No. 04-1360

IN THE

Supreme Court of the United States

BOOKER T. HUDSON, JR.,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Michigan

BRIEF FOR THE CATO INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the inevitable discovery doctrine create a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, the Arkansas Supreme Court, and the Maryland Court of Appeals have held?

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BRIEF FOR THE CATO INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICI[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to restore the principles of limited constitutional government. The Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with this Court. The instant case addresses an important Fourth Amendment issue, and is thus of central concern to the Cato Institute and its Center for Constitutional Studies.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the fair administration of criminal justice. NACDL strives to defend the liberties guaranteed by the Bill of Rights and therefore has an interest in the important Fourth Amendment issues raised in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part. *Amicus* Cato Institute funded the preparation and submission of this brief with the financial support of a grant from the JEHT Foundation Trust, a nonprofit charitable institution incorporated under the laws of the State of New York that provides monetary assistance to organizations engaged in criminal justice reform.

STATEMENT OF THE CASE

On August 27, 1998, at approximately 3:35 p.m., several Detroit police officers arrived at the home of Petitioner Booker T. Hudson, Jr., to execute a search warrant for weapons and narcotics. Officer Jamal Good testified that he did not see or hear any activity in the home as he approached the door. Although Good announced "Police, search warrant," he did not knock on the door and did not wait for anyone to open the door. J.A. 19-20. Good waited three to five seconds before opening the door and entering "[r]eal fast." J.A. 19. After entering the home, Good saw Petitioner seated in the living room. Good ordered Petitioner to remain seated. After a sweep of the premises, Good returned to the living room and conducted a protective frisk of Petitioner. That search revealed five rocks of cocaine in Petitioner's pants pocket. J.A. 4-8.

Based on the evidence found in Petitioner's pants and other evidence obtained pursuant to the execution of the search warrant, Petitioner was charged with possession of cocaine with intent to deliver, possession of cocaine, and felony firearm. At the suppression hearing, the prosecutor conceded that the police entry into Petitioner's home violated the knock-and-announce requirement. Pet. App. 10. The trial court granted Petitioner's motion to suppress the evidence found on his person and in his home. Respondent then appealed to the Michigan Court of Appeals for peremptory reversal of the trial court's suppression order. Although Respondent conceded that the police entry of Petitioner's home "may have violated" the Fourth Amendment, J.A. 13, Respondent argued exclusion was an impermissible remedy under the Michigan Supreme Court's ruling in *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999).

Stevens held that evidence unlawfully obtained pursuant to a police violation of the knock-and-announce requirement is not subject to the exclusionary rule, provided the police

possess a valid search warrant and conduct a search of proper scope. Acknowledging that announcement is constitutionally mandated by *Wilson v. Arkansas*, 514 U.S. 927 (1995), and its progeny, *Stevens* explained that under this Court's cases "there has to be a causal relationship between the violation and the seizing of the evidence to warrant the sanction of suppression." 597 N.W.2d at 60. *Stevens* concluded that the inevitable discovery exception to the exclusionary rule was applicable where police violate the Fourth Amendment's announcement requirement. According to the court, the "exclusionary rule is not meant to put the prosecution in a worse position than if the police officer's improper conduct had not occurred, but, rather it is to prevent the prosecutor from being in a better position because of that conduct." *Id*. at 61, *quoting Nix v. Williams*, 467 U.S. 431, 443 (1984) (hereinafter *Williams II*). Because the police in *Stevens* had a valid warrant, the Michigan Supreme Court opined that "the evidence would have been discovered despite any police misconduct" and that there are state and federal "disincentives to deter police misconduct." *Id*. at 62.

The Michigan Court of Appeals granted Respondent's motion for peremptory reversal of the trial court's order suppressing the evidence found on Petitioner and in his home. That court ruled that *Stevens* and *People v. Vasquez*, 602 N.W.2d 376 (Mich. 1999) (*per curiam*) (reaffirming *Stevens*), did not authorize exclusion as an appropriate remedy for a knock-and-announce violation. Pet. App. 4. Petitioner filed an application for leave to appeal to the Michigan Supreme Court, but that application was denied. The Michigan Supreme Court reaffirmed its earlier holdings in *Stevens* and *Vasquez* that exclusion is not a proper remedy for a violation of the Fourth Amendment's announcement rule. Pet. App. 5.

Petitioner was then convicted in the trial court of possession of less than 25 grams of cocaine, based on the evidence discovered in his pants; he was acquitted of felony

firearm and possession of cocaine with intent to deliver. Petitioner was sentenced to 18 months probation. J.A. 21-24. Petitioner again appealed to the Michigan Court of Appeals, but that court affirmed his conviction based on the holdings in *Stevens* and *Vasquez*. Petitioner's application to the Michigan Supreme Court for leave to appeal the judgment of the Court of Appeals was denied. This Court granted certiorari to consider whether the inevitable discovery doctrine creates a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment knock-and-announce violation.

SUMMARY OF ARGUMENT

This case presents in unmistakable terms the question of constitutional remedy undecided in *Wilson v. Arkansas* and its progeny: whether and in what circumstances it is appropriate to exclude evidence seized in violation of the Fourth Amendment's knock-and-announcement requirement. The Michigan Supreme Court has held that the inevitable discovery doctrine authorizes a *per se* exception to the exclusionary rule for evidence illegally seized after a Fourth Amendment announcement violation. That judgment is inconsistent with the logic of this Court's knock-and-announce and exclusionary rule decisions.

