IN THE SUPREME COURT OF THE UNITED STATES

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BOOKER T. HUDSON, JR., :

Petitioner :

v. : No. 04-1360

MICHIGAN. :

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Washington, D.C.

Thursday, May 18, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

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

TIMOTHY A. BAUGHMAN, ESQ., Detroit, Michigan; on behalf of the Respondent.

DAVID B. SALMONS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear reargument this morning in Hudson v. Michigan.

Mr. Moran.

ORAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF THE PETITIONER

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

For centuries the knock and announce rule has been a core part of the right of the people to be secure in their houses from unreasonable searches and seizures. It reflects the notion that when the government has the right to enter a house, whether to perform an arrest, to search for evidence, or to seize goods, that the people should have the right to answer the door in a dignified manner, except in an emergency, and to avoid the unnecessarily gratuitous embarrassment and shock that often follows a precipitous police entry.

CHIEF JUSTICE ROBERTS: So wouldn't it be more accurate to say that it's protected the right to be free from unreasonable entry as opposed to unreasonable search and seizure?

MR. MORAN: Well, this Court has recognized

in Wilson, consistent with the common law authorities, Mr. Chief Justice, that they are connected, that the entry directly affects the reasonableness of the search and seizure that occurs within. And that's why this Court in Miller and in Sabbath suppressed the evidence following knock and announce violations. But in Wilson, this Court directly stated that the common law, the Fourth Amendment, -- the common law that informs the Fourth Amendment, directly demonstrates that the Framers thought that the method of entry directly affects whether a search or seizure inside a home is reasonable.

JUSTICE KENNEDY: So -- so in your view, there has to be a 4- to 6-hour search for complex financial records, business documents. There's a warrant. The search is otherwise proper. They forget to knock. They say, oh, you know, we are police officers. There's a discussion for a while. But -- anything seized after that is -- must be suppressed.

MR. MORAN: If there is --

JUSTICE KENNEDY: It just seems to me in the hypothetical I put -- and there's obviously a reason I put it -- is there's just no causal link between the -- the suppression and -- and the failure to knock.

MR. MORAN: Your Honor, the evidence inside

-- the evidence is seized inside. The seizure of the evidence inside is directly related to the manner of entry, just as there's a direct causal link between when the officers come in without a warrant when they should have gotten a warrant first. They thought there was an exigent --

JUSTICE KENNEDY: Well, but you say directly related. That -- that assumes the very point that I have in mind. I don't know why it's directly related.

MR. MORAN: Well, going back to Wilson, this Court said in Wilson, if I might quote from Wilson, that the -- the common law search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announce their presence and authority prior to entering.

JUSTICE KENNEDY: It depends -- it depends in part.

MR. MORAN: It depends in part, certainly. There are other factors as well, but the reasonableness of the search depends in part.

The issue --

JUSTICE SCALIA: Counsel, what -- what do you do with our opinion in -- in 1986 in Segura v. United States, which seems to me to contradict your assertion

that you cannot separate, for purposes of the exclusionary rule, the manner of entry from the search? In that case, the -- the policemen entered without a search warrant. So the entry was clearly a violation. They left two officers in the room and other officers went back and got a search warrant. When they returned with the search warrant, the two officers who were in the room proceeded to do a search, and we admitted the evidence. It seems to me that in that case, we -- we did succeed in -- in separating the -- the entry from the subsequent search, and I don't know why -- why we can't do the same thing here.

MR. MORAN: Because there were exceptional circumstances, Justice Scalia, in Segura.

JUSTICE SCALIA: What -- what were the exceptional circumstances?

MR. MORAN: A 19-hour delay and a warrant that was obtained that had nothing to do with the initial entry. That was in no way dependent on the initial entry.

JUSTICE SCALIA: We're still, it would seem to me -- I don't know -- the warrant wasn't dependent on the initial entry? You could also say the initial entry wasn't the product of the -- of the later warrant.

MR. MORAN: The initial entry was not the product of the later warrant, but once this Court ruled --

JUSTICE SCALIA: And therefore was unlawful.

MR. MORAN: That's right. The -- the initial entry wasn't lawful.

JUSTICE SCALIA: But we didn't hold -- but we didn't hold that.

MR. MORAN: Well, but this -- the Government in Segura never contested the fact that the evidence that was seen and seized during the initial entry should be suppressed. And that's all we're asking for here.

JUSTICE SCALIA: Excuse me? No, I don't understand that.

MR. MORAN: When the officers went in initially in Segura, some evidence was seen and seized at that time, and the Government did not contest that that evidence should not --

JUSTICE SCALIA: No. I'm talking about only the evidence that -- that was the product of the search conducted after the warrant was delivered.

MR. MORAN: That's right.

JUSTICE SCALIA: And that evidence was admitted in.

MR. MORAN: Right, but the --

JUSTICE SCALIA: Even though the entry of those officers was an unlawful entry.

MR. MORAN: The entry -- the initial entry was an unlawful entry. When they came back with the warrant --

JUSTICE SCALIA: Well, no, no. The -- there was no subsequent entry. You said the initial entry was unlawful. Those officers stayed there. Their presence there was the product of an unlawful entry.

MR. MORAN: Their presence was, yes.

JUSTICE SCALIA: Their presence was the product of an unlawful entry, and nonetheless, we admitted in the -- the material that they obtained in the search after a warrant had been obtained.

MR. MORAN: I -- I read Segura as saying that the presence -- the later presence of the warrant, which was in no way tainted by the initial entry, made the officers' presence in the home retroactively lawful from that point. It was unlawful until that point, which is why the Government did not contest the -- the point that all the evidence that was seized during the initial entry up to the point when the warrant was issued had to be suppressed. That's all we're asking for here.

I can imagine hypotheticals in which you have a knock and announce violation and then something happens like in Segura or like in Murray, where you have later action that creates an independent source. But in your typical --

JUSTICE KENNEDY: Suppose the -- suppose the officer -- excuse me, we forgot to knock, but we are police officers. We do have a warrant. We're going to proceed with a search. Please don't be alarmed. We're going to -- does that do it?

MR. MORAN: That might do it. That would be a different case than the case we have here --

JUSTICE KENNEDY: Well, but your -- your point is -- is there -- is that they have to go out and come back in again.

MR. MORAN: You would have to create some sort of analogy to Murray and Segura. Murray and Segura are exceptional cases. There are very rare cases when the Government breaks in and then realizes we shouldn't have done that. We should go get a warrant.

JUSTICE KENNEDY: I agree. Segura -- I forget what it is in torts. It's kind of a supervening, independent cause or something like that.

MR. MORAN: Yes. Yes. And -- and you can

have -- imagine such hypotheticals in the knock and announce context. And in the Moreno case in the Ninth Circuit, you have one where you have a knock and announce violation committed in the outer door. No evidence is found in the outer door, but then the officers properly knock and announce at the inner door, and the Court in the Ninth Circuit held that that was proper to seize that. We have no problem with that. That -- that seems like a proper result because ultimately the purposes of the knock and announce rule were vindicated when the officers knocked and announced at the inner door before -- before forcing entry.

CHIEF JUSTICE ROBERTS: Mr. Moran, how -- how long do you think the officers had to wait before they could have entered?

MR. MORAN: In this case?

CHIEF JUSTICE ROBERTS: Yes.

MR. MORAN: From Banks, somewhere closer to 15 seconds. 15 to 20 seconds was considered --

CHIEF JUSTICE ROBERTS: What would -- if they had done that, what would have been different from what happened in this case?

