1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOOKER T. HUDSON, JR., :

4 Petitioner :

5 v. : No. 04-1360

6 MICHIGAN. :

7 - - - - - - - - - - - - - - - - -X

8 Washington, D.C.

9 Thursday, May 18, 2006

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 10:00 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 behalf

17 of the Respondent.

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

19 General, Department of Justice, Washington, D.C.;

20 on behalf of the United States, as amicus curiae,

21 supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 now in Hudson v. Michigan.

5 Mr. Moran.

6 ORAL ARGUMENT OF DAVID A. MORAN

7 ON BEHALF OF THE PETITIONER

8 MR. MORAN: Mr. Chief Justice, and may it

9 please the Court:

10 For centuries the knock and announce rule has

11 been a core part of the right of the people to be

12 secure in their houses from unreasonable searches and

13 seizures. It reflects the notion that when the

14 government has the right to enter a house, whether to

15 perform an arrest, to search for evidence, or to seize

16 goods, that the people should have the right to answer

17 the door in a dignified manner, except in an emergency,

18 and to avoid the unnecessarily gratuitous embarrassment

19 and shock that often follows a precipitous police

20 entry.

21 CHIEF JUSTICE ROBERTS: So wouldn't it be

22 more accurate to say that it's protected the right to

23 be free from unreasonable entry as opposed to

24 unreasonable search and seizure?

25 MR. MORAN: Well, this Court has recognized

1 in Wilson, consistent with the common law authorities,
2 Mr. Chief Justice, that they are connected, that the
3 entry directly affects the reasonableness of the search
4 and seizure that occurs within. And that's why this
5 Court in Miller and in Sabbath suppressed the evidence
6 following knock and announce violations. But in
7 Wilson, this Court directly stated that the common law,
8 the Fourth Amendment, -- the common law that informs
9 the Fourth Amendment, directly demonstrates that the
10 Framers thought that the method of entry directly
11 affects whether a search or seizure inside a home is
12 reasonable.
13 JUSTICE KENNEDY: So -- so in your view,
14 there has to be a 4- to 6-hour search for complex
15 financial records, business documents. There's a
16 warrant. The search is otherwise proper. They forget
17 to knock. They say, oh, you know, we are police
18 officers. There's a discussion for a while. But --
19 anything seized after that is -- must be suppressed.
20 MR. MORAN: If there is --
21 JUSTICE KENNEDY: It just seems to me in the
22 hypothetical I put -- and there's obviously a reason I
23 put it -- is there's just no causal link between the --
24 the suppression and -- and the failure to knock.
25 MR. MORAN: Your Honor, the evidence inside

1 -- the evidence is seized inside. The seizure of the
2 evidence inside is directly related to the manner of
3 entry, just as there's a direct causal link between
4 when the officers come in without a warrant when they
5 should have gotten a warrant first. They thought there
6 was an exigent --
7 JUSTICE KENNEDY: Well, but you say directly
8 related. That -- that assumes the very point that I
9 have in mind. I don't know why it's directly related.
10 MR. MORAN: Well, going back to Wilson, this
11 Court said in Wilson, if I might quote from Wilson,
12 that the -- the common law search and seizure leaves no
13 doubt that the reasonableness of a search of a dwelling
14 may depend in part on whether law enforcement officers
15 announce their presence and authority prior to
16 entering.
17 JUSTICE KENNEDY: It depends -- it depends in
18 part.
19 MR. MORAN: It depends in part, certainly.
20 There are other factors as well, but the reasonableness
21 of the search depends in part.
22 The issue --
23 JUSTICE SCALIA: Counsel, what -- what do you
24 do with our opinion in -- in 1986 in Segura v. United
25 States, which seems to me to contradict your assertion

1 that you cannot separate, for purposes of the
2 exclusionary rule, the manner of entry from the search?
3 In that case, the -- the policemen entered without a
4 search warrant. So the entry was clearly a violation.
5 They left two officers in the room and other officers
6 went back and got a search warrant. When they returned
7 with the search warrant, the two officers who were in
8 the room proceeded to do a search, and we admitted the
9 evidence. It seems to me that in that case, we -- we
10 did succeed in -- in separating the -- the entry from
11 the subsequent search, and I don't know why -- why we
12 can't do the same thing here.
13 MR. MORAN: Because there were exceptional
14 circumstances, Justice Scalia, in Segura.
15 JUSTICE SCALIA: What -- what were the
16 exceptional circumstances?
17 MR. MORAN: A 19-hour delay and a warrant
18 that was obtained that had nothing to do with the
19 initial entry. That was in no way dependent on the
20 initial entry.
21 JUSTICE SCALIA: We're still, it would seem
22 to me -- I don't know -- the warrant wasn't dependent
23 on the initial entry? You could also say the initial
24 entry wasn't the product of the -- of the later
25 warrant.

1 MR. MORAN: The initial entry was not the
2 product of the later warrant, but once this Court ruled
3 --
4 JUSTICE SCALIA: And therefore was unlawful.
5 MR. MORAN: That's right. The -- the initial
6 entry wasn't lawful.
7 JUSTICE SCALIA: But we didn't hold -- but we
8 didn't hold that.
9 MR. MORAN: Well, but this -- the Government
10 in Segura never contested the fact that the evidence
11 that was seen and seized during the initial entry
12 should be suppressed. And that's all we're asking for
13 here.
14 JUSTICE SCALIA: Excuse me? No, I don't
15 understand that.
16 MR. MORAN: When the officers went in
17 initially in Segura, some evidence was seen and seized
18 at that time, and the Government did not contest that
19 that evidence should not --
20 JUSTICE SCALIA: No. I'm talking about only
21 the evidence that -- that was the product of the search
22 conducted after the warrant was delivered.
23 MR. MORAN: That's right.
24 JUSTICE SCALIA: And that evidence was
25 admitted in.

1 MR. MORAN: Right, but the --
2 JUSTICE SCALIA: Even though the entry of
3 those officers was an unlawful entry.
4 MR. MORAN: The entry -- the initial entry
5 was an unlawful entry. When they came back with the
6 warrant --
7 JUSTICE SCALIA: Well, no, no. The -- there
8 was no subsequent entry. You said the initial entry
9 was unlawful. Those officers stayed there. Their
10 presence there was the product of an unlawful entry.
11 MR. MORAN: Their presence was, yes.
12 JUSTICE SCALIA: Their presence was the
13 product of an unlawful entry, and nonetheless, we
14 admitted in the -- the material that they obtained in
15 the search after a warrant had been obtained.
16 MR. MORAN: I -- I read Segura as saying that
17 the presence -- the later presence of the warrant,
18 which was in no way tainted by the initial entry, made
19 the officers' presence in the home retroactively lawful
20 from that point. It was unlawful until that point,
21 which is why the Government did not contest the -- the
22 point that all the evidence that was seized during the
23 initial entry up to the point when the warrant was
24 issued had to be suppressed. That's all we're asking
25 for here.

1 I can imagine hypotheticals in which you have
2 a knock and announce violation and then something
3 happens like in Segura or like in Murray, where you
4 have later action that creates an independent source.
5 But in your typical --
6 JUSTICE KENNEDY: Suppose the -- suppose the
7 officer -- excuse me, we forgot to knock, but we are
8 police officers. We do have a warrant. We're going to
9 proceed with a search. Please don't be alarmed. We're
10 going to -- does that do it?
11 MR. MORAN: That might do it. That would be
12 a different case than the case we have here --
13 JUSTICE KENNEDY: Well, but your -- your
14 point is -- is there -- is that they have to go out and
15 come back in again.
16 MR. MORAN: You would have to create some
17 sort of analogy to Murray and Segura. Murray and
18 Segura are exceptional cases. There are very rare
19 cases when the Government breaks in and then realizes
20 we shouldn't have done that. We should go get a
21 warrant.
22 JUSTICE KENNEDY: I agree. Segura -- I
23 forget what it is in torts. It's kind of a
24 supervening, independent cause or something like that.
25 MR. MORAN: Yes. Yes. And -- and you can

1 have -- imagine such hypotheticals in the knock and
2 announce context. And in the Moreno case in the Ninth
3 Circuit, you have one where you have a knock and
4 announce violation committed in the outer door. No
5 evidence is found in the outer door, but then the
6 officers properly knock and announce at the inner door,
7 and the Court in the Ninth Circuit held that that was
8 proper to seize that. We have no problem with that.
9 That -- that seems like a proper result because
10 ultimately the purposes of the knock and announce rule
11 were vindicated when the officers knocked and announced
12 at the inner door before -- before forcing entry.
13 CHIEF JUSTICE ROBERTS: Mr. Moran, how -- how
14 long do you think the officers had to wait before they
15 could have entered?
16 MR. MORAN: In this case?
17 CHIEF JUSTICE ROBERTS: Yes.
18 MR. MORAN: From Banks, somewhere closer to
19 15 seconds. 15 to 20 seconds was --
20 CHIEF JUSTICE ROBERTS: What would -- if they
21 had done that, what would have been different from what
22 happened in this case?
23 MR. MORAN: Mr. Hudson presumably would have
24 gotten up from his chair, would have come to the door,
25 would have admitted the officers, and then after --

1 CHIEF JUSTICE ROBERTS: Why do you presume
2 that? Someone sitting in a chair with gun -- with a
3 gun and the drugs you say would have gotten up and
4 said, oh, it's the police. Let's see what they want?
5 MR. MORAN: We presume that people act
6 lawfully in response to commands from the police. We
7 do not presume that people will act unlawfully. If the
8 police have evidence or information that someone will,
9 in fact, act unlawfully by trying to dispose of the
10 evidence or by --
11 CHIEF JUSTICE ROBERTS: Isn't a good sign of
12 what might have happened what actually happened when
13 the police came in, which was there was an effort to
14 hide the evidence?
15 MR. MORAN: The record does not disclose any
16 effort on Mr. Hudson's part to hide any evidence, Your
17 Honor.
18 CHIEF JUSTICE ROBERTS: I thought -- where --
19 where were the drugs found?
20 MR. MORAN: The rocks of crack cocaine, for
21 which he was convicted, were found in his left front
22 pants pocket.
23 CHIEF JUSTICE ROBERTS: Where was the gun
24 found?
25 MR. MORAN: The gun was in the chair.

