

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 BOOKER T. HUDSON, JR., :

4 Petitioner, :

5 v. : No. 04-1360

6 MICHIGAN. :

7 - - - - - x

8 Washington, D.C.

9 Monday, January 9, 2006

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United

12 States at 10:02 a.m.

13 APPEARANCES:

14 DAVID A. MORAN, ESQ., Detroit, Michigan; on behalf of

15 the Petitioner.

16 TIMOTHY A. BAUGHMAN, ESQ., Detroit, Michigan; on

17 behalf of the Respondent.

18 DAVID B. SALMONS, ESQ., Assistant to the Solicitor General,

19 Department of Justice, Washington, D.C.; for the

20 United States, as amicus curiae, supporting the

21 Respondent.

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DAVID A. MORAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	TIMOTHY A. BAUGHMAN, ESQ.	
7	On behalf of the Respondent	29
8	ORAL ARGUMENT OF	
9	DAVID B. SALMONS, ESQ.	
10	For the United States, as amicus curiae,	
11	Supporting the Respondent	50
12	REBUTTAL ARGUMENT OF	
13	DAVID A. MORAN, ESQ.	
14	On behalf of the Petitioner	63
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument
in Hudson versus Michigan.

Mr. Moran.

ORAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF PETITIONER

MR. MORAN: Mr. Chief Justice, and may it
please the Court:

Over the last 50 years, courts in virtually
every American jurisdiction have suppressed evidence
seized inside homes following knock-and-announce
violations -- including this Court, on two occasions.

Those suppression orders reflect an understanding of
two points key to this appeal. The first point is
that the manner of entry -- and, in particular, a
knock-and-announce violation -- is not somehow
independent of the police activity that occurs inside
the house. And, as this Court directly recognized in
Wilson, the reasonableness of police activity inside
a home is dependent on the manner of the police
entry.

JUSTICE O'CONNOR: May I ask you whether
there are statutes in various States that allow an
officer to get a no-knock warrant?

1 MR. MORAN: Yes, there are, Justice
2 O'Connor.

3 JUSTICE O'CONNOR: And does Michigan have
4 such a statute?

5 MR. MORAN: I do not believe so, Justice
6 O'Connor.

7 JUSTICE O'CONNOR: How common are those
8 statutes?

9 MR. MORAN: I believe about half the States
10 have such no-knock -- no-knock statutes. So, in
11 Michigan, a police officer -- if the -- if the
12 circumstances on the scene justify a no-knock entry,
13 then the officer is permitted, by case law and, of
14 course, by the precedents of this Court, to go ahead
15 and do so.

16 JUSTICE O'CONNOR: Why would an officer,
17 without such permission, want to make a no-knock
18 entry while possessing a warrant --

19 MR. MORAN: Well --

20 JUSTICE O'CONNOR: -- a search warrant?

21 MR. MORAN: -- as this case illustrates,
22 sometimes officers believe that it is to their
23 advantage to perform a no-knock entry, or to fail to
24 comply with the knock-and-announce requirement. And
25 that is why --

1 JUSTICE O'CONNOR: Why?

2 MR. MORAN: Well, Officer Good apparently
3 thought that his safety would be better served he if
4 disregarded the knock-and-announce requirement; and
5 so, he candidly testified, at the evidentiary
6 hearing, that it's essentially his policy, in drug
7 cases, to go in without a -- without performing the
8 necessary knock-and-announce. And that was 1 year
9 after the -- this Court's decision in Richards,
10 saying that there is no per-se exclusion of drug
11 cases from the knock-and-announce requirement.

12 But that brings me to the second reason why
13 courts have almost universally, until the Stevens
14 case in 1999, held that suppression of evidence is
15 necessary, and that is deterrence; because, without
16 the suppression of evidence, there is very little
17 chance that the officers will be deterred from
18 routinely violating the knock-and-announce
19 requirement, from adopting a sort of personal
20 violation of the requirement, just as --

21 JUSTICE SCALIA: I don't know, I'd be
22 worried -- you know, bust in somebody's door -- that
23 the homeowner wouldn't shoot me. Without announcing
24 that I'm the police, he had every reason to believe
25 he's under attack. Isn't that a considerable

1 deterrent?

2 MR. MORAN: Yes, that's the one purpose of
3 the knock-and-announce requirement that doesn't
4 protect the homeowner's interest, that protects the
5 officer's interest --

6 JUSTICE SCALIA: Exactly.

7 MR. MORAN: -- against being shot.

8 JUSTICE SCALIA: Right.

9 MR. MORAN: However, what we'll see then,
10 if there is no exclusion of evidence following knock-
11 and-announce rules, are entries precisely like the
12 one we have here, where the officers will, in fact,
13 announce -- they yell, "Police, search warrant" --
14 but then they'll immediately go in. Officer Good
15 said that he went in real fast. He went in, and it
16 took him just a few seconds to get in the door. So,
17 that's what they'll do. They'll announce -- some
18 officers will announce, because they'll want the --

19 JUSTICE SCALIA: Yes.

20 MR. MORAN: -- people inside to know that
21 they're police, but they will not wait for a refusal,
22 and they certainly will not wait for a reasonable
23 amount of time for some --

24 JUSTICE SCALIA: I'm not sure I agree with
25 a point that you make in your brief that civil

1 actions simply are of no use. That might have been
2 the case when we first adopted the exclusionary rule,
3 but our docket is crowded with 1983 cases brought by
4 prisoners, brought by convicted felons, and many of
5 these cases are successful below. What reason is
6 there to believe that that wouldn't be an adequate
7 deterrent?

8 MR. MORAN: Simply, Justice Scalia, that,
9 as far as we can determine, no one wins a knock-and-
10 announce case, or we haven't been able to find a
11 single case in which someone has actually recovered
12 damages for a knock-and-announce violation. So, if
13 this --

14 JUSTICE GINSBURG: Is that because the
15 damages are slight or because there's a defense that
16 is successful? What has been the defense in these
17 tort cases?

18 MR. MORAN: Both, Justice Ginsburg. First
19 of all, in many cases, such as this one, where the
20 police don't actually destroy the door, it would be
21 very hard to quantify the damages, and it would be
22 very hard to find a lawyer to take a case such as
23 this. But the second barrier is the various
24 immunities, tort immunities. In section 1983
25 actions, there are qualified immunities that make it

1 difficult to win a suit. And because it is not a
2 bright line as to when the police officers have to
3 knock and announce, and when they do not -- that is,
4 Is there a reasonable suspicion that a quick entry or
5 a no-knock entry will be met with violence or that
6 the evidence will be destroyed? -- courts tend to be
7 very generous in granting qualified immunity to
8 officers -- that is, concluding that some reasonable
9 officers might have concluded that it was justified
10 to dispense with the knock-and-announcement
11 requirement.

12 JUSTICE SCALIA: Of course, that same
13 problem exists if the consequence is exclusion of
14 evidence. Courts are going to view it the same way.
15 You're not going to avoid that problem by excluding
16 evidence.

17 MR. MORAN: Well, there -- but there is not
18 a qualified-immunity defense to the exclusionary
19 rule.

20 JUSTICE SCALIA: Well --

21 MR. MORAN: And so, if the Court concluded
22 --

23 JUSTICE SCALIA: Well, I mean, your point
24 is, it's very hard to tell whether they waited long
25 enough, right? And that's why they don't win a lot

1 of these cases. But the same thing is going to be
2 true if the consequence of not waiting long enough is
3 the exclusion of the evidence. The court is going to
4 be very -- it's going to be very difficult to tell if
5 they waited long enough, and, as you say, the court
6 is likely to say, you know, "Let it go."

7 MR. MORAN: That's true, to some extent,
8 Justice Scalia, but, as an empirical matter, I've
9 cited many cases, in my brief, over the last 50 years
10 where courts from a vast majority of American
11 jurisdictions have found knock-and-announce
12 violations in criminal cases, and have, therefore,
13 excluded the evidence, including this Court, on two
14 occasions, 1958 and 1968. So, courts do find knock-
15 and-announce violations in criminal cases.

16 JUSTICE SCALIA: Our two cases did not --
17 did not raise that issue. The issue was not decided
18 in those cases, was it?

19 MR. MORAN: The issue of a knock-and-
20 announce violation leading to exclusion of evidence--

21 JUSTICE SCALIA: Right.

22 MR. MORAN: -- was decided. The -- there
23 was not an inevitable-discovery issue raised in those
24 two cases, because those cases predated the
25 inevitable-discovery doctrine. But, of course, in

1 1958 and 1968, this Court was very familiar with the
2 independent-source doctrine. And, really, the
3 argument that the Michigan Supreme Court has adopted
4 -- they call it an inevitable-discovery argument;
5 it's really an independent-source doctrine.

6 CHIEF JUSTICE ROBERTS: You don't -- you
7 don't dispute the application of the inevitable-
8 discovery principle here, do you?

9 MR. MORAN: Not at all, Justice -- Mr.
10 Chief Justice.

11 CHIEF JUSTICE ROBERTS: Okay.

12 MR. MORAN: No, the --

13 CHIEF JUSTICE ROBERTS: And you don't
14 dispute that the purpose of the knock-and-announce
15 rule is not to allow the targets of the search to
16 dispose of evidence, or anything of that sort.