MR. MORAN: Mr. Hudson presumably would have gotten up from his chair, would have come to the door, would have admitted the officers, and then after --

CHIEF JUSTICE ROBERTS: Why do you presume that? Someone sitting in a chair with gun -- with a gun and the drugs you say would have gotten up and said, oh, it's the police. Let's see what they want?

MR. MORAN: We presume that people act lawfully in response to commands from the police. We do not presume that people will act unlawfully. If the police have evidence or information that someone will, in fact, act unlawfully by trying to dispose the evidence or by --

CHIEF JUSTICE ROBERTS: Isn't a good sign of what might have happened what actually happened when the police came in, which was there was an effort to hide the evidence?

MR. MORAN: The record does not disclose any effort on Mr. Hudson's part to hide any evidence, Your Honor.

CHIEF JUSTICE ROBERTS: I thought -- where -- where were the drugs found?

MR. MORAN: The rocks of crack cocaine, for which he was convicted, were found in his left front pants pocket.

CHIEF JUSTICE ROBERTS: Where was the gun found?

MR. MORAN: The gun was in the chair.

CHIEF JUSTICE ROBERTS: In the chair?

MR. MORAN: In the chair. There was no evidence that there was any secreting of evidence in this case.

CHIEF JUSTICE ROBERTS: Is there any reason to suppose that if the officers had waited 15 seconds instead of the 3 to 4, that they wouldn't have found the same evidence?

MR. MORAN: It's always possible, Your Honor, but we don't presume that. Just as in Segura, the Court said --

CHIEF JUSTICE ROBERTS: Well, the only -- the only reason they wouldn't have found the same evidence, I take it, is if they -- if -- if the defendants had had additional time to dispose of it.

MR. MORAN: We don't contest that they would have found the same evidence, no. We do not argue that Mr. Hudson or any of the other people in the house would have destroyed the evidence.

JUSTICE SCALIA: Is --

MR. MORAN: We certainly don't make that argument.

JUSTICE SCALIA: Is in the chair the same thing as on the chair?

MR. MORAN: I --

JUSTICE SCALIA: You tell me something is in the chair. Did they stuff it -- stuff it in the cushion or what?

MR. MORAN: It's not really clear from the record, Justice Scalia.

JUSTICE SCALIA: Yes, inside it --

MR. MORAN: It's in -- in the chair.

JUSTICE SCALIA: I think it's pretty clear you don't talk of something as being in the chair. It's on the chair unless you stuff it in the chair. I assume he stuffed it behind a pillow or something.

MR. MORAN: I'm not completely clear exactly where in the chair it was.

JUSTICE SCALIA: English is English. You said it was in the chair.

MR. MORAN: In the chair.

JUSTICE SCALIA: Okay.

MR. MORAN: 49 of the 50 States currently suppress evidence following knock and announce violations, just as this Court did in -- in Miller and Sabbath.

JUSTICE ALITO: Well, what do you think is the standard for determining what sort of causal connection there has to be in order to have suppression here?

MR. MORAN: We go back to the Wong Sun fruits test. Is the evidence that was recovered the direct fruit of the violation? In other words, is there a clear, logical connection? Now, my opponent --

JUSTICE ALITO: What's the purpose of the causal connection requirement? What's the reason for having it?

MR. MORAN: Well, it's so -- it's so that there is a -- an obvious connection. Before the court takes the step of -- of excluding evidence, there should be some connection, some clear connection, between the violation and the evidence recovered. But my --

JUSTICE ALITO: And what's the reason for requiring a clear connection?

MR. MORAN: I suppose that it's simply the matter of logic, that evidence that's completely unrelated to a violation nobody would think should be -- should be excluded. But evidence --

JUSTICE ALITO: But why?

MR. MORAN: Well, it's -- it's unrelated. So if, for example, the police break into my house and -- and find evidence -- find nothing in my house -- they illegally break into my house, but then they -- they do a proper warrant search of my office and find evidence,

I -- I don't -- I don't see any connection between the illegal search of my house and the legal search of my office, assuming that it was not the fruit of the illegal search of my house.

JUSTICE ALITO: But why? Isn't the reason just a -- just a question of crafting an appropriate remedy for -- an appropriate deterrence --

MR. MORAN: Yes.

JUSTICE ALITO: -- for violations?

MR. MORAN: Exactly. It -- the whole point is deterrence. And so you wouldn't deter the officers who illegally broke into my house by excluding the evidence from my office if -- if -- it may even well be different --

JUSTICE SCALIA: Sure you would. Sure you would.

MR. MORAN: Well, it may well even be a different --

JUSTICE SCALIA: I mean, you'd deterred him more if you threw the whole case out, but we don't do that.

MR. MORAN: No, we don't.

JUSTICE SCALIA: Yes.

MR. MORAN: We -- we limit --

JUSTICE SCALIA: I mean, we -- we insist that

the deterrence somehow be related --

MR. MORAN: We do.

JUSTICE SCALIA: -- to the -- and -- and the related usually means that the acquisition of the evidence was the product of the violation. It was caused by the violation. And -- and for that reason, we keep it out.

And here, it's -- it's hard to say that this was caused by the fact that they -- that they entered in a few seconds too soon. So he would have answered the door and they would have seen the stuff.

MR. MORAN: What the knock and announce violation causes, Justice Scalia, is the officer to be illegally in the home. Going back to the common law authorities, the courts have long recognized -- American courts have long recognized that an officer who illegally enters a home, even with a valid writ or a valid piece of paper allowing him to be in the home, if the manner of entry is illegal, he is a trespasser. His entry is -- is void ab initio. And so in that sense, the entry is the cause of the illegal --

JUSTICE SCALIA: Although you say it can be retroactively validated.

MR. MORAN: After Segura --

JUSTICE SCALIA: Yes, in Segura, you can

retroactively validate it by -- by getting a warrant afterwards.

Could it be -- have been retroactively validated by knocking and announcing afterwards? I'm -- I'm sorry we came in too soon, and they run back to the door and they knock and announce and wait -- wait 10 seconds.

MR. MORAN: Again, I --

JUSTICE SCALIA: Would that do the job?

MR. MORAN: I concede that it's possible that you can come up with a Segura-type hypothetical. I think the easiest one is the Moreno case from the Ninth Circuit.

JUSTICE SCALIA: The hypothetical sounds ridiculous only if one accepts your explanation of Segura, that -- that it was somehow a retroactive validation.

MR. MORAN: Well --

JUSTICE BREYER: Sorry. I have laryngitis. Can you hear me all right?

MR. MORAN: Yes, I can, Justice Breyer.

JUSTICE BREYER: Why is it retroactive validation? I would have thought Segura and those cases are Silverthorne cases.

MR. MORAN: It is. It's an --

JUSTICE BREYER: All that it is is it's an independent chain of events.

MR. MORAN: It's an independent source.

JUSTICE BREYER: An independent chain of events that almost certainly would have led to the discovery of the evidence despite -- not without -- despite the unlawful entry. And if that's so, all we have is a -- is a set of cases where deterrence is most unlikely to play any significant role because no policeman could possibly count on that kind of thing getting the evidence in --

MR. MORAN: And that's exactly right. And -- and the situation we have in Michigan now is that officers know to a certainty that if they violate the knock and announce rule, nothing will happen. And so that's why in all the other States --

CHIEF JUSTICE ROBERTS: That's not true. There are cases where the violation of the knock and announce rule gives rise to evidence that may be admitted and that would presumably be excluded if you can show that the seizure is related to the violation. The problem here is that the evidence that is being suppressed, as -- as you've suggested, that there's no question that it would have been available if the officers had waited 15 seconds as opposed to 4 seconds.