According to the Michigan court's analysis, the violation of the announcement requirement "was independent of" the search and seizure that occurred in Petitioner's home. *Stevens*, 597 N.W.2d at 64. This analysis ignores *Wilson*'s holding that "the method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure." *Wilson*, 514 U.S. at 934. Because the police violated the announcement requirement, as conceded by Respondent below, the search and seizure inside Petitioner's home was unconstitutional under the Fourth Amendment. Thus, the courts below were wrong to suggest that the search of Petitioner and his home was causally disconnected from the announcement violation. The

correct analysis is provided by *Wilson*: the illegal entry into Petitioner's home unconstitutionally tainted the subsequent search and seizure that occurred inside.

Because *Wilson* and its progeny indisputably establish that the intrusion into and search of Petitioner's person and home was unconstitutional, the question here is whether the exclusionary rule is the proper remedy for an announcement violation. The argument against exclusion—at its core—is that Petitioner would find himself in the same position (because the evidence would have been found anyway) if the search had been properly announced. There are three reasons why this argument proves too much.

First, unless illegally obtained evidence is excluded, there will be no effective deterrent to future announcement violations in ordinary cases like Petitioner's. Common sense teaches that if exclusion is unavailable as a remedy for an announcement violation, officers will not comply with *Wilson* and its progeny. Affirming the judgment below would mean the evisceration—as a practical matter—of the constitutional protection announced in *Wilson*.

Second, the Michigan Supreme Court's analysis misunderstands the purpose of the exclusionary rule. Even assuming that the evidence found in Petitioner's pants would have been discovered had the police complied with the announcement requirement, that fact is irrelevant when determining whether exclusion is appropriate for a Fourth Amendment violation. This Court recognizes that the purpose of exclusion is to deter future violations of the Fourth Amendment; it has, moreover, repeatedly explained that the "wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's right which he has already suffered.'" *United States v. Leon*, 468 U.S. 897, 906 (1984) (citations omitted). If when determining the applicability of the exclusionary rule in a

particular case, this Court is unconcerned with "cur[ing] the invasion of the defendant's rights," *id.*, then it follows that the Court is equally unconcerned with what evidence might have been found had the police not violated the Constitution. Put simply, application of the exclusionary rule turns on deterrence, not on the evidence discovered by the police or the evidence lost because of suppression. [2]

Third, the Michigan Supreme Court's logic cannot be confined to this case. No principled line can be drawn that distinguishes application of the exclusionary rule to cases where the police have probable cause and sufficient time to secure a warrant but fail to do so from non-application of the rule to announcement cases. Applying the Michigan court's analysis to a factual scenario where the police could have secured a warrant, but conduct an illegal warrantless search anyway, would suggest that the warrant requirement itself need not be enforced by the exclusionary rule.

To be sure, the Court has recognized exceptions to the exclusionary rule in cases where an "independent source" for the same evidence exists or where the evidence would have been inevitably discovered. Neither exception applies here. To fall within either exception, the prosecution must show an independent, untainted source for the same evidence. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392

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[2] While this Court has firmly held that deterrence is the main rationale supporting application of the Fourth Amendment exclusionary rule, *amici* also believe that other rationales, recognized by some inferior courts applying state law analogues to the Fourth Amendment rule, may offer additional reasons to support exclusion under federal law. *See, e.g.*, Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 Harv. J.L. & Pub. Pol'y 711 (2000) (discussing additional rationales); *cf., e.g.*, *State v. Hall*, 115 P.3d 908 (Or. 2005) (recognizing protection of expectation interests as a justification for applying state-law version of exclusionary rule). Nonetheless, *amici*'s argument below treats the deterrence rationale as the sole governing rationale for Fourth Amendment exclusion in this case.

(1920) (Holmes, J.) ("the knowledge gained by the Government's own wrong cannot" be the means for admitting the evidence). In other words, the constitutional violation itself can never be the "independent source" that justifies admitting the evidence.

This Court's subsequent cases applying the independent source and inevitable discovery exceptions have strictly adhered to this limitation. *Segura v. United States*, 468 U.S. 796 (1984), *Nix v. Williams*, 467 U.S. 431 (1984) (*Williams II*), and *Murray v. United States*, 487 U.S. 533 (1988), establish that the independent source and inevitable discovery exceptions authorize the admission of unlawfully obtained evidence only when lawful means, wholly independent of any constitutional violation, would have revealed the challenged evidence. When evidence is "derived from or related in any way to" an illegal entry and search, *Segura*, 468 U.S. at 814, it cannot be admitted under either of these exceptions. Respondent cannot prove that lawful means, independent of the illegal entry and search of Petitioner's home, were used to discover the evidence found in Petitioner's pants. To the contrary, there was only one intrusion in this case—and it was unreasonable under *Wilson* and its progeny; the inevitable discovery exception is unconcerned with speculation that police officers *might* or *could* have seized the same evidence properly if a different chain of events had occurred. Nor does police possession of a valid warrant change this result. As *Wilson* instructs, the search conducted pursuant to that warrant was tainted by the illegal entry.

Finally, the availability of the inevitable discovery exception does not depend upon whether the prosecution would be put in a worse position because of exclusion. Exclusion of incriminating evidence always puts the prosecution in a worse position than it would be in if there were no police misconduct. Exclusion was inappropriate in *Williams II* only because the challenged evidence had an independent source free

from the taint of the unconstitutional conduct that initially secured the evidence.