17 MR. MORAN: Absolutely not. The purpose of
18 the knock-and-announce rule is to protect the
19 homeowner's privacy rights. It's one of the core
20 parts of the right of the people to be secure in
21 their homes against unreasonable police invasions.

22 CHIEF JUSTICE ROBERTS: Well, but it's a
23 limited privacy right, of course. These people have
24 a warrant, right?

25 MR. MORAN: That's correct.

1 CHIEF JUSTICE ROBERTS: So, how would you
2 describe the privacy interest that the knock-and-
3 announce rule is protecting?

4 MR. MORAN: Well, I think this Court has
5 described it well in the -- in its most recent cases
6 -- in Banks and Richards, in particular, as well as
7 Ramirez and Wilson -- that it is a right against
8 being terrified by having the police come in. It is
9 a right against being embarrassed. People might be
10 in all stages of undress or in compromising positions
11 when the police come in. And it is a right against
12 having one's door destroyed. The English cases, the
13 early English cases, first recognized that it's a
14 right against having one's --

15 CHIEF JUSTICE ROBERTS: So, it doesn't go
16 at all to the items that are the target of the
17 warrant.

18 MR. MORAN: No.

19 CHIEF JUSTICE ROBERTS: And so, why should
20 the remedy for the violation be to exclude those
21 items? The privacy that's protected isn't the
22 cocaine, the weapons, the other items that were
23 discovered.

24 MR. MORAN: Well, with respect, Mr. Chief
25 Justice, I think you could say the same thing about

1 the warrant requirement. The purpose of the warrant
2 requirement is also to protect the sanctity and the
3 privacy of the home; it's not to protect contraband
4 that one might have in the home, or whatever it is
5 that the police are looking for. It's --

6 CHIEF JUSTICE ROBERTS: No, it's to protect
7 privacy in the possessions and papers and effects.
8 And these are possessions, papers, and effects. It
9 goes right to what the police are trying to seize,
10 and you have an independent magistrate make a
11 determination that there's probable cause to believe
12 it, et cetera, et cetera. The knock-and-announce
13 rule is an entirely -- concerned with entirely
14 different things. And yet, you're enforcing it by
15 excluding the papers, effects, and possessions.

16 MR. MORAN: And I think the courts have
17 recognized that it's necessary to enforce it that
18 way, because other methods of enforcing it will not
19 work. But --

20 JUSTICE KENNEDY: Well, but just --

21 MR. MORAN: -- I think it's --

22 JUSTICE KENNEDY: -- just on the point of
23 the causal relation that the Chief Justice was
24 exploring, I mean, there is a causal relation in a
25 but-for sense. We know that.

1 MR. MORAN: Yes.

2 JUSTICE KENNEDY: I suppose the position of
3 the Respondent is that the minute there's an entry
4 after the knock violation -- the no-knock violation -
5 - the minute there's an entry, that injury ceases, so
6 that it's different from a warrantless rummaging-
7 around through drawers and so forth. I suppose that
8 would be their argument.

9 MR. MORAN: I think that is their argument,
10 Justice Kennedy, and I respectfully disagree with it.

11 As a historical matter, even the early English cases
12 recognized that when an officer illegally entered --
13 a sheriff illegally entered a home with a valid writ,
14 that officer became a trespasser, and the activity
15 that he performed in the home was, therefore,
16 illegal. In the reply brief, I cited several early
17 American cases, from the 1830s and 1840s, holding
18 that when an officer had a valid writ to seize a
19 debtor's goods, but illegally entered the home, then
20 that writ became no good; and, therefore, the officer
21 -- the sheriff, in those cases -- could be sued, not
22 only for the illegal entry, but also for the seizure
23 of the goods that he had a valid warrant, or a valid
24 writ, to seize, and that that --

25 JUSTICE SCALIA: Yes, but here it was a

1 warrant to enter the home, not to seize particular
2 goods. So, the entry of the home was not illegal.
3 The entering of the home was perfectly okay. What
4 was illegal was not knocking and announcing in
5 advance. It seems to me that's quite a different --
6 quite a different issue, and the causality is quite
7 different.

8 MR. MORAN: Well, Justice Scalia, I
9 respectfully disagree that the entry was not illegal.

10 I believe the entry was illegal, because what a
11 warrant authorizes an -- a -- an officer to do is to
12 make a legal entry. It does not allow the officer to
13 enter however he pleases; it allows the officer to
14 make an entry that complies with the law -- in
15 particular, the fourth amendment. And so, the entry
16 was illegal. They could have performed a legal
17 entry.

18 JUSTICE SCALIA: I understand that, but the
19 essence of the violation was not the entering;
20 whereas, in the cases, the old common law cases
21 you're talking about, the essence of the violation
22 was the entering. Here, the entering was perfectly
23 okay; it was the manner of it, the failure to give
24 the advance notice, that made it bad. And that, it
25 seems to me, creates a different situation.

1 MR. MORAN: I think, starting in Semayne's
2 case, the Court recognized that even if the officer
3 would have a right to knock down the door after a
4 refusal of entry was obtained, that if the officer
5 did not wait for that refusal, then the entry was
6 illegal. And so, I think the common law cases do
7 support -- the old English common law cases, starting
8 with Semayne's case -- do support the notion that the
9 entry -- the entry does become illegal if the officer
10 does not wait for the refusal. And in this case, of
11 course, the officer did not wait at all for any
12 refusal, candidly admitted that he went in as soon as
13 he could get through the door, as quickly as he
14 could.

15 JUSTICE GINSBURG: Mr. Moran, would you
16 clarify an answer you gave to Justice O'Connor at the
17 outset of the argument? You said there is no
18 statutory right to get a no-knock warrant. But did
19 you say, as a matter of case law and practice, that
20 can be done in Michigan?

21 MR. MORAN: I don't believe so. I don't
22 believe that Michigan still allows for no-knock
23 warrants. But officers, of course, can perform no-
24 knock entries when arriving at the scene, the
25 circumstances justify a no-knock entry.

1 CHIEF JUSTICE ROBERTS: You mean, if you
2 had a case where the reason you were arresting the
3 guy is because he's shot through the door the last
4 three times somebody knocked and announced, you still
5 have to knock and announce, under Michigan law?

6 MR. MORAN: No, I don't think so, Mr. Chief
7 Justice. I think, in that case, that would satisfy
8 the Richards standard. In that case, the officer
9 would have particularized suspicions amounting --

10 CHIEF JUSTICE ROBERTS: But he couldn't get
11 a warrant saying that.

12 MR. MORAN: I don't believe Michigan has a
13 procedure for granting no-knock warrants, not --

14 JUSTICE BREYER: But that's -- that's
15 actually what's disturbing me about this, because I
16 thought the knock-and-announce rule was a rule that
17 would allow a policeman to go in without knocking and
18 announcing when he has reasonable grounds for
19 thinking he might get shot if he didn't. So, I -- as
20 I read the briefs, I thought maybe that's not how
21 it's being implemented, that the policemen are
22 supposed to run the risk of being shot. I didn't
23 think that was the situation. So, I'd appreciate
24 your explaining that to me.

25 MR. MORAN: Well, in Richards, this Court

1 said that if there are particular facts about this
2 particular entry that would make an officer have
3 reasonable suspicions that he is going to be shot at
4 or the evidence is going to be destroyed, then the
5 officer may dispense with the knock-and-announce
6 requirement. There were no such suspicions in this
7 case, and that's why the prosecution conceded, at the
8 outset and at every step since, that it was a knock-
9 and-announce violation. The officers had no
10 information about this particular --

11 JUSTICE BREYER: Would it be sufficient if
12 the officer says, "One, this is a drug gang; two,
13 they don't let people into the house whom they don't
14 know; and, three, they have guns"?

15 MR. MORAN: That might be sufficient, after
16 Richards, but that's not the facts of this case. We
17 have none of those facts in this case. They were
18 serving a warrant, and they had no information that
19 they were going to be in particular danger. They had
20 no information, for example, that there were drugs,
21 stored near the toilet, that were going to be flushed
22 down.

23 JUSTICE STEVENS: Let me just be sure I
24 understand the hypothetical case, where, three times
25 before, there had been warrants served, and, each

1 time, the homeowner shot at the officer, the fourth
2 time, they could go in without waiting.

3 MR. MORAN: I think that would be an easy
4 case, Justice Stevens.

5 JUSTICE STEVENS: You think it would, okay.

6 MR. MORAN: Because then you would have
7 particular facts about this particular residence and
8 the people involved. I think that would be a very
9 easy case for a no-knock entry. We --

10 CHIEF JUSTICE ROBERTS: But you can't get a
11 warrant that says he can do that.

12 MR. MORAN: I don't believe Michigan has
13 that procedure. Perhaps Mr. Baughman can correct me.
14 He's a -- he's with the prosecuting attorney's
15 office. But I don't believe Michigan has that
16 procedure. Not all States do have that procedure.
17 And, instead, States that don't have that procedure
18 simply leave it to the officer to determine if there
19 are those facts that justify a no-knock entry. So,
20 there are many entries in Michigan, that occur all
21 the time, that do not comply with the knock-and-
22 announce requirement. And that's fine, because the
23 officer does, in fact, have the particularized facts
24 justifying a no-knock entry.