MR. MORAN: Mr. Chief Justice, none of the parties has been able to identify any cases in which you can point to evidence and say this -- this evidence was produced by the knock and announce violation and nothing else in the house --

CHIEF JUSTICE ROBERTS: The Solicitor General hypothesized one in the amicus briefs. If somebody -- you know, they -- they burst in and someone screams, you know, run away, it's the police, that excited utterance caused by the absence of a knock and announce would presumably be related to the violation and could be suppressed. That doesn't mean that the gun and the drugs that are found in the room is in the same category.

MR. MORAN: If I may make two responses to that. First, the Solicitor General hypothesized such a case but has not identified a single case where that's ever happened. It's purely hypothetical.

But the second point is that excluding that evidence would have no deterrent effect whatsoever because by -- by definition, that's evidence that the police would only get by committing the knock and announce violation. So the police lose nothing by risking the possibility that somebody will make an excited utterance and then say, okay, we won't get to

use that excited utterance, but we would never have gotten that excited utterance in the first place. That's not deterrence, Mr. Chief Justice. That's restitution. That's like saying that I can be deterred from stealing something by being told that if I'm caught, I'll have to give it back.

CHIEF JUSTICE ROBERTS: What it is is recognizing that if there is a fruit of the illegal act, it is suppressed so that there is a cost to the illegal act. What it's saying is that not everything that happens after the illegal act is a fruit of the illegal act.

MR. MORAN: I think your question, Mr. Chief Justice, really goes to the worst position language in Nix, and the point is, from our brief, is that this Court has placed the prosecution in the worst position than it would have been had the police acted lawfully dozens, possibly scores, of time -- times.

All the cases in which the Court has noted that the police easily could have obtained a warrant. Most recently in Georgia v. Randolph, where this Court noted that there were two lawful methods for the police to get the cocaine -- the cocaine residue on the straw, but still suppressed the evidence. The police and the prosecution do get placed in a worse position, and

that's necessary for deterrence. What --

JUSTICE GINSBURG: Would it have been possible for these police to get a no-knock warrant?

MR. MORAN: It might well have been. I was asked this question last time, Justice Ginsburg, and I'd like to modify my answer. In Michigan, there is no statute governing no-knock warrants, and there's -- there are also no court decisions governing no-knock warrants. And there never will be under the People v. Stevens regime.

One of the nice things that's happened in -- in -- since Wilson v. Arkansas, in fact, before Wilson v. Arkansas in many States, is courts have developed -- developed procedures for police officers to get no-knock warrants, to go to the police and ask for a no-knock warrant.

JUSTICE KENNEDY: Well, what about in this case, which is Justice Ginsburg's question? If the police said, we have reasonable grounds to -- to believe that he has a weapon and we're also looking for drugs that are easily disposable, would that be grounds for knocking -- for not -- for dispensing with the knock requirement?

MR. MORAN: Could the -- could a judge have issued such a warrant in Michigan? Is that your

question?

JUSTICE KENNEDY: Well, let's take it step by step. Suppose the police articulate this at the outset --

MR. MORAN: It could well --

JUSTICE KENNEDY: -- and under -- under State procedures, they're allowed to make the on-the-spot judgment. Would that -- would those facts suffice to allow them to enter without the knock?

MR. MORAN: If they had specific information along those lines, that -- that there was evidence hidden in places or -- or stored in places where it could easily be disposed --

JUSTICE STEVENS: Well, is that correct? I thought in most States, there had to be a statute that authorizes a non-knock warrant.

MR. MORAN: In most States --

JUSTICE STEVENS: And that most States do have such statutes. And we had this case because Michigan chooses to go on -- on a separate path.

MR. MORAN: Most States do have statutes, but a few States by court decision have allowed for the issuance of no-knock warrants. My point --

JUSTICE SOUTER: Even -- even if Michigan doesn't, I mean, that has nothing -- as I understand

it, that -- that doesn't affect the -- the answer to the Federal question that we have because, as I understand it, we -- we can -- we can take as good law that even with a warrant that does not have a no-knock authorization, if the police have a justification for going in without knocking, so far as the Fourth Amendment is concerned, the search is still good.

MR. MORAN: That's right.

JUSTICE SOUTER: Isn't that correct?

MR. MORAN: Absolutely.

JUSTICE SOUTER: So what we're really arguing is what -- what is Michigan law on the subject, but the -- the issue we've got is not Michigan law.

MR. MORAN: That's right. And this case comes to us in the posture in which --

JUSTICE GINSBURG: But this is a -- this is a place -- a case in which the warrant was for drugs. Is that not so?

MR. MORAN: It was.

JUSTICE KENNEDY: Well, so in -- in this case, they could have entered in your view if they had specific knowledge of the gun and disposable contraband.

MR. MORAN: Yes, after Banks and -- and Richards, especially Richards, if the police had

reasonable suspicion that you had contraband in a position where it could be easily disposed and if they had information about the weapons that could be used to resist the police entry, then yes, there could have been a -- a legal no-knock entry.

JUSTICE SCALIA: What about just the former without the latter? I thought the former alone would be enough.

MR. MORAN: Either would be. That's correct, Justice Scalia.

JUSTICE GINSBURG: Going back to my question, isn't it then a reasonable assumption, based on the police experience in case after case, that where there -- where narcotics are housed, there is often a gun and there is ease of disposal, couldn't the police simply say this is a narcotics search and therefore we don't need to knock and announce because those circumstances will be present in most cases?

MR. MORAN: No, because this Court unanimously foreclosed that argument in Richards v. Wisconsin by holding that there must be a particularized showing for the particular case. That particularized showing I will gladly concede will be easier to make in a narcotics case than it would be in a -- in a stolen property case.

But it wasn't made in this case, and this case comes to this Court on the posture that the prosecution has conceded, at every step of the way, that that particularized showing was not made here and that, therefore, there was a knock and announce violation.

CHIEF JUSTICE ROBERTS: I'm sorry. A particularized showing of what?

MR. MORAN: That in this particular case, it's likely that the drugs would be in an easily disposable situation and that the occupants would be armed and ready to resist the police entry. And there was no such showing made here.

CHIEF JUSTICE ROBERTS: I --

MR. MORAN: The prosecution didn't even attempt to make such a showing.

CHIEF JUSTICE ROBERTS: I'm vaguely recalling cases from the court of appeals in the D.C. Circuit that accepted a presumption that if there are drugs around, there are likely to be firearms around. Are you saying that that's inconsistent with the Richards decision?

MR. MORAN: That might not be inconsistent, but the -- the -- to follow that up with, therefore, you can do a no-knock entry automatically is

inconsistent with the Richards decision.

The --

JUSTICE STEVENS: May I ask this question? As I understand it, the prosecutor conceded a violation of the knock and announce rule.

MR. MORAN: Yes.

JUSTICE STEVENS: And I'm just wondering. In Michigan, since there's no adverse effect to it, do the prosecutors routinely concede that there's a violation because there's no point in litigating it I suppose?

MR. MORAN: Well, I don't even think we get that far, Justice Stevens. Motions to suppress aren't filed. There's no point filing a motion to suppress except for the -- the fact that this case is pending in this Court. There's no point for --

JUSTICE STEVENS: So that if the issue arises, you can assume the prosecutor will always say, yes, we'll assume there was a violation. There would be no reason not to assume that.

MR. MORAN: That's right.

JUSTICE STEVENS: So you'll never really litigate in Michigan how far they can go before they violate the rule.

MR. MORAN: It's a dead letter in Michigan.

JUSTICE SCALIA: But I assume that lawsuits

are allowable if -- if knock and announce is -- is not observed, and if you intrude upon someone in a state of undress.

MR. MORAN: Michigan --

JUSTICE SCALIA: Isn't a civil lawsuit bringable?

