably would have obtained the same evidence if they had refrained from the tainted activity – that is, whether the police would have obtained the same evidence through means independent of the violation.

If the Michigan Supreme Court's version of inevitable discovery were extended to all types of constitutional violations, the police would have no incentive to avoid

unconstitutional shortcuts so long as the prosecution could plausibly claim that the police could have been able to find the same evidence without acting illegally. For example, police with probable cause to search a home would not bother to obtain a warrant before searching because they would know that exclusion would put the prosecution in a worse position than it would have enjoyed had the police obtained a warrant. By the same token, the Michigan Supreme Court's *per se* rule of inevitable discovery means that the police have no incentive to knock and announce because they know that the evidence will come in despite the violation.

This Court has long recognized that other remedies cannot effectively substitute for the exclusionary rule. The police do not face any realistic threat of civil liability for knock and announce violations because damages are difficult to assess and because various barriers prevent recovery in any event. This Court's precedents confirm that the knock and announce rule protects important privacy interests and that only the threat of exclusion can force the police to respect those interests.

ARGUMENT

I. Evidence Found in a Home Following a Fourth Amendment Knock and Announce Violation Is Suppressible Fruit of the Illegal Entry.

A. The Evidence Found Inside a Home Following a Knock and Announce Violation Is the Fruit of an Illegal Entry Because the Violation Renders the Entry Illegal.

In *Wilson v. Arkansas*, 514 U.S. 927, 937 n.4 (1995), this Court noted that the state had argued that evidence seized after a Fourth Amendment knock and announce violation should not be excluded because such evidence is "causally disconnected from the constitutional violation and . . . exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation." This Court declined to reach this argument because the lower courts had not addressed it and because it was not within the question for which certiorari had been granted. *Id.*

Seizing upon the argument this Court declined to address in *Wilson*, the Michigan Supreme Court has concluded that evidence seized after a knock and announce violation is never excludable. *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999), *cert. denied*, 528 U.S. 1164 (2000). The Michigan Supreme Court reasoned that it "was not the means of entry that led to the discovery of the evidence, but, rather, it was the authority of the search warrant that enabled the police to search and seize the contested evidence." *Id*. at 64.

This Court's precedents do not support the notion that evidence seized after a knock and announce violation is *per se* admissible. In fact, this Court has itself twice held

that a knock and announce violation requires exclusion of the evidence found inside the home following the violation. *See Miller v. United States*, 357 U.S. 301 (1958); *Sabbath v. United States*, 391 U.S. 585 (1968). That is, this Court had twice recognized long before *Wilson* that a knock and announce violation renders the entry illegal and, therefore, that the search inside the home following the violation is the fruit of the illegal entry. *Wilson* and its progeny reaffirm that a knock and announce violation is not independent from the entry and subsequent search.

1. This Court Has Long Recognized That a Knock and Announce Violation Renders the Entry Illegal and Requires Suppression of Evidence Seized from Inside the Home.

In *Miller*, a police officer forcibly entered an apartment in order to arrest a suspect for narcotics offenses and subsequently found evidence of those offenses in the apartment. 357 U.S. at 302-304. The defendant moved to suppress the evidence found in his apartment on several grounds, including that the police had violated the knock and announce requirement codified at 18 U.S.C. § 3109. *Id.* at 305. After a lengthy review of the common-law history behind § 3109, this Court concluded that the officer had failed to give proper notice before forcibly entering the apartment. *Id.* at 306-313.

In so holding, this Court observed that the knock and announce requirement "is deeply rooted in our heritage and should not be given grudging application" and that, by codifying a "tradition embedded in Anglo-American law," Congress had affirmed "the reverence of the law for the individual's right of privacy in his house." *Id.* at 313. This

Court then concluded that the violation of the knock and announce requirement rendered illegal both the entry into the apartment and the arrest inside and that the evidence seized from the home must therefore be suppressed:

> The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. *Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.*

Id. at 313-314 (emphasis added).

In *Sabbath*, this Court again suppressed evidence because of a knock and announce violation. As in *Miller*, the police in *Sabbath* violated § 3109 when they entered an apartment to arrest a suspect. 391 U.S. at 587-588. Unlike *Miller*, the police in *Sabbath* did not have to break the door to enter. *Id.* at 587. Concluding that this fact made no difference, the Court again ruled that the knock and announce violation rendered illegal both the entry and the police activity inside the home and therefore required exclusion of the evidence seized there:

> The issue in this case is whether petitioner's arrest was invalid because federal officers opened the closed but unlocked door of petitioner's apartment and entered in order to arrest without first announcing their identity and purpose. *We hold that the method of entry vitiated the arrest and therefore that evidence seized in the subsequent search incident thereto should not have been admitted at petitioner's trial*.

Id. at 586 (emphasis added).

Miller and *Sabbath* thus confirm that a knock and announce violation is not somehow causally disconnected from the evidence seized inside the home after the entry. To the contrary, the knock and announce requirement, like the warrant requirement, is an integral part of a legal entry unless exigent circumstances excuse compliance. The violation of that requirement makes the entry illegal, and the evidence found inside after the illegal entry must therefore be suppressed.

Indeed, *Miller* and *Sabbath* are simply applications of the general and longstanding principle that "[t]he exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *see also id.* at 485-486 (observing that exclusionary rule also requires suppression of verbal evidence derived from illegal intrusion). Therefore, any kind of evidence found inside private premises following a police entry that is illegal for any reason is inadmissible. *See, e.g.*, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390-392 (1920) (barring derivative use of documents seized after officers illegally made warrantless entry to search); *Wong Sun*, 371 U.S. at 482-487 (excluding verbal evidence obtained after officers illegally entered home to arrest without probable cause and without knocking and announcing); *Payton v. New York*, 445 U.S. 573 (1980) (excluding evidence seized in home after illegal warrantless entry to arrest); *cf. New York v. Harris*, 495 U.S. 14 (1990) (holding admissible verbal statements obtained *outside* home after illegal warrantless entry to arrest).