25 JUSTICE KENNEDY: We've been down this

1 route before in other cases, like Wilson, but it's
2 still a troublesome measure. It's hard for me to
3 believe that if a person has drugs in the pockets of
4 his trousers or on the -- next to the chair where
5 he's sitting, that he wouldn't immediately run and
6 try to dispose them. I just think that it's ordinary
7 behavior. And, if that's so, then it would follow
8 that you never have to knock if you're looking for
9 drugs that might be on the person. Do you have any
10 comment as to that?

11 MR. MORAN: Well, then that would -- this
12 Court, I think, would have to reverse Richards,
13 because Richards said that the fact that it's a
14 felony drug investigation does not justify a blanket
15 exclusion from the knock-and-announce requirement.
16 And this Court unanimously held, in Richards, that
17 the knock-and-announce requirement applies in felony
18 drug cases --

19 JUSTICE KENNEDY: But --

20 MR. MORAN: -- unless --

21 JUSTICE KENNEDY: But if we say that a
22 likelihood -- or that the -- or substantial
23 probability that the evidence will be destroyed
24 allows the no-knock, why won't that be true in every
25 drug case, other than for what we said in Richards?

1 MR. MORAN: Well, because in Richards --

2 JUSTICE KENNEDY: I mean, do people say,
3 "Oh, they've got me now. I won't get rid of the
4 drugs"?

5 MR. MORAN: Well, first of all, Justice
6 Kennedy, I think the law presumes that homeowners
7 will either make an explicit refusal, "No," or will
8 answer the door; and primarily that they'll do the
9 latter. The presumption of the homeowner that we're
10 talking about is an innocent homeowner, somebody who
11 is either -- has nothing to do with whatever the
12 police are looking for. There are many cases where
13 the police are looking for goods that are not
14 connected to the people who are home.

15 JUSTICE KENNEDY: Well, when there's
16 probable cause to enter, there's no presumption of
17 innocence, is there, or am I wrong?

18 MR. MORAN: Well, it -- with -- probable
19 cause is a standard at somewhere around 50 percent,
20 and a very large number of warrants are executed on
21 the homes of people who have nothing, or people who -
22 - there is something that the police are looking for,
23 but they don't have anything to do with it; they're
24 third-party homeowners. And, for that reason, the
25 knock-and-announce requirement recognizes that many,

1 many warrants -- many, many searches -- will be
2 executed on the homes of perfectly upstanding,
3 innocent people. And --

4 CHIEF JUSTICE ROBERTS: Do you have -- do
5 you have any empirical basis for your statement that
6 many warrants are executed and they don't find
7 anything?

8 MR. MORAN: Well, I don't have any
9 statistics. I'm sure the FBI keeps statistics on at
10 least Federal warrants. But it's true that in a
11 large number of warrants, the police don't find what
12 they're looking for, because probable cause is a
13 standard that is not particularly high.

14 CHIEF JUSTICE ROBERTS: Do you have any
15 basis for your statement that, in a large number,
16 they don't find what they're -- anything that they're
17 looking for?

18 MR. MORAN: I don't have any empirical
19 evidence, but certainly lots and lots of anecdotal
20 evidence, from reading newspaper accounts of police -
21 -

22 JUSTICE STEVENS: And you --

23 MR. MORAN: -- searches.

24 JUSTICE STEVENS: -- you don't dispute the
25 fact that presumption of innocence -- the presumption

1 of innocence survives an indictment, doesn't it?

2 MR. MORAN: It does, and I think it --

3 JUSTICE STEVENS: Yes.

4 MR. MORAN: -- survives the search warrant.

5 JUSTICE STEVENS: So probable cause is not
6 enough to eliminate the presumption of innocence.

7 MR. MORAN: I certainly would argue that --

8 JUSTICE STEVENS: Yes.

9 MR. MORAN: -- Justice Stevens, that
10 probable cause it not a very high standard. And in -
11 - many search warrants are, in fact, served on the
12 homes of people who are not suspected, because
13 they're thought to be the place where stuff was
14 stored, but not be the people who are suspected of
15 doing anything wrong in the first place.

16 JUSTICE GINSBURG: In --

17 JUSTICE SCALIA: Mr. Moran, these old
18 common law cases you referred to, which held that a
19 failure to knock and announce renders the entry
20 unlawful, what was the consequence, in those cases?

21 MR. MORAN: Those were cases in which,
22 typically, the sheriff was sued for trespassing.

23 JUSTICE SCALIA: Right. And the evidence
24 would -- if found, was not excluded, right?

25 MR. MORAN: No. There was --

1 JUSTICE SCALIA: So, if we wanted to be
2 faithful to those common law cases, we wouldn't
3 exclude the evidence.

4 MR. MORAN: I think things have changed,
5 Justice Scalia, since those common law days, for that
6 reason.

7 JUSTICE SCALIA: Well, then you shouldn't
8 have cited the common law case.

9 [Laughter.]

10 MR. MORAN: Well, Justice Stevens -- I
11 mean, excuse me, Justice Scalia, things have changed,
12 in the sense, first of all, that in those days there
13 was a common law writ of trespass. If one were to
14 file, in Michigan, a complaint for trespass against
15 the sheriff, one would be laughed out of court today,
16 because all that you have is a tort suit, which you
17 have to show an extreme violation -- I cited the
18 Michigan statute that requires extreme recklessness
19 on the part of the police officer.

20 The second point is that in those days the
21 sheriffs were -- there were adequate means to control
22 the behavior of sheriffs, because they were seen as
23 arms of the judiciary. That, of course, was before
24 the rise of the independent police forces that we
25 have today. And so, the exclusionary rule, of

1 course, was adopted in the late 1800s, early 1900s --
2 in part, in response to the changing circumstances of
3 the police. The police were no longer under the
4 direct control of the judiciary; and so, different
5 remedies were necessary in order to assure compliance
6 with constitutional rights.

7 JUSTICE GINSBURG: In the courts that have
8 allowed this action to go forward, has the rationale
9 been that there is no other effective deterrent to
10 ignoring or violating the knock-and-announce rule?

11 MR. MORAN: Yes, Justice Ginsburg. At last
12 count now, 11 State and Federal appellate courts have
13 directly rejected the Michigan Supreme Court's
14 reasoning. The Idaho Court of Appeals just joined
15 the list 2 weeks ago, in a -- in a case that I -- is
16 not cited, because it's so recent. And they have
17 uniformly -- I believe all 11 of those cases have
18 said that, "Were we to hold otherwise, the knock-and-
19 announce rule would become meaningless," a worry that
20 this Court expressed in Richards. This Court was
21 very concerned, in Richards, that simply excluding
22 drug cases from the knock-and-announce rule would
23 make the knock-and-announce rule meaningless. And
24 these courts have noted that statement -- the courts
25 that came out -- this -- the decisions that came out

1 after Richards, and have said, "If that is
2 meaningless, then it would be especially meaningless
3 if we were to exclude the entire knock-and-announce
4 rule from the exclusionary rule, that there would be
5 virtually no reason for police officers ever to
6 comply with a knock-and-announce requirement.

7 And so, I think the deterrence rationale is
8 a large part of this, and that's what distinguishes
9 this case from the inevitable-discovery cases, which
10 the Michigan Supreme Court relied on.

11 JUSTICE SCALIA: Well, I suppose there are
12 a lot of other violations of constitutional rights by
13 the police that are very hard to get at, and that
14 cannot be remedied. And I suppose we could punish
15 them by excluding all the evidence, as well. We
16 don't do so, simply because there's no causality. We
17 insist upon a causal connection between the two.
18 It's not enough just to say the -- this is the only
19 way to stop the police from making the violation.

20 MR. MORAN: No, it is not enough, but what
21 is critical in this case is that the knock-and-
22 announce violation goes to the manner of entry, and
23 the Court has long recognized that the two predicates
24 for seizure of goods inside a home, or arrest inside
25 a home, are authority to enter the home, which is not

1 contested here, and a lawful entry. And if either
2 one of those two predicates is missing, then you have
3 grounds to suppress the evidence; that is, the
4 evidence inside the home is in the fruit of the
5 unlawful entry.

6 JUSTICE SCALIA: What about our opinion in
7 Ramirez, where the manner of entry was such that
8 there was damage to property?