MR. MORAN: Michigan has a particularly vigorous State immunity statute that makes it effectively impossible to sue for a -- a knock and announce violation. I have not found a single Michigan case in which anyone has successfully sued for a knock and announce violation.

You can sue in Federal court under section 1983, but there you run into various doctrines, especially including qualified immunity.

I made the claim the first time and it still hasn't been contradicted by my opponents. We've not been able to find any cases, published or unpublished, in which anyone has collected anything other than nominal damages anywhere in the United States --

CHIEF JUSTICE ROBERTS: But those doctrines that you're talking about would be overridden on the hypothetical that you want us to be concerned about. In other words, you're saying if you don't suppress the evidence, there's going to be no incentive to comply

with the law. So they're going to deliberately violate the law. Well, if they're deliberately violating the law, qualified immunity isn't going to help them very much.

MR. MORAN: Qualified immunity would still protect them to the extent that any reasonable officer could have thought that a -- a no-knock entry was valid. I cited a number of cases, for example, where innocent people have been shot following entries into wrong doors, and qualified immunity has been granted to the officers.

JUSTICE SCALIA: Wait a minute. The government is not arguing here that -- that it's valid. It's just arguing that though it is invalid, the punishment for it should not be to let the criminal go. That's -- that's all they're saying.

MR. MORAN: That -- that is their argument.

JUSTICE SCALIA: The punishment for the invalidity should not be the -- the inadmissibility of all of the evidence of the crime that was found.

MR. MORAN: That --

JUSTICE SCALIA: Well, that's quite different from saying that it's -- that it's valid. So I think they acknowledge that -- that a lawsuit against an officer who knowingly dispenses with -- with knock and

announce because, as you say, he says there's -- there's no consequence, but there is a consequence. He can be sued.

MR. MORAN: I assume --

JUSTICE SCALIA: And sometimes he may be going into the wrong house and the person suing him may not be a criminal, but may be some -- some innocent -- innocent bystander.

And -- and what about -- you know, you say there's no incentive to knock and announce. There -- there may -- you don't know any Michigan cases in which a -- a civil suit has succeeded, but I know numerous cases in which police who -- who burst in without knocking and announcing expose themselves to danger, that is, to being shot at by a -- by a householder who doesn't know that they are the police. Isn't that enough of -- of an incentive, the fact that you may lose your life?

MR. MORAN: No, Your Honor, because I think what some officers will do is exactly what Officer Good did in this case, which is shout police and then burst in immediately. So they'll do the announce part, which protects the police, to some extent, from being shot, but they will skip the rest of the knock and announce requirement, which is to wait some reasonable amount of

time to allow the householder to make himself more dignified, to get to the door, to answer the door, to admit the police in a dignified manner.

You raise the point that lots of innocent people are subject to search warrants. Thousands of cases every year of -- of people who didn't do anything either --

JUSTICE ALITO: Well, I think you said the -- you thought the police here had to wait what? 15 seconds? What was the figure you gave?

MR. MORAN: Well, from Banks, this Court ruled that 15 seconds -- 15 to 20 seconds was an appropriate time for a drug search.

JUSTICE ALITO: And now suppose they waited 10 seconds. And so there would be a -- a constitutional violation? Why would suppression be appropriate in that situation? Why would it be in any way proportional to the -- to the violation that occurred?

MR. MORAN: Well, if it was 10 seconds, Justice Alito, the government still might have an argument. 15 seconds was enough in Banks. The Court did not say --

JUSTICE ALITO: Well, wherever the line is, suppose they're just -- they're just slightly on the wrong side of the line?

MR. MORAN: I think as a practical matter, that if the police are just very slightly on the wrong side of the line, the courts are not likely to hold that there was a knock and announce violation. But when you have a flagrant violation like here --

JUSTICE ALITO: Then you're -- you're contradicting the premise.

MR. MORAN: Well, in a case like -- in a -- if a court were to hold that the police did violate the knock and announce requirement by coming in -- by coming in, by not giving the person a reasonable amount of time to come to the door or to make himself presentable, then yes, the evidence should be suppressed because those officers need to be deterred. The -- the exclusionary rule is all about deterrence, and is there any method that will deter officers from violating the knock and announce requirement other than excluding the evidence by teaching them through example that next time you need to wait longer? You need to wait a reasonable amount of time for someone to come to the door unless you have facts suggesting that waiting a reasonable amount of time would defeat the purposes of the search.

JUSTICE SCALIA: What about -- you talk about deterrence. What about their not getting promoted? I

assume that -- that police departments, even if you have some maverick officers, that the administration of the police department teaches them that they have to knock and announce. Or if it doesn't teach them that, then you do have a 1983 cause of action against the city, not just the officers. And that -- you know, that's a deep pocket.

MR. MORAN: I very seriously doubt officers such as Officer Good will not be promoted because of the violation that he committed --

JUSTICE SCALIA: Why? Really?

MR. MORAN: -- in a case like this.

JUSTICE SCALIA: You -- you know, I'm the police commissioner and I have a policy that you -- you obey the law, you knock and announce, and -- and I know that this particular officer disregards it all the time. You really think that's not going to go in his record?

MR. MORAN: I do, Justice Scalia, and I think it's inconsistent with Mapp in which the Court recognized that other remedies have proven completely futile in enforcing the -- the Fourth Amendment.

JUSTICE SCALIA: Mapp was a long time ago. It was before 1983 was being used, wasn't it?

MR. MORAN: It was before 1983 was --

JUSTICE SCALIA: You bet you.

MR. MORAN: -- being used. But I don't think section 1983 has changed the landscape here. I -- I don't think Mapp is ripe for overruling, and in fact, the Criminal Justice Legal Foundation, one of the amici for the other side, concedes that tort remedies cannot, at this time, substitute for the exclusionary rule.

If there are no other question, I'll reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Moran.

Mr. Baughman, we'll hear now from you.

ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN

ON BEHALF OF THE RESPONDENT

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

Justice Robert Jackson once said that when he was arguing cases before the Court, he always gave three arguments: the well-structured argument he rehearsed, the disjointed and confused argument he delivered to the Court, and the brilliant argument he thought of in the car on the way home. I have the rare opportunity to deliver the argument I thought of in the car on the way home.

(Laughter.)

MR. BAUGHMAN: But I'm going to refrain,

mindful of the fact that this is our -- our second time through and try to hone in on -- on what I think are some critical points.

A search warrant, a judicial command, must be obtained from a neutral and detached magistrate. It must particularly describe the place to be searched and the things to be seized, and it must be issued based on probable cause drawn from information which is sworn to are affirmed -- or affirmed. If these requirements are met, the privacy of the described premises will be invaded, and any privilege the occupants might have to withhold evidence or contraband from the police is abrogated.

But that command must be executed in a reasonable fashion. And so the police may not bring third parties into the premises who are unnecessary to the execution of the warrant. They may not search in places where the items described may not be found. They may not cause unnecessary damage to property, and they may not use force to accomplish the entry unless consent to enter is denied either explicitly or implicitly or unless entering immediately is reasonable under the circumstances to avoid the destruction of the evidence or harm to the officers.

If no valid warrant exists in the first

place, then -- and no exception exists, then the privacy of the dwelling has been unlawfully invaded. It never should have happened. But if a valid warrant exists and some error occurs in its execution, it is not the invasion of privacy which should not have occurred that is commanded by the warrant.

JUSTICE SOUTER: And you -- you concede that there was error in execution here? You concede that there was a violation because -- technically because there was no knock?

MR. BAUGHMAN: Yes.