ARGUMENT

I. ANNOUNCEMENT IS A REQUISITE ELEMENT IN DETERMINING THE REASONABLENESS OF A POLICE ENTRY AND SUBSEQUENT SEARCH AND SEIZURE IN A PRIVATE DWELLING

Wilson v. Arkansas establishes that an unannounced police entry implicates the Fourth Amendment rights of a homeowner. *Wilson* ruled that the common-law principle of announcement "is an element of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 514 U.S. at 934. *Wilson* and its progeny do recognize that the "Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id*. However, unless police have reasonable suspicion of exigent circumstances under the particular facts, officers have a constitutional "obligation," *United States v. Banks*, 540 U.S. 31, 35 (2003), to both announce their presence and purpose, *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997), and wait a reasonable period of time before effectuating a forcible entry into a private home. *Banks*, 540 U.S. at 43. After *Wilson*, the constitutional status of the announcement rule can no longer be questioned.[3] Law enforcement officers have no discretion

[3] In *Miller v. United States*, 357 U.S. 301 (1958), and *Sabbath v. United States*, 391 U.S. 585 (1968), the Court focused upon the knock-and-announce requirements codified in 18 U.S.C. § 3109 to address the validity of the defendants' arrests. In both cases, the Court held that because officers did not announce their presence and purpose before entering the defendants' residences, the arrests of the defendants were illegal and the evidence seized incident to the arrests should have been suppressed. *Miller*, 357 U.S. at 313-14; *Sabbath*, 391 U.S. at 586. In *Ker v. California*, 374 U.S. 23 (1963) (plurality opinion), Justice Clark found that an unannounced police entry "was not unreasonable under the stand-

or privilege to ignore the announcement requirement, and judges must consider the manner of a police entry when determining the constitutional validity of a police search and seizure of private premises. *See Wilson*, 514 U.S. at 934 ("[T]he method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure.").

Despite the constitutional command established in *Wilson* and its progeny, Respondent and the Michigan Supreme Court have intimated that violation of the announcement requirement does not affect the reasonableness of a search and seizure in a home and does not jeopardize any significant Fourth Amendment interests of the Petitioner. Respondent, for example, has opined that the police conduct here simply involves "a 'timing' error with regard to entry." Resp. Ans. 8. Similarly, the Michigan Supreme Court has stated, referring to its statutory announcement requirement, that the knock-and-announce rule "does not control the execution of a valid warrant; rather it only delays entry." *Stevens*, 597 N.W. 2d at 63. Under this logic, the announcement requirement "was independent of" the search and seizure of evidence that occurred in Petitioner's home. *Id*. at 64.

These arguments are wrong. *Wilson* indisputably establishes that the intrusion into and search of Petitioner's person and home violated the Fourth Amendment.[4] As Respondent

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ards of the Fourth Amendment" because exigent circumstances arising under the particular facts of that case justified the entry. *Id*. at 40-41. The *Ker* plurality did not question the constitutional status of the announcement rule and the four dissenting Justices in *Ker* vigorously argued that the rule was firmly rooted in the Constitution. *Id*. at 47-59 (Brennan, J., dissenting in part). This Court granted certiorari in *Wilson* to resolve a conflict among the lower courts regarding whether the announcement rule was mandated by the Fourth Amendment.

[4] This Court has long recognized that the concept of reasonableness requires examination of the manner in which a search and seizure is

conceded below, the police violated the announcement requirement, and there were no exigent circumstances justifying failure to comply with that requirement. This is all that needs to be said regarding the constitutionality of the search of Petitioner's person and home.

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conducted. In *Ker*, officers entered the defendants' home unannounced, arrested the defendants and seized contraband in plain view. The defendants argued that the lawfulness of their arrests, "even if based upon probable cause, was vitiated by the method of entry." *Ker*, 374 U.S. at 37. Eight Justices in *Ker* did not question the proposition that the manner of a police entry into a home was directly linked to the constitutional reasonableness of a subsequent search or seizure in that home. Justice Clark's plurality opinion explained that "the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search." *Id*. at 38. The four dissenting Justices in *Ker* concluded that the arrests of the defendants were illegal "because the unannounced intrusion of the arresting officers into their apartment violated the Fourth Amendment." *Id*. at 47 (Brennan, J., dissenting in part). And because those arrests were illegal, the *Ker* dissent stated that the exclusionary rule requires suppression of the evidence found incident to the arrests. *Id*. *Wilson*'s holding, "that the method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure," *Wilson*, 514 U.S. at 934, extinguished any lingering doubt that existed after *Ker* as to "whether the lack of announcement might render a search unreasonable under other circumstances." *Id*. at 934 n.3. The constitutional principle established by *Wilson* and its progeny is clear: If the police fail to announce their presence and purpose before entering a private dwelling, and there are no exigent circumstances justifying an unannounced entry, the search and seizure inside the dwelling is *per se* unreasonable. *See also Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (explaining that reasonableness under the Fourth Amendment "depends on not only when a [search or] seizure is made, but also how it is carried out") (citations omitted).

II. EXCLUSION IS THE PROPER REMEDY FOR THE VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS

A. Exclusion Is Necessary To Enforce The Fourth Amendment

The police violated Petitioner's Fourth Amendment rights. Unless the Court is considering overruling *Wilson*, Respondent cannot now ask this Court to ignore the conceded violation of the announcement requirement in order to resolve this case. That being the case, the only question here is whether the exclusionary rule is the proper remedy. *Amici* respectfully submit that exclusion is indispensable: either the exclusionary rule is applicable in ordinary cases like this one or else the knock-and-announce requirement established in *Wilson* and its progeny becomes a dead-letter.