9 MR. MORAN: I --

10 JUSTICE SCALIA: We didn't exclude the
11 evidence there, did we?

12 MR. MORAN: No. First of all, this Court
13 didn't find that there was a violation in the -- in
14 the damage in property; this Court found no -- did
15 not find, as a matter of law, any fourth amendment
16 violation. But I read the Ramirez -- that language
17 from Ramirez as saying that as long as the entry
18 remains lawful -- and, in Ramirez, the entry was
19 lawful, because there were valid grounds to dispense
20 with the knock-and-announce requirement. You had a
21 known dangerous fugitive, who had bragged that he
22 wouldn't be taken alive. And so, there was every
23 reason for the officers to dispense with the knock-
24 and-announce requirement. Therefore, the entry was
25 legal. They had both authority -- that is, the

1 warrant -- and they had a valid entry -- that is, a
2 no-knock entry that was justified by reasonable
3 suspicion that the officers would be met with
4 violence if they did knock and announce their
5 presence. And so, we -- in Ramirez, we have a lawful
6 entry. The language that's quoted from Ramirez
7 directly says, "the entry remains lawful," or words
8 to that effect. And you have a different case if you
9 had --

10 JUSTICE SCALIA: Well, what had happened?
11 Had they broken a window on the way in? Is that --

12 MR. MORAN: That's correct.

13 JUSTICE SCALIA: Well, the entry remains
14 lawful, despite the fact that the manner of the
15 entry, which included the breaking of a window, was
16 unlawful. I think what the Court meant was not, as
17 you're portraying it, that, objectively, the entry
18 was lawful. I think they were speaking: as a matter
19 of law, despite the fact that the breaking of the
20 window was wrong, the entry was lawful. Just as your
21 opponent is saying here: despite the fact that there
22 was no knock-and-announce, the entry was lawful.

23 MR. MORAN: Justice Scalia, I don't see any
24 language in Ramirez saying that the breaking of the
25 window was unlawful. I think the breaking of the

1 window -- I read the Ramirez opinion as saying the
2 breaking --

3 JUSTICE STEVENS: But even if it was
4 unlawful, it was not unconstitutional.

5 MR. MORAN: It wasn't -- certainly wasn't
6 unconstitutional. Often, when the police perform a
7 valid no-knock entry, they will damage property.
8 Typically, they will destroy the door. And so, the
9 breaking of the window in Ramirez, I don't believe
10 was unlawful. I believe it was perfectly valid way
11 for the officer to perform the entry; that is, to put
12 the gun through the window in the garage area in
13 order to prevent -- they believed that the homeowner
14 had guns there and was going to use the -- run to the
15 guns in order to repel the entry. And so, I believe
16 it was a perfectly lawful entry.

17 I think what Ramirez was saying was that
18 not all fourth amendment violations bear fruit. And
19 I agree with that. We do not have -- we do not
20 propound here a theory of everything, having to do
21 with all fourth amendment violations and the fruit
22 that they propound. We simply say that, with a
23 knock-and-announce violation that makes the entry
24 unlawful, the evidence found inside the home, and
25 only inside the home, is the fruit of that violation,

1 unless there truly is an inevitable-discovery or
2 independent-source argument; that is, something
3 independent of the entry, which can't be done here,
4 when the police simply barge in and, in a matter of
5 seconds, perhaps minutes, find the evidence. So, the
6 --

7 JUSTICE O'CONNOR: Mr. Moran, is it
8 undisputed by you that the client would not have
9 disposed of the drugs if the police had waited a few
10 seconds?

11 MR. MORAN: Yes, we presume that he would
12 have come to the door. He was just a few feet from
13 the door, in fact. He was right in front of the
14 door. We presume that he would have come to the
15 door, answered the door, admitted the police, and the
16 police would -- then would have performed the search.

17 If the Court has no further questions, I'd
18 like to reserve the balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.
20 Moran.

21 MR. MORAN: Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Mr. Baughman.

23 ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN

24 ON BEHALF OF RESPONDENT

25 MR. BAUGHMAN: Mr. Chief Justice, and may

1 it please the Court:

2 The metaphor of "fruit of the poisonous
3 tree" is frequently employed when the exclusionary
4 rule is discussed. And that metaphor is apt. It is
5 apt, because the sanction of exclusion, which is not,
6 itself, constitutionally required, is designed to
7 deter, and to deter in a specific way: to deter by
8 depriving the police of the result -- the fruit, the
9 product, the evidentiary advantage that has been
10 gained by their improper conduct. And so --

11 JUSTICE O'CONNOR: Would you agree there is
12 a knock-and-announce requirement --

13 MR. BAUGHMAN: Yes.

14 JUSTICE O'CONNOR: -- even though there is
15 a warrant?

16 MR. BAUGHMAN: Yes.

17 JUSTICE O'CONNOR: And do you agree that
18 that was violated here, that there wasn't really a
19 knock-and-announce here?

20 MR. BAUGHMAN: Yes, there was a -- an
21 announcement, but a failure to wait. There's not --
22 the announcement principles require --

23 JUSTICE O'CONNOR: All right.

24 MR. BAUGHMAN: -- not only an --

25 JUSTICE O'CONNOR: Now, is exclusion of

1 evidence in these circumstances a deterrent, so that
2 the police would be less likely to do that?

3 MR. BAUGHMAN: It may be.

4 JUSTICE O'CONNOR: Yes.

5 MR. BAUGHMAN: But I believe that, before
6 the question of deterrence is reached, the question
7 of causality must be addressed. This Court has
8 always said that causation is a necessary, though not
9 always sufficient, predicate, for a application of
10 the exclusionary rule. The way this Court has put it
11 is that it is clear that implementation of the
12 exclusionary rule in particular cases begins with the
13 premise that the challenged evidence is, in some
14 sense, the product of the improper police activity.
15 So, I believe --

16 JUSTICE SOUTER: Well, isn't it --

17 MR. BAUGHMAN: -- the question --

18 JUSTICE SOUTER: -- the product, here? I
19 mean, if they had not -- if they had not entered,
20 they would not have gotten their evidence. Their
21 entry, because it violated knock-and-announce, was
22 unlawful. So, it is a product, isn't it?

23 MR. BAUGHMAN: I think -- I think where I
24 would disagree, Your Honor, is that the entry is
25 lawful -- in fact, it's not simply authorized, it's

1 commanded by judicial order. The use of force --

2 JUSTICE SOUTER: Well, an entry that
3 conformed with knock-and-announce would have been
4 lawful. This entry didn't. This entry was
5 unreasonable. So, I don't see how your argument fits
6 the facts.

7 MR. BAUGHMAN: The way I distinguish it,
8 and what I -- where I believe the distinction lies is
9 that what was improper was not the fact of entry;
10 what was improper was the use of force in entering.
11 The --

12 JUSTICE SOUTER: Well, but --

13 MR. BAUGHMAN: -- knock-and-announce --

14 JUSTICE SOUTER: -- I mean, how do you make
15 that distinction? I mean, it's like the -- you know,
16 the Cheshire cat and a -- and the smile; you can't
17 distinguish the two. There was one entry, and that
18 entry violated the knock-and-announce rule.

19 MR. BAUGHMAN: Well, again, the use of
20 force in making the entry violated the knock-and-
21 announce rule. The entry itself was commanded by the
22 order of the court.

23 JUSTICE BREYER: Well, how is that
24 different from saying the entry is lawful, its only
25 problem is, it was done without a warrant? I mean,

1 you know, he's --

2 MR. BAUGHMAN: Because if they're --

3 JUSTICE BREYER: -- inside the building;
4 just, unfortunately, the means wasn't right. No
5 warrant.

6 MR. BAUGHMAN: No, if --

7 JUSTICE BREYER: The means wasn't right.
8 No knock-and-announce.

9 MR. BAUGHMAN: If there is no warrant,
10 there is no judicial command to enter, so the entry
11 is completely unjustified. Here, we have not set the
12 appropriate --

13 JUSTICE STEVENS: Well, but you might have
14 probable cause, but just not have the -- have the
15 warrant. So, what is the difference between having
16 probable cause to enter, but failing to get a
17 warrant, and having a warrant, but failing to knock
18 and announce?

19 MR. BAUGHMAN: Because the fourth amendment
20 commands that the police not enter without judicial
21 authorization. The police don't get to make the
22 probable cause decision in advance. And we wish to
23 have a judge make that decision, so we won't, in
24 hindsight, say, "Had you gone to the judge, the judge
25 would have found probable cause, so we'll ratify what

1 you did after the fact." The entry itself -- not
2 just the manner of entry -- the entry is invalid,
3 unless the judge authorizes it, or unless some
4 exception exists.

5 JUSTICE STEVENS: Is it your view the entry
6 was lawful or unlawful, in this case?

7 MR. BAUGHMAN: The fact of entry was
8 lawful.

9 JUSTICE STEVENS: No.

10 JUSTICE BREYER: So, in fact --

11 JUSTICE STEVENS: No --

12 JUSTICE BREYER: -- if they had a bazooka -
13 -

14 JUSTICE STEVENS: -- that's not the
15 question. The actually -- actual entry was lawful,
16 yes?

17 MR. BAUGHMAN: The entry was lawful.

18 JUSTICE STEVENS: Oh, okay.

19 JUSTICE BREYER: And the same would be true
20 if what they had was a bazooka, and blew the house
21 up.

22 [Laughter.]

23 MR. BAUGHMAN: Yes.

24 JUSTICE BREYER: Yes, okay.

25 MR. BAUGHMAN: Yes. The entry would be

1 lawful. The manner of entry would be unlawful. And
2 the consequence of that entry would turn on what
3 force was used. As, in this case, they opened the
4 door and walked in. There was no -- there was no
5 injury to person, there was no injury to property.

6 JUSTICE SOUTER: So, basically, your
7 argument rests on the fact that we can draw a
8 distinction between entry and manner of entry.