1 CHIEF JUSTICE ROBERTS: In the chair?
2 MR. MORAN: In the chair. There was no
3 evidence that there was any secreting of evidence in
4 this case.
5 CHIEF JUSTICE ROBERTS: Is there any reason
6 to suppose that if the officers had waited 15 seconds
7 instead of the 3 to 4, that they wouldn't have found
8 the same evidence?
9 MR. MORAN: It's always possible, Your Honor,
10 but we don't presume that. Just as in Segura, the
11 Court said --
12 CHIEF JUSTICE ROBERTS: Well, the only -- the
13 only reason they wouldn't have found the same evidence,
14 I take it, is if they -- if -- if the defendants had
15 had additional time to dispose of it.
16 MR. MORAN: We don't contest that they would
17 have found the same evidence, no. We do not argue that
18 Mr. Hudson or any of the other people in the house
19 would have destroyed the evidence.
20 JUSTICE SCALIA: Is --
21 MR. MORAN: We certainly don't make that
22 argument.
23 JUSTICE SCALIA: Is in the chair the same
24 thing as on the chair?
25 MR. MORAN: I --

1 JUSTICE SCALIA: You tell me something is in
2 the chair. Did they stuff it -- stuff it in the
3 cushion or what?
4 MR. MORAN: It's not really clear from the
5 record, Justice Scalia.
6 JUSTICE SCALIA: Yes. So I -- I --
7 MR. MORAN: It's in -- in the chair.
8 JUSTICE SCALIA: I think it's pretty clear
9 you don't talk of something as being in the chair.
10 It's on the chair unless you stuff it in the chair. I
11 assume he stuffed it behind a pillow or something.
12 MR. MORAN: I'm not completely clear exactly
13 where in the chair it was.
14 JUSTICE SCALIA: English is English. You
15 said it was in the chair.
16 MR. MORAN: In the chair.
17 JUSTICE SCALIA: Okay.
18 MR. MORAN: 49 of the 50 States currently
19 suppress evidence following knock and announce
20 violations, just as this Court did in -- in Miller and
21 Sabbath.
22 JUSTICE ALITO: Well, what do you think is
23 the standard for determining what sort of causal
24 connection there has to be in order to have suppression
25 here?

1 MR. MORAN: We go back to the Wong Sun fruits
2 test. Is the evidence that was recovered the direct
3 fruit of the violation? In other words, is there a
4 clear, logical connection? Now, my opponent --
5 JUSTICE ALITO: What's the purpose of the
6 causal connection requirement? What's the reason for
7 having it?
8 MR. MORAN: Well, it's so -- it's so that
9 there is a -- an obvious connection. Before the court
10 takes the step of -- of excluding evidence, there
11 should be some connection, some clear connection,
12 between the violation and the evidence recovered. But
13 my --
14 JUSTICE ALITO: And what's the reason for
15 requiring a clear connection?
16 MR. MORAN: I suppose that it's simply the
17 matter of logic, that evidence that's completely
18 unrelated to a violation nobody would think should be
19 -- should be excluded. But evidence --
20 JUSTICE ALITO: But why?
21 MR. MORAN: Well, it's -- it's unrelated. So
22 if, for example, the police break into my house and --
23 and find evidence -- find nothing in my house -- they
24 illegally break into my house, but then they -- they do
25 a proper warrant search of my office and find evidence,

1 I -- I don't -- I don't see any connection between the
2 illegal search of my house and the legal search of my
3 office, assuming that it was not the fruit of the
4 illegal search of my house.
5 JUSTICE ALITO: But why? Isn't the reason
6 just a -- just a question of crafting an appropriate
7 remedy for -- an appropriate deterrence --
8 MR. MORAN: Yes.
9 JUSTICE ALITO: -- for violations?
10 MR. MORAN: Exactly. It -- the whole point
11 is deterrence. And so you wouldn't deter the officers
12 who illegally broke into my house by excluding the
13 evidence from my office if -- if -- it may even well be
14 different --
15 JUSTICE SCALIA: Sure you would. Sure you
16 would.
17 MR. MORAN: Well, it may well even be a
18 different --
19 JUSTICE SCALIA: I mean, you'd deterred him
20 more if you threw the whole case out, but we don't do
21 that.
22 MR. MORAN: No, we don't.
23 JUSTICE SCALIA: Yes.
24 MR. MORAN: We -- we limit --
25 JUSTICE SCALIA: I mean, we -- we insist that

1 the deterrence somehow be related --

2 MR. MORAN: We do.

3 JUSTICE SCALIA: -- to the -- and -- and the

4 related usually means that the acquisition of the

5 evidence was the product of the violation. It was

6 caused by the violation. And -- and for that reason,

7 we keep it out.

8 And here, it's -- it's hard to say that this

9 was caused by the fact that they -- that they entered

10 in a few seconds too soon. So he would have answered

11 the door and they would have seen the stuff.

12 MR. MORAN: What the knock and announce

13 violation causes, Justice Scalia, is the officer to be

14 illegally in the home. Going back to the common law

15 authorities, the courts have long recognized --

16 American courts have long recognized that an officer

17 who illegally enters a home, even with a valid writ or

18 a valid piece of paper allowing him to be in the home,

19 if the manner of entry is illegal, he is a trespasser.

20 His entry is -- is void ab initio. And so in that

21 sense, the entry is the cause of the illegal --

22 JUSTICE SCALIA: Although you say it can be

23 retroactively validated.

24 MR. MORAN: After Segura --

25 JUSTICE SCALIA: Yes, in Segura, you can

1 retroactively validate it by -- by getting a warrant
2 afterwards.
3 Could it be -- have been retroactively
4 validated by knocking and announcing afterwards? I'm
5 -- I'm sorry we came in too soon, and they run back to
6 the door and they knock and announce and wait -- wait
7 10 seconds.
8 MR. MORAN: Again, I --
9 JUSTICE SCALIA: Would that do the job?
10 MR. MORAN: I concede that it's possible that
11 you can come up with a Segura-type hypothetical. I
12 think the easiest one is the Moreno case from the Ninth
13 Circuit.
14 JUSTICE SCALIA: The hypothetical sounds
15 ridiculous only if one accepts your explanation of
16 Segura, that -- that it was somehow a retroactive
17 validation.
18 MR. MORAN: Well --
19 JUSTICE BREYER: Sorry. I have laryngitis.
20 Can you hear me all right?
21 MR. MORAN: Yes, I can, Justice Breyer.
22 JUSTICE BREYER: Why is it retroactive
23 validation? I would have thought Segura and those
24 cases are Silverthorne cases.
25 MR. MORAN: It is. It's an --

1 JUSTICE BREYER: All that it is is it's an
2 independent chain of events.
3 MR. MORAN: It's an independent source.
4 JUSTICE BREYER: An independent chain of
5 events that almost certainly would have led to the
6 discovery of the evidence despite -- not without --
7 despite the unlawful entry. And if that's so, all we
8 have is a -- is a set of cases where deterrence is most
9 unlikely to play any significant role because no
10 policeman could possibly counter that kind of thing
11 getting the evidence in --
12 MR. MORAN: And that's exactly right. And --
13 and the situation we have in Michigan now is that
14 officers know to a certainty that if they violate the
15 knock and announce rule, nothing will happen. And so
16 that's why in all the other States --
17 CHIEF JUSTICE ROBERTS: That's not true.
18 There are cases where the violation of the knock and
19 announce rule gives rise to evidence that may be
20 admitted and that would presumably be excluded if you
21 can show that the seizure is related to the violation.
22 The problem here is that the evidence that is being
23 suppressed, as -- as you've suggested, that there's no
24 question that it would have been available if the
25 officers had waited 15 seconds as opposed to 4 seconds.