This Court has never deviated from the rule that *all* evidence, tangible or verbal, "which derives so immediately

from an unlawful entry" is "the 'fruit' of official illegality." *Wong Sun*, 371 U.S. at 485. Given that this Court squarely held in *Miller* and *Sabbath* that a knock and announce violation renders the entry unlawful and the search that follows inside unreasonable, the evidence found inside a home following a knock and announce violation must be suppressed.

2. This Court's More Recent Cases Confirm That a Knock and Announce Violation Renders Unreasonable the Search and Seizure That Follow the Entry.

In 1995, this Court unanimously held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 514 U.S. at 929. Relying on much of the same common-law history that had led the Court to observe nearly forty years earlier that the knock and announce requirement "is deeply rooted in our heritage," *Miller*, 357 U.S. at 313, this Court held in *Wilson* "that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." 514 U.S. at 934.

In reaching this conclusion, this Court repeatedly recognized, just as it did in *Miller* and *Sabbath*, that a knock and announce violation is directly connected to the search and seizure that follows the illegal entry. Thus, this Court explained that "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*." *Id.* (emphasis added); *see also id.* at 931 ("An examination of the common law of search and seizure

leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."); *id.* at 936 ("We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.").

Wilson thus affirmed that the Fourth Amendment reasonableness of a search and seizure inside a dwelling is directly connected to whether the officers knocked and announced before entering. Accordingly, the Michigan Supreme Court's attempt to treat the knock and announce violation as "independent of" the subsequent search and seizure*, Stevens*, 597 N.W.2d at 64, is insupportable.

This Court's decisions since *Wilson* also lend no support to the claim that a knock and announce violation is independent of the search and seizure that follows the violation. In *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court held that the police were justified in performing a no-knock entry under the particular facts confronting them, but rejected a state court decision excluding all felony drug searches from the knock and announce requirement. The unanimous opinion in *Richards* never suggests that the defendant's argument to suppress must fail because the no-knock entry into his motel room was somehow causally disconnected from the seizure of drugs and money that followed the entry. On the contrary, this Court expressed concern that if it upheld *per se* exceptions from the knock and announce rule, "the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Id*. at 394.

This Court unanimously held in its next knock and announce case, *United States v. Ramirez*, 523 U.S. 65 (1998), that an otherwise justifiable no-knock entry did not become unreasonable merely because the police damaged property during the intrusion. In so holding, this Court specifically noted the distinction, for evidence suppression purposes, between violations that render the entry unlawful and those that do not:

> This is not to say that the Fourth Amendment speaks not at all to the manner of executing a search warrant. The general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, *even though the entry itself is lawful* and the fruits of the search are not subject to suppression.

Id. at 71 (citation omitted; emphasis added).

Ramirez thus recognized (albeit in dicta[1]) that some Fourth Amendment violations unrelated to the lawfulness of the entry, such as unnecessary property destruction, might not result in suppression of evidence. But as *Miller*, *Sabbath*, and *Wilson* confirm, the *Ramirez* dictum does not apply to violations of the knock and announce requirement because violations of that requirement do render the entry unlawful.

[1] This Court declined to decide whether the breaking of the window in *Ramirez* bore a "sufficient causal relationship" to the discovery of the guns inside the home. *Id*. at 72 n.3.

Ramirez also confirmed that the statutory knock and announce requirement that the Court had applied in *Miller* and *Sabbath* was a codification of the same common law that, in turn, "informs the Fourth Amendment." 523 U.S. at 73. Thus, this Court concluded that the constitutional standards the Court had applied in *Wilson* and *Richards* were congruent with the statutory standards applied in *Miller* and *Sabbath*.

In its most recent knock and announce decision, *United States v. Banks*, 540 U.S. 31 (2003), this Court unanimously concluded that there was no violation because, unlike the instant case, the police waited a reasonable amount of time after knocking and announcing before forcing entry. Even though the government urged this Court in *Banks* to hold that the evidence should not be suppressed even if there was a knock and announce violation, Brief of United States in No. 02-473 at 25-29, the Court's opinion does not even mention this argument or provide any support for the notion that the evidence found in the apartment was somehow causally disconnected from the entry. This Court did confirm again in *Banks* that the federal statute applied in *Miller* and *Sabbath* was congruent with the Fourth Amendment understanding of the knock and announce requirement developed in *Wilson*. 540 U.S. at 42-43.

In sum, this Court's knock and announce cases, both before and after *Wilson*, confirm that a violation of the requirement renders the entry and the subsequent search illegal. Therefore, as with other types of illegal entries, a knock and announce violation requires the exclusion of evidence found inside the dwelling immediately following the entry.

B. The Evidence Found Inside a Home Following a Knock and Announce Violation Is Not Subject to a *Per Se* Inevitable Discovery Exception.

Despite the fact that this Court has itself ordered the suppression of evidence found in homes after knock and announce violations, *see Miller* and *Sabbath*, *supra*, the Michigan Supreme Court has held that such evidence is never suppressible on the ground that the evidence would have been inevitably discovered if the police had knocked and announced. *Stevens*, 597 N.W.2d at 62; Given this *per se* rule, courts in Michigan no longer have any reason to decide whether knock and announce violations have occurred. *See People v. Vasquez*, 602 N.W.2d 376, 378 (Mich. 1999) (*per curiam*) ("In light of our recent decision in [*Stevens*], we need not decide whether the police violated the constitutional and statutory knock-and-announce requirement").