9 MR. BAUGHMAN: Yes. My principle that I am
10 advocating is that any police error in the execution
11 of a search, or in the accomplishment of a search,
12 bears fruit only in relation to the purpose, or
13 purposes, served by the principle violated. One --

14 CHIEF JUSTICE ROBERTS: It's a --

15 MR. BAUGHMAN: -- has to ask --

16 CHIEF JUSTICE ROBERTS: It's a -- it's a
17 strong argument, on the other side, that if we adopt
18 your position, the officers would have no incentive,
19 other than their own judgment about their personal
20 safety, whether to comply with the knock-and-announce
21 rule.

22 MR. BAUGHMAN: That is if one assumes that
23 the civil remedy -- that the 1983 actions has no
24 teeth and has no force, and I don't believe that's
25 true at all.

1 JUSTICE GINSBURG: What is the experience
2 in Michigan? The Michigan Supreme Court has had this
3 rule for some time, that you don't exclude the
4 evidence.

5 MR. BAUGHMAN: Uh-huh.

6 JUSTICE GINSBURG: How many successful 1983
7 actions have there been --

8 MR. BAUGHMAN: I am not -- I am not aware
9 of any. On the other hand, like Mr. Moran, I --
10 other than anecdotal evidence, I have no statistical
11 evidence that the police are violating the knock-and-
12 announce principle since the decision in Stevens.

13 JUSTICE GINSBURG: But you have not even
14 one case that you can cite where a 1983 remedy was
15 resorted to and was successful.

16 MR. BAUGHMAN: In Michigan, I don't. There
17 are cases cited in our brief where, in fact, there
18 are actions -- such actions brought. There are
19 several recent decisions in the Seventh Circuit, for
20 example, where qualified immunity was denied on a
21 knock-and-announce violation in the cases in the
22 district court for trial or settlement. And there
23 may be many cases that don't make the reports, what
24 actions are brought and settled.

25 JUSTICE GINSBURG: But you're not aware of

1 any case --

2 MR. BAUGHMAN: I am not aware of any case -

3 -

4 JUSTICE GINSBURG: -- where anyone has

5 recovered --

6 MR. BAUGHMAN: And, again, I think Mr.

7 Moran correctly points out, in -- many of these cases

8 are resolved by finding that the Richards v.

9 Wisconsin exceptions have been met. It is not, to

10 me, remarkable that there are not a lot of civil

11 actions. I believe there are not a lot of

12 violations, because, while no-knock entries may

13 occur, they are justified, under Richards v.

14 Wisconsin, in most cases. This case is an

15 aberration.

16 JUSTICE GINSBURG: On the no-knock warrant,

17 do you agree that it's not possible to get one in

18 Michigan?

19 MR. BAUGHMAN: Yes, there is no statute in

20 Michigan where one can go to the judge in advance and

21 say, "Here are the facts, known to me already, before

22 I even get to the scene, that should justify a no-

23 knock." That doesn't exist in Michigan. Michigan

24 follows Richards v. Wisconsin, and, in -- had case

25 law, even in advance of that, which simply said,

1 "Whether known in advance, or whether the facts
2 occurred at the time of the execution of the warrant,
3 if the Richards exceptions are met, you can go in
4 without knocking and announcing." So, we do follow
5 that rule. You just simply can't get advance
6 judicial authorization. It doesn't exist. But it is
7 certainly permissible, and it -- as Mr. Moran
8 indicated, it happens on a fairly regular basis,
9 because, unlike Mr. Moran, I believe the notion that
10 -- even in this case, I'm not saying there was no
11 violation; there was a violation, because the police
12 didn't know in advance that the defendant was sitting
13 in a chair with the cocaine in his pocket, on the
14 chair in front of him, and a gun by his side. I
15 think that he would have answered the door. It's
16 highly speculative, and somewhat fanciful, in that
17 circumstance.

18 CHIEF JUSTICE ROBERTS: Do they get to make
19 -- do they get to make "inevitable" arguments on
20 their side? I mean, let's say, as what happened
21 here, or as seemingly happened, the fellow is found
22 near the chair with the drugs. Can't they argue,
23 "Well, if you had knocked and you had waited 10
24 seconds, he would have gotten up from the chair and
25 gone somewhere else"? And you wouldn't have been

1 able to argue, at trial, "He was sitting in the chair
2 with the drugs."

3 MR. BAUGHMAN: That's true, but the drugs
4 were -- in this case, the drugs were in his pocket.

5 So, it wouldn't have helped him.

6 CHIEF JUSTICE ROBERTS: There was something
7 in the chair, right? I mean, the --

8 MR. BAUGHMAN: There was --

9 CHIEF JUSTICE ROBERTS: -- the gun, or what
10 --

11 MR. BAUGHMAN: The gun was in the -- in the
12 chair, but he was only convicted for the drugs in his
13 pocket.

14 CHIEF JUSTICE ROBERTS: Hmm.

15 MR. BAUGHMAN: I don't think he -- he could
16 say, "If you would have -- I would have gotten up and
17 answered the door; and, therefore, you wouldn't have
18 had to come in without knocking, you wouldn't have
19 had to break the door, you wouldn't have had to scare
20 me."

21 CHIEF JUSTICE ROBERTS: You wouldn't have
22 been able to tell the jury, "I was standing next to
23 the chair, because if I had -- I obviously would have
24 gotten away from the chair, because I knew that's
25 where the gun was."

1 MR. BAUGHMAN: That's -- that may well be.

2 And I want to be clear, I am not here arguing that
3 this Court should decide that there is no
4 circumstance possible where something that occurs in
5 the premises is not causally connected to the failure
6 to knock and announce. All I'm asking the Court to
7 decide is that causation is required before the
8 exclusionary rule is implemented, and physical
9 evidence found within a proper search of -- search of
10 proper scope, pursuant to the warrant, that that is
11 not causally connected to the -- to the knock-and-
12 announce violation. There may be other --

13 JUSTICE SCALIA: So, you -- so, you think
14 it's possible that the defendant could argue that the
15 evidence should be excluded because, "Had he knocked
16 and announced, I would have run to the toilet and
17 flushed it down, rather than" --

18 MR. BAUGHMAN: No.

19 JUSTICE SCALIA: -- "answering the" --

20 MR. BAUGHMAN: No, I --

21 JUSTICE SCALIA: Well, why not?

22 MR. BAUGHMAN: I think the only thing he
23 could --

24 JUSTICE SCALIA: That's causal.

25 MR. BAUGHMAN: But I think you have to tie

1 the causal connection to the purposes -- as I have
2 tried to indicated -- to the purpose, or purposes,
3 served by the principle violated. What is the
4 purpose of knocking and announcing? And I think --
5 Your Honor indicated -- it's to protect against
6 injury to the police, injury of people inside, and
7 property. It has no purpose to protect against the
8 invasion of the privacy of the dwelling and the
9 discovery of the evidence. In fact, if the police
10 knew in advance that the defendant might flush the
11 drugs down the toilet, they wouldn't have to knock
12 and announce at all. So, I think we have to relate
13 the causal question to, What is the principle
14 violated? What purposes does it serve? And, in the
15 case of knock-and-announce, it does not serve the
16 purpose of allowing evidence to be destroyed. That,
17 in fact, serves as an exception to knocking and
18 announcing at all.

19 JUSTICE SOUTER: What do you say the
20 purpose of knock-and-announce is?

21 MR. BAUGHMAN: This Court has identified it
22 on several occasions as to avoid unnecessary violence
23 to the property, avoid unnecessary possible injury to
24 people, both to the officers who are executing the
25 warrant and people inside, and to allow the person

1 inside to prepare to answer -- as Mr. Moran
2 indicated, if they might be in a state of undress or
3 something, they could avoid that embarrassment.

4 JUSTICE SOUTER: So, I take it your
5 argument is that, except in cases in which the people
6 inside the house are not dressed, or cases in which
7 there is, in fact, a gun battle of some sort, that a
8 knock-and-announce violation will, in fact, never be
9 the cause of any damage at all.

10 MR. BAUGHMAN: It will never be the cause
11 of the discovery of the physical evidence found --

12 JUSTICE SOUTER: No, no, it -- no, but
13 it'll never be the cause of any compensable damage at
14 all.

15 MR. BAUGHMAN: Well, if a --

16 JUSTICE SOUTER: Because I take it your
17 argument is: what you can recover from requires
18 causation. And what I mean by "causation" is the
19 causation of the harms which the rule is intended to
20 avoid.

21 MR. BAUGHMAN: Correct.

22 JUSTICE SOUTER: And if the only harms that
23 the rule is intended to avoid is the exposure of
24 nakedness and violence, once inside, and there are
25 cases without nakedness or without violence, then, in

1 those cases, there will never be a recovery.

2 MR. BAUGHMAN: Oh, in those cases, correct.

3 In cases where there is violence, there will be
4 recovery. In a case such as the instant one, where
5 there is no nakedness, there is no violence, they
6 simply opened an unlocked door, I would say, yes,
7 there would be no recovery, in that circumstance;
8 there would be no damages. There may be cases -- and
9 this is why not -- I'm not arguing there was no
10 knock-and-announce violation, in that the police
11 shouldn't knock and announce, because, in different
12 cases, the consequences may be dramatic, they may be
13 severe, and damages may be severely assessed.