Stevens takes the view that exclusion in cases like Petitioner's is an inappropriate remedy for the constitutional violation. The argument against exclusion—at its core—is that Petitioner would find himself in the same position (because the evidence would have been found anyway) if the search had been properly executed. The flaw in this argument is that it proves too much.

First, unless illegally obtained evidence is excluded, there will be no effective deterrent to an announcement violation in an ordinary case like Petitioner's. Common sense teaches that if exclusion is never available as a remedy for violation of the announcement requirement, police officers will rarely, if ever, comply with the command of *Wilson* and its progeny. Officers executing a search or arrest warrant gain an indisputable practical advantage if they are not required to announce their entry. For example, when executing a search warrant for narcotics, "[d]rug enforcement authorities believe that safety for the police lies in a swift, surprising entry with overwhelming force—not in announcing their official author-

ity." Kemal Alexander Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule—Part I*, 16 Search & Seizure L. Rep. 129, 130 (1989). The facts of this case prove the point. Officer Good admitted that subjective concerns about his own safety motivated his conduct: He effectuated an immediate entry without waiting for anyone to open the door (in violation of *United States v. Banks*) because of such subjective concerns. *See* J.A. 20. Of course, as this Court recognized in *Banks*, Officer Good's subjective fears of danger were not legally sufficient to justify failing to knock on Petitioner's door and failing to wait a reasonable period of time before entering without permission. *Banks*, 540 U.S. at 43 ("Absent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one."). Accepting the judgment of the Michigan Supreme Court would mean the evisceration—as a practical matter—of the constitutional protection announced in *Wilson* and its progeny.

Moreover, the bald assertion that exclusion is not appropriate because tort liability or criminal sanctions authorized by federal and state law will serve as deterrents for the type of unconstitutional behavior seen here, *Stevens*, 597 N.W.2d at 64, ignores the holding of *Mapp v. Ohio*, 367 U.S. 643 (1961), and the many cases since *Mapp* where this Court has upheld state and federal court rulings imposing the exclusionary rule. *See, e.g., Arizona v. Hicks*, 480 U.S. 321 (1987); *United States v. Chadwick*, 433 U.S. 1 (1977). *Mapp* rejected the argument that suing or prosecuting police officers was a sufficient deterrent to prevent violations of the Fourth Amendment. *Mapp* noted that the experience of most states had indicated that "such remedies have been worthless and futile" in protecting Fourth Amendment freedoms. 367 U.S. at 652. Since *Mapp* was decided, this Court has not questioned the appropriateness of exclusion as the remedy for Fourth Amendment violations, notwithstanding the existence of other federal and state sanctions. *See Leon*, 468 U.S. at

908-09 ("The Court has, to be sure, not seriously questioned, 'in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate.'") (citations omitted). As this Court has repeatedly stated, the primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974). Without exclusion, in ordinary announcement cases, police officers will have no meaningful incentive to comply with *Wilson* and its progeny.

Second, according to the Michigan Supreme Court, exclusion is inappropriate because the incriminating evidence would have been found if the police had followed the law. This argument also proves too much and has no boundaries. As Justice Scalia noted in an analogous context, "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001).

One could assume that the crack cocaine located in Petitioner's pants would have been discovered had the police complied with the announcement requirement. But as nearly every search and seizure case decided by this Court demonstrates, that fact is irrelevant when deciding whether exclusion is appropriate for a Fourth Amendment violation. The exclusionary rule's purpose is to deter future Fourth Amendment violations. The applicability of the rule does not pivot on whether admitting (or suppressing) incriminating evidence in a particular case will facilitate the conviction of a guilty person. Instead, the rule is intended to protect all persons, the innocent and guilty alike, from future unlawful searches and seizures. *Cf. Hicks*, 480 U.S. at 329 ("[T]here is nothing new

in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."). This Court has repeatedly explained that the "wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's right which he has already suffered.'" *Leon*, 468 U.S. at 906 (citations omitted). If when determining the applicability of the exclusionary rule in a particular case, this Court is unconcerned with "cur[ing] the invasion of the defendant's rights," *id*., then it follows that the Court is equally unconcerned with what evidence might have been found had the police not violated the Constitution. Simply stated, application of the exclusionary rule turns on deterrence, not on the evidence discovered by the police or the evidence lost because of suppression.

Not only is the logic of the Michigan court inconsistent with this Court's understanding of the purpose of the exclusionary rule, it also cannot be confined to ordinary announcement cases. The reasoning of *Stevens*—exclusion is inappropriate whenever incriminating evidence would have been found had the police properly announced their search—is equally applicable to other Fourth Amendment contexts. Consider, for example, the facts and result in *United States v. Chadwick*, 433 U.S. 1 (1977). There, police had probable cause that a 200-pound footlocker possessed by the defendants contained illegal narcotics. *Id*. at 3-4. Police arrested the defendants outside of South Station in Boston and seized the footlocker. *Id*. Immediately after the arrests, the footlocker remained under the exclusive control of law enforcement officials. *Id*. at 4. An hour and a half after the arrests, officers opened the footlocker at a federal building. *Id*. It was undisputed that no exigency existed requiring an immediate search. *Id*. at 4. And the officers did not have the defendants' consent, nor did they obtain a search warrant. *Id*.

at 4-5. A large amount of marijuana was found inside the footlocker. *Id*.