At least ten federal and state appellate courts have rejected the position of the Michigan Supreme Court by squarely holding that the inevitable discovery doctrine does not exempt knock and announce violations from the exclusionary rule. *See United States v. Dice*, 200 F.3d 978, 984-986 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1220 (8th Cir. 1993); *Mazepink v. State*, 987 S.W.2d 648, 657-658 (Ark.), *cert. denied*, 528 U.S. 927 (1999); *Kellom v. State*, 849 So. 2d 391, 396 (Fla. Dist. Ct. App. 2003); *People v. Tate*, 753 N.E.2d 347, 351-352 (Ill. App. Ct. 2001); *State v. Lee*, 821 A.2d 922, 931-946 (Md. 2003); *State v. Taylor*, 733 N.E.2d 310, 312 (Ohio Ct. App. 1999); *Commonwealth v. Rudisill*, 622 A.2d 397, 400 n.7 (Pa. Super. Ct. 1993); *State v. Lee*, 836 S.W.2d 126, 128-130 (Tenn. Crim. App. 1991); *Price v. State*, 93 S.W.3d 358,

370-372 (Tex. App. 2002). Only one appellate court, the Seventh Circuit, has endorsed the Michigan Supreme Court's position. *United States v. Langford*, 314 F.3d 892, 894-895 (7th Cir. 2002), *cert. denied,* 540 U.S. 1075 (2003). Courts in many other jurisdictions have assumed that evidence seized inside a home after a knock and announce violation is the fruit of the violation and have therefore suppressed such evidence. *See, e.g.*, *United States v. Cantu*, 230 F.3d 148, 153 (5th Cir. 2000); *United States v. Gallegos*, 314 F.3d 456, 458 (10th Cir. 2002); *State v. Cohen*, 957 P.2d 1014, 1017 (Ariz. Ct. App. 1998); *District of Columbia v. Mancouso*, 778 A.2d 270, 275 (D.C. 2001); *State v. Harada*, 41 P.3d 174, 176 (Haw. 2002); *State v. Nelson*, 817 So. 2d 158, 165-166 (La. Ct. App. 2002); *Commonwealth v. Jimenez*, 780 N.E.2d 2, 5-10 (Mass. 2002); *Garza v. State*, 632 N.W.2d 633, 640 (Minn. 2001); *State v. Ricketts*, 981 S.W.2d 657, 662 (Mo. Ct. App. 1998); *State v. Anyan*, 104 P.3d 511, 525 (Mont. 2004); *State v. Johnson*, 775 A.2d 1273, 1283-1284 (N.J. 2001); *State v. Reynaga*, 5 P.3d 579, 582-583 (N.M. Ct. App. 2000); *City of Bismarck v. Glass*, 581 N.W.2d 474, 477 (N.D. Ct. App. 1998); *Park v. Commonwealth*, 528 S.E.2d 172, 177 (Va. Ct. App. 2000). The clear majority of state and federal courts thus continue to suppress evidence seized from homes immediately after knock and announce violations, just as this Court did in *Miller* and *Sabbath*.

In refusing to suppress such evidence, the Michigan Supreme Court distorted the inevitable discovery doctrine. That court jettisoned any requirement that the prosecution prove that the evidence would have been found through means independent of the tainted police activity. Instead, *Stevens* held that the evidence should not be suppressed because police would have found it had they

not committed the violation. That is, *Stevens* adopted a version of the inevitable discovery doctrine that admits evidence so long as the police can claim "if we hadn't done it wrong, we would have done it right." *See* 6 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 11.4(a), at 272-274 (4th ed. 2004) (criticizing such reasoning and characterizing *Stevens* as an "absurdity" that adopted an "Alice-in-Wonderland version of inevitable discovery").

As the many courts that have rejected the Michigan Supreme Court's position have recognized, a *per se* rule of inevitable discovery eviscerates the knock and announce requirement. Police officers in Michigan currently have no reason ever to knock and announce before entering a home because they know that the evidence they find will always be admitted despite the violation. The radical version of inevitable discovery adopted in *Stevens*, if extended beyond the knock and announce context, would also effectively destroy any incentive the police may have to comply with many other constitutional rules, including the warrant requirement.

1. Inevitable Discovery Requires Proof That the Evidence Would Have Been Found Through a Source Independent of the Violation.

This Court adopted the inevitable discovery doctrine in *Nix v. Williams*, 467 U.S. 431 (1984). In *Nix*, a police detective had violated the defendant's Sixth Amendment right to counsel by deliberately eliciting incriminating statements from him after he had invoked his right to counsel at an arraignment. Those statements led the police to the location of the victim's body. *Id.* at 436. At Williams'

first trial, the prosecution introduced his statements and evidence derived from the body, but this Court ultimately concluded that the statements should have been suppressed. *See Brewer v. Williams*, 430 U.S. 387 (1977). On retrial, the prosecution did not introduce Williams' statements but did introduce evidence derived from the body. The state courts upheld the introduction of evidence from the body on the theory that it would have been inevitably discovered by search parties that were nearing the location of the body at the time Williams led the police there. *Nix*, 467 U.S. at 436, 437-439.

In upholding that result, this Court stressed that the inevitable discovery doctrine is "closely related" to the independent source doctrine, which, in turn, "allows admission of evidence that has been discovered by means *wholly independent* of any constitutional violation." *Id.* at 443 (emphasis added). This Court explained the rationale for both doctrines:

> When the challenged evidence has an *independent source*, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule.

Id. at 443-444 (emphasis added).

Nix rejected the argument that the inevitable discovery doctrine would undermine the deterrent effect of the exclusionary rule because "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." *Id*. at 445. That is, since the inevitable discovery doctrine, like the independent source doctrine, requires proof of an *independent* process that would have produced the same evidence, the officer illegally seizing the evidence will rarely, if ever, know whether there happens to be an untainted independent source leading to the same evidence. Even if he does know of such an independent source, he is very unlikely to know the probability that the independent source will produce the same evidence in the same condition.

The independent source in *Nix* itself illustrates this point. Organized search parties systematically combing the countryside were within two and one-half miles of the culvert where the body was found at the time the search was suspended. *Id.* at 448-449. This Court thus found that "the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found." *Id.* at 449-450. Admitting the body in *Nix* thus did not undermine the deterrence rationale of the exclusionary rule because the detective who illegally questioned Williams could not have known at the time of the violation that the search parties would have soon discovered the body.

This Court reaffirmed the close relationship between the independent source and inevitable discovery doctrines in *Murray v. United States*:

> The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.