14 JUSTICE SOUTER: But, basically, your rule
15 is, the police are entitled to take the chance. If
16 they -- if they get inside, and people have got their
17 clothes on and there's no gun battle, no problem;
18 nothing that the police are exposed to, either by an
19 exclusionary rule or by a civil recovery. And if
20 they want to take that chance, if they want to take
21 the chance that somebody will not be dressed or a gun
22 will be pulled, basically that's their option.

23 MR. BAUGHMAN: I think, as in other
24 situations where this Court does not apply the
25 exclusionary rule, simply on a deterrence basis --

1 because the Court does not always apply the
2 exclusionary rule, even when there would be
3 deterrence -- that that is correct.

4 CHIEF JUSTICE ROBERTS: Well, that's not
5 true. I mean, there are going to be situations, or
6 at least possible, where evidence is going to be a --
7 causally connected to a violation of the knock-and-
8 announce rule, right? The situation -- the warrant
9 is because these people were involved in a shootout
10 with the -- you know, the Johnson gang; they knock
11 the door down and somebody yells, "Look out, it's the
12 Johnson gang."

13 MR. BAUGHMAN: Yes.

14 CHIEF JUSTICE ROBERTS: And if they had
15 knocked and announced, and "It's the police," they
16 wouldn't have that statement that's incriminating.
17 Now, you would agree that that statement would be
18 excluded because of the violation, right?

19 MR. BAUGHMAN: Yes, exactly. That was
20 precisely the point I was going to make, in terms of
21 a hypothetical. We're not arguing -- as I tried to
22 indicate earlier, we're not arguing that you need to
23 resolve every question today about what is, or is
24 not, causally related. And there are circumstances
25 where a spontaneous declaration -- you know, the

1 police break through the door, and the defendant
2 says, "The drugs are in the closet," and you want to
3 use that declaration to tie him to the drugs -- that
4 may well be causally connected. All we're asking
5 today is for this Court to decide that the items --
6 the physical evidence found within a proper scope, a
7 search of proper scope of the warrant that's being
8 executed -- is not causally connected. Other
9 questions of spontaneous declarations, tying the
10 defendant by position to the chair, those may present
11 different issues. But the drugs that were named in
12 the search warrant as items to be searched for and
13 seized are not causally connected; they are the fruit
14 of the execution of the judicial command, not of the
15 knock-and-announce violation.

16 JUSTICE STEVENS: I can understand the
17 requirement there be causal connection. Are there
18 cases in which courts have held that there was a
19 knock-and-announce violation, and there is a general
20 remedy of exclusion, unless -- except when there's a
21 causal connection; but, in fact, the evidence was
22 admitted because it was not causally connected to the
23 entry?

24 MR. BAUGHMAN: I'm not aware of any.

25 JUSTICE STEVENS: I mean, I can understand

1 the hypothetical, but it seems to me it's really a
2 hypothetical.

3 MR. BAUGHMAN: Yeah. And I think the
4 reason that that exists is because, up til today --
5 and Mr. Moran's correct, most courts go the other way
6 -- up until the Stevens case, the assumption had been
7 -- and I think the assumption has come from Miller
8 and Sabbath -- the assumption has been, if there's a
9 knock-and-announce violation, you exclude the
10 evidence. So, questions of causation have not been
11 explored until the Stevens case, and then the Seventh
12 Circuit, in several opinions, has also reached the
13 same conclusion. But I think Sabbath and Miller
14 present very different circumstances. Sabbath and
15 Miller, as the Court will recall, were arrest cases.

16 And the arrest situation does not translate into the
17 execution of a search warrant, because knock-and-
18 announce serves a different purpose, an additional
19 purpose, in the arrest situation, that is not served
20 when -- in the search situation.

21 JUSTICE BREYER: Oh, I see your argument
22 now. I think your argument is, most of the fourth
23 amendment rules are really designed to prevent
24 warrantless entries. But this one isn't.

25 MR. BAUGHMAN: That's correct.

1 JUSTICE BREYER: This one is designed to
2 prevent damage to property --

3 MR. BAUGHMAN: That's correct.

4 JUSTICE BREYER: -- et cetera. So, let's
5 not have the exclusionary rule and rely on the damage
6 remedy where that kind of thing actually occurs,
7 which isn't often.

8 MR. BAUGHMAN: That's correct.

9 JUSTICE BREYER: And if we buy that
10 principle, suppose we were to apply it in the Miranda
11 area -- purpose of a Miranda warning is really to
12 make certain he can have a lawyer, if he wants one,
13 for example. So, now we prove this guy wouldn't have
14 asked for a lawyer anyway. All the evidence comes
15 in.

16 I mean, it's an interesting principle. I
17 see the logic. But it seems to me to have a lot of
18 implications that this Court has never bought.

19 MR. BAUGHMAN: I think it's much more
20 speculative in the -- in the fifth-amendment area,
21 but I think --

22 JUSTICE BREYER: I can't think of any other
23 area, fifth or fourth, where we've bought it. And
24 I've tried to explain, in the question, why we
25 haven't bought it. Now, you go ahead.

1 MR. BAUGHMAN: But I think to not accept
2 causation as a requirement, which I think this Court
3 has always done -- as I said at the outset, this
4 Court has said that implementation of the
5 exclusionary rule is premised on the evidence being
6 the product of the police misconduct. To not do
7 that, to not have a causation requirement, I believe,
8 severs this Court's current exclusionary-rule
9 doctrines from its moorings. There are many
10 circumstances that this Court has, at this point, at
11 least, seen fit to rest with the lower courts, such
12 as the execution of a search warrant. You search
13 within proper scope, you're looking for computer
14 monitors, you find them, but, as you're executing,
15 you open a desk drawer and you shut it, you exceed
16 the scope of the warrant. The law is pretty uniform,
17 currently, that you don't suppress the computer
18 monitors because you exceeded the scope by opening
19 the drawer. If you found drugs in the drawer, you
20 make -- you'd exclude those. But you don't exclude
21 the monitors, because there's not a causal connection
22 between the wrong in exceeding the scope of the
23 warrant and the discovery of the monitors.

24 All those cases are up for grabs again if
25 this Court severs the causation requirement from the

1 application of the exclusionary rule. And that's
2 just one example; there are others. This Court has
3 always required that there be a causal connection,
4 and I believe that it should simply continue to do
5 so.

6 We're not asking this Court to overrule any
7 cases, to create any really new principles, we're
8 simply asking this Court to understand that Sabbath
9 and Miller were knock-and-announce for arrest. With
10 an arrest situation, if a person surrenders at the
11 door, you don't go in and search the premises
12 thoroughly. There's a different purpose served in
13 arrest. With a search warrant, knock-and-announce
14 has no purpose of protecting the privacy of the
15 dwelling itself with the discovery of the items named
16 in the warrant, and they shouldn't be suppressed.
17 Things that are causally connected can be left to an
18 argument that may be made by counsel in different
19 situations, but, as to the items named in the warrant
20 -- contraband, fruit, spirits, instrumentalities --
21 that should not be suppressed. It is simply not
22 causally connected to the entry, and we would ask
23 this Court to so hold.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1 Mr. Salmons.

2 ORAL ARGUMENT OF DAVID B. SALMONS

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 IN SUPPORT OF RESPONDENT

5 MR. SALMONS: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 The knock-and-announce rule, unlike the
8 warrant and probable cause requirements, does not
9 protect the individual's privacy interest in the
10 items to be searched, and does not relate to the
11 officer's authority to conduct the search and obtain
12 the evidence. An unannounced or premature entry,
13 therefore, does not detract from the officer's legal
14 authority reflected in the warrant to enter and
15 conduct a search. Instead, as this Court held in
16 Segura, an untainted warrant provides an independent
17 source for the search, even where the entry is
18 illegal. There was only one entry in the Segura
19 case, since the officers remained in the apartment
20 until a warrant was finally obtained.

21 JUSTICE BREYER: It depends, of course, on
22 whether you -- what you're doing. Now I see what
23 you're doing. You're applying a kind of Palsgraf
24 causation analysis within the risk -- I think that's
25 what you're doing -- to saying it's outside, it's not

1 a cause. You're saying -- you don't say it's not a
2 necessary condition of his being there. It is. You
3 do say, "Well, the being-in-the-room-there is not
4 within the risk, the reason for which we have a
5 knock-and-announce rule." But, of course, that's a
6 matter of judgment. I mean, you could say the
7 purpose of the cause -- of the knock-and-announce
8 rule is to keep people out of there without knocking
9 and announcing. And if that's the purpose of it,
10 it's right within the risk, right cause.

11 MR. SALMONS: Your Honor --

12 JUSTICE BREYER: You just are looking at
13 the harms that his being there in that room without
14 announcing might bring about. That doesn't mean
15 that's why we don't have the rule. We have the rule
16 to keep him out of there without announcing.

