No. 04-1360

IN THE

Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

On Writ of Certiorari to the Court of Appeals of Michigan

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

(Intentionally left blank)

QUESTIONS PRESENTED

Does the exclusionary rule apply to violations of the knock and announce rule?

(Intentionally left blank)

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

The exclusionary rule should not be extended "by even a fraction of an inch" 4

II

Whether the exclusionary rule applies to knock and announce violations remains an open question 13

III

The exclusionary rule should not be extended to cover knock and announce violations 17

Conclusion 23

TABLE OF AUTHORITIES

Cases

Agnello v. United States, 269 U. S. 20, 70 L. Ed. 145,
46 S. Ct. 4 (1925) 16

Anderson v. Creighton, 483 U. S. 635, 97 L. Ed. 2d 523,
107 S. Ct. 3034 (1987) 20

Arizona v. Evans, 514 U. S. 1, 131 L. Ed. 2d 34,
115 S. Ct. 1185 (1995) 8

Bivens v. Six Unknown Named Agents of Federal
Bureau of Narcotics, 403 U. S. 388, 29 L. Ed. 2d 619,
91 S. Ct. 1999 (1971) 8, 10

Colorado v. Connelly, 479 U. S. 157, 93 L. Ed. 2d 473,
107 S. Ct. 515 (1986) 12

Coolidge v. New Hampshire, 403 U. S. 443,
29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971) 8

Delaware v. Van Arsdall, 475 U. S. 673, 89 L. Ed. 2d 674,
106 S. Ct. 1431 (1986) 12

Dickerson v. United States, 530 U. S. 428,
147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000) 11

Elkins v. United States, 364 U. S. 206, 4 L. Ed. 2d 1669,
80 S. Ct. 1437 (1960) 16

Illinois v. Gates, 462 U. S. 213, 76 L. Ed. 2d 527,
103 S. Ct. 2317 (1983) 17

INS v. Lopez-Mendoza, 468 U. S. 1032, 82 L. Ed. 2d 778,
104 S. Ct. 3479 (1984) 18, 21

Lopez v. United States, 373 U. S. 427, 10 L. Ed. 2d 462,
83 S. Ct. 1381 (1963) 15

Mallory v. United States, 354 U. S. 449, 1 L. Ed. 2d 1479,
77 S. Ct. 1356 (1957) 15

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961) 3, 5, 10, 15, 16, 18

McNabb v. United States, 318 U. S. 332, 87 L. Ed. 819,
63 S. Ct. 608 (1943) 15, 16

Miller v. United States, 357 U. S. 301, 2 L. Ed. 2d 1332,
78 S. Ct. 1190 (1958) 3, 13, 14

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694,
86 S. Ct. 1602 (1966) 10

Nix v. Williams, 467 U. S. 431, 81 L. Ed. 2d 377,
104 S. Ct. 2501 (1984) 16, 19, 20, 22

Payne v. Tennessee, 501 U. S. 808, 115 L. Ed. 2d 720,
111 S. Ct. 2597 (1991) 15

Pennsylvania Bd. of Probation and Parole v. Scott,
524 U. S. 357, 141 L. Ed. 2d 344,
118 S. Ct. 2014 (1998) 5, 7, 8, 12, 18

People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926) 5

People v. Hudson, 472 Mich. 862,
692 N. W. 2d 385 (2005) 2

People v. Stevens, 460 Mich. 626,
597 N. W. 2d 53 (1999) 2

Rakas v. Illinois, 439 U. S. 128, 58 L. Ed. 2d 387,
99 S. Ct. 421 (1978) 16

Rea v. United States, 350 U. S. 214, 100 L. Ed. 233,
76 S. Ct. 292 (1956) 15

Richards v. Wisconsin, 520 U. S. 385, 137 L. Ed. 2d 615,
117 S. Ct. 1416 (1997) 22

Sabbath v. United States, 391 U. S. 585, 20 L. Ed. 2d 828, 88 S. Ct. 1755 (1968) 3, 13, 16, 17