487 U.S. 533, 539 (1988) (emphasis in original).

Murray is illustrative of the type of independent activity necessary to invoke the independent source or inevitable discovery doctrines. In *Murray,* federal agents illegally entered a warehouse and observed bales of marijuana, but did not seize them. *Id.* at 535. The agents then applied for and obtained a warrant to search the warehouse without mentioning the prior entry or the observations they had made during that entry. *Id.* at 535-536. Armed with the warrant, the agents then re-entered the warehouse and seized the marijuana and other evidence. *Id.* at 536.

This Court concluded in *Murray* that the search conducted pursuant to the warrant could be a "genuinely independent source" from the earlier illegal entry if the information obtained from the illegal entry was not used to obtain the warrant and did not affect the decision of the agents to seek a warrant. *Id.* at 542. This Court accordingly remanded for determination of that question. *Id.* at 543-544; *see also Segura v. United States*, 468 U.S. 796, 813-815 (1984) (holding that earlier illegal entry into apartment did not affect admissibility of evidence police found during later search authorized by untainted warrant).

Both *Murray* and *Segura* thus stand for the proposition that a *second* lawful entry can be a source independent from an earlier illegal entry if that second entry is "genuinely independent" from the earlier entry. As discussed in the next subsection, *Murray* and *Segura* lend no support to the notion that a *single* unlawful entry can be its own independent source.

2. Since There Is No Independent Source When Officers Immediately Enter and Seize Evidence After Violating the Knock and Announce Requirement, the Inevitable Discovery Doctrine Is Inapplicable.

The inevitable discovery doctrine, as set forth in *Nix* and explained in *Murray*, is quite clear. The doctrine is simply an extension of the independent source doctrine that applies when the tainted police activity actually leads to the discovery of the evidence but when there is also an independent untainted source that would have also produced the evidence. *Murray*, 487 U.S. at 539; *Nix*, 467 U.S. at 443-444.

The obvious problem, then, with the Michigan Supreme Court's *per se* application of the inevitable discovery doctrine to knock and announce violations is the complete absence of an independent source. In *Nix*, search parties that were nearing the body were wholly independent of the illegal questioning of Williams. In *Murray* and *Segura*, there were legal entries and searches that were, or were claimed to be, genuinely independent of the illegal entries that had occurred hours earlier. But in Petitioner's case, there was only one police action, a concededly illegal entry followed immediately by a search and seizure. There was

no other independent process of any kind that would have lawfully produced the evidence found in Petitioner's home.

The Michigan Supreme Court held in *Stevens*, however, that there is always an independent source for the discovery of the evidence:

> It was not the means of entry that led to the discovery of the evidence, but, rather, it was the authority of the search warrant that enabled the police to search and seize the contested evidence. Therefore, the searching and seizing of the evidence was independent of failure to comply with the "knock and announce" statute.

597 N.W.2d at 64. In reality, then, *Stevens* relied on the independent source doctrine, not inevitable discovery, to justify a *per se* rule of admissibility. According to the Michigan Supreme Court, the evidence found inside a home flows from the authority the police have to enter and search that home, not from the entry of the home, and the entry and the authority are independent of each other.

The most obvious response to this argument is that it is flatly contrary to the raft of precedent discussed in Part A, *supra*, holding that an illegal entry renders unreasonable a search conducted inside *following that entry* even if the entry was, or could have been, authorized with a warrant. The Michigan Supreme Court ignored that precedent, arbitrarily declared the entry to be independent of the authority for the entry, and thus contravened the requirement of *Nix*, *Murray*, and *Segura* that there be a genuinely independent source of the evidence.

In addition, the reasoning in *Stevens* directly contradicts *Miller* and *Sabbath*. In both *Miller* and *Sabbath*, the lawful authority of the officers to enter the defendants'

homes to arrest them was conceded or assumed. *See Miller*, 357 U.S. at 305-306 & n.4 (discussing local law authorizing officers to enter without warrant to arrest upon probable cause); *Sabbath*, 391 U.S. at 588 (holding that § 3109 governs "an entry of a federal officer to effect an arrest without a warrant").[2] By the time *Miller* and *Sabbath* were decided, this Court had long applied the independent source doctrine. *See, e.g.*, *Silverthorne Lumber*, 251 U.S. at 392 ("If knowledge of [facts obtained by illegal means] is gained from an independent source they may be proved like any others"). Thus, if *Stevens* were correct, the fact that the officers in *Miller* and *Sabbath* had probable cause to arrest (and therefore lawful authority to enter) would have been an independent source for the evidence seized inside the homes. As discussed in Part A, *supra*, however, this Court in *Miller* and *Sabbath* most certainly did not view the search and seizure of the evidence inside the home as somehow independent from the knock and announce violation. Nor, for that matter, did the Court in *Wilson* view the entry and search as divorced from a knock and announce violation.

Indeed, eight members of this Court in *Ker v. California*, 374 U.S. 23 (1963), explicitly rejected a claim that the method of entering a home is independent from the search and seizure inside. As the plurality in *Ker* explained, "notwithstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the

[2] Of course, this Court later held in *Payton v. New York*, 445 U.S. 573 (1980), that probable cause to arrest is insufficient to justify a warrantless entry into a home in the absence of an exigency, but *Miller* and *Sabbath* predated *Payton*.

legality of an accompanying search." *Id.* at 38. The four dissenters in *Ker* put it even more plainly: "This Court settled in *Gouled v. United States*, 255 U.S. 298, 305-306 (1921), that a lawful entry is the indispensable predicate of a reasonable search." *Id*. at 53 (Brennan, J., dissenting).

The Michigan Supreme Court artificially and arbitrarily treated the authority to perform an entry as an independent source from the actual entry performed under that authority. This atomistic approach stretches beyond reason the independent source doctrine and, by extension, the inevitable discovery doctrine. As the Sixth Circuit explained in rejecting a similar argument based on *Murray* and *Segura*:

> The cases on which the Government relies are distinguishable from this case because they all involved a *second search* pursuant to a valid warrant, and that second search was independent of the illegal initial search. . . . In this case, there was but one entry, and it was illegal. The officers seized the evidence in question directly following that illegal entry. Knock-and-announce caselaw in this circuit and others makes very clear that such evidence is inadmissible as the direct fruit of that search.