17 MR. SALMONS: Your Honor, there are --
18 there are several reasons why the Court has -- the
19 Court has articulated several reasons for why there
20 is the knock-and-announce rule. We think the
21 important point, though, with regard to Segura
22 case is that the entry, in Segura, was unlawful both
23 because the officers did not announce and because
24 they did not have a warrant. They, nonetheless,
25 stayed there for 20 hours, and, when they finally did

1 obtain a warrant, they conducted the search. And
2 this Court had no difficulty in saying that, even
3 though the initial entry was unlawful, the warrant-
4 authorized search -- the warrant was an independent
5 source for the search, and that the legality with
6 regard to the initial entry was, quote, "wholly
7 irrelevant to the evidence that was obtained pursuant
8 to the warrant." And we would submit that it would
9 be an odd fourth amendment rule that would allow
10 admission of the evidence where the officers failed
11 to obtain a warrant. They entered without a warrant
12 and without announcement, and only later obtained
13 one, as in Segura; and then suppress all evidence, in
14 this case, where the officers did obtain a warrant in
15 advance, and their only illegality was the much more
16 minor one of entering a few moments prematurely.

17 JUSTICE SOUTER: What was the --

18 MR. SALMONS: Nothing in this Court's cases
19 --

20 JUSTICE SOUTER: I'm sorry, I didn't mean
21 to interrupt.

22 MR. SALMONS: No, that's fine, Your Honor.

23 JUSTICE SOUTER: I was going to say, What
24 was -- what were the grounds upon which the warrant,
25 in Segura, was obtained?

1 MR. SALMONS: The warrant, in Segura, was
2 obtained by -- based on evidence that was in
3 existence prior to the unlawful entry, so that it was
4 an untainted warrant.

5 JUSTICE SOUTER: So, it didn't -- it didn't
6 depend on the entry or anything gained as a result of
7 the entry, right?

8 MR. SALMONS: Well, of course, the officers
9 -- once that warrant was obtained, officers would
10 have to enter the apartment in order to conduct a
11 search --

12 JUSTICE SOUTER: Right, but the --

13 MR. SALMONS: -- here, except for the fact
14 that --

15 JUSTICE SOUTER: -- but the --

16 MR. SALMONS: -- they had already entered
17 illegally and were already present illegally --

18 JUSTICE SOUTER: Right, but the warrant --

19 MR. SALMONS: -- in the apartment.

20 JUSTICE SOUTER: -- the warrant -- the
21 warrant itself didn't depend on anything they had
22 gained as a result of the entry. There was no --

23 MR. SALMONS: That's correct --

24 JUSTICE SOUTER: -- kind of causal --

25 MR. SALMONS: -- in Segura.

1 JUSTICE SOUTER: -- continuum there.

2 MR. SALMONS: That's absolutely correct,
3 and that's --

4 JUSTICE BREYER: So, you do --

5 JUSTICE SOUTER: Isn't --

6 MR. SALMONS: -- a requirement for --

7 JUSTICE SOUTER: Isn't that the difference,
8 though, with this case? Because, here, there is a
9 causal continuum, at least, as Justice Breyer said, a
10 but-for causal continuum. They wouldn't have been in
11 the apartment but for the entry. And so, the
12 authority of the warrant and the manner of executing
13 the warrant are not divisible the way they were in
14 Segura.

15 MR. SALMONS: Your Honor, with respect, I
16 think that's -- it would be an improper reading of
17 Segura. There was an illegal entry, in Segura, that
18 was just as necessary in order to conduct the search
19 and obtain evidence in that case as there was at
20 premature entry here.

21 JUSTICE SOUTER: But, in Segura, the court
22 issuing the subsequent warrant says, "You can -- you
23 can go in there and do this." The court -- by the
24 way, I -- maybe this makes it even easier -- did the
25 court, in Segura, know that they were in the

1 apartment?

2 MR. SALMONS: No, Your Honor.

3 JUSTICE SOUTER: Okay.

4 MR. SALMONS: Their -- they had no
5 knowledge of the illegality, and the evidence that
6 was -- that was the basis for the affidavit for the
7 warrant was untainted by the illegal entry. But, of
8 course, the same is true here, there was -- there is
9 no allegation at all that --

10 JUSTICE BREYER: No, no --

11 MR. SALMONS: -- the warrant in this case -
12 -

13 JUSTICE BREYER: -- the difference is --

14 MR. SALMONS: -- is tainted.

15 JUSTICE BREYER: All right, look, this --
16 you know, I'd appreciate your explaining this -- this
17 seems to me what you're saying in your brief was the
18 inevitable discovery. The inevitable-discovery rule,
19 in my -- the way -- the way I've thought of it, and
20 I'd like you to correct me if I haven't thought of it
21 correctly -- to use a kind of analogy, it's like a
22 primitive tribe that beats a tom-tom every morning so
23 the sun comes up. Hey, the sun's going to come up
24 anyway, and the bodies are going to be discovered
25 anyway, in those cases. And, in Segura, the warrant

1 is going to be issued anyway. So, it isn't a
2 question of whether it would have been issued if they
3 had behaved properly, it's a question of what will
4 really happen in the absence of the illegality.

5 MR. SALMONS: Well --

6 JUSTICE BREYER: Now, that's what I thought
7 inevitable discovery here was, and, in the absence of
8 these people entering the apartment illegally, they
9 wouldn't have found a thing, because --

10 MR. SALMONS: Well, Your Honor --

11 JUSTICE BREYER: -- there was nothing else
12 in motion.

13 MR. SALMONS: Your Honor, with respect,
14 that is -- that is directly at odds with the way the
15 Court, in Segura, approached --

16 JUSTICE BREYER: Now, which --

17 MR. SALMONS: -- the question.

18 JUSTICE BREYER: -- case is contrary to
19 what I said?

20 MR. SALMONS: I think Segura is contrary to
21 that.

22 JUSTICE BREYER: Segura?

23 MR. SALMONS: I think Murray --

24 JUSTICE BREYER: You have just said --

25 MR. SALMONS: -- is contrary to that.

1 JUSTICE BREYER: -- that, in Segura, they
2 would have gotten in, anyway, under a legal warrant
3 that had nothing whatsoever to do with the illegal
4 entry.

5 MR. SALMONS: In fact, that is precisely
6 the analysis --

7 JUSTICE BREYER: The sun rose, anyway.

8 MR. SALMONS: -- that's precisely the
9 analysis the Court ordered -- took in Segura. It
10 said, if there had been no illegal entry, the
11 officers --

12 JUSTICE BREYER: Right.

13 MR. SALMONS: -- would have obtained the
14 evidence --

15 JUSTICE BREYER: Exact --

16 MR. SALMONS: -- the same way --

17 JUSTICE BREYER: No. Well --

18 MR. SALMONS: -- because they had --

19 JUSTICE BREYER: -- not "would have." Did.

20 MR. SALMONS: Well, Your -- I'm just
21 informing Your Honor what the Segura case says. It
22 says the court -- the courts would have found --
23 excuse me -- the officers would have found the same
24 evidence that they found pursuant to the warrant if
25 they had complied with the fourth amendment. That's

1 because the court viewed the -- that warrant as a
2 separate independent source for the authority to
3 enter and conduct a search. One would have to posit,
4 I guess, that the officers in this case, if they --
5 if they would rather not execute the warrant than
6 delay a few additional moments before entering, but I
7 think that would not be a very realistic hypothesis.

8 JUSTICE GINSBURG: Then your --

9 MR. SALMONS: Now, with regard --

10 JUSTICE GINSBURG: -- position is that you
11 never -- if you have a warrant, then you can seize
12 what the warrant lists. So, if you have a warrant,
13 then there is never a reason that the police would
14 have to knock and announce, because the warrant gives
15 them independent authority to enter. That seems to
16 be what you're saying, that as long as you have a
17 warrant, there -- the knock-and-announce does not
18 have to be complied with.

19 MR. SALMONS: No, Your Honor. The knock-
20 and-announce requirement is -- we take no issue with
21 that. That is required by the fourth amendment.
22 With regard --

23 JUSTICE O'CONNOR: Well --

24 MR. SALMONS: -- to deterrence --

25 JUSTICE O'CONNOR: -- but in this very case

1 you had an officer who said it was his regular policy

2 --

3 MR. SALMONS: Well --

4 JUSTICE O'CONNOR: -- never to knock and

5 announce --

6 MR. SALMONS: That's not --

7 JUSTICE O'CONNOR: -- to just go in. So,

8 if the rule you propose is adopted, then every police

9 officer in America can follow the same policy. Is

10 there no policy of protecting the homeowner a little

11 bit --

12 MR. SALMONS: Of course the --

13 JUSTICE O'CONNOR: -- and the sanctity of

14 the home --

15 MR. SALMONS: Of course there is --

16 JUSTICE O'CONNOR: -- from this immediate -

17 -

18 MR. SALMONS: -- Your Honor, and that is

19 not --

20 JUSTICE O'CONNOR: -- entry?

21 MR. SALMONS: -- our position. And we,

22 respectfully, would argue that that's not an

23 appropriate way to conduct the deterrence analysis.

24 Even just on the terms of deterrence, we think that

25 suppression here would be a disproportionate remedy.

1 And that's because, as this Court has repeatedly
2 recognized, the officers already have an incentive,
3 inherent in the nature of the circumstances, to
4 announce and delay some period of time before entry.