1 MR. MORAN: Mr. Chief Justice, none of the
2 parties has been able to identify any cases in which
3 you can point to evidence and say this -- this evidence
4 was produced by the knock and announce violation and
5 nothing else in the house --
6 CHIEF JUSTICE ROBERTS: The Solicitor General
7 hypothesized one in the amicus briefs. If somebody --
8 you know, they -- they burst in and someone screams,
9 you know, run away, it's the police, that excited
10 utterance caused by the absence of a knock and announce
11 would presumably be related to the violation and could
12 be suppressed. That doesn't mean that the gun and the
13 drugs that are found in the room is in the same
14 category.
15 MR. MORAN: If I may make two responses to
16 that. First, the Solicitor General hypothesized such a
17 case but has not identified a single case where that's
18 ever happened. It's purely hypothetical.
19 But the second point is that excluding that
20 evidence would have no deterrent effect whatsoever
21 because by -- by definition, that's evidence that the
22 police would only get by committing the knock and
23 announce violation. So the police lose nothing by
24 risking the possibility that somebody will make an
25 excited utterance and then say, okay, we won't get to

1 use that excited utterance, but we would never have
2 gotten that excited utterance in the first place.
3 That's not deterrence, Mr. Chief Justice. That's
4 restitution. That's like saying that I can be deterred
5 from stealing something by being told that if I'm
6 caught, I'll have to give it back.
7 CHIEF JUSTICE ROBERTS: What it is is
8 recognizing that if there is a fruit of the illegal
9 act, it is suppressed so that there is a cost to the
10 illegal act. What it's saying is that not everything
11 that happens after the illegal act is a fruit of the
12 illegal act.
13 MR. MORAN: I think your question, Mr. Chief
14 Justice, really goes to the worst position language in
15 Nix, and the point is, from our brief, is that this
16 Court has placed the prosecution in the worst position
17 than it would have been had the police acted lawfully
18 dozens, possibly scores, of time -- times.
19 All the cases in which the Court has noted
20 that the police easily could have obtained a warrant.
21 Most recently in Georgia v. Randolph, where this Court
22 noted that there were two lawful methods for the police
23 to get the cocaine -- the cocaine residue on the straw,
24 but still suppressed the evidence. The police and the
25 prosecution do get placed in a worse position, and

1 that's necessary for deterrence. What --
2 JUSTICE GINSBURG: Would it have been
3 possible for these police to get a no-knock warrant?
4 MR. MORAN: It might well have been. I was
5 asked this question last time, Justice Ginsburg, and
6 I'd like to modify my answer. In Michigan, there is no
7 statute governing no-knock warrants, and there's --
8 there are also no court decisions governing no-knock
9 warrants. And there never will be under the People v.
10 Stevens regime.
11 One of the nice things that's happened in --
12 in -- since Wilson v. Arkansas, in fact, before Wilson
13 v. Arkansas in many States, is courts have developed --
14 developed procedures for police officers to get no-
15 knock warrants, to go to the police and ask for a no-
16 knock warrant.
17 JUSTICE KENNEDY: Well, what about in this
18 case, which is Justice Ginsburg's question? If the
19 police said, we have reasonable grounds to -- to
20 believe that he has a weapon and we're also looking for
21 drugs that are easily disposable, would that be grounds
22 for knocking -- for not -- for dispensing with the
23 knock requirement?
24 MR. MORAN: Could the -- could a judge have
25 issued such a warrant in Michigan? Is that your

1 question?

2 JUSTICE KENNEDY: Well, let's take it step by

3 step. Suppose the police articulate this at the outset

4 --

5 MR. MORAN: It could well --

6 JUSTICE KENNEDY: -- and under -- under State

7 procedures, they're allowed to make the on-the-spot

8 judgment. Would that -- would those facts suffice to

9 allow them to enter without the knock?

10 MR. MORAN: If they had specific information

11 along those lines, that -- that there was evidence

12 hidden in places or -- or stored in places where it

13 could easily be disposed --

14 JUSTICE STEVENS: Well, is that correct? I

15 thought in most States, there has to be a statute that

16 authorizes a non-knock warrant.

17 MR. MORAN: In most States --

18 JUSTICE STEVENS: And that most States do

19 have such statutes. And we got this case because

20 Michigan chooses to go on on a separate path.

21 MR. MORAN: Most States do have statutes, but

22 a few States by court decision have allowed for the

23 issuance of no-knock warrants. My point --

24 JUSTICE SOUTER: Even -- even if Michigan

25 doesn't, I mean, that has nothing -- as I understand

1 it, that -- that doesn't affect the -- the answer to
2 the Federal question that we have because, as I
3 understand it, we -- we can -- we can take as good law
4 that even with a warrant that does not have a no-knock
5 authorization, if the police have a justification for
6 going in without knocking, so far as the Fourth
7 Amendment is concerned, the search is still good.
8 MR. MORAN: That's right.
9 JUSTICE SOUTER: Isn't that correct?
10 MR. MORAN: Absolutely.
11 JUSTICE SOUTER: So what we're really arguing
12 is what -- what is Michigan law on the subject, but the
13 -- the issue we've got is not Michigan law.
14 MR. MORAN: That's right. And this case
15 comes to us in the posture in which --
16 JUSTICE GINSBURG: But this is a -- this is a
17 place -- a case in which the warrant was for drugs. Is
18 that not so?
19 MR. MORAN: It was.
20 JUSTICE KENNEDY: Well, so in -- in this
21 case, they could have entered in your view if they had
22 specific knowledge of the gun and disposable
23 contraband.
24 MR. MORAN: Yes, after Banks and -- and
25 Richards, especially Richards, if the police had

1 reasonable suspicion that you had contraband in a
2 position where it could be easily disposed and if they
3 had information about the weapons that could be used to
4 resist the police entry, then yes, there could have
5 been a -- a legal no-knock entry.
6 JUSTICE SCALIA: What about just the former
7 without the latter? I thought the former alone would
8 be enough.
9 MR. MORAN: Either would be. That's correct,
10 Justice Scalia.
11 JUSTICE GINSBURG: Going back to my question,
12 isn't it then a reasonable assumption, based on the
13 police experience in case after case, that where there
14 -- where narcotics are housed, there is often a gun and
15 there is ease of disposal, couldn't the police simply
16 say this is a narcotics search and therefore we don't
17 need to knock and announce because those circumstances
18 will be present in most cases?
19 MR. MORAN: No, because this Court
20 unanimously foreclosed that argument in Richards v.
21 Wisconsin by holding that there must be a
22 particularized showing for the particular case. That
23 particularized showing I will gladly concede will be
24 easier to make in a narcotics case than it would be in
25 a -- in a stolen property case.

1 But it wasn't made in this case, and this
2 case comes to this Court on the posture that the
3 prosecution has conceded, at every step of the way,
4 that that particularized showing was not made here and
5 that, therefore, there was a knock and announce
6 violation.
7 CHIEF JUSTICE ROBERTS: I'm sorry. A
8 particularized showing of what?
9 MR. MORAN: That in this particular case,
10 it's likely that the drugs would be in an easily
11 disposable situation and that the occupants would be
12 armed and ready to resist the police entry. And there
13 was no such showing made here.
14 CHIEF JUSTICE ROBERTS: I --
15 MR. MORAN: The prosecution didn't even
16 attempt to make such a showing.
17 CHIEF JUSTICE ROBERTS: I'm vaguely recalling
18 cases from the court of appeals in the D.C. Circuit
19 that accepted a presumption that if there are drugs
20 around, there are likely to be firearms around. Are
21 you saying that that's inconsistent with the Richards
22 decision?
23 MR. MORAN: That might not be inconsistent,
24 but the -- the -- to follow that up with, therefore,
25 you can do a no-knock entry automatically is

1 inconsistent with the Richards decision.

2 The --

3 JUSTICE STEVENS: May I ask this question?

4 As I understand it, the prosecutor conceded a violation

5 of the knock and announce rule.

6 MR. MORAN: Yes.

7 JUSTICE STEVENS: And I'm just wondering. In

8 Michigan, since there's no adverse effect to it, do the

9 prosecutors routinely concede that there's a violation

10 because there's no point in litigating it I suppose?

11 MR. MORAN: Well, I don't even think we get

12 that far, Justice Stevens. Motions to suppress aren't

13 filed. There's no point filing a motion to suppress

14 except for the -- the fact that this case is pending in

15 this Court. There's no point for --

16 JUSTICE STEVENS: So that if the issue

17 arises, you can assume the prosecutor will always say,

18 yes, we'll assume there was a violation. There would

19 be no reason not to assume that.

20 MR. MORAN: That's right.

21 JUSTICE STEVENS: So you'll never really

22 litigate in Michigan how far they can go before they

23 violate the rule.