Dice, 200 F.3d at 985 (emphasis in original); *see also Marts*, 986 F.2d at 1220 ("[In *Segura*], the illegal entry was not related to the evidence later seized. . . . In the present case, the officers seized the evidence immediately upon their illegal entry.").

As this Court has long recognized, the seizure of evidence in a home is the fruit of both the authority for the entry and the entry itself. If either the authority for the

entry or the entry itself is illegal, the evidence seized inside is suppressible fruit of the illegality.

Although Petitioner rejects the Michigan Supreme Court's *per se* rule of admissibility, he does not contend that the inevitable discovery doctrine is never applicable to a knock and announce violation. Petitioner agrees that evidence seized after a knock and announce violation should be admitted if the prosecution establishes that the evidence was, or inevitably would have been, found through a genuinely independent source. For example, if an officer forced open a defendant's front door without complying with the knock and announce requirement, evidence seized inside would be admissible under the independent source doctrine if the prosecution could show that the evidence was actually found by another officer who did knock and announce at the back door. Alternatively, if the officer who came through the front door found the evidence, the evidence would be admissible under the inevitable discovery doctrine if the prosecution could show that the officer who did knock and announce at the back door would have found it if the other officer had not found it first. Evidence may also be admissible despite a knock and announce violation in a case such as *United States v. Moreno*, 758 F.2d 425 (9th Cir. 1985), where officers violated the requirement in entering the alcove of an apartment, where they found no evidence, but then properly knocked and announced before entering the interior of the apartment, where they did find the evidence.[3] Finally,

[3] Evidence also might be admissible if officers commit a violation in the home that neither renders the entry illegal nor leads to discovery of the evidence. *See Ramirez*, 523 U.S. at 71 (suggesting in dicta that "[e]xcessive or unnecessary destruction of property in the course of a

(Continued on following page)

the evidence presumably would be admissible despite a knock and announce violation if it were found *outside* the home. *See Harris*, 495 U.S. at 21 (holding admissible evidence procured outside home after illegal warrantless entry).

By contrast, there is no independent source or process of any kind in Petitioner's case, where the police violated the knock and announce rule, barged into the home, and immediately seized the evidence. Exactly as in *Miller* and *Sabbath*, the seizure of the evidence inside Petitioner's home flowed directly and immediately from the illegal entry.

Since there is no independent process or source for the seizure of the evidence in such a case, there is also no inevitable discovery. *Murray*, 487 U.S. at 539. The clear majority of courts have correctly rejected arguments that the inevitable discovery doctrine erects a *per se* rule of admissibility for evidence found in a home after a knock and announce violation.

3. The Michigan Supreme Court Distorted the Inevitable Discovery Doctrine by Interpreting the "Worse Position" Language in *Nix* To Require the Admission of Any Evidence the Police *Could Have* Obtained Lawfully.

Despite the absence of any genuinely independent source of the evidence, the Michigan Supreme Court concluded in *Stevens* that the inevitable discovery doctrine

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search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression").

applied because "excluding the evidence puts the prosecution in a worse position than it would have been had there been no police misconduct." 597 N.W.2d at 62. The *Stevens* court derived this language from *Nix*, where this Court observed that "suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct." 467 U.S. at 447 (emphasis in original). Therefore, the Michigan Supreme Court reasoned, since the police presumably would have found the same evidence in the home if they had knocked and announced, exclusion would put the prosecution in a "worse position" than it would have enjoyed had the police knocked and announced. *Stevens*, 597 N.W.2d at 64.

The Michigan Supreme Court's reasoning is based on a fundamental misreading of *Nix*. If the understanding of the inevitable discovery rule set forth in *Stevens* were correct, the inevitable discovery doctrine would devour most of the exclusionary rule.

The most basic problem with the *Stevens* version of inevitable discovery is that it turns on what would have happened if the police had performed the tainted search or seizure *properly* instead of what would have happened if the police had *refrained* from the tainted activity. The Fourth Circuit has observed that the former approach, which it dubbed "if we hadn't done it wrong, we would have done it right," would swallow the exclusionary rule because the police would "profit from their own wrongdoing." *United States v. Thomas*, 955 F.2d 207, 209-210 (4th Cir. 1992). That is, an officer would have no incentive to avoid "doing it wrong" because she would know that the court would admit the evidence just as if she had "done it right." *See also United States v. Boatwright*, 822 F.2d 862,

865 (9th Cir. 1987) (observing that unless independent search was underway or would occur as matter of routine procedure, applying inevitable discovery doctrine would "permit the government to ignore search requirements at any convenient point in the investigation, and would go well beyond the present scope of the doctrine").

The correct approach under both the inevitable discovery and independent source doctrines is to ask what inevitably would have happened if the police had refrained from the tainted activity. In *Nix*, for example, this Court concluded that search parties inevitably would have found the body if the detective had refrained from eliciting information from Williams. The Court found in *Segura* and the Government claimed in *Murray* that the police still would have found the evidence during the second lawful entry even if they had refrained from the initial illegal entry.

It is inherent in the nature of the exclusionary rule itself that the prosecution may be placed in a "worse position" than it would have been in had the government conducted itself within constitutional limits. Thus, Justice Holmes, writing for a unanimous Court in *Silverthorne Lumber*, rejected the Government's argument that corporate papers seized through an illegal search should nonetheless be admitted because they could have been subpoenaed: "[T]he rights of a corporation against unlawful search and seizure are to be protected *even if the same result might have been achieved in a lawful way*." 251 U.S. at 392 (emphasis added).

Under the Michigan Supreme Court's approach, the documents in *Silverthorne Lumber* should be regarded as "inevitably discovered" because the Government *could*

have obtained them in a lawful way. The correct analysis, after *Nix*, *Murray*, and *Segura*, is to ask whether the Government in *Silverthorne Lumber* inevitably *would have* obtained the documents by subpoena if it had refrained from the illegal entry and search that actually produced them.