Writing for a majority of the Court, Chief Justice Burger held that the warrantless search of the footlocker violated the Fourth Amendment. The Chief Justice explained that because the defendants had important privacy interests in the footlocker, the Fourth Amendment's warrant requirement applied to the search of the footlocker. *Id*. at 7-11. Accordingly, the judgment of the Court of Appeals suppressing the marijuana found inside the footlocker was affirmed. *Id*. at 16. But using the logic of *Stevens*, exclusion was inappropriate in *Chadwick* because the defendants would have found themselves in the same position (because the evidence would have been found anyway) had the officers secured a warrant to open the footlocker. If this Court affirms the judgment below, no principled line can be drawn that distinguishes application of the exclusionary rule in a *Chadwick*-type case from non-application of the exclusionary rule in an announcement case. Applying the Michigan court's analysis to a fact pattern where the police have probable cause to secure a warrant, but conduct an illegal search anyway, would mean that the warrant requirement itself need not be enforced by the exclusionary rule.

Finally, there is no hierarchy of Fourth Amendment rights that justifies not applying the exclusionary rule in announcement cases. Failure to comply with the announcement requirement is no "technical" Fourth Amendment violation.[5] For purposes of applying the exclusionary rule, *Wilson*'s holding means that violations of the announcement requirement must be treated like violations of the warrant requirement in cases like *Chadwick* or *Payton v. New York*,

[5] *Amici* agree with Justice Stevens that "there is no such thing as a 'technical' violation of the Fourth Amendment." *Leon*, 468 U.S. at 970 n.23 (opinion of Stevens, J.).

445 U.S. 573 (1980) (police must obtain an arrest warrant when entering a suspect's home to effectuate a routine arrest; irrelevant that police had sufficient evidence that would have authorized the issuance of an arrest warrant); or like violations of the search incident to arrest rule in cases like *Knowles v. Iowa*, 525 U.S. 113 (1998) ("search incident to citation" inconsistent with Fourth Amendment; immaterial that officer could have arrested defendant under state law and then conducted the same search that would have been allowed under this Court's search incident to arrest rulings); and like *Chimel v. California*, 395 U.S. 752 (1969) (extensive search of arrestee's home not authorized by search incident to arrest rule; irrelevant that police had sufficient evidence to support issuance of a search warrant that would have authorized the same extensive search); or like violations of this Court's investigative detention cases.

Terry v. Ohio, 392 U.S. 1 (1968), and its progeny also plainly demonstrate that there is no hierarchy of Fourth Amendment rights that controls application of the exclusionary rule. *Terry* upheld an investigative frisk for weapons, and in subsequent cases the Court has approved investigative searches and detentions that fall short of traditional arrests or full-blown searches. In allowing such investigative intrusions based on reasonable suspicion, the Court has explained that certain investigative techniques "constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Michigan v. Summers*, 452 U.S. 692, 699 (1981).

But when the police violate the strictures established in *Terry* and its progeny, this Court has never suggested that exclusion is an inappropriate remedy because the illegal detention or investigative search was less intrusive than an arrest or traditional search. On the contrary, the Court has

stated that "[i]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (citation omitted). It makes no difference that the text of the Fourth Amendment does not explicitly mandate the announcement rule. As Justice Scalia has noted, the text of the Amendment does not expressly mandate the warrant requirement either. *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in the judgment) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'"). What matters is that an unannounced entry without exigent circumstances is unreasonable under the Fourth Amendment's requirement of reasonable searches and seizures. Because the entry and search violated the Petitioner's Fourth Amendment rights, exclusion is the proper remedy.

B. The Independent Source And Inevitable Discovery Exceptions To The Exclusionary Rule Are Inapplicable To Petitioner's Case

1. The Independent Source And Inevitable Discovery Exceptions Forbid The Admission of Evidence Derived From A Constitutional Violation

Since *Weeks v. United States*, 232 U.S. 383 (1914), this Court has developed several exceptions to the Fourth Amendment's exclusionary rule. One such exception is the independent source rule, first articulated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). There, federal law enforcement officials illegally seized documents from the defendants' office. After the district court ordered the return of the original documents to the defendants, a grand jury subpoena was issued to produce the original documents. When the defendants refused to comply with the subpoena, they were held in contempt. This Court reversed

the contempt convictions and explained that a ruling for the government would reduce the Fourth Amendment "to a form of words." *Id*. at 392. According to Justice Holmes, "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id*. Justice Holmes then commented that the exclusionary rule did not make the facts learned from an illegal intrusion forever "sacred and inaccessible." *Id*. Rather, he noted that "[i]f knowledge of [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id*.

The independent source exception envisioned in *Silverthorne* contains a built-in limitation. Evidence discovered from a constitutional violation may be admissible if the prosecution can show an independent source for the same evidence, "but the knowledge gained by the Government's own wrong cannot" be the means for admitting the evidence. In other words, the constitutional violation itself can never be the "independent source" that justifies admitting the evidence. This Court's later cases applying the independent source and inevitable discovery exceptions to the exclusionary rule—*Segura v. United States*, 468 U.S. 796 (1984); *Nix v. Williams*, 467 U.S. 431 (1984) (*Williams II*); and *Murray v. United States*, 487 U.S. 533 (1988)—have strictly adhered to this limitation.