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

25 JUSTICE SCALIA: But I assume that lawsuits

1 are allowable if -- if knock and announce is -- is not
2 observed, and if you intrude upon someone in a state
3 undress.
4 MR. MORAN: Michigan --
5 JUSTICE SCALIA: Isn't a civil lawsuit
6 bringable?
7 MR. MORAN: Michigan has a particularly
8 vigorous State immunity statute that makes it
9 effectively impossible to sue for a -- a knock and
10 announce violation. I have not found a single Michigan
11 case in which anyone has successfully sued for a knock
12 and announce violation.
13 You can sue in Federal court under section
14 1983, but there you run into various doctrines,
15 especially including qualified immunity.
16 I made the claim the first time and it still
17 hasn't been contradicted by my opponents. We've not
18 been able to find any cases, published or unpublished,
19 in which anyone has collected anything other than
20 nominal damages anywhere in the United States --
21 CHIEF JUSTICE ROBERTS: But those doctrines
22 that you're talking about would be overridden on the
23 hypothetical that you want us to be concerned about.
24 In other words, you're saying if you don't suppress the
25 evidence, there's going to be no incentive to comply

1 with the law. So they're going to deliberately violate
2 the law. Well, if they're deliberately violating the
3 law, qualified immunity isn't going to help them very
4 much.
5 MR. MORAN: Qualified immunity would still
6 protect them to the extent that any reasonable officer
7 could have thought that a -- a no-knock entry was
8 valid. I cited a number of cases, for example, where
9 innocent people have been shot following entries into
10 wrong doors, and qualified immunity has been granted to
11 the officers.
12 JUSTICE SCALIA: Wait a minute. The
13 government is not arguing here that -- that it's valid.
14 It's just arguing that though it is invalid, the
15 punishment for it should not be to let the criminal go.
16 That's -- that's all they're saying.
17 MR. MORAN: That -- that is their argument.
18 JUSTICE SCALIA: The punishment for the
19 invalidity should not be the -- the inadmissibility of
20 all of the evidence of the crime that was found.
21 MR. MORAN: That --
22 JUSTICE SCALIA: Well, that's quite different
23 from saying that it's -- that it's valid. So I think
24 they acknowledge that -- that a lawsuit against an
25 officer who knowingly dispenses with -- with knock and

1 announce because, as you say, he says there's --
2 there's no consequence, but there is a consequence. He
3 can be sued.
4 MR. MORAN: I assume --
5 JUSTICE SCALIA: And sometimes he may be
6 going into the wrong house and the person suing him may
7 not be a criminal, but may be some -- some innocent --
8 innocent bystander.
9 And -- and what about -- you know, you say
10 there's no incentive to knock and announce. There --
11 there may -- you don't know any Michigan cases in which
12 a -- a civil suit has succeeded, but I know numerous
13 cases in which police who -- who burst in without
14 knocking and announcing expose themselves to danger,
15 that is, to being shot at by a -- by a householder who
16 doesn't know that they are the police. Isn't that
17 enough of -- of an incentive, the fact that you may
18 lose your life?
19 MR. MORAN: No, Your Honor, because I think
20 what some officers will do is exactly what Officer Good
21 did in this case, which is shout police and then burst
22 in immediately. So they'll do the announce part, which
23 protects the police, to some extent, from being shot,
24 but they will skip the rest of the knock and announce
25 requirement, which is to wait some reasonable amount of

1 time to allow the householder to make himself more
2 dignified, to get to the door, to answer the door, to
3 admit the police in a dignified manner.
4 You raise the point that lots of innocent
5 people are subject to search warrants. Thousands of
6 cases every year of -- of people who didn't do anything
7 either --
8 JUSTICE ALITO: Well, I think you said the --
9 you thought the police here had to wait what? 15
10 seconds? What was the figure you gave?
11 MR. MORAN: Well, from Banks, this Court
12 ruled that 15 seconds -- 15 to 20 seconds was an
13 appropriate time for a drug search.
14 JUSTICE ALITO: Suppose they waited 10
15 seconds. And so there would be a -- a constitutional
16 violation? Why would suppression be appropriate in
17 that situation? Why would it be in any way
18 proportional to the -- to the violation that occurred?
19 MR. MORAN: Well, if it was 10 seconds,
20 Justice Alito, the government still might have an
21 argument. 15 seconds was enough in Banks. The Court
22 did not say --
23 JUSTICE ALITO: Well, wherever the line is,
24 suppose they're just -- they're just slightly on the
25 wrong side of the line?

1 MR. MORAN: I think as a practical matter,
2 that if the police are just very slightly on the wrong
3 side of the line, the courts are not likely to hold
4 that there was a knock and announce violation. But
5 when you have a flagrant violation like here --
6 JUSTICE ALITO: Then you're -- you're
7 contradicting the premise.
8 MR. MORAN: Well, in a case like -- in a --
9 if a court were to hold that the police did violate the
10 knock and announce requirement by coming in -- by
11 coming in, by not giving the person a reasonable amount
12 of time to come to the door or to make himself
13 presentable, then yes, the evidence should be
14 suppressed because those officers need to be deterred.
15 The -- the exclusionary rule is all about deterrence,
16 and is there any method that will deter officers from
17 violating the knock and announce requirement other than
18 excluding the evidence by teaching them through example
19 that next time you need to wait longer? You need to
20 wait a reasonable amount of time for someone to come to
21 the door unless you have facts suggesting that waiting
22 a reasonable amount of time would defeat the purposes
23 of the search.
24 JUSTICE SCALIA: What about -- you talk about
25 deterrence. What about their not getting promoted? I

1 assume that -- that police departments, even if you
2 have some maverick officers, that the administration of
3 the police department teaches them that they have to
4 knock and announce. Or if it doesn't teach them that,
5 then you do have a 1983 cause of action against the
6 city, not just the officers. And that -- you know,
7 that's a deep pocket.
8 MR. MORAN: I very seriously doubt officers
9 such as Officer Good will not be promoted because of
10 the violation that he committed --
11 JUSTICE SCALIA: Why? Really?
12 MR. MORAN: -- in a case like this.
13 JUSTICE SCALIA: You -- you know, I'm the
14 police commissioner and I have a policy that you -- you
15 obey the law, you knock and announce, and -- and I know
16 that this particular officer disregards it all the
17 time. You really think that's not going to go in his
18 record?
19 MR. MORAN: I do, Justice Scalia, and I think
20 it's inconsistent with Mapp in which the Court
21 recognized that other remedies have proven completely
22 futile in enforcing the -- the Fourth Amendment.
23 JUSTICE SCALIA: Mapp was a long time ago.
24 It was before 1983 was being used, wasn't it?
25 MR. MORAN: It was before 1983 was --

1 JUSTICE SCALIA: You bet you.

2 MR. MORAN: -- being used. But I don't think

3 section 1983 has changed the landscape here. I -- I

4 don't think Mapp is ripe for overruling, and in fact,

5 the Criminal Justice Legal Foundation, one of the amici

6 for the other side, concedes that tort remedies cannot,

7 at this time, substitute for the exclusionary rule.

8 If there are no other question, I'll reserve

9 the balance of my time.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr. Moran.

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

12 ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN

13 ON BEHALF OF THE RESPONDENT

14 MR. BAUGHMAN: Mr. Chief Justice, and may it

15 please the Court:

16 Justice Robert Jackson once said that when he

17 was arguing cases before the Court, he always gave

18 three arguments: the well-structured argument he

19 rehearsed, the disjointed and confused argument he

20 delivered to the Court, and the brilliant argument he

21 thought of in the car on the way home. I have the rare

22 opportunity to deliver the argument I thought of in the

23 car on the way home.

24 (Laughter.)

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

1 mindful of the fact that this is our -- our second time
2 through and try to hone in on -- on what I think are
3 some critical points.
4 A search warrant, a judicial command, must be
5 obtained from a neutral and detached magistrate. It
6 must particularly describe the place to be searched and
7 the things to be seized, and it must be issued based on
8 probable cause drawn from information which is sworn to
9 are affirmed -- or affirmed. If these requirements are
10 met, the privacy of the described premises will be
11 invaded, and any privilege the occupants might have to
12 withhold evidence or contraband from the police is
13 abrogated.
14 But that command must be executed in a
15 reasonable fashion. And so the police may not bring
16 third parties into the premises who are unnecessary to
17 the execution of the warrant. They may not search in
18 places where the items described may not be found.
19 They may not cause unnecessary damage to property, and
20 they may not use force to accomplish the entry unless
21 consent to enter is denied either explicitly or
22 implicitly or unless entering immediately is reasonable
23 under the circumstances to avoid the destruction of the
24 evidence or harm to the officers.
25 If no valid warrant exists in the first

1 place, then -- and no exception exists, then the
2 privacy of the dwelling has been unlawfully invaded.
3 It never should have happened. But if a valid warrant
4 exists and some error occurs in its execution, it is
5 not the invasion of privacy which should not have
6 occurred that is commanded by the warrant.
7 JUSTICE SOUTER: And you -- you concede that
8 there was error in execution here? You concede that
9 there was a violation because -- technically because
10 there was no knock?
11 MR. BAUGHMAN: Yes.
12 JUSTICE SOUTER: Why do you concede that?
13 You've got a case in which, as I understand it, not
14 only was the evidence but the warrant itself an
15 indication not only that drugs were present, but that
16 guns were present. It's perfectly true we don't have a
17 general rule that anytime you do a drug search, you can
18 do a no-knock, but in this case you had specific
19 evidence that there were firearms there. And based on
20 what I've seen in the case, I don't know why Michigan
21 did not argue that, in fact, it was justified to go in
22 without knocking.
23 And I'll be candid to say you -- to tell you
24 that the fact that Michigan does not make that argument
25 suggests to me that Michigan is trying to structure a