JUSTICE SOUTER: Why do you concede that? You've got a case in which, as I understand it, not only was the evidence but the warrant itself an indication not only that drugs were present, but that guns were present. It's perfectly true we don't have a general rule that anytime you do a drug search, you can do a no-knock, but in this case you had specific evidence that there were firearms there. And based on what I've seen in the case, I don't know why Michigan did not argue that, in fact, it was justified to go in without knocking.

And I'll be candid to say you -- to tell you that the fact that Michigan does not make that argument suggests to me that Michigan is trying to structure a

case in which it's going to have the best shot to -- to get the exclusionary rule out of the way here. Why don't you claim that the search was lawful?

MR. BAUGHMAN: Well, let me first say this case was not structured to try -- to try to -- to get it here on our -- on our part. I think initially the prosecutor handling the hearing here reached the conclusion that Richards precluded an argument that a no -- that the failure to knock and announce was justified here. But --

JUSTICE SOUTER: Well, Richards precluded a general rule, but it didn't preclude you from arguing in a specific case, and it's the fact that the prosecutor and, hence, all the way up the line to you do not argue that is -- is what I don't understand.

MR. BAUGHMAN: Well, again, I -- I think it would be an interesting argument to revisit Richards on this proposition.

JUSTICE SOUTER: I don't think we have to revisit Richards. I -- I think what -- what I'm -- what I'm concerned is that you don't make an argument based on the evidence in this case that you had probable cause to believe that there were going to be guns facing you when -- when you went in the door and therefore the knock was not required.

MR. BAUGHMAN: Again, I think the -- the belief of the prosecutors, as the case went forward, was that because that belief, the -- you're correct. Guns were described as things to be seized in the warrant. The probable cause for that was not any specific knowledge about a gun in the house. It was the officer's general experience that when I execute search warrants for drugs, guns tend to be there. Richards seems to say, at least it certainly could be argued, that's not sufficient. You can't make that decision based on experience that drugs and guns go together.

JUSTICE SOUTER: Well, are you suggesting -- did -- did the warrant -- I don't know this. I should but I don't. Did the warrant authorize seizure of guns as well as --

MR. BAUGHMAN: Yes, it did.

JUSTICE SOUTER: -- drugs? Well, are you suggesting that the -- the gun portion of the authorization was, in fact, invalid?

MR. BAUGHMAN: No. I -- I don't because I believe probable cause can be based on the experience of officers --

JUSTICE SOUTER: Okay.

MR. BAUGHMAN: -- without specific knowledge

of the --

JUSTICE SOUTER: If -- so -- in any case, at -- at the moment that you got the warrant, you -- you had, in fact, a -- a finding by a trial court, or a -- whoever the issuing magistrate was, that there was probable cause to believe that you were going to confront guns as well as drugs inside. And -- and Richards does not seem to me to be a good reason, under those circumstances, to concede that you didn't have a basis for -- for dispensing with the knock.

MR. BAUGHMAN: It may not have been a good reason, but it was the reason in that the prosecutors believed that the rejection of the drugs and guns always go together as a justifying -- not knocking and announcing in Richards meant that the determination in this case that guns were on the premises based on the officer's experience that drugs and guns go together, not any specific knowledge about a gun was inadequate then to forgive knocking and announcing. That may have been a misjudgment, but it was a belief that Richards foreclosed that. It was not an attempt to set the case up. We had the Stevens case in Michigan.

JUSTICE KENNEDY: Well -- well, do you think just as an empirical matter that in most cases where

there's known to be guns plus drugs, the police will enter without knocking?

MR. BAUGHMAN: No. I -- I don't believe that's the case. I think if there's specific knowledge that there are guns on the premises, yes, absolutely.

JUSTICE KENNEDY: There's -- there's specific knowledge.

MR. BAUGHMAN: Yes. If they knew -- I think then they would enter without knocking. If -- if the --

JUSTICE SOUTER: There was specific knowledge here.

MR. BAUGHMAN: Well, no, it's knowledge based on experience.

JUSTICE SOUTER: Well, you got a -- you got a warrant --

JUSTICE KENNEDY: It's in the warrant.

JUSTICE SOUTER: -- that said look for them. That's about as specific as you can get.

MR. BAUGHMAN: I understand but the facts in the affidavit justifying looking for guns was in my experience drugs and guns go together.

JUSTICE SOUTER: Well, you can't have it both ways.

JUSTICE STEVENS: But, nevertheless, was not

there a finding that there was probable cause that there was a gun there?

MR. BAUGHMAN: Yes.

JUSTICE STEVENS: All right.

MR. BAUGHMAN: I would be happy to -- to, in a different case, make the argument that although Richards says a court cannot say that knock and announce is forgiven every time a drug warrant is executed on the theory that experience teaches that drugs and guns go together. I'd be happy to argue that that holding does not apply when a judge determines, in issuing the warrant, that drugs and guns go together, so I'm putting it in the warrant. I'd be happy to argue that case.

At this time --

JUSTICE SCALIA: Don't argue it to me. It doesn't make much sense.

(Laughter.)

MR. BAUGHMAN: Prosecutors believed that Richards couldn't be avoided by putting the drugs and guns go together into the warrant instead of --

JUSTICE STEVENS: May I ask this?

MR. BAUGHMAN: -- the judge --

JUSTICE STEVENS: May I ask this question about the practice in Michigan? Since People against

Stevens and People against Vasquez have been decided, are there any cases, other than this one, in which a prosecutor has raised the knock and announce argument that got litigated all the way to the appellate court?

MR. BAUGHMAN: Yes, there have been a handful of cases where defense attorneys have filed a motion, despite People v. Stevens, and then they -- they have lost because of Stevens.

JUSTICE STEVENS: So but there really is no incentive for the prosecutor to fight -- argue about this anymore in Michigan, is there?

MR. BAUGHMAN: No. Not, in the criminal case, the prosecutor is responsible -- be, as it was in this case, although the judge refused to follow Stevens --

JUSTICE STEVENS: Well, it concedes there's a violation.

MR. BAUGHMAN: -- there should be no hearing. They're not conceding the violation. They're simply saying the -- a violation is irrelevant to the question of the admission of the evidence, so we should not litigate it.

JUSTICE STEVENS: So there's no point in litigating it.

MR. BAUGHMAN: Exactly.

JUSTICE STEVENS: So it's a functional equivalent of conceding a violation in every case because there's simply no effective remedy.

MR. BAUGHMAN: Well --

JUSTICE STEVENS: No effective remedy in the litigation itself.

MR. BAUGHMAN: In the criminal --

JUSTICE STEVENS: Of course, there's always the possibility that the officer will be disciplined by his very zealous superior, I guess.

MR. BAUGHMAN: Or -- or civil litigation. There is no -- there is no exclusion. Yes, that's correct.

JUSTICE SOUTER: Do you -- do you dispute -- your -- your brother on the other side said in his argument that he had not heard a dispute about this. But do you dispute his claim that there has never been any -- at least in recent history, any -- any civil judgment actually rendered against anyone in the officer's position?

MR. BAUGHMAN: I -- I am not aware of one from Michigan. I am aware that there have been civil judgments against officers from other jurisdictions. I'm not aware of one in Michigan. I know there have -- there are some suits that have been brought in the

Eastern District that are pending. And -- and part of the difficulty is civil suits can be brought. They can be settled. There can even be trials and damages awarded, and they won't be in the reports. They're not in the F.Supp.'s. They're not in the --

JUSTICE SOUTER: But we don't -- we don't have any indication that there's an effective deterrence then in civil suits. Maybe there will be some day, but we haven't seen it yet in Michigan, I take it.

MR. BAUGHMAN: I think one could also make the argument that that cuts the other way. The fact that there are not a lot of reported decisions may mean there's not a lot of violations going on, that the police are not routinely kicking down doors without knocking and announcing when they should, and that's why they're not being sued.