If the Michigan Supreme Court is correct that the prosecution should be placed in the position that it would have enjoyed had the police acted constitutionally, then this Court has wrongly decided every criminal case, beginning with *Silverthorne Lumber*, in which evidence was excluded when the government had a lawful route to obtain the same evidence it unlawfully obtained. For example, in *Katz v. United States*, 389 U.S. 347, 354 (1967), this Court observed, "it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate . . . could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." Nevertheless, the Court suppressed the evidence in *Katz* because the agents did not choose the constitutional path but instead acted without seeking a magistrate's authorization. That is, the prosecution in *Katz* was placed in a "worse position" than it would have enjoyed had the police acted lawfully, but it was placed in exactly the same position that it would have been in had the police not engaged in the tainted activity at all. *See also Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001) ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment."); *Knowles v. Iowa*, 525 U.S. 113, 115-118 (1998) (suppressing evidence found during vehicle search "incident to citation" because motorist was

not arrested even though Iowa law authorized officer to arrest motorist for traffic offense); *Thompson v. Louisiana*, 469 U.S. 17, 22 (1984) (suppressing evidence seized from home after exigency had ended even though officers could have seized evidence "under the plain-view doctrine while they were in petitioner's house to offer her assistance"); *United States v. Place*, 462 U.S. 696, 709 (1983) (suppressing evidence obtained from unreasonably prolonged *Terry* stop after noting that agents "knew the time of Place's scheduled arrival at LaGuardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests"); *Florida v. Royer*, 460 U.S. 491, 504-507 (1983) (plurality opinion) (suppressing evidence seized after excessively intrusive *Terry* stop and noting that less intrusive means to obtain evidence were available); *Coolidge v. New Hampshire*, 403 U.S. 443, 450-451 (1971) (suppressing evidence found pursuant to warrant issued by prosecuting official and treating as irrelevant claim by State "that any magistrate, confronted with the showing of probable cause made by the Manchester chief of police, would have issued the warrant in question"); *Mancusi v. DeForte*, 392 U.S. 364, 372 n.12 (1968) ("It is, of course, immaterial that the State might have been able to obtain the same papers by means which did not violate the Fourth Amendment."); *cf. Sgro v. United States*, 287 U.S. 206, 211-212 (1932) (suppressing evidence seized by officers acting with expired search warrant without considering whether same evidence would have been found if officers had executed warrant earlier).

These cases demonstrate that the Michigan Supreme Court's reading of the "worse position" language in *Nix*

would work a radical change to the exclusionary rule. Instead of requiring the prosecution to prove, as it did in *Nix*, that the evidence *inevitably would have* been lawfully discovered without the violation through the operation of an independent source, the Michigan Supreme Court's approach would admit the evidence so long as the police *could have* behaved lawfully and obtained the evidence in the absence of any independent source at all.

Under the Michigan Supreme Court's approach, the police would have a clear incentive to behave unlawfully so long as they know they *could* obtain the evidence by behaving lawfully. In other words, the police would have every reason to take unconstitutional shortcuts because they would know that the evidence would come in anyway. Thus, for example, an Iowa police officer would know that she could unconstitutionally search a motorist's vehicle "incident to citation," despite the holding in *Knowles*, because the court would hold that suppression would put the prosecution in a "worse position" than it would have been in had the officer first arrested the motorist and then searched the vehicle.

The Michigan Supreme Court's version of inevitable discovery would effectively gut the warrant requirement for any case in which the police have probable cause to obtain a warrant or an alternative method of obtaining the evidence. In any case such as *Katz* and *Coolidge* where the police have ample probable cause to obtain a warrant, they would not bother to get one because the court would invariably hold that suppression would put the prosecution in a "worse position" than it would have been in had the police obtained a warrant. In cases such as *Silverthorne Lumber*, where the police could lawfully obtain the evidence through more onerous or time-consuming means,

the police would simply obtain it illegally, secure in the knowledge that the court would refuse to put the prosecution in a "worse position" than it would have been in had the police used the lawful method to obtain the evidence.

The Michigan Supreme Court has, so far, only applied its unique reading of *Nix* to the knock and announce rule. That reading of *Nix* has resulted in a *per se* rule of inevitable discovery that "would completely emasculate the knock-and-announce rule." *Dice*, 200 F.3d at 986. *See also Marts*, 986 F.2d at 1220 (concluding *per se* inevitable discovery argument would mean "officers, in executing a valid search warrant, could break in doors of private homes without sanction"); *Mazepink*, 987 S.W.2d at 657-658 ("[E]xclusion of the evidence is the appropriate remedy. . . . [W]ere we to hold otherwise, the 'knock and announce' rule would be rendered meaningless."). As discussed in the next subsection, there is no incentive other than suppression that could possibly motivate the police to comply with a requirement that a typical police officer is likely to view as a hindrance to the search and a threat to his own safety. *See* J.A. 20 (Officer Good explaining his decision to immediately enter Petitioner's home as a "safety factor" since he had "been shot at numerous times going into drug houses").

In sum, the Michigan Supreme Court has misinterpreted the "worse position" language from *Nix*. In *Nix*, the prosecution would have unjustifiably been placed in a "worse position" if the body had been suppressed even though it was about to be discovered by lawful means independent of the illegality. Therefore, the Court put the prosecution in the position it would have enjoyed had the police refrained from the illegal activity. *Nix* gave absolutely no indication that it meant to overturn the many

cases in which the Court had suppressed evidence and placed the prosecution in a "worse position" than it would have been in had the police used lawful means to obtain the evidence. *Nix*, then, must be read in context to apply to those situations in which the evidence *inevitably would have* been found through lawful independent means, not as a license for courts to construct hypothetical alternative realities in which the police decide to act lawfully instead of illegally.