In *Segura*, for example, law enforcement officers illegally entered the defendants' home and immediately observed incriminating evidence in plain view. The officers remained in the home until a search warrant was obtained. Nineteen hours later, officers conducted a search pursuant to a valid warrant and discovered additional incriminating evidence. The evidence that was discovered in plain view after the officers' illegal entry was suppressed by the lower court and

not addressed by this Court. *Segura*, 468 U.S. 802-03 & n.4. But this Court did hold that the evidence discovered pursuant to the valid search warrant was admissible under the independent source exception. *Segura*'s explanation on why the independent source rule applied to these facts is worth quoting in full:

> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of that search, wholly unrelated to the prior entry. The valid warrant search was a "means sufficiently distinguishable" to purse the evidence of any "taint" arising from the entry.

Id. at 814, *quoting Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

Similarly, in *Williams II*, incriminating statements obtained from Williams in violation of his Sixth Amendment right to counsel led police to the body of a murder victim. In *Williams I* (*Brewer v. Williams*, 430 U.S. 387 (1977)), the Court held that Williams' statements could not be used at trial. After Williams was retried and convicted again, the issue in *Williams II* was whether "evidence pertaining to the discovery and condition of the victim's body was properly admitted on the ground that it would ultimately or inevitably

have been discovered even if no violation of any constitutional or statutory provision had taken place." *Williams II*, 467 U.S. at 434. This Court ruled that the evidence related to the victim's body was admissible under an inevitable discovery exception to the exclusionary rule otherwise applicable to Sixth Amendment violations, but emphasized that the discovery must have been inevitable by lawful means, untainted by the unconstitutional conduct.

Before explaining why the challenged evidence was admissible under an inevitable discovery exception, *Williams II* reiterated the limitation stated in *Silverthorne* that the independent source exception only applies when the means used by the government to discover evidence are truly separate from any constitutional misconduct. *See id.* at 443 ("The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation."). The independent source exception was unavailable in *Williams II* because the unconstitutional questioning of Williams led police to the victim's body. *Id*. Therefore, because the challenged evidence "was derived from" and "the product of" and not "wholly unconnected" from that constitutional violation, *Segura*, 468 U.S. at 814, the prosecution could not prove an independent source for the evidence.

Although the evidence concerning the condition of the victim's body could not be admitted under the independent source exception, *Williams II* reasoned that an inevitable discovery exception might authorize the admission of evidence that would otherwise be subject to suppression. Like the independent source rule, the inevitable discovery exception "ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." *Williams II*, 467 U.S. at 443 (emphasis in original). But the inevitable discovery rule is not an exception designed to swallow the exclusionary rule and *Williams II* did

not so hold. Rather, the Court's reasoning is consistent with a more limited proposition: that the inevitable discovery exception is subject to the same limitation that restricts application of the independent source exception. That is, it applies when the lawful means that would have led to the challenged evidence are wholly independent of any constitutional violation. *Id*. at 448 ("when, as here, the evidence in question would inevitably have been discovered *without reference to the police error or misconduct*, there is no nexus sufficient to provide a taint") (emphasis added).

Based on its analysis, *Williams II* held that the prosecution bears a burden to prove—not merely assert—that a lawful means would inevitably have led to the evidence. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means then the deterrence rationale has so little basis that the evidence should be received." *Id*. at 444. The *Williams II* Court concluded that the evidence pertaining to the discovery and condition of the victim's body was admissible because the prosecution proved that the victim's body inevitably would have been found by an independent team of searchers that had been separately looking for the body. *See id.* at 448 (upholding admissibility because evidence in question showed the body "would inevitably have been discovered" by the searchers "without reference to the police error or misconduct").

Finally, *Murray v. United States* addressed whether the independent source exception applies to evidence initially discovered during an illegal entry and search, but later obtained independently from activities untainted by the initial constitutional misconduct. After lawfully discovering narcotics in two vehicles, federal officers illegally entered the warehouse from which the vehicles had come. Inside the warehouse, officers observed burlap-wrapped bales. The officers left the warehouse, obtained a warrant to search the

warehouse, and executed the warrant and seized the bales that contained marijuana. *Murray* ruled that the bales of marijuana might be admissible under the independent source exception. But, again, the Court did so with the proviso that the means used to discover the evidence must be both lawful and wholly independent of any unconstitutional conduct—just as *Silverthorne* had envisioned, and *Segura* and *Williams II* had held. As Justice Scalia stated, "[t]he ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Murray*, 487 U.S. at 542. Under the facts in *Murray*, Justice Scalia explained that would be the case if the government could prove that the officers' decision to obtain a warrant was not prompted by what they had seen during the initial, illegal entry into the warehouse, and the information obtained during that illegal entry was not presented to the magistrate and did not affect his decision to issue the warrant. *Id*.

Silverthorne, *Segura*, *Williams II*, and *Murray* plainly establish that the independent source and inevitable discovery exceptions permit the admission of evidence previously illegally obtained only when lawful means, wholly independent of any unconstitutional conduct, would have revealed the challenged evidence. Obviously, when evidence is "derived from or related in any way to" an illegal entry and search (*Segura*, 468 U.S. at 814), it cannot be admitted under either of these exceptions.