JUSTICE SOUTER: And it may mean that -- that potential plaintiffs say if the courts are winking at this in the criminal case, we don't have much chance of getting a -- a verdict in a civil case.

MR. BAUGHMAN: No. It's not --

JUSTICE SOUTER: We don't know, but that might be the case too, mightn't it?

MR. BAUGHMAN: It might be, but it's not been

my experience that either -- either the criminals or certainly innocent parties, people -- probable cause, after all, doesn't mean certainty. People who have had damage done or physical injury occur have been -- are shy about suing the government in those circumstances.

JUSTICE SCALIA: Is there any evidence that the citizens -- that Michiganders are less litigious than people in other States?

MR. BAUGHMAN: That certainly hasn't been my experience and certainly not in my county.

JUSTICE SCALIA: So -- so the mere existence of suits in other States ought to suffice as something --

JUSTICE KENNEDY: I -- I --

JUSTICE SCALIA: -- that's -- that's a deterrent. Shouldn't it?

MR. BAUGHMAN: I would -- I would think so.

JUSTICE KENNEDY: I still don't understand where -- where we are with guns. You -- you have a specific finding in a warrant that says there's probable cause there's going to be a gun, and there's drugs. I take it your position is that this allows you to enter without knocking.

MR. BAUGHMAN: It would be my position. I would have thought, as the prosecutor thought here,

that a probable cause finding that guns are in the house, based not on any specific knowledge about guns, but based on experience in similar circumstances, was not sufficient to satisfy Richards in terms of not knocking. I would certainly make the argument that it ought to be, but I would have not criticized the prosecutor, who didn't make that argument.

JUSTICE STEVENS: But why would you bother making the argument? The evidence can't be suppressed. I don't understand why -- why would there ever be any litigation over this issue in a criminal case?

MR. BAUGHMAN: And -- and I think Your Honor is correct. The prosecutor's point in this case was we shouldn't litigate --

JUSTICE STEVENS: And can you cite me any other example of a -- a violation of the Fourth Amendment? Maybe we shouldn't have held it's a violation. I understand that argument. Is there any other area of Fourth Amendment law in which the violation of the Fourth Amendment is not followed by a suppression ruling?

MR. BAUGHMAN: Well, certainly. Let me give an example. One of the circumstances that I indicated that the police -- a manner in which the police must behave when reasonably executing a warrant is not to

look in places where the items sought cannot be found. If the police were searching a house for stolen computer monitors, a large object, and as they were searching for them, they opened the desk drawer where the monitor could not be and they shut it, and they found computer monitors in the home, the -- this Court has never addressed the question, that I'm aware of, but the law is uniform in the country that you would not suppress the computer monitors.

JUSTICE BREYER: Well, now you're talking about other cases in other courts. I looked through with my law clerks 300 cases since Weeks, not Mapp, Weeks. That's what we're talking about, 1914. I couldn't find in 300 cases one single Supreme Court case that did not suppress evidence where there was a Fourth Amendment violation with one exception. The exception is there are sets of cases where deterrence is really not a factor. For example, good faith; for example, it isn't going into a criminal proceeding. Okay?

Now, what I'd like you to do is to tell me if I missed some, which is certainly possible, or second, if you want us to change the rule and go back 300 years or 300 cases back before 1914, or are you going to tell us that deterrence doesn't play a role here or whatever

you want? I want to put to you the state of the art as far as I can see it.

MR. BAUGHMAN: It would be my position that in all of those cases, there was a causal connection between the evidence found in the --

JUSTICE BREYER: Well, there's a causal connection absolutely here. It is a but-for connection.

MR. BAUGHMAN: Well --

JUSTICE BREYER: This person being in the room and a child of 2 would know that if you get into a room, as a result of your being in that room, you're likely to find evidence. So it's both but for and it fits within the problem. There we are.

That's the same, by the way, as it is with making a false oath to a magistrate. You make a false oath to a magistrate. That permits the magistrate to get into the house with -- the policeman gets in there with a warrant. It doesn't take the court long to suppress that. About a second. And -- and how -- how is this somehow different?

MR. BAUGHMAN: Let me try to give a couple of examples from different situations to make my point that there is a difference.

JUSTICE SCALIA: Well, give some cases first.

He's talking about actual cases.

MR. BAUGHMAN: I --

JUSTICE SCALIA: I mean, isn't it possible that if his law clerk overlooked Segura, he overlooked other cases as well.

JUSTICE BREYER: No. We read Segura. We read Segura, which happens to be a case --

JUSTICE SCALIA: There was unquestionably, was there not, a violation of the Fourth Amendment in Segura?

MR. BAUGHMAN: Your Honor is correct, and I am confident that when the officers returned with the search warrant, with the officers already inside, they did not knock and announce when they when they returned with the search warrant.

JUSTICE BREYER: He is not -- well --

CHIEF JUSTICE ROBERTS: Isn't that an example where there's a violation of the Fourth Amendment that is brought up and yet suppression is not the --

MR. BAUGHMAN: Because of the habeas concerns of comity that this Court has, that's correct. It is also not suppressed.

JUSTICE BREYER: -- important exception. The exception which comes from Silverthorne is when there is an independent chain of events such that it will be

-- not could be, but would be -- in fact, discovered anyway, despite the unlawfulness -- Silverthorne -- Holmes says, of course, you don't keep it out then because that's not going to impact deterrence. Now, that's Segura. That's Silverthorne. That's case after case. Of course, I accept that. And if you can show that this case somehow fits within that chain, fine. Then I -- then I maybe appear I have my mind made up on this, but I'm open to change.

MR. BAUGHMAN: Well, let -- let me try a couple of examples that --

(Laughter.)

MR. BAUGHMAN: -- that I -- that I hope might make the point. It is -- and my -- my belief is -- it's common in human experience that things can be accomplished either by command or by permission when the manner of doing so, the manner in which they end up being accomplished is subject to criticism. And let me give a couple quick examples.

If, when she was young, I sent my daughter to her room -- and that was rare, but if I sent her to her room and she stomped up the stairs and slammed the door, she would be in further difficulty not because she carried out my command by going to her room, but because she stomped up the stairs.

If a young athlete is told by his coach, catch the ball with two hands and he catches it with one, he is admonished not because he caught the ball but because he caught it with one hand.

And if a football player taunts the opposing team as he crosses the goal line, he gets a penalty not because he crossed the goal line, but because he taunted the other team.

These strictures are not prerequisites to the conduct. I do not tell my daughter go to your room but only if you don't stomp up the stairs --

JUSTICE BREYER: No, no. That's -- I -- I understand that point from your brief and I'm glad that you brought it up. But I have never -- I have never seen Fourth Amendment matters cut that finely. I have never seen the courts say I want to go back to the reason why this policeman is unlawfully in the room and then try to connect each piece of evidence with that reason. Rather, they ask is he unreasonably and unconstitutionally in the room.

So my concern about that, which I'd like you to address, is if we took that approach, I think we'd be doing it for the first time, and we'd let a kind of computer virus loose in the Fourth Amendment. I don't know what the implications of that are. I can't tell

you what you're saying is illogical. It's not illogical. It's conceivable, but it strikes me as risky and unprecedented.

MR. BAUGHMAN: I think as -- as -- in the examples I gave, knock and announce works the same way. These are not prerequisites. They're rules of conduct. They are principles of behavior. It's not do this only if you behave in this manner. It's do this and behave in this manner while doing it. And if you don't behave in the manner we have prescribed, the question is what flows from that misbehavior, not from the achievement of the end.