When *Nix* is read properly, the outcome here is clear. The police unconstitutionally forced their way into Petitioner's home without knocking and without giving Petitioner any reasonable amount of time to come to his door. Immediately after violating the knock and announce requirement, the police barged in and found the evidence inside Petitioner's home. There was no independent untainted process of any kind by which the police would have found the evidence in Petitioner's home. Therefore, the evidence found following the knock and announce violation should have been suppressed, just as this Court suppressed such evidence in *Miller* and *Sabbath*.

4. Remedies Other Than Exclusion Will Not Deter Police Officers from Committing Knock and Announce Violations.

The purpose of the exclusionary rule is "to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960); *see also Weeks v. United States*, 232 U.S. 383, 393 (1914) (concluding that without the exclusionary sanction, the Fourth Amendment "might as well be stricken from the Constitution"). As this Court explained in *Nix*, the

inevitable discovery doctrine does not undermine the deterrence rationale of the exclusionary rule because "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." 467 U.S. at 445.

By contrast, police officers operating under the *per se* rule announced by the Michigan Supreme Court do not have to perform any calculations at all. They know to a certainty that a reviewing court will *always* regard the evidence they find after a knock and announce violation to be "inevitably discovered," so they know that violating the knock and announce rule will *never* result in exclusion. Therefore, even if the inevitable discovery doctrine actually were applicable when there are no independent and untainted means of discovering the evidence, the *per se* application of the doctrine to knock and announce violations would still be inappropriate because it would destroy the deterrence rationale of the exclusionary rule.

The Michigan Supreme Court has concluded, however, that exclusion is not necessary to deter the police from violating the knock and announce rule because there are other effective deterrents. The Michigan Supreme Court identified the possibility of a federal lawsuit under 42 U.S.C. § 1983 and also pointed to a state statute that declares that an officer executing a search warrant is guilty of a misdemeanor if he "willfully exceeds his authority or exercises it with unnecessary severity." *Stevens*, 597 N.W.2d at 61 (quoting Mich. Comp. Laws § 780.657).

The Michigan Supreme Court's reliance on the threat of criminal liability to deter knock and announce violations can be disposed of quickly. More than forty years ago,

this Court found that state statutes imposing criminal liability on officers, like other remedies, had proven to be "worthless and futile" in protecting citizens' Fourth Amendment rights. *Mapp v. Ohio*, 367 U.S. 643, 651-652 & n.7 (1961). Indeed, Mich. Comp. Laws § 780.657, the statute that the Michigan Supreme Court cited in *Stevens*, proves the point from *Mapp*. Even though this statute was enacted in 1948, there does not appear to be a single case, reported or unreported, of any Michigan police officer ever having been prosecuted under the statute, much less an officer prosecuted for a knock and announce violation. *See also Stevens*, 597 N.W.2d at 66 n.6 (Cavanagh, J., dissenting) (noting that prosecutor for Michigan's largest county had conceded at oral argument that he was not aware of any prosecutions brought by his office under the statute). The entirely hypothetical "threat" of criminal prosecution remains as "worthless and futile" a method of enforcing the Fourth Amendment today as it was when *Mapp* was decided.

The Michigan Supreme Court's reliance on the possibility of tort liability as an effective deterrent for knock and announce violations also does not survive scrutiny. The reliance on tort liability to deter Fourth Amendment violations, like the reliance on the possibility of criminal prosecution, is inconsistent with *Mapp*, in which this Court recognized the "obvious futility of relegating the Fourth Amendment [to] the protection of other remedies." 367 U.S. at 652.

Mapp extended to the states the holding of *Weeks* that Fourth Amendment violations are subject to the exclusionary rule. *Id.* at 655. There is no support in *Weeks*, *Mapp*, or any of this Court's other cases for the proposition that courts should feel free to remove certain types of

Fourth Amendment violations from the exclusionary rule upon finding that the threat of tort liability is sufficient to deter the police from committing that particular type of violation.

Even if courts were free to carve out such categorical exceptions from the exclusionary rule, the knock and announce requirement would be one of the worst candidates for such treatment because violations of that requirement are far less likely to result in tort liability than most other Fourth Amendment violations. In fact, Petitioner has not been able to locate a single decision, reported or unreported, from anywhere in the United States upholding a verdict awarding actual damages for a knock and announce violation.[4] Even if there have been cases in which plaintiffs have recovered actual damages for knock and announce violations, those cases must be so exceedingly rare as to have essentially no deterrent effect on the conduct of police officers.

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[4] Petitioner has found one unreported trial court case, *Buss v. Quigg*, No. 01-CV-3908, 2002 WL 31262060 (E.D. Pa. Oct. 9, 2002), in which the plaintiffs apparently collected nominal damages of $1 each for a knock and announce violation. Respondent cites three cases – *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *Kornegay v. Cottingham*, 120 F.3d 392 (3d Cir. 1997), and *Aponte Matos v. Toledo Davila*, 135 F.3d 182 (1st Cir. 1998) – in support of the proposition that "civil suits can and are brought in these situations." Br. Opp. Pet. at 11. The plaintiffs in *Ayeni* claimed that the officers were liable for bringing along the media, not for a knock and announce violation. 35 F.3d at 683. In *Kornegay*, the court allowed a knock and announce claim to proceed but took pains to "not suggest that these officers ought to be liable under section 1983." 120 F.3d at 399 n.5. There is no indication that the officers were held liable on remand. Finally, in *Aponte Matos* the court *granted* qualified immunity to the officers. 135 F.3d at 190-191.

The knock and announce rule embodies "the reverence of the law for the individual's right of privacy in his house." *Miller*, 357 U.S. at 313. The rule protects that privacy by seeking to "avoid 'the destruction or breaking of any house . . . by which great damage and inconvenience might ensue.'" *Wilson*, 514 U.S. at 935-936 (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng.Rep. 194, 196 (K.B. 1603)) (omission in original). In addition, the rule protects the dignity of residents by giving them an opportunity "to prepare themselves for such an entry" by, for example, "pull[ing] on clothes or get[ting] out of bed." *Richards*, 520 U.S. at 393 n.5; *see also Ker*, 374 U.S. at 57 (Brennan J., dissenting) ("Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion.").