1 case in which it's going to have the best shot to -- to
2 get the exclusionary rule out of the way here. Why
3 don't you claim that the search was lawful?
4 MR. BAUGHMAN: Well, let me first say this
5 case was not structured to try -- to try to -- to get
6 it here on our -- on our part. I think initially the
7 prosecutor handling the hearing here reached the
8 conclusion that Richards precluded an argument that a
9 no -- that the failure to knock and announce was
10 justified here. But --
11 JUSTICE SOUTER: Well, Richards precluded a
12 general rule, but it didn't preclude you from arguing
13 in a specific case, and it's the fact that the
14 prosecutor and, hence, all the way up the line to you
15 do not argue that is -- is what I don't understand.
16 MR. BAUGHMAN: Well, again, I -- I think it
17 would be an interesting argument to revisit Richards on
18 this proposition.
19 JUSTICE SOUTER: I don't think we have to
20 revisit Richards. I -- I think what -- what I'm --
21 what I'm concerned is that you don't make an argument
22 based on the evidence in this case that you had
23 probable cause to believe that there were going to be
24 guns facing you when -- when you went in the door and
25 therefore the knock was not required.

1 MR. BAUGHMAN: Again, I think the -- the
2 belief of the prosecutors, as the case went forward,
3 was that because that belief, the -- you're correct.
4 Guns were described as things to be seized in the
5 warrant. The probable cause for that was not any
6 specific knowledge about a gun in the house. It was
7 the officer's general experience that when I execute
8 search warrants for drugs, guns tend to be there.
9 Richards seems to say, at least it certainly could be
10 argued, that's not sufficient. You can't make that
11 decision based on experience that drugs and guns go
12 together.
13 JUSTICE SOUTER: Well, are you suggesting --
14 did -- did the warrant -- I don't know this. I should
15 but I don't. Did the warrant authorize seizure of guns
16 as well as --
17 MR. BAUGHMAN: Yes, it did.
18 JUSTICE SOUTER: -- drugs? Well, are you
19 suggesting that the -- the gun portion of the
20 authorization was, in fact, invalid?
21 MR. BAUGHMAN: No. I -- I don't because I
22 believe probable cause can be based on the experience
23 of officers --
24 JUSTICE SOUTER: Okay.
25 MR. BAUGHMAN: -- without specific knowledge

1 of the --

2 JUSTICE SOUTER: If -- so -- in any case, at

3 -- at the moment that you got the warrant, you -- you

4 had, in fact, a -- a finding by a trial court, or a --

5 whoever the issuing magistrate was, that there was

6 probable cause to believe that you were going to

7 confront guns as well as drugs inside. And -- and

8 Richards does not seem to me to be a good reason, under

9 those circumstances, to concede that you didn't have a

10 basis for -- for dispensing with the knock.

11 MR. BAUGHMAN: It may not have been a good

12 reason, but it was the reason in that the prosecutors

13 believed that the rejection of the drugs and guns

14 always go together as justifying a crime. Not knocking

15 and announcing in Richards meant that the determination

16 in this case that guns were on the premises based on

17 the officer's experience that drugs and guns go

18 together, not any specific knowledge about a gun was

19 inadequate then to forgive knocking and announcing.

20 That may have been a misjudgment, but it was a belief

21 that Richards foreclosed that. It was not an attempt

22 to set the case up. We had the Stevens case in

23 Michigan.

24 JUSTICE KENNEDY: Well -- well, do you think

25 just as an empirical matter that in most cases where

1 there's known to be guns plus drugs, the police will
2 enter without knocking?
3 MR. BAUGHMAN: No. I -- I don't believe
4 that's the case. I think if there's specific knowledge
5 that there are guns on the premises, yes, absolutely.
6 JUSTICE KENNEDY: There's -- there's specific
7 knowledge.
8 MR. BAUGHMAN: Yes. They knew -- I think
9 then they would enter without knocking. If -- if the
10 --
11 JUSTICE SOUTER: There was specific knowledge
12 here.
13 MR. BAUGHMAN: Well, no, it's knowledge based
14 on experience.
15 JUSTICE SOUTER: Well, you got a -- you got a
16 warrant --
17 JUSTICE KENNEDY: It's in the warrant.
18 JUSTICE SOUTER: -- that said look for them.
19 That's about as specific as you can get.
20 MR. BAUGHMAN: I understand but the facts in
21 the affidavit justifying looking for guns was in my
22 experience drugs and guns go together.
23 JUSTICE SOUTER: Well, you can't have it both
24 ways.
25 JUSTICE STEVENS: But, nevertheless, was not

1 there a finding that there was probable cause that
2 there was a gun there?
3 MR. BAUGHMAN: Yes.
4 JUSTICE STEVENS: All right.
5 MR. BAUGHMAN: I would be happy to -- to, in
6 a different case, make the argument that although
7 Richards says a court cannot say that knock and
8 announce is forgiven every time a drug warrant is
9 executed on the theory that experience teaches that
10 drugs and guns go together. I'd be happy to argue that
11 that holding does not apply when a judge determines, in
12 issuing the warrant, that drugs and guns go together,
13 so I'm putting it in the warrant. I'd be happy to
14 argue that case.
15 At this time --
16 JUSTICE SCALIA: Don't argue it to me. It
17 doesn't make much sense.
18 (Laughter.)
19 MR. BAUGHMAN: Prosecutors believed that
20 Richards couldn't be avoided by putting the drugs and
21 guns go together into the warrant instead of --
22 JUSTICE STEVENS: May I ask this?
23 MR. BAUGHMAN: -- the judge --
24 JUSTICE STEVENS: May I ask this question
25 about the practice in Michigan? Since People against

1 Stevens and People against Vasquez have been decided,
2 are there any cases, other than this one, in which a
3 prosecutor has raised the knock and announce argument
4 that got litigated all the way to the appellate court?
5 MR. BAUGHMAN: Yes, there have been a handful
6 of cases where defense attorneys have filed a motion,
7 despite People v. Stevens, and then they -- they have
8 lost because of Stevens.
9 JUSTICE STEVENS: So but there really is no
10 incentive for the prosecutor to fight -- argue about
11 this anymore in Michigan, is there?
12 MR. BAUGHMAN: No. Now, in the criminal
13 case, the prosecutor is responsible -- be, as it was in
14 this case, although the judge refused to follow Stevens
15 --
16 JUSTICE STEVENS: Well, it concedes there's a
17 violation.
18 MR. BAUGHMAN: -- there should be no hearing.
19 They're not conceding the violation. They're simply
20 saying the -- a violation is irrelevant to the question
21 of the admission of the evidence, so we should not
22 litigate it.
23 JUSTICE STEVENS: So there's no point in
24 litigating it.
25 MR. BAUGHMAN: Exactly.

1 JUSTICE STEVENS: So it's a functional
2 equivalent of conceding a violation in every case
3 because there's simply no effective remedy here.
4 MR. BAUGHMAN: Well --
5 JUSTICE STEVENS: No effective remedy in the
6 litigation itself.
7 MR. BAUGHMAN: In the criminal --
8 JUSTICE STEVENS: Of course, there's always
9 the possibility that the officer will be disciplined by
10 his very zealous superior, I guess.
11 MR. BAUGHMAN: Or -- or civil litigation.
12 There is no -- there is no exclusion. Yes, that's
13 correct.
14 JUSTICE SOUTER: Do you -- do you dispute --
15 your -- your brother on the other side said in his
16 argument that he had not heard a dispute about this.
17 But do you dispute his claim that there has never been
18 any -- at least in recent history, any -- any civil
19 judgment actually rendered against anyone in the
20 officer's position?
21 MR. BAUGHMAN: I -- I am not aware of one
22 from Michigan. I am aware that there have been civil
23 judgments against officers from other jurisdictions.
24 I'm not aware of one in Michigan. I know there have --
25 there are some suits that have been brought in the

1 Eastern District that are pending. And -- and part of
2 the difficulty is civil suits can be brought. They can
3 be settled. There can even be trials and damages
4 awarded, and they won't be in the reports. They're not
5 in the F.Supp.'s. They're not in the --
6 JUSTICE SOUTER: But we don't -- we don't
7 have any indication that there's an effective
8 deterrence then in civil suits. Maybe there will be
9 some day, but we haven't seen it yet in Michigan, I
10 take it.
11 MR. BAUGHMAN: I think one could also make
12 the argument that that cuts the other way. The fact
13 that there are not a lot of reported decisions may mean
14 there's not a lot of violations going on, that the
15 police are not routinely kicking down doors without
16 knocking and announcing when they should, and that's
17 why they're not being sued.
18 JUSTICE SOUTER: And it may mean that -- that
19 potential plaintiffs say if the courts are winking at
20 this in the criminal case, we don't have much chance of
21 getting a -- a verdict in a civil case.
22 MR. BAUGHMAN: No. It's not --
23 JUSTICE SOUTER: We don't know, but that
24 might be the case too, mightn't it?
25 MR. BAUGHMAN: It might be, but it's not been