JUSTICE STEVENS: It seems to me that your example it's -- stomping up the stairs is like failing to knock and announce.

MR. BAUGHMAN: That's correct, and -- and the police are not illegally on the premises and my daughter --

JUSTICE STEVENS: And so there should be a deterrent for the stomping up the stairs, and you've got no deterrent for the knock and announce.

MR. BAUGHMAN: Well, and part of what -- part of what I wanted to say also to Justice Breyer and I think also works here is it's -- the suggestion seems to be that knock -- that a Fourth Amendment violation

-- the question of whether one has occurred and the question of whether or not the -- to apply the exclusionary rule are one in the same. And this Court has never said that. To me that would be a dramatic changing of the law of this Court. This Court has always said those are separate questions, and I think Petitioner's argument conflates the two.

We first ask whether there has been a constitutional violation and then we say -- this Court has said the premise for application of the exclusionary sanction is whether or not the challenged evidence is the product of the illegal government activity. So once we establish that there has been a constitutional error, the question becomes is the challenged evidence the product of it. And just like the touchdown is not the product of the taunting, the entry into the premises is not the product of the failure to knock and announce. It's the product of a warrant, which the judge issued commanding the police to enter.

JUSTICE SOUTER: Isn't -- isn't the problem that in -- in fact, it's the product of both? The warrant alone does not get the police officer into -- into the building. It -- it is in fact the entry that gets the police officer into the building, the

execution of the warrant. The judge has to do something. The police officer has to do something.

And the question that I think we face when we say is the later search the product of the entry, is -- is what your -- what -- I think a point that -- that counsel on the other side was making. It's a pragmatic point. Where do we draw the line of causation? And his answer is -- and I think the -- the answer of the cases that Justice Breyer was -- was referring to -- is this. We draw it in a way that will allow us to deter illegal police conduct, and if we engage in this slicing process of causation that you talk about, there will be no deterrent for the violation of the no-knock rule. If instead we say, yes, this is enough the product that we ought to deter -- that we ought to -- to respond to it in a way that will deter the no-knock and therefore we find causation and we get deterrence. What is fallacious about that argument?

MR. BAUGHMAN: There's nothing fallacious about the argument if one accepts that excluding the truth in -- in a criminal proceeding is a fair tradeoff in that circumstance --

JUSTICE SOUTER: We do that every single time we exclude a piece of evidence in every suppression case, don't we?

MR. BAUGHMAN: But -- but the Court has --
JUSTICE SOUTER: Don't -- don't we?
MR. BAUGHMAN: Yes, we do. But the Court has said that because that's a dramatic thing to do, because it -- it has a high societal cost, it should only be done when there is a causal connection, when the evidence is the product of the police wrongdoing.
CHIEF JUSTICE ROBERTS: Thank you, Mr. Baughman.
MR. BAUGHMAN: I thank the Court.
CHIEF JUSTICE ROBERTS: Mr. Salmons.

ORAL ARGUMENT OF DAVID B. SALMONS
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

MR. SALMONS: Thank you, Mr. Chief Justice, and may it please the Court:
Suppression would not be an appropriate remedy in this context for two primary reasons. The first is if the knock and announce rule does not protect the individual's privacy interest in the underlying items seized and, instead, it seeks to limit discrete risks related to the execution of warrants that property will be damaged, that officers will be mistaken for intruders, or that occupants will be caught in embarrassing situations. That makes the

knock and announce rule similar to other Fourth Amendment requirements related to the manner of executing warrants such as --

JUSTICE SOUTER: Well, what -- what do you say to Justice Breyer's argument that we haven't previously analyzed suppression by tracing or trying to trace the causal connection between a particular piece of evidence and a particular reason for the rule that was broken? What we have said in the past is if the rule or the standard is violated and the search is therefore unreasonable, the evidence doesn't come in.

You're proposing a -- a different causal analysis. You're proposing a causal analysis that requires the connection between a piece of evidence and the particular reason for one of these standards in every case in which suppression is -- is requested.

Number one, do you agree that that -- that would be a departure, as Justice Breyer suggested? And number two, what would be the justification for that?

MR. SALMONS: It would not be a departure, Your Honor. In fact, that's common practice in the Fourth Amendment area. This Court, for example, in New York v. Harris looked to the purposes of the rule against arrest in the home absent a warrant and to conclude that it wasn't appropriate to suppress a

statement made at the station even though it assumed that there was but-for causation. And this Court in Cruz did a similar analysis. It's very common to look to the purposes served --

JUSTICE BREYER: It's common, when you have a chain of causal connection, to say it ends somewhere. It's common, and in Harris, it ended once they left the home and now they're over in the station.

MR. SALMONS: But --

JUSTICE BREYER: This isn't over in the station. This is in the home. You speak of interests, but this doesn't interests.

What about Boyd? I mean, the most famous statement in Fourth Amendment history to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense. But it is the invasion of his indivisible right of personal security, personal liberty, and private property.

Now, I thought -- 1886 -- that's what's governed these cases for about 100 -- and far more, a century and a half or a quarter. And -- and the -- then suddenly you say, well, it's this interest in the

one or the other one. I mean, doesn't that describe it?

MR. SALMONS: No, Your Honor. I mean, certainly that's -- that is one of the principles underlying the Fourth Amendment, but this Court has looked to the types of considerations I'm discussing, and I will give you some examples. And we think, in fact, the knock and announce rule is very analogous to -- for example, to a claim of unnecessary property damage or to a claim that the officers brought the media along when they shouldn't or that they used excessive force.

CHIEF JUSTICE ROBERTS: There's no doubt in here that an invasion of the home was authorized by the warrant. Right?

MR. SALMONS: That's correct.

CHIEF JUSTICE ROBERTS: The interest we're talking about is not the sanctity of the drawers. It is 10 seconds that the officers should have waited additionally, according to the -- to your brother.

MR. SALMONS: That's correct. The illegality --

JUSTICE BREYER: Correct? I'm sorry. That is correct? I -- I thought that this warrant does not say you can enter the house without knocking.

I mean, I have a warrant. This warrant lets me search the house in daytime. I search it in nighttime. Is my search authorized?

MR. SALMONS: I don't think that would be a warrantless search or I don't think that would be a violation. That might be --

JUSTICE BREYER: I have a warrant --

MR. SALMONS: -- of the manner of execution. But again, if I may --

JUSTICE BREYER: What -- what happens with my example? I'm curious. That's not a rhetorical question.

I have a warrant which says, search 1618 5th Street. I search 1518 5th Street. Was it a warrant -- a warrant back search?

MR. SALMONS: Well --

JUSTICE BREYER: I don't have a warrant to search 1518. I don't have a warrant that allows me to come in in the middle of the night when it says day, and I don't have a warrant here that allows me to come in without knocking. So where's the warrant?

MR. SALMONS: I think the question in that case, Your Honor, would be about reasonable reliance on the warrant and whether it was a reasonable mistake. And if it wasn't, then it would be a warrantless

search.

And if I may just focus the Court -- attention on the claim of unnecessary property damage. We think that's quite analogous here in part because the typical -- in the typical case, a premature or unannounced entry will be a forcible entry. But whether the claim is that the officers entered a few moments prematurely or that they unnecessarily used a battering ram on the door, in either case the -- the violation doesn't relate to the privacy interests and the items to be seized and shouldn't result in suppression. And in addition to that --

JUSTICE SOUTER: Well, it does relate to the privacy interests, and we've seen the explanation. One of the reasons for requiring the knock is that there is enough respect for a person's home, a person's privacy to say the police should not barge in like an invading army.

MR. SALMONS: Well, that certainly is --

JUSTICE SOUTER: That is a respect for privacy.