Segura v. United States, 468 U. S. 796, 82 L. Ed. 2d 599, 104 S. Ct. 3380 (1984) 16, 19

Silverman v. United States, 365 U. S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961) 13

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319, 40 S. Ct. 182 (1920) 19

State v. Bamber, 630 So. 2d 1048 (Fla. 1994) 22

State v. Carufel, 112 R I. 664, 314 A. 2d 144 (1974) 23

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) 5, 6, 8, 16

Terry v. Ohio, 392 U. S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) 7, 10, 17

United States v. Alvarez-Sanchez, 511 U. S. 350, 128 L. Ed. 2d 319, 114 S. Ct. 1599 (1994) 15

United States v. Calandra, 414 U. S. 338, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974) 7, 16

United States v. Havens, 446 U. S. 620, 64 L. Ed. 2d 559, 100 S. Ct. 1912 (1980) 6, 21

United States v. Janis, 428 U. S. 433, 49 L. Ed. 2d 1046, 96 S. Ct. 3021 (1976) 5, 6, 16, 18

United States v. Leon, 468 U. S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984) 7, 8, 12, 16, 17, 18

United States v. Patane, 542 U. S. 630, 159 L. Ed. 2d 667, 124 S. Ct. 2620 (2005) 6, 8

United States v. Payner, 447 U. S. 727, 65 L. Ed. 2d 468, 100 S. Ct. 2439 (1980) 15

Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652,
34 S. Ct. 341 (1914) 15

Wilson v. Arkansas, 514 U. S. 927, 131 L. Ed. 2d 976,
115 S. Ct. 1914 (1995) 13

Wong Sun v. United States, 371 U. S. 471, 9 L. Ed. 2d 441,
83 S. Ct. 407 (1963) 19, 20

United States Statutes

18 U. S. C. § 2232(a) 21

18 U. S. C. § 3109 16

42 U. S. C. § 1988 11

Treatises

W. LaFave, Search and Seizure (4th ed. 2004) 4, 22

J. Wigmore, Evidence (McNaughton rev. 1961) 6

Miscellaneous

Amar, Fourth Amendment First Principles,
107 Harv. L. Rev. 757 (1994) 7, 8, 10, 11, 12

Amsterdam, Perspective on the Fourth Amendment, 58
Minn. L. Rev. 349 (1974) 8

Atkins & Rubin, Effects of Criminal Procedure on Crime
Rates: Mapping Out Effects of the Exclusionary Rule,
46 J. Law & Econ. 157 (2003) 7

Canon, Ideology and Reality in the Debate Over the
Exclusionary Rule: A Conservative Argument for Its
Retention, 23 So. Tex. L. J. 559 (1982) 5

Kaplan, The Limits of the Exclusionary Rule,
26 Stan. L. Rev. 1027 (1974) 11

Morris, The Exclusionary Rule, Deterrence and Posner's Economic Analysis of the Law, 57 Wash. L. Rev. 647 (1982) 5

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970) 20

Posner, Rethinking the Fourth Amendment, 1981 S. Ct. Rev. 49 (1982) 7, 8, 9, 10, 11

Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 Ill. L. Rev. 363 . . . . 5, 7

Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L. Rev. 736 (1972) 20

IN THE

Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The considerable cost of the Fourth Amendment exclusionary rule is well known. Reliable evidence of guilt is suppressed without regard to the severity of the invasion of privacy. The public is forced to bear the costs of the officer's blunder, while

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

the criminal reaps the immediate reward. At the same time, the reason for the exclusionary rule, deterring police from violating the Fourth Amendment, is unproven. This costly rule should not be extended any further. Applying the exclusionary rule to knock and announce violations will allow guilty criminals to escape punishment without adding any meaningful deterrent. This is contrary to the interests of justice and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 27, 1998, Detroit police officers executed a search warrant at the home of the defendant, Booker T. Hudson. Joint Appendix ("J. A.") 4-5. The search took place at 3:35 p.m. J. A. 5. Police found Hudson sitting in a chair in the living room as they entered. *Ibid.* An officer announced their presence and purpose before entering, but did not knock. J. A. 8. The officers waited three or four seconds after the announcement, but did not wait for an answer before entering. See *ibid.* Several officers entered, and one patted down Hudson, finding five rocks of cocaine in his left front pants pocket. J. A. 6-7.