1 my experience that either -- either the criminals or
2 certainly innocent parties, people -- probable cause,
3 after all, doesn't mean certainty. People who have had
4 damage done or physical injury occur have been -- are
5 shy about suing the government in those circumstances.
6 JUSTICE SCALIA: Is there any evidence that
7 the citizens -- that Michiganders are less litigious
8 than people in other States?
9 MR. BAUGHMAN: That certainly hasn't been my
10 experience and certainly not in my county.
11 JUSTICE SCALIA: So -- so the mere existence
12 of suits in other States ought to suffice as something
13 --
14 JUSTICE KENNEDY: I -- I --
15 JUSTICE SCALIA: -- that's -- that's a
16 deterrent. Shouldn't it?
17 MR. BAUGHMAN: I would -- I would think so.
18 JUSTICE KENNEDY: I still don't understand
19 where -- where we are with guns. You -- you have a
20 specific finding in a warrant that says there's
21 probable cause there's going to be a gun, and there's
22 drugs. I take it your position is that this allows you
23 to enter without knocking.
24 MR. BAUGHMAN: It would be my position. I
25 would have thought, as the prosecutor thought here,

1 that a probable cause finding that guns are in the
2 house, based not on any specific knowledge about guns,
3 but based on experience in similar circumstances, was
4 not sufficient to satisfy Richards in terms of not
5 knocking. I would certainly make the argument that it
6 ought to be, but I would have not criticized the
7 prosecutor --
8 JUSTICE STEVENS: But why would you bother
9 making the argument? The evidence can't be suppressed.
10 I don't understand why -- why would there ever be any
11 litigation over this issue in a criminal case?
12 MR. BAUGHMAN: And -- and I think Your Honor
13 is correct. The prosecutor's point in this case was we
14 shouldn't litigate --
15 JUSTICE STEVENS: And can you cite me any
16 other example of a -- a violation of the Fourth
17 Amendment? Maybe we shouldn't have held it's a
18 violation. I understand that argument. Is there any
19 other area of Fourth Amendment law in which the
20 violation of the Fourth Amendment is not followed by a
21 suppression ruling?
22 MR. BAUGHMAN: Well, certainly. Let me give
23 an example. One of the circumstances that I indicated
24 that the police -- a manner in which the police must
25 behave when reasonably executing a warrant is not to

1 look in places where the items sought cannot be found.
2 If the police were searching a house for stolen
3 computer monitors, a large object, and as they were
4 searching for them, they opened the desk drawer where
5 the monitor could not be and they shut it, and they
6 found computer monitors in the home, the -- this Court
7 has never addressed the question, that I'm aware of,
8 but the law is uniform in the country that you would
9 not suppress the computer monitors.
10 JUSTICE BREYER: Well, now you're talking
11 about other cases in other courts. I looked through
12 with my law clerks 300 cases since Weeks, not Mapp,
13 Weeks. That's what we're talking about, 1914. I
14 couldn't find in 300 cases one single Supreme Court
15 case that did not suppress evidence where there was a
16 Fourth Amendment violation with one exception. The
17 exception is there are sets of cases where deterrence
18 is really not a factor. For example, good faith; for
19 example, it isn't going into a criminal proceeding.
20 Okay?
21 Now, what I'd like you to do is to tell me if
22 I missed some, which is certainly possible, or second,
23 if you want us to change the rule and go back 300 years
24 or 300 cases back before 1914, or are you going to tell
25 us that deterrence doesn't play a role here or whatever

1 you want? I want to put to you the state of the art as
2 far as I can see it.
3 MR. BAUGHMAN: It would be my position that
4 in all of those cases, there was a causal connection
5 between the evidence found in the --
6 JUSTICE BREYER: Well, there's a causal
7 connection absolutely here. It is a but-for
8 connection.
9 MR. BAUGHMAN: Well --
10 JUSTICE BREYER: This person being in the
11 room and a child of 2 would know that if you get into a
12 room, as a result of your being in that room, you're
13 likely to find evidence. So it's both but for and it
14 fits within the problem. There we are.
15 That's the same, by the way, as it is with
16 making a false oath to a magistrate. You make a false
17 oath to a magistrate. That permits the magistrate to
18 get into the house with -- the policeman gets in there
19 with a warrant. It doesn't take the court long to
20 suppress that. About a second. And -- and how -- how
21 is this somehow different?
22 MR. BAUGHMAN: Let me try to give a couple of
23 examples from different situations to make my point
24 that there is a difference.
25 JUSTICE SCALIA: Well, give some cases first.

1 He's talking about actual cases.

2 MR. BAUGHMAN: I --

3 JUSTICE SCALIA: I mean, isn't it possible

4 that if his law clerk overlooked Segura, he overlooked

5 other cases as well.

6 JUSTICE BREYER: No. He read Segura. We

7 read Segura, which happens to be a case --

8 JUSTICE SCALIA: There was unquestionably,

9 was there not, a violation of the Fourth Amendment in

10 Segura?

11 MR. BAUGHMAN: Your Honor is correct, and I

12 am confident that when the officers returned with the

13 search warrant, with the officers already inside, they

14 did not knock and announce when they when they returned

15 to the --

16 JUSTICE BREYER: He is not -- well --

17 CHIEF JUSTICE ROBERTS: Isn't that an example

18 where there's a violation of the Fourth Amendment that

19 is brought up and yet suppression is not the --

20 MR. BAUGHMAN: Because of the habeas concerns

21 of comity that this Court has, that's correct. It is

22 also not suppressed.

23 JUSTICE BREYER: -- important exception. The

24 exception which comes from Silverthorne is when there

25 is an independent chain of events such that it will be

1 -- not could be, but would be -- in fact, discovered
2 anyway, despite the unlawfulness -- Silverthorne --
3 Holmes says, of course, you don't keep it out then
4 because that's not going to impact deterrence. Now,
5 that's Segura. That's Silverthorne. That's case after
6 case. Of course, I accept that. And if you can show
7 that this case somehow fits within that chain, fine.
8 Then I -- then I maybe appear I have my mind made up on
9 this, but I'm open to change.
10 MR. BAUGHMAN: Well, let -- let me try a
11 couple of examples that --
12 (Laughter.)
13 MR. BAUGHMAN: -- that I -- that I hope might
14 make the point. It is -- and my -- my belief is --
15 it's common in human experience that things can be
16 accomplished either by command or by permission when
17 the manner of doing so, the manner in which they end up
18 being accomplished is subject to criticism. And let me
19 give a couple quick examples.
20 If, when she was young, I sent my daughter to
21 her room -- and that was rare, but if I sent her to her
22 room and she stomped up the stairs and slammed the
23 door, she would be in further difficulty not because
24 she carried out my command by going to her room, but
25 because she stomped up the stairs.

1 If a young athlete is told by his coach,
2 catch the ball with two hands and he catches it with
3 one, he is admonished not because he caught the ball
4 but because he caught it with one hand.
5 And if a football player taunts the opposing
6 team as he crosses the goal line, he gets a penalty not
7 because he crossed the goal line, but because he
8 taunted the other team.
9 These strictures are not prerequisites to the
10 conduct. I do not tell my daughter go to your room but
11 only if you don't stomp up the stairs --
12 JUSTICE BREYER: No, no. That's -- I -- I
13 understand that point from your brief and I'm glad that
14 you brought it up. But I have never -- I have never
15 seen Fourth Amendment matters cut that finely. I have
16 never seen the courts say I want to go back to the
17 reason why this policeman is unlawfully in the room and
18 then try to connect each piece of evidence with that
19 reason. Rather, they ask is he unreasonably and
20 unconstitutionally in the room.
21 So my concern about that, which I'd like you
22 to address, is if we took that approach, I think we'd
23 be doing it for the first time, and we'd let a kind of
24 computer virus loose in the Fourth Amendment. I don't
25 know what the implications of that are. I can't tell

1 you what you're saying is illogical. It's not
2 illogical. It's conceivable, but it strikes me as
3 risky and unprecedented.
4 MR. BAUGHMAN: I think as -- as -- in the
5 examples I gave, knock and announce works the same way.
6 These are not prerequisites. They're rules of
7 conduct. They are principles of behavior. It's not do
8 this only if you behave in this manner. It's do this
9 and behave in this manner while doing it. And if you
10 don't behave in the manner we have prescribed, the
11 question is what flows from that misbehavior, not from
12 the achievement of the end.
13 JUSTICE STEVENS: It seems to me that your
14 example it's -- stomping up the stairs is like failing
15 to knock and announce.
16 MR. BAUGHMAN: That's correct, and -- and the
17 police are not illegally on the premises and my
18 daughter --
19 JUSTICE STEVENS: And so there should be a
20 deterrent for the stomping up the stairs, and you've
21 got no deterrent for the knock and announce.
22 MR. BAUGHMAN: Well, and part of what -- part
23 of what I wanted to say also to Justice Breyer and I
24 think also works here is it's -- the suggestion seems
25 to be that knock -- that a Fourth Amendment violation