2. The Court Below Has Improperly Applied The Inevitable Discovery Exception

Despite the straightforward rule established in these cases, the Michigan Supreme Court concluded that evidence discovered after an illegal entry and search of a defendant's home is always admissible when the police fail to comply with the announcement requirement, provided they act pursuant to a valid warrant. *Stevens* justified this conclusion

by explaining that "the evidence would have been discovered despite any police misconduct." 597 N.W.2d at 62. *Stevens* also reasoned that admitting the evidence found after an announcement violation "does not put the prosecution in any better position than it would be in had the police adhered to the knock-and-announce requirement." *Id*. Excluding the evidence, however, "puts the prosecution in a worse position than it would have been in had there been no police misconduct." *Id*. This reasoning incorrectly applies the independent source and inevitable discovery exceptions established by this Court.

a. At the outset, the Michigan courts erred when they ruled that the evidence obtained from Petitioner was admissible because "the evidence would have been discovered despite any police misconduct." *Id*. at 62. The inevitable discovery exception cannot be used to justify the admission of evidence seized after the illegal entry and search of Petitioner's person and home. As discussed above, *Segura*, *Williams II*, and *Murray* establish that for the evidence to be admitted under this exception, the prosecution must meet its burden to show that a lawful and independent intrusion would have uncovered the evidence: which, on the facts of those cases, involved showing a lawful intrusion was either (1) underway or (2) would soon be executed and (3) that the lawful intrusion would have disclosed evidence that had originally been secured by unconstitutional conduct. *See*, *e.g.*, *Williams II*, 467 U.S. at 488 (admitting evidence based on proof that a search team independently searching for body would "inevitably" have discovered it).

Here, Respondent cannot show that lawful means either were used or imminently would have been used to discover the evidence found in Petitioner's pants. To the contrary, and in contrast to *Segura*, *Williams II*, and *Murray*, there was only one search and one intrusion in this case—and it was unreasonable under the Fourth Amendment. Thus, Respondent cannot show

that the evidence seized from Petitioner "ultimately or inevitably would have been discovered by lawful means," and "without reference to the police error or misconduct." *Id*. at 444, 448. Nor can Respondent prove the evidence found in Petitioner's pants was the result of "a later, lawful seizure [that] is genuinely independent of an earlier, tainted one." *Murray*, 487 U.S. at 542.

For similar reasons, Respondent cannot establish what the government proved in *Segura*. That is, the prosecution cannot prove that none of the evidence seized from Petitioner "was derived from or related in any way to the initial [illegal] entry into petitioner[']s [home]." *Segura*, 468 U.S. at 814. Respondent cannot demonstrate that the evidence seized from Petitioner "came from sources wholly unconnected with the entry and was known to the [Detroit police] well before the initial [illegal] entry." *Id*. Furthermore, Respondent cannot prove that the evidence taken from Petitioner "was the product of [a] search, wholly unrelated to the prior [illegal] entry." *Id*. In sum, Respondent cannot establish, as this Court's rulings require it to do to invoke the independent source or inevitable discovery exceptions, that "[t]he illegal entry into petitioner[']s [home] did not contribute in any way to discovery of the [challenged] evidence." *Id*. at 815.

b. The Michigan courts also erroneously relied on the fact that the police acted pursuant to a valid search warrant, opining that the warrant causally disconnected the search from the illegal entry. But this analysis is flawed because possession of a valid warrant, standing alone, is not a sufficient basis for invoking the inevitable discovery exception. Rather, in *Wilson v. Layne*, the Court squarely held that the existence of a valid warrant cannot, *post hoc*, make an otherwise unreasonable intrusion reasonable. 526 U.S. 603, 611 (1999) (possession of a valid arrest warrant did not entitle police to bring members of the press with them to execute warrant).

As one commentator has noted, invocation of the inevitable discovery rule cannot turn simply on

> whether the evidence would have been discovered had the officers acted differently; it must be whether the evidence would have been discovered had the illegal search never occurred. If the officers in possession of the issued warrant enter illegally, there can be no ultimate or inevitable discovery by lawful means. The only possible lawful search, pursuant to the warrant, was tainted by the illegal entry.[6]

Consequently, the evidence found inside Petitioner's pants is inadmissible, notwithstanding the existence of a valid search warrant. A contrary result would allow the police "to do what [they] cannot do otherwise"—ignore *Wilson*. *Cf. Stevens*, 597 N.W.2d at 70 (Cavanagh, J., dissenting).

c. The reasoning of *Stevens* was also flawed because it relied upon hypothesized facts that officers might or could have obtained illegally seized evidence properly. A similar problem arises in Petitioner's case: There is no evidence in this record to support the assertion that "the discovery of the evidence in [Petitioner's] case was inevitable, regardless of the illegalities on the police officers' entry into [Petitioner's] home." *Id.* at 64. In effect, the prosecution, like *Stevens*, rests on the absurd and flimsy theory "that police would have done it right had they not done it wrong." 6 Wayne R. LaFave, *Search and Seizure* § 11.4(a), at 270 n.77 (4th ed. 2004), *quoting State v. Davolt*, 84 P.3d 456, 469 (Ariz. 2004). Professor LaFave properly describes this as an "Alice-in-Wonderland version of inevitable discovery." *Id*. at 273.

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[6] Mattias Luukkonen, *Knock, Knock. What's Inevitably There? An Analysis of the Applicability of the Doctrine of Inevitable Discovery to Knock and Announce Violations*, 35 McGeorge L. Rev. 153, 177 (2004).