5 Now, there may be --

6 JUSTICE SOUTER: But what --

7 MR. SALMONS: -- not --

8 JUSTICE SOUTER: Wait a minute. What is
9 this incentive inherent in the circumstances?

10 MR. SALMONS: It's not to be mistaken for
11 an intruder and shot at, Your Honor.

12 JUSTICE SOUTER: Well, it doesn't seem to
13 work.

14 MR. SALMONS: Well --

15 JUSTICE SOUTER: I mean, you've got -- this
16 is a case in which the officer testifies, "It never
17 works, I always go in."

18 MR. SALMONS: That's not really -- I mean,
19 to be fair, Your Honor, that's not what he testified
20 to, exactly. What he said was, he's been shot at
21 several times, and he went in early, in this case, in
22 part because of his safety concerns. But he didn't
23 speak to any broader policy.

24 JUSTICE SOUTER: When is it going --

25 MR. SALMONS: But, in any event, the --

1 JUSTICE SOUTER: I mean, what reason do we
2 have to believe that this incentive inherent in
3 circumstances is ever going to work in the absence of
4 an exclusionary rule?

5 MR. SALMONS: Well, Your Honor, I think --
6 I think there are several reasons. One -- and,
7 again, this Court -- these are -- all of the things
8 I'm going to list come from this Court's cases,
9 including Nix and Murray and Segura, where the Court
10 has applied the doctrines we ask the Court to apply
11 here. And what you have is, you have the inherent
12 incentive to knock and announce, because of their own
13 safety concerns. We think the only thing that might
14 not cover, in terms of deterrence, would be the
15 additional few moments you may want them to wait.
16 They will announce, and they will delay some period
17 of time.

18 Now, in the absence of concerns about
19 safety or destruction of evidence, the officers have
20 nothing to gain by entering prematurely. And so, in
21 doing a deterrence analysis, I think it's important
22 to keep that in mind. It's not like there's a huge
23 gain for the officers --

24 JUSTICE SOUTER: Why don't they --

25 MR. SALMONS: -- when they don't have

1 legitimate concerns.

2 JUSTICE SOUTER: Why don't they have
3 something to gain? If they're right that there is
4 evidence inside, they gain. They're -- I mean,
5 they're perfectly rational --

6 MR. SALMONS: Well --

7 JUSTICE SOUTER: -- in this. They gain a
8 greater chance of getting that evidence than if they
9 let a few seconds elapse and the evidence can be
10 flushed away.

11 MR. SALMONS: To be sure, Your Honor, there
12 are times when they may miscalculate the nature of
13 the concerns about safety and destruction of
14 evidence, but, in cases where there aren't those
15 concerns, they have nothing to gain. And, in
16 addition, entering prematurely may make them a
17 defendant in 1983 or Bivens actions, which I'm sure
18 that no officer --

19 JUSTICE SOUTER: For --

20 MR. SALMONS: -- relishes and --

21 JUSTICE SOUTER: For which there is no
22 record of any recovery in any court in the United
23 States, isn't that correct?

24 MR. SALMONS: May I answer, Your Honor?

25 CHIEF JUSTICE ROBERTS: Sure.

1 MR. SALMONS: Your Honor, I would -- I
2 would disagree with that. And I would point the
3 Court, in particular, to a recent case out of the
4 Seventh Circuit, Jones versus Wilhelm. The seventh
5 circuit has announced the position -- it decided the
6 position that we advocate. There are many cases,
7 Your Honor -- the courts -- the courts are replete
8 with them -- where people --

9 CHIEF JUSTICE ROBERTS: Thank --

10 MR. SALMONS: -- bring those types of
11 claims, and win, and then they settle.

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

13 MR. SALMONS: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Moran, you have
15 4 minutes remaining.

16 REBUTTAL ARGUMENT OF DAVID A. MORAN

17 ON BEHALF OF PETITIONER

18 MR. MORAN: Thank you, Mr. Chief Justice.

19 First of all, as to the evidence that is
20 causally connected to the knock-and-announce
21 violation, there are two reasons why the remote
22 possibility of such evidence will never deter police
23 officers from violating the knock-and-announce
24 requirement. The first is that it's very remote.
25 I'm not aware of a single case in American history

1 where there has been identified such evidence that is
2 directly causally related only to the knock-and-
3 announce violation. But the second reason, more
4 fundamental, is that even if there were such
5 evidence, by definition the possibility of finding
6 such evidence will not deter the police from
7 committing a knock-and-announce violation, because
8 they wouldn't have found that evidence had they
9 complied with the knock-and-announce requirement. In
10 other words, the police would only gain that evidence
11 by committing the knock-and-announce violation, so
12 there would be nothing lost in going ahead and
13 risking an excited utterance that they wouldn't be
14 able to use, because, by definition, they wouldn't be
15 getting that excited utterance, anyway.

16 I think it's important, with the Solicitor
17 General's brief, to rebut the claim that Miller and
18 Sabbath had something to do with the fact that there
19 was no warrant in those cases. Nothing in Miller and
20 Sabbath turned on the absence of a warrant. And, in
21 fact, in Miller the Court specifically said, "The
22 requirements stated in Semayne's case still obtains.

23 It applies, as the Government here concedes, whether
24 the arrest is to be made by virtue of a warrant or
25 when officers are authorized to make an arrest for a

1 felony without a warrant." The Government conceded,
2 in Miller, that whether there was a warrant or not
3 had nothing to do with the knock-and-announce
4 violation in that case.

5 JUSTICE SCALIA: I thought the Government's
6 distinction was based on the fact that they were
7 arrest cases. I thought that's the distinction they
8 were making.

9 MR. MORAN: Perhaps I misread their brief,
10 Justice Scalia, but I thought it was that there was
11 an absence of a warrant. Of course, this is an
12 arrest case, as well. The -- Mr. Hudson was seized,
13 and was searched, incident to arrest. And so, this
14 was also an arrest case, much like Miller and
15 Sabbath.

16 As for the causal-connection argument, if
17 this Court were to accept it, I listed, in my
18 principal brief, a litany of cases that I think would
19 have to be overruled -- Katz, Knowles, Silverthorne
20 Lumber -- for that matter, Kyllo. All those cases
21 say that it doesn't matter that the Government has a
22 clear, lawful route to get the evidence; the fact
23 that they didn't follow that clear, lawful route
24 prevents the Government from using that evidence.
25 And it's impossible to explain how Mr. Baughman's

1 causation theory is consonant with all of those
2 cases.

3 CHIEF JUSTICE ROBERTS: Well --

4 MR. MORAN: I think --

5 CHIEF JUSTICE ROBERTS: Well, isn't the --
6 isn't the reason it's consonant is because, in those
7 cases, there is a -- the connection, in terms of the
8 purposes of the rule that was violated and the
9 evidence that was seized?

10 MR. MORAN: Mr. Chief Justice, I think the
11 same thing applies here. I think that the knock-and-
12 announce rule is about the sanctity of the home. And
13 this Court could not have said it any more clearly in
14 Wilson, that the reasonableness of a search or
15 seizure inside a home is connected to the method of
16 entry. In fact, the Court said it three times, in
17 Wilson, in various ways. And so, I think it is the
18 purpose of the knock-and-announce rule, is to protect
19 the homeowner's right of privacy against shock,
20 fright, and embarrassment that can come with a
21 precipitous police entry.

22 CHIEF JUSTICE ROBERTS: But not the general
23 privacy of the home, because you don't dispute that
24 if he had waited an additional 4 seconds, he could
25 have entered the home and executed the warrant.

1 MR. MORAN: No, we don't dispute that at
2 all, Mr. Chief Justice.

3 Finally, I have to ask why this Court has
4 decided all these knock-and-announce cases in the
5 last 10 years, if my opponents are right. This Court
6 shouldn't have -- they're all criminal cases, and
7 this Court should have simply said the Petitioners or
8 Respondents, as the case may be, cannot obtain the
9 relief they are seeking, because the knock-and-
10 announce rule is not causally related to the evidence
11 that they're trying to suppress. And so, if this
12 Court were to adopt my opponent's position, the
13 knock-and-announce rule will become a dead letter.
14 There will be virtually no cases, there will be
15 virtually no more development of this rule. This
16 Court would have been wrong in Miller, it would have
17 been wrong in Sabbath, and it was wrong to reach the
18 substantive constitutional questions it reached in
19 Banks, Richards, Ramirez, and Wilson. And all the
20 other courts, the -- virtually every State currently
21 suppressing evidence seized after a knock-and-
22 announce -- well, they would have to be wrong, too.
23 And so, a lot of courts, including this Court, have
24 been wrong a lot of times, if my opponent is correct.

25 Finally, one last word on Segura. Segura

1 is the sort of case where one can make a respectable
2 inevitable-discovery -- in fact, a winning
3 inevitable-discovery or independent-source argument.

4 But the key thing in Segura is, this Court did not
5 disturb the fact that the evidence that was seized
6 during the initial entry was suppressed, because that
7 was directly connected to the unlawful entry. And
8 so, the evidence that the police initially seized,
9 before the 19-hour wait in Segura, was suppressed.

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

12 The case is submitted.

13 [Whereupon, at 11:01 a.m., the case in the
14 above-entitled matter was submitted.]

15

16

17

18

19

20

21

22

23

24

25