1 -- the question of whether one has occurred and the
2 question of whether or not the -- to apply the
3 exclusionary rule are one in the same. And this Court
4 has never said that. To me that would be a dramatic
5 changing of the law of this Court. This Court has
6 always said those are separate questions, and I think
7 petitioner's argument conflates the two.
8 We first ask whether there has been a
9 constitutional violation and then we say -- this Court
10 has said the premise for application of the
11 exclusionary sanction is whether or not the challenged
12 evidence is the product of the illegal government
13 activity. So once we establish that there has been a
14 constitutional error, the question becomes is the
15 challenged evidence the product of it. And just like
16 the touchdown is not the product of the taunting, the
17 entry into the premises is not the product of the
18 failure to knock and announce. It's the product of a
19 warrant, which the judge issued commanding the police
20 to enter.
21 JUSTICE SOUTER: Isn't -- isn't the problem
22 that in -- in fact, it's the product of both? The
23 warrant alone does not get the police officer into --
24 into the building. It -- it is in fact the entry that
25 gets the police officer into the building, the

1 execution of the warrant. The judge has to do
2 something. The police officer has to do something.
3 And the question that I think we face when we
4 say is the later search the product of the entry, is --
5 is what your -- what -- I think a point that -- that
6 counsel on the other side was making. It's a pragmatic
7 point. Where do we draw the line of causation? And
8 his answer is -- and I think the -- the answer of the
9 cases that Justice Breyer was -- was referring to -- is
10 this. We draw it in a way that will allow us to deter
11 illegal police conduct, and if we engage in this
12 slicing process of causation that you talk about, there
13 will be no deterrent for the violation of the no-knock
14 rule. If instead we say, yes, this is enough the
15 product that we ought to deter -- that we ought to --
16 to respond to it in a way that will deter the no-knock
17 and therefore we find causation and we get deterrence.
18 What is fallacious about that argument?
19 MR. BAUGHMAN: There's nothing fallacious
20 about the argument if one accepts that excluding the
21 truth in -- in a criminal proceeding is a fair tradeoff
22 in that circumstance --
23 JUSTICE SOUTER: We do that every single time
24 we exclude a piece of evidence in every suppression
25 case, don't we?

1 MR. BAUGHMAN: But -- but the Court has --
2 JUSTICE SOUTER: Don't -- don't we?
3 MR. BAUGHMAN: Yes, we do. But the Court has
4 said that because that's a dramatic thing to do,
5 because it -- it has a high societal cost, it should
6 only be done when there is a causal connection, when
7 the evidence is the product of the police wrongdoing.
8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 Baughman.
10 MR. BAUGHMAN: I thank the Court.
11 CHIEF JUSTICE ROBERTS: Mr. Salmons.
12 ORAL ARGUMENT OF DAVID B. SALMONS
13 ON BEHALF OF THE UNITED STATES,
14 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT
15 MR. SALMONS: Thank you, Mr. Chief Justice,
16 and may it please the Court:
17 Suppression would not be an appropriate
18 remedy in this context for two primary reasons. The
19 first is if the knock and announce rule does not
20 protect the individual's privacy interest in the
21 underlying items seized and, instead, it seeks to limit
22 discrete risks related to the execution of warrants
23 that property will be damaged, that officers will be
24 mistaken for intruders, or that occupants will be
25 caught in embarrassing situations. That makes the

1 knock and announce rule similar to other Fourth
2 Amendment requirements related to the manner of
3 executing warrants such as --
4 JUSTICE SOUTER: Well, what -- what do you
5 say to Justice Breyer's argument that we haven't
6 previously analyzed suppression by tracing or trying to
7 trace the causal connection between a particular piece
8 of evidence and a particular reason for the rule that
9 was broken? What we have said in the past is if the
10 rule or the standard is violated and the search is
11 therefore unreasonable, the evidence doesn't come in.
12 You're proposing a -- a different causal
13 analysis. You're proposing a causal analysis that
14 requires the connection between a piece of evidence and
15 the particular reason for one of these standards in
16 every case in which suppression is -- is requested.
17 Number one, do you agree that that -- that
18 would be a departure, as Justice Breyer suggested? And
19 number two, what would be the justification for that?
20 MR. SALMONS: It would not be a departure,
21 Your Honor. In fact, that's common practice in the
22 Fourth Amendment area. This Court, for example, in New
23 York v. Harris looked to the purposes of the rule
24 against arrest in the home absent a warrant and to
25 conclude that it wasn't appropriate to suppress a

1 statement made at the station even though it assumed
2 that there was but-for causation. And this Court in
3 Cruz did a similar analysis. It's very common to look
4 to the purposes served --
5 JUSTICE BREYER: It's common, when you have a
6 chain of causal connection, to say it ends somewhere.
7 It's common, and in Harris, it ended once they left the
8 home and now they're over in the station.
9 MR. SALMONS: But --
10 JUSTICE BREYER: This isn't over in the
11 station. This is in the home. You speak of interests,
12 but this doesn't interests.
13 What about Boyd? I mean, the most famous
14 statement in Fourth Amendment history to all invasions
15 on the part of the government and its employees of the
16 sanctity of a man's home and the privacies of life. It
17 is not the breaking of his doors and the rummaging of
18 his drawers that constitutes the essence of the
19 offense. But it is the invasion of his indivisible
20 right of personal security, personal liberty, and
21 private property.
22 Now, I thought -- 1886 -- that's what's
23 governed these cases for about 100 -- and far more, a
24 century and a half or a quarter. And -- and the --
25 then suddenly you say, well, it's this interest in the

1 one or the other one. I mean, doesn't that describe
2 it?
3 MR. SALMONS: No, Your Honor. I mean,
4 certainly that's -- that is one of the principles
5 underlying the Fourth Amendment, but this Court has
6 looked to the types of considerations I'm discussing,
7 and I will give you some examples. And we think, in
8 fact, the knock and announce rule is very analogous to
9 -- for example, to a claim of unnecessary property
10 damage or to a claim that the officers brought the
11 media along when they shouldn't or that they used
12 excessive force.
13 CHIEF JUSTICE ROBERTS: There's no doubt in
14 here that an invasion of the home was authorized by the
15 warrant. Right?
16 MR. SALMONS: That's correct.
17 CHIEF JUSTICE ROBERTS: The interest we're
18 talking about is not the sanctity of the drawers. It
19 is 10 seconds that the officers should have waited
20 additionally, according to the -- to your brother.
21 MR. SALMONS: That's correct. The illegality
22 --
23 JUSTICE BREYER: Correct? I'm sorry. That
24 is correct? I -- I thought that this warrant does not
25 say you can enter the house without knocking.

1 I mean, I have a warrant. This warrant lets
2 me search the house in daytime. I search it in
3 nighttime. Is my search authorized?
4 MR. SALMONS: I don't think that would be a
5 warrantless search or I don't think that would be a
6 violation. That might be --
7 JUSTICE BREYER: I have a warrant --
8 MR. SALMONS: -- of the manner of execution.
9 But again, if I may --
10 JUSTICE BREYER: What -- what happens with my
11 example? I'm curious. That's not a rhetorical
12 question.
13 I have a warrant which says, search 1618 5th
14 Street. I search 1518 5th Street. Was it a warrant --
15 a warrant back search?
16 MR. SALMONS: Well --
17 JUSTICE BREYER: I don't have a warrant to
18 search 1518. I don't have a warrant that allows me to
19 come in in the middle of the night when it says day,
20 and I don't have a warrant here that allows me to come
21 in without knocking. So where's the warrant?
22 MR. SALMONS: I think the question in that
23 case, Your Honor, would be about reasonable reliance on
24 the warrant and whether it was a reasonable mistake.
25 And if it wasn't, then it would be a warrantless

1 search.

2 And if I may just focus the Court --

3 attention on the claim of unnecessary property damage.

4 We think that's quite analogous here in part because

5 the typical -- in the typical case, a premature or

6 unannounced entry will be a forcible entry. But

7 whether the claim is that the officers entered a few

8 moments prematurely or that they unnecessarily used a

9 battering ram on the door, in either case the -- the

10 violation doesn't relate to the privacy interests and

11 the items to be seized and shouldn't result in

12 suppression. And in addition to that --

13 JUSTICE SOUTER: Well, it does relate to the

14 privacy interests, and we've seen the explanation. One

15 of the reasons for requiring the knock is that there is

16 enough respect for a person's home, a person's privacy

17 to say the police should not barge in like an invading

18 army.

19 MR. SALMONS: Well, that certainly is --

20 JUSTICE SOUTER: That is a respect for

21 privacy.

22 MR. SALMONS: That -- that certainly is true,

23 Your Honor, but that -- that is not a protection --

24 JUSTICE SOUTER: And that is involved -- and

25 that is -- that is the whole point of -- of knock and

1 announce, isn't it?