The trial court suppressed the cocaine as the product of a knock and announce violation, but the Michigan Court of Appeals reversed, relying on Michigan Supreme Court precedent holding that the exclusionary rule did not apply to knock and announce violations. See *People* v. *Hudson*, No. 246403 (Mich. App. June 17, 2004), p. 1; see also *People* v. *Stevens*, 460 Mich. 626, 647, 597 N. W. 2d 53, 64 (1999). On remand, the defendant was convicted at a bench trial of possession of less than 25 grams of cocaine with the intent to deliver. See *Hudson*, *supra*, at 1. Hudson was sentenced to 18 months probation. See *ibid.* His conviction was affirmed by the intermediate appellate court. See *ibid.* The Michigan Supreme Court denied Hudson's application for leave to appeal. See *People* v. *Hudson*, 472 Mich. 862, 692 N. W. 2d 385 (2005).

This Court granted certiorari on January 27, 2005.

SUMMARY OF ARGUMENT

The exclusionary rule is a very costly remedy that should not be extended "by even a fraction of an inch." The rule's costs are substantial. By depriving the courts of relevant, reliable evidence of guilt, the exclusionary rule allows criminals to go free because of police error. The remedy is also unfair, as it is applied without regard to the degree of harm done to the victim's Fourth Amendment rights. This mismatch between punishment and harm causes the exclusionary rule to overdeter, which induces police to refrain from engaging in useful, lawful activity.

Arrayed against these substantial costs is a deterrent that is unproven and unprovable. Tort law would seem to provide a more efficient remedy, since it is the traditional means for remedying invasions of privacy, and monetary damages are rewarded in proportion to the harm suffered. A tort law substitute for the exclusionary rule is not possible right now because immunity doctrines shield police and governments from civil liability for Fourth Amendment violations, and because *Mapp* v. *Ohio*, 367 U. S. 643 (1961) discourages the states from developing alternative remedies. The exclusionary rule is the remedy for Fourth Amendment violations not because it is efficient or just, but by default. A rule such as this should only be applied when absolutely necessary.

Whether the exclusionary rule applies to knock and announce violations remains an open question even after *Miller* v. *United States*, 357 U. S. 301 (1958) and *Sabbath* v. *United States*, 391 U. S. 585 (1968). There was no real debate over the relationship between the knock and announce rule and the exclusionary rule in *Miller*. That decision simply reflects this Court's willingness to impose the exclusionary rule on the federal government for lesser wrongs than a violation of the Constitution. Also, *Miller* did not apply its rule to the states,

and the law of the exclusionary rule has developed considerably since that decision. Since *Sabbath* is simply an application of *Miller*, these decisions do not govern the present case. Instead, it is necessary to weigh the costs and benefits of exclusion before deciding whether to apply the exclusionary rule in knock and announce violations.

The balance of interests does not justify extending the exclusionary rule to knock and announce violations. Since there is no legitimate causal connection between a knock and announce violation and the discovery of evidence, the exclusionary rule's deterrent is compromised. Applying the exclusionary rule to knock and announce violations would place the police in a worse position than if the violation had never occurred, which is contrary to the rationale of the inevitable discovery exception to the exclusionary rule.

The only possible causal connection between a knock and announce violation and discovering evidence is if the violation prevents the destruction of the evidence, which is not a legitimate reason for distinguishing the inevitable discovery exception. The exclusionary rule is also unnecessary to induce officers into complying with the Fourth Amendment, since officer safety is a powerful incentive for police to follow the knock and announce rule. Therefore, there is no reason to invoke the compromised deterrent of the exclusionary rule.