MR. SALMONS: That -- that certainly is true, Your Honor, but that -- that is not a protection --

JUSTICE SOUTER: And that is involved -- and that is -- that is the whole point of -- of knock and

announce, isn't it?

MR. SALMONS: No, Your Honor. The point of knock and announce is a more limited privacy. It's not related to the privacy of the items to be seized. That's separate. And that's why it makes it like the claim of unnecessary --

JUSTICE SOUTER: We're talking about the privacy of individual in his home, and the reasonableness of the search depends upon the reasonableness of invading the individual's privacy in his home. Is that not the general rule?

MR. SALMONS: No, Your Honor. I think what -- what focuses in terms of suppression is whether the government has obtained an evidentiary advantage as a consequence of the illegality. Here, the illegality was the failure to delay a few additional moments before entry.

JUSTICE SOUTER: Then there will never be a suppression of -- of evidence specified in a warrant when the warrant's no-knock component is violated --

MR. SALMONS: But --

JUSTICE SOUTER: -- because we -- we will say -- in every single time, following your argument, you will -- we will say the -- the violation had nothing to do with the authorization to seize the evidence. The

violation simply had to do with the -- with the -- the niceties and the risks involved in entering. So if we accept your argument, no-knock is -- is a dead duck, isn't it?

MR. SALMONS: I don't think so, Your Honor. If I may try to explain. I think as a general matter, with regard to physical evidence in the home that's within the scope of the search warrant, that you're -- you're probably right. Most of the time, that evidence will come in.

We think that there are probably at least two areas that might lead to suppression in these cases. One is the -- the type of statements that the Chief Justice mentioned earlier. Another might be what you might call proximity evidence, that the officers went in prematurely and as a result, they saw a --

JUSTICE STEVENS: Mr. Salmons, may I ask you this -- this question? If you'd been the prosecutor in this case and you had -- knew that the evidence would be suppressed if there were a constitutional violation, would you have conceded that there was a constitutional violation in this case?

MR. SALMONS: Well, I don't think -- I think there is a reasonable argument that could be --

JUSTICE STEVENS: Yes or no.

MR. SALMONS: I'm -- I'm attempting to answer that, Your Honor. I think there's a reasonable argument that could be made in this case that there wasn't a violation. I think it was probably a smart strategy.

JUSTICE STEVENS: So you would not have conceded.

MR. SALMONS: I can't -- I can't second-guess the strategy here to concede it.

JUSTICE STEVENS: But you would not have conceded. If you -- if you thought there was a reasonable argument, you would not have conceded that there was a violation, would you?

MR. SALMONS: I think I probably would have argued in the alternative, Your Honor. I think that's probably the safest --

JUSTICE KENNEDY: Can you tell me what -- what happens if there's a violation of the daytime warrant provision in -- in a search warrant and the search is at night? Do we suppress?

MR. SALMONS: I think generally no, Your Honor. I think -- and I would -- I would --

JUSTICE KENNEDY: Are there cases -- are there cases on that?

MR. SALMONS: I -- not in this Court. There

-- there may be in the court of appeals. I think the way that the Court would analyze that would be, again, along the same lines.

Now, certainly in jurisdictions that haven't adopted the rule that we're articulating here, the courts may suppress. But we think under the principles we're articulating, that suppression probably would not be appropriate there.

JUSTICE SOUTER: No, but apparently you're saying we would not suppress because as long as the warrant specified the items to be seized and they didn't go beyond that, there was no causal connection between the fact that they broke in and disturbed people in the night, when they were not authorized to, and their ultimate obtaining of -- of the evidence. Once again, it seems to me if we follow your -- your reasoning, then the distinction between the nighttime and the daytime warrant is a dead letter.

MR. SALMONS: Well, you know, we respectfully disagree with that. We think that there are two separate questions, what the Constitution requires and whether suppression is an appropriate remedy.

JUSTICE SOUTER: The Constitution requires --

MR. SALMONS: The Court has always treated those --

JUSTICE SOUTER: The Constitution requires a reasonable search. It is hornbook law that violating no-knock, violating nighttime searches when only a daytime search is authorized amounts to an unreasonable search. You're saying that's utterly irrelevant because there's no causal connection between that violation and the seizure of the particular items that the warrant -- the warrant specified.

MR. SALMONS: Your Honor, if I may. It's also hornbook law now in this Court that you can't unnecessarily destroy property in executing the warrant or effecting the entry and that you can't bring the media along. This Court in both Ramirez and --

JUSTICE KENNEDY: I'd to get your -- I'd like to get your position. I -- I think Justice Souter is correct, that under the theory you're arguing to us here, the violation of the daytime warrant rule is not grounds for suppressing evidence. So we can have nighttime searches with no suppression remedy.

MR. SALMONS: Well, I -- I think that's probably the position that we would take. I think the way the Court would analyze that, as it has done in these other cases, it would look to two factors. One, what are the purposes served by the Fourth Amendment rule that's violated and how well those purposes fit

with the remedy of suppression; and two, whether the government obtained any evidentiary advantage as a result of the violation.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Salmons.

Mr. Moran, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF THE PETITIONER

MR. MORAN: Thank you --

CHIEF JUSTICE ROBERTS: You think there -- you think there was a violation of the knock and announce rule in this case. Correct?

MR. MORAN: I do, Your Honor. The warrant was never actually made part of the record, but my understanding, from the record we have, was that only drugs -- there was only knowledge of drugs. The -- the warrant authorized a search for guns because Officer Good told the magistrate that in his experience guns were often associated with drugs. But they had no particularized information about any guns on the premises. They only had particularized information about drugs on the premises.

The issue here about causation goes back, I think, to the common law. And as Justice Breyer articulated, when an officer is illegally in the home,

that causes his seizure of goods or his arrest of people in the home to be illegal. If I can go all the way back to 1831, Chief Justice Shaw of the Massachusetts Supreme Court said, the rule is well established -- this is 1831 it was well established -- that where an authority given by law is exceeded, the party loses the benefit of his justification and the law holds him a trespasser ab initio although, to a certain extent, he followed the authority given. The law will operate to defeat all acts thus done under color of lawful authority when exceeded and a fortiori will it operate to prospectively to prevent the acquisition of any lawful right by the excess and abuse of an authority given for useful and beneficial purposes.

CHIEF JUSTICE ROBERTS: So you draw a distinction between two cases? If they illegally entered and they suddenly said we waited 4 seconds, it was supposed to be 15. They say, never mind. They go back out. There's another knock. They wait 15 and they come in. Then it's all right. Correct?

MR. MORAN: It might be.

CHIEF JUSTICE ROBERTS: Okay. But you're saying it's a world of difference if, when they go in and enter and they say, we should have waited 10 more

seconds, we're the police, we're here to execute a search warrant, let's count to 10, then all of a sudden, it's invalid from there on. Those are the -- they're two different cases in your mind?

MR. MORAN: I think that's -- that's right because an -- a reasonable search and seizure, as this Court held in Wilson, requires a lawful entry. Eight Justices agreed that an -- a lawful entry is the indispensable predicate of a reasonable search in Ker v. California. These are not disconnected. It is not in.

The -- the prosecution's claim here, the Respondent's claim, would eliminate all manner of entry arguments from the exclusionary rule. Nighttime search, use of excessive force, blowing up the building to get in, knocking a wall off the building wouldn't matter. They were in -- they're in, they have a warrant, everything is fine once they're in. It simply wouldn't matter for exclusionary purposes.

In Harris, I want to stress again in Harris that this Court never questioned the fact that the evidence found inside the home had to be suppressed, and that's all we're asking for here. The evidence in the home.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)