2 MR. SALMONS: No, Your Honor. The point of

3 knock and announce is a more limited privacy. It's not

4 related to the privacy of the items to be seized.

5 That's separate. And that's why it makes it like the

6 claim of unnecessary --

7 JUSTICE SOUTER: We're talking about the

8 privacy of individual in his home, and the

9 reasonableness of the search depends upon the

10 reasonableness of invading the individual's privacy in

11 his home. Is that not the general rule?

12 MR. SALMONS: No, Your Honor. I think what

13 -- what focuses in terms of suppression is whether the

14 government has obtained an evidentiary advantage as a

15 consequence of the illegality. Here, the illegality

16 was the failure to delay a few additional moments

17 before entry.

18 JUSTICE SOUTER: Then there will never be a

19 suppression of -- of evidence specified in a warrant

20 when the warrant's no-knock component is violated --

21 MR. SALMONS: But --

22 JUSTICE SOUTER: -- because we -- we will say

23 -- in every single time, following your argument, you

24 will -- we will say the -- the violation had nothing to

25 do with the authorization to seize the evidence. The

1 violation simply had to do with the -- with the -- the
2 niceties and the risks involved in entering. So if we
3 accept your argument, no-knock is -- is a dead duck,
4 isn't it?
5 MR. SALMONS: I don't think so, Your Honor.
6 If I may try to explain. I think as a general matter,
7 with regard to physical evidence in the home that's
8 within the scope of the search warrant, that you're --
9 you're probably right. Most of the time, that evidence
10 will come in.
11 We think that there are probably at least two
12 areas that might lead to suppression in these cases.
13 One is the -- the type of statements that the Chief
14 Justice mentioned earlier. Another might be what you
15 might call proximity evidence, that the officers went
16 in prematurely and as a result, they saw a --
17 JUSTICE STEVENS: Mr. Salmons, may I ask you
18 this -- this question? If you'd been the prosecutor in
19 this case and you had -- knew that the evidence would
20 be suppressed if there were a constitutional violation,
21 would you have conceded that there was a constitutional
22 violation in this case?
23 MR. SALMONS: Well, I don't think -- I think
24 there is a reasonable argument that could be --
25 JUSTICE STEVENS: Yes or no.

1 MR. SALMONS: I'm -- I'm attempting to answer
2 that, Your Honor. I think there's a reasonable
3 argument that could be made in this case that there
4 wasn't a violation. I think it was probably a sort of
5 strategy.
6 JUSTICE STEVENS: So you would not have
7 conceded.
8 MR. SALMONS: I can't -- I can't second guess
9 their strategy here to concede it.
10 JUSTICE STEVENS: But you would not have
11 conceded. If you -- if you thought there was a
12 reasonable argument, you would not have conceded that
13 there was a violation, would you?
14 MR. SALMONS: I think I probably would have
15 argued in the alternative, Your Honor. I think that's
16 probably the safest --
17 JUSTICE KENNEDY: Can you tell me what --
18 what happens if there's a violation of the daytime
19 warrant provision in -- in a search warrant and the
20 search is at night? Do we suppress?
21 MR. SALMONS: I think generally no, Your
22 Honor. I think -- and I would -- I would --
23 JUSTICE KENNEDY: Are there cases -- are
24 there cases on that?
25 MR. SALMONS: I -- not in this Court. There

1 -- there may be in the court of appeals. I think the
2 way that the Court would analyze that would be, again,
3 along the same lines.
4 Now, certainly in jurisdictions that haven't
5 adopted the rule that we're articulating here, the
6 courts may suppress. But we think under the principles
7 we're articulating, that suppression probably would not
8 be appropriate there.
9 JUSTICE SOUTER: No, but apparently you're
10 saying we would not suppress because as long as the
11 warrant specified the items to be seized and they
12 didn't go beyond that, there was no causal connection
13 between the fact that they broke in and disturbed
14 people in the night, when they were not authorized to,
15 and their ultimate obtaining of -- of the evidence.
16 Once again, it seems to me if we follow your -- your
17 reasoning, then the distinction between the nighttime
18 and the daytime warrant is a dead letter.
19 MR. SALMONS: Well, you know, we respectfully
20 disagree with that. We think that there are two
21 separate questions, what the Constitution requires and
22 whether suppression is an appropriate remedy.
23 JUSTICE SOUTER: The Constitution requires --
24 MR. SALMONS: The Court has always treated
25 those --

1 JUSTICE SOUTER: The Constitution requires a
2 reasonable search. It is hornbook law that violating
3 no-knock, violating nighttime searches when only a
4 daytime search is authorized amounts to an unreasonable
5 search. You're saying that's utterly irrelevant
6 because there's no causal connection between that
7 violation and the seizure of the particular items that
8 the warrant -- the warrant specified.
9 MR. SALMONS: Your Honor, if I may. It's
10 also hornbook law now in this Court that you can't
11 unnecessarily destroy property in executing the warrant
12 or effecting the entry and that you can't bring the
13 media along. This Court in both Ramirez and --
14 JUSTICE KENNEDY: I'd to get your -- I'd like
15 to get your position. I -- I think Justice Souter is
16 correct, that under the theory you're arguing to us
17 here, the violation of the daytime warrant rule is not
18 grounds for suppressing evidence. So we can have
19 nighttime searches with no suppression remedy.
20 MR. SALMONS: Well, I -- I think that's
21 probably the position that we would take. I think the
22 way the Court would analyze that, as it has done in
23 these other cases, it would look to two factors. One,
24 what are the purposes served by the Fourth Amendment
25 rule that's violated and how well those purposes fit

1 with the remedy of suppression; and two, whether the
2 government obtained any evidentiary advantage as a
3 result of the violation.
4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Salmons.
6 Mr. Moran, you have 3 minutes remaining.
7 REBUTTAL ARGUMENT OF DAVID A. MORAN
8 ON BEHALF OF THE PETITIONER
9 MR. MORAN: Thank you --
10 CHIEF JUSTICE ROBERTS: You think there --
11 you think there was a violation of the knock and
12 announce rule in this case. Correct?
13 MR. MORAN: I do, Your Honor. The warrant
14 was never actually made part of the record, but my
15 understanding, from the record we have, was that only
16 drugs -- there was only knowledge of drugs. The -- the
17 warrant authorized a search for guns because Officer
18 Good told the magistrate that in his experience guns
19 were often associated with drugs. But they had no
20 particularized information about any guns on the
21 premises. They only had particularized information
22 about drugs on the premises.
23 The issue here about causation goes back, I
24 think, to the common law. And as Justice Breyer
25 articulated, when an officer is illegally in the home,

1 that causes his seizure of goods or his arrest of
2 people in the home to be illegal. If I can go all the
3 way back to 1831, Chief Justice Shaw of the
4 Massachusetts Supreme Court said, the rule is well
5 established -- this is 1831 it was well established --
6 that where an authority given by law is exceeded, the
7 party loses the benefit of his justification and the
8 law holds him a trespasser ab initio although, to a
9 certain extent, he followed the authority given. The
10 law will operate to defeat all acts thus done under
11 color of lawful authority when exceeded and a fortiori
12 will it operate to prospectively to prevent the
13 acquisition of any lawful right by the excess and abuse
14 of an authority given for useful and beneficial
15 purposes.
16 CHIEF JUSTICE ROBERTS: How do you draw a
17 distinction between two cases? If they illegally
18 entered and they suddenly said we waited 4 seconds, it
19 was supposed to be 15. They say, never mind. They go
20 back out. There's another knock. They wait 15 and
21 they come in. Then it's all right. Correct?
22 MR. MORAN: It might be.
23 CHIEF JUSTICE ROBERTS: Okay. But you're
24 saying it's a world of difference if, when they go in
25 and enter and they say, we should have waited 10 more

1 seconds, we're the police, we're here to execute a
2 search warrant, let's count to 10, then all of a
3 sudden, it's invalid from there on. Those are the --
4 they're two different cases in your mind?
5 MR. MORAN: I think that's -- that's right
6 because an -- a reasonable search and seizure, as this
7 Court held in Wilson, requires a lawful entry. Eight
8 Justices agreed that an -- a lawful entry is the
9 indispensable predicate of a reasonable search in Ker
10 v. California. These are not disconnected. It is not
11 in.
12 The -- the prosecution's claim here, the
13 respondent's claim, would eliminate all manner of entry
14 arguments from the exclusionary rule. Nighttime
15 search, use of excessive force, blowing up the building
16 to get in, knocking a wall off the building wouldn't
17 matter. They were in -- they're in, they have a
18 warrant, everything is fine once they're in. It simply
19 wouldn't matter for exclusionary purposes.
20 In Harris, I want to stress again in Harris
21 that this Court never questioned the fact that the
22 evidence found inside the home had to be suppressed,
23 and that's all we're asking for here. The evidence in
24 the home.
25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

2 (Whereupon, at 11:00 a.m., the case in the

3 above-entitled matter was submitted.)

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