ARGUMENT

I. The exclusionary rule should not be extended "by even a fraction of an inch."

This case centers on the eternally controversial Fourth Amendment exclusionary rule. In spite of over a half century of debate, see 1 W. LaFave, Search and Seizure § 1.2(a), p. 27, and n. 1 (4th ed. 2004), fundamental questions about the rule remain unanswered. While the primary rationale for the exclusionary rule is deterring Fourth Amendment violations,

see *Stone* v. *Powell*, 428 U. S. 465, 486 (1976), its value as a deterrent is at best unproven. Empirical studies on the exclusionary rule's deterrence are typically flawed. See *United States* v. *Janis*, 428 U. S. 433, 449-450, and n. 22 (1976). Given the numerous practical difficulties with making a good empirical assessment of the rule's deterrence, see *id.*, at 450-453, proving that the exclusionary rule actually does deter police misconduct may be impossible. See Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 Ill. L. Rev. 363, 368-371; Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention, 23 So. Tex. L. J. 559, 560 (1982); Morris, The Exclusionary Rule, Deterrence and Posner's Economic Analysis of the Law, 57 Wash. L. Rev. 647, 653 (1982).

Although unproven and probably unprovable, the exclusionary rule still looms over the criminal justice system. While "significantly limited" by this Court's decisions, see *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364, n. 4 (1998), the main thrust of the exclusionary rule still operates in countless cases to suppress the fruits of illegal searches or seizures from being used as evidence of guilt. This gives *Mapp* v. *Ohio*, 367 U. S. 643 (1961) and its progeny an extraordinary influence over the criminal justice system, being a potential issue in almost every criminal case.

While the rule remains pervasive but unproven, its costs are not ephemeral. The heavy cost and potential unfairness of the exclusionary rule was well known even before *Mapp* extended that rule to the states. As Justice Cardozo famously put it, "The criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926). Dean Wigmore had similar sentiments:

> " 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so

> by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.'
>
> "Some day, no doubt, we shall emerge from this quaint method of enforcing the law. At present, we see it in many quarters. It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice." 8 J. Wigmore, Evidence § 2184a, p. 31, n. 1 (McNaughton rev. 1961) (quoting 8 J. Wigmore, Evidence § 2184 (3d ed. 1940) (emphasis in original)).

Searches and seizures produce physical evidence, which is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone*, 428 U. S., at 490. Since there is little, if any, connection between the legality of the search and the reliability of the seized evidence, see *ibid*., the exclusionary rule deprives the criminal justice system of reliable evidence, requiring the prosecution to use less reliable evidence or to forgo prosecution entirely. Cf. *United States* v. *Patane*, 542 U. S. 630, 124 S. Ct. 2620, 2631,159 L. Ed. 2d 667, 680 (2005) (Kennedy, J., concurring) (noting "important probative value of reliable physical evidence"). This makes the exclusionary rule a very costly remedy to society.

"There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *United States* v. *Havens*, 446 U. S. 620, 626 (1980). By depriving the criminal justice system of one of the most effective means of achieving this fundamental interest, the exclusionary rule places a substantial cost on society. See *Janis*, 428 U. S., at 448-449; see also *Stone*, 428 U. S., at 489-490. "Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the

truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Scott*, 524 U. S. at 364. It is no surprise that some recent research shows that the rule played a role in the increase in crime following *Mapp*. See Atkins & Rubin, Effects of Criminal Procedure on Crime Rates: Mapping Out Effects of the Exclusionary Rule, 46 J. Law & Econ. 157, 173-174 (2003). One "conservative estimate" places the cost at about "10,000 felons and 55,000 misdemeanants who evade punishment each year because of successful Fourth Amendment suppression motions." Slobogan, *supra*, at 443, and n. 359; see also *United States v. Leon*, 468 U. S. 897, 998, n. 6 (1984).

Another dimension to the exclusionary rule's cost is that the rule does not take into account the actual damage to the privacy of the victim of the illegal search or seizure. As this Court has made clear, the exclusionary rule is not justified by any sense of redress to the victim of the police illegality. See *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). A remedy that is not matched to the actual cost of the harm is an invitation to unfairness and skews the incentives that are supposed to be the justification for the rule.