As this Court has recognized, such privacy interests are a core part of the Fourth Amendment right of the people to be secure in their houses, but such interests are singularly difficult to enforce through tort liability, especially when the police do not destroy property. *Cf. Sabbath*, 391 U.S. at 589-590 (holding that rule protects against unannounced entries even if police do not break door). Even if the police do destroy the door, it is extremely doubtful that the cost of replacing the door would be worth a lawsuit.

Petitioner's case proves the point. The police apparently did not destroy his door, but they certainly did destroy his right to be secure in his home when seven armed police officers, including a "shotgun man," burst through his door so quickly that he did not have an opportunity to arise from his chair in the front room. J.A. 17-20. While such an entry would frighten and embarrass any resident, it would be highly unrealistic to expect that a

lawsuit could possibly result in anything more than nominal damages. Therefore, most victims of knock and announce violations will not file a lawsuit at all.

Only in an extreme case, such as *Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005) (*en banc*), might a victim of a knock and announce violation have a colorable claim for significant damages, but as *Doran* illustrates, recovery still is highly unlikely. A jury awarded the plaintiff in *Doran* $2,000,000 upon finding that he had been shot as the direct result of a knock and announce violation, but the Eighth Circuit reversed the judgment on the ground that the no-knock entry was justified by the circumstances. *Id*. at 960, 963-967; *see also Leaf v. Shelnutt*, 400 F.3d 1070, 1082-1085 (7th Cir. 2005) (reversing denial of summary judgment to officer who entered and shot resident without knocking and announcing).

Even if there are damages worth litigating and even if a court actually agrees that there was a knock and announce violation, other legal barriers will generally prevent the victims of the violation from ever recovering damages. In a § 1983 action, the officers who committed the violation will enjoy qualified immunity from damages so long as any reasonable officer could disagree as to whether the no-knock entry was justified. *See, e.g.*, *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d 293, 305 (5th Cir. 2004) (granting qualified immunity to officer for alleged knock and announce violation because not all reasonable officers would have concluded entry was illegal). In a state tort action, governmental immunity statutes will typically protect the officers from liability. *See, e.g.*, Mich. Comp. Laws § 691.1407(2)(c) (providing that officers are liable in tort only for "conduct so reckless as to demonstrate a substantial lack of concern for

whether an injury results"); *Thomas v. Pontiac Police Officers*, No. 203002, 1999 WL 33446475, at *2 (Mich. Ct. App. Apr. 27, 1999) (affirming summary judgment to officers because "[a]ssuming, arguendo, that defendants did not comply with the knock-and-announce statute, plaintiff offers no evidence that defendants' conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results") (footnote omitted).

This Court recognized in *Mapp* that remedies other than exclusion were worthless in deterring police from committing Fourth Amendment violations. The Michigan Supreme Court was wrong to reach a contrary conclusion, and it was especially wrong to reach that contrary conclusion for knock and announce violations since other remedies have proven to be completely ineffective in enforcing that particular constitutional guarantee.

Finally, the *per se* application of the inevitable discovery doctrine to the knock and announce rule would effectively make the rule a dead letter because courts in criminal cases would no longer decide whether the police violated the rule. This has already happened in Michigan, where the courts no longer have any reason to decide whether the police violated the knock and announce rule. *See Vasquez*, 602 N.W.2d at 378 (declining to decide, in light of *Stevens*, whether police violated knock and announce rule); *see also United States v. Brown*, 333 F.3d 850, 853 (7th Cir. 2003) (avoiding decision on whether knock and announce violation occurred because "Brown's argument is cut short by this court's recent decision in *United States v. Langford*"), *cert. denied*, 540 U.S. 1163 (2004).

At present, officers in Michigan are not only undeterred from committing knock and announce violations, they are no longer even *informed* by the courts when they do commit such a violation. If this Court were to adopt the position of the Michigan Supreme Court, criminal defendants nationwide will simply stop moving to suppress evidence obtained after knock and announce violations, and the rule itself would become purely hortatory. The courts would no longer have any reason to decide whether the police have violated the rule (except in the rare civil case, and only then if there were no immunity or other barrier to recovery), and the development of the law in this area would effectively come to a halt.[5]

It is worth noting in this regard that all four of this Court's Fourth Amendment knock and announce decisions (*Wilson*, *Richards*, *Ramirez*, and *Banks*) came in *criminal* cases in which the defendants hoped to suppress the evidence seized from their homes. If the Michigan Supreme Court's approach is correct, this Court should never have reached the substantive constitutional questions presented in any of those four cases. Instead, this Court should have simply ruled, as the Michigan Supreme Court did in *Vasquez*, that the defendants could not obtain the

[5] In this respect, the *per se* rule of *Stevens* is unlike the good faith exception announced in *United States v. Leon*, 468 U.S. 897 (1984). As the Court recognized in *Leon*, defendants still have an incentive to file motions to suppress evidence seized pursuant to warrants lacking probable cause because such motions will still be granted if the warrant is so lacking in probable cause that a reasonable officer should not have relied on it. *Id.* at 924 n.25. By contrast, there is currently no reason for a criminal defendant in Michigan to file a motion to suppress evidence seized after a knock and announce violation.

relief they were seeking even if the police did commit knock and announce violations.

If this Court were to hold that evidence found after a knock and announce violation is always to be regarded as inevitably discovered, the rule "might as well be stricken from the Constitution." *Weeks*, 232 U.S. at 393. Such a holding would make irrelevant a core part of the right of the people to be secure in their houses from unreasonable searches and seizures and, at the same time, work a radical change to the inevitable discovery doctrine that would put many other constitutional protections at risk.

Therefore, Petitioner respectfully requests that this Court reaffirm *Miller* and *Sabbath* and hold that the evidence seized from him is the suppressible fruit of the illegal entry into his home.

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed, and the case should be remanded to that court with instructions to reverse Petitioner's conviction.

Respectfully submitted,

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