Even if one is willing to assume facts not supported by the record, such an assumption would not matter under the inevitable discovery rule. Rather than depend upon "metaphysical analysis," *Murray*, 487 U.S. at 542, or rank conjecture, the inevitable discovery exception was designed to apply to the real world of police investigations and after-the-fact judicial review. The exception "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification." *Williams II*, 467 U.S. at 431 n.5. Yet, the record in this case, unlike that in *Segura* and *Williams II*, lacks *any* "demonstrated historical facts" (*id.*) that prove lawful means, genuinely independent of any unconstitutional conduct, would have revealed the evidence found on Petitioner. When this element is missing, the inevitable discovery or independent source exceptions are simply unavailable, and it is beside the fact that judges are able to imagine that police officers *could* have done things differently.[7] In effect, Petitioner would permit the admission of unlawfully obtained evidence anytime the police say, "'Yes, what [we] did was illegal, but [we] could have done the same thing and obtained the same evidence through legal means if [we] had chosen to follow [constitutional] procedure. Hence, [we] would have discovered the evidence anyway.'"[8] *Williams II* does not condone such a perverse result.

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[7] As Professor Yale Kamisar puts it, the inevitable discovery exception allows the admission of illegally obtained evidence if the prosecution can prove that the evidence "'ultimately or inevitably *would* have been discovered by lawful means.' It does not apply simply because the police *could* have or *might* have obtained the evidence lawfully—simply because 'the police had *the capacity* (which they did not exercise)' to proceed lawfully." *See* Yale Kamisar et al., *Modern Criminal Procedure: Cases–Comments–Questions* 919-20 (11th ed. 2005) (emphasis in original) (citations omitted).

[8] Loly Garcia Tor, *Mandating Exclusion for Violations of the Knock and Announce Rule*, 83 B.U. L. Rev. 853, 868 (2003).

d. Finally, the Michigan Supreme Court also improperly reasoned that exclusion is never an appropriate remedy for evidence unlawfully obtained after a violation of the announcement rule because exclusion would put the prosecution in a "worse position" because of police misconduct. Neither the holding nor logic of *Williams II* supports this conclusion.

To be sure, *Williams II* explained that the independent source and inevitable discovery exceptions "ensure[] that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." 467 U.S. at 443 (emphasis in original); *see also id*. at 443-44, 445, 447 (explaining that "suppression of evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct") (emphasis in original). None of these statements, however, support the *per se* rule of non-exclusion adopted by the Michigan Supreme Court. Exclusion was inappropriate in *Williams II* not simply because omitting the evidence put the prosecution in a worse position. After all, exclusion of evidence *always* puts the prosecution in a worse position than it would be if there had been no exclusion. Taken seriously, the Michigan Supreme Court's flawed interpretation of *Williams II* would overrule the exclusionary rule—which, of course, *Williams II* did not do.

Exclusion was inappropriate in *Williams II* for a more limited reason: because the challenged evidence would have had an independent source free from the taint of the unconstitutional conduct that initially secured the evidence. As Chief Justice Burger noted for the majority: "*When* the challenged evidence has an *independent source*, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Id*. at 443 (emphasis added); *see also id.* at 448 (evidence may be admitted where the prosecution proves by a preponderance of evidence that it "would inevitably have been discovered

without reference to the police error or misconduct") (emphasis added). But when the prosecution cannot show that illegally seized evidence would have been inevitably uncovered by lawful means, the inevitable discovery and independent source exceptions are inapplicable, and exclusion is required notwithstanding the obvious fact that exclusion puts the prosecution in a worse position than it would have been in absent police misconduct. Because Respondent did not prove that the cocaine illegally seized from Petitioner would have been disclosed by lawful means, this evidence should have been suppressed, and it is immaterial that exclusion would have put the prosecution in a worse position.

The *per se* rule of non-exclusion adopted by the Michigan Supreme Court also conflicts with another aspect of *Williams II*. Chief Justice Burger noted that "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." *Id.* at 445. Under the *per se* rule adopted below, however, Michigan law enforcement officers can be certain that failure to follow the announcement requirement will cause no adverse consequences at a criminal trial because exclusion will always be unavailable. This result contradicts the *Williams II* Court's understanding of how the inevitable discovery exception would be applied because it encourages officers to take unconstitutional "'shortcuts' to obtain [incriminating] evidence." *Id*. at 446. As Justice Stevens' concurrence noted in *Williams II*, the majority was careful "to insist that any rule of exclusion not provide the authorities with an incentive to commit violations of the Constitution." *Id*. at 456 (Stevens, J., concurring in judgment). Contrary to that goal, the *per se* exception to the exclusionary rule imposed by the Michigan courts gives police officers a substantial incentive "to avoid the uncertainties inherent in [their] search for evidence, [which in turn] undermines the constitutional guarantee itself, and therefore [is] inconsistent with the deterrent purposes of

the exclusionary rule." *Id*. (footnote omitted). Ultimately, "[i]t seems inappropriate, to say the least, to develop a bright-line rule that informs police how to 'properly' violate someone's Fourth Amendment rights."[9]

Yet, this is the very effect of the *per se* rule adopted by the Michigan Supreme Court: Michigan police officers have little incentive to follow the instructions of this Court (or any court) regarding their method of entry into a private home, because any incriminating evidence discovered by the police will be admissible regardless of whether officers obey the law.

CONCLUSION

For the reasons stated above, the judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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[9] Stephen E. Hessler, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 Mich. L. Rev. 238, 260 (2000).