The exclusionary rule is often a gift to the criminal defendant fortunate enough to win the Fourth Amendment lottery. A major shortcoming of the rule is that its exercise does not depend upon the degree of intrusion upon constitutionally protected privacy interests. A minor violation of *Terry* v. *Ohio*, 392 U. S. 1 (1968) creates as strong of a case for suppression as a suspicionless, warrantless, night-time invasion of a house. Nor does the rule's use turn on the importance of what is being suppressed. A shoplifted bottle of water and a murder victim's body are equally suppressible. At the same time, some of the worst violations of privacy, like intentional police harassment, are beyond the rule's deterrent. See Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 795-798 (1994); Posner, Rethinking the Fourth Amendment, 1981 S. Ct. Rev. 49, 54 (1982). "Freeing either a tiger or a mouse in a school-

room is an illegal act, but no rational person would suggest that these two acts be punished in the same way." *Bivens* v. *Six Unknown Narcotics Agents*, 403 U. S. 388, 419 (1971) (Burger, C.J., dissenting). Yet the exclusionary rule treats all violations equally without regard to the actual harm inflicted by the search, or what was gained by the search. "The disparity in some cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." *Stone*, 428 U. S., at 490.

While the exclusionary rule is justified as a necessary defense of the Fourth Amendment, it is not a part of the Fourth Amendment's guarantee. Unlike the Fifth Amendment self-incrimination privilege, there is no textual authorization for a Fourth Amendment exclusionary rule. See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 496 (1971) (Black, J., concurring and dissenting); cf. *Patane*, 124 S. Ct., at 2628, 159 L. Ed. 2d, at 677 (plurality opn.). Nor can support for the Fourth Amendment exclusionary rule be found in constitutional history. The exclusionary rule cannot be justified by an appeal to the intent of the framers of the Fourth Amendment or common law remedies for illegal government searches. See Amar, 107 Harv. L. Rev. 757, 785-787; Posner, 1981 S. Ct. Rev., at 51-52. It is not a part of the Fourth Amendment. See *Scott*, 524 U. S., at 362; *Leon*, 468 U. S., at 906. It is a judicially created constitutional policy that lives or dies on the grounds for its justification. See *Arizona* v. *Evans*, 514 U. S. 1, 10-11 (1995).

Disproportionality is not just a minor flaw. Rather, it is a feature of the exclusionary rule. One contention on behalf of the rule is that the victims of illegal searches will often lack the incentives and resources to bring an action for damages. Amsterdam, Perspective on the Fourth Amendment, 58 Minn. L. Rev. 349, 430 (1974). While a comparatively small invasion of privacy will not support a sufficient level of damages to justify civil litigation, the exclusionary rule

provides both the incentive and the forum to vindicate these rights.

This highlights another problem with the exclusionary rule. Even if the exclusionary rule does deter, it does so in a socially inefficient manner. Since the exclusionary rule is simply a constitutional policy, it must deter efficiently if it is to be allowed to deter at all.

Ideally, the Fourth Amendment should be enforced through an optimum deterrent, one where the penalty for the offense is equal to the cost to society of the improper conduct. See Posner, 1981 S. Ct. Rev., at 54-55. The legitimate costs to be protected by the exclusionary rule are the privacy and property interests protected by the Fourth Amendment. See *id*., at 50-51. The criminal's interest in avoiding punishment, while the motivation for the suppression motions that give the exclusionary rule its force, is not a legitimate interest for the rule to vindicate. See *id*., at 51-52. The exclusionary rule's lack of proportionality means that there will be many situations in which a minimal privacy value will be enforced through the socially costly suppression of evidence.

Too much deterrence is no better for society than too little. Since people cannot predict the legal outcome of their actions with absolute precision, excessive deterrence "will lead people to forgo socially valuable activities near the uncertain boundary." *Id*., at 55. By overpunishing relatively trivial infringements upon privacy, the Fourth Amendment exclusionary rule overdeters. The rule "is not merely crude; to the extent obeyed, it systematically overdeters, because it imposes social costs that are greatly disproportionate to the actual harm to lawful interests from unreasonable searches and seizures." *Id*., at 56.

Tort law would seem to be a more appropriate remedy for Fourth Amendment violations. It is a natural avenue for redressing wrongs, and readily accommodates the invasions of privacy that would make up a standard Fourth Amendment civil action. See *id*., at 53-54. It is also the method of enforce-

ment intended by the framers of the Fourth Amendment. See Amar, 107 Harv. L. Rev., at 786. Unlike the exclusionary rule, the tort remedy can be adjusted to fit the level of intrusion on Fourth Amendment interests, yielding a more optimum deterrent. See Posner, 1981 S. Ct. Rev., at 54. Unfortunately, two factors prevent substituting tort law for the exclusionary rule at this time. The first is the substantial web of civil immunities surrounding government action that have developed over the years. See *id*., at 64-68. While it could be possible for a state to deal with this problem and design an effective tort alternative to the exclusionary rule, a second problem prevents this.

Since *Mapp* was in part based upon the inadequacy of other remedies, it is understandable that the states and the federal government do not want to risk an alternative remedy. While this Court invited alternative approaches in *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966), a majority of this Court has not yet encouraged alternatives to the exclusionary rule. The fact that the most prominent opinion advocating alternative remedies is a dissent, see *Bivens*, 403 U. S., at 411-426 (Burger, C.J., dissenting), is telling. A state that went to the expense of establishing an alternative civil remedy has no reason to believe that it could then dispense with the exclusionary rule. *Mapp*'s uneasy compromise deters the innovation that could enforce the Fourth Amendment at much less cost to society than the exclusionary rule, effectively preempting the field of any alternatives.

The exclusionary rule is little more than a "lesser evil" approach to the Fourth Amendment. The defenses of the rule resonate with the claim that some method for enforcing the Fourth Amendment must be found or the right will be a dead letter. See *Mapp*, 367 U. S., at 660 ("we can no longer permit that [Fourth Amendment] right to remain an empty promise"); see also *Terry*, 392 U. S., at 12. The exclusionary rule has won the contest to defend the Fourth Amendment more by default than on its merits as a fair and efficient remedy.

The notion that we need the exclusionary rule because nothing else works is a poor justification for such an important constitutional policy. See Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1032 (1974). It may also be the best available argument for the rule. The deterrent rationale is unproven and unprovable, the costs of exclusion are substantial, and the rule will work genuine unfairness in many cases. Inertia and a lack of available alternatives may be the best explanations for the exclusionary rule's continued survival.

Even this weak rationale for the rule may diminish. It is now easier for victims of illegal searches and seizures to seek damages in the courts than it was when *Mapp* was decided. Federal law now allows for the recovery of attorneys fees for a successful plaintiff in a civil rights action. See 42 U. S. C. § 1988. The tort and civil rights bars have developed considerably since *Mapp*. There are now more alternatives to curb abusive police conduct than existed when *Mapp* was decided. See *Dickerson* v. *United States*, 530 U. S. 428, 442 (2000) (more remedies than when *Miranda* was decided, three years later). If this Court were to encourage alternatives, the states might feel more free to use these new tools to fashion a superior alternative.

A further problem with the exclusionary rule is that it disproportionately grants more benefits to criminals than to the innocent. See Posner, 1981 S. Ct. Rev., at 54; Amar, 107 Harv. L. Rev., at 795-796. By relying on suppression motion to enforce the Fourth Amendment, the exclusionary rule elevates the accused criminal into "a kind of private attorney general." Amar, *supra*, 796.

> "But the worst kind. He is self-selected and self-serving. He is often unrepresentative of the larger class of law-abiding citizens, and his interests regularly conflict with theirs. Indeed, he is often despised by the public, the class he implicitly is supposed to represent. He will litigate on the worst set of facts, heedless that the result will be a bad precedent for the Fourth Amendment generally. He

> cares only about the case at hand — his case — and has no long view. He is not a sophisticated repeat player. He rarely hires the best lawyer. He cares only about exclusion — and can get only exclusion — even if other remedies (damages or injunctions) would better prevent future violations. He is, in many ways, the exact opposite of the litigants the NAACP sought out in its carefully orchestrated campaign to revive the Equal Protection Clause in the 1930s through the 1960s. He is, in short, an awkward champion of the Fourth Amendment." *Ibid.*

While the innocent may receive some secondary benefit if the exclusionary rule actually deters illegal searches of innocent civilians, the fact remains that criminals are the primary beneficiaries of the rule. The proponents of the rule cannot ignore the fact that under the exclusionary rule "the more guilty you are the more you benefit." *Id.*, at 797. The rule creates a Fourth Amendment enforced by an "overcompensated" private attorney general, see *id.*, at 796, which can only lead to the distortion of search and seizure law.

This Court recognizes that the exclusionary rule is a costly sanction that should be employed only in "certain circumstances." *Scott*, 524 U. S., at 364. It is an "extreme sanction," *Leon*, 468 U. S., at 916, that should only be used when truly necessary. "We have previously cautioned against expanding 'currently applicable exclusionary rules by erecting additional barriers to placing truthful evidence before state juries . . . .' " *Colorado* v. *Connelly*, 479 U. S. 157, 166 (1986) (quoting *Lego* v. *Twomey*, 404 U. S. 477, 488-489 (1972)). "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986). The exclusionary rule is a direct assault on this vital societal interest. It may be the only alternative for now, but the exclusionary rule should only be employed when absolutely necessary to protect the Fourth Amendment through its unproven deterrent.

It has been over 40 years since *Mapp*. It is highly unlikely that there is any remaining aspect of search and seizure law so fundamental that it will require an expansion of the exclusionary rule. The exclusionary rule should not be extended to cover the knock and announce rule, even if that required only a fractional extension of *Mapp*. Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961) ("but we decline to go beyond it, by even a fraction of an inch").

II. Whether the exclusionary rule applies to knock and announce violations remains an open question.

The decision incorporating the knock and announce rule into the Fourth Amendment explicitly declined to address whether the independent source doctrine and the inevitable discovery rule precluded the use of the exclusionary rule in knock and announce cases. See *Wilson* v. *Arkansas*, 514 U. S. 927, 937, n. 4 (1995). Petitioner attempts to preempt this issue by invoking a pair of cases decided long before *Wilson*. See Petitioner's Brief 9-12. While this Court did suppress evidence because of violations of the federal statutory knock and announce rule in *Miller* v. *United States*, 357 U. S. 301 (1958), and *Sabbath* v. *United States*, 391 U. S. 585 (1968), these cases do not govern the exclusionary rule's application to the Fourth Amendment knock and announce rule. Those cases come from an era when the knock and announce rule had a much smaller impact on the criminal justice system than it has now, and when the understanding of the exclusionary rule was far from fully developed. While *Miller* and *Sabbath* could be relevant to a knock and announce rule that only applied to the federal government, they are irrelevant to the Fourth Amendment regime at issue in the present case.

In *Miller*, federal agents arrested Miller at his apartment. See 357 U. S., at 302. One of the agents knocked on Miller's door and was met with a " 'Who's there,' " to which the agent responded, " 'Police.' " *Id*., at 303. Miller then went to the

door, with the chain attached, and asked the officers what they were doing there. Before the agents could reply, Miller closed the door. The agents " put our hands inside the door and pulled and ripped the chain off, and entered.' " *Id*., at 303-304. Miller and his codefendant were then arrested, and marked money used in an earlier drug transaction was found in the apartment. *Id*., at 304. "The officers had no arrest or search warrant." *Ibid*.

Although the federal statutory knock and announce rule only regulated the execution of search warrants, the government conceded that the rule also applied to warrantless arrests under rules developed judicially by the D.C. Circuit. See *id*., at 306. After examining the common law history of the knock and announce rule, see *id*., at 306-309, the *Miller* Court concluded that the federal officers did not comply with the rule because they did not state their purpose before entering. See *id*., at 313-314. This made the resulting arrest unlawful, and without further discussion the Court held, "the evidence seized should have been suppressed." *Id*., at 314.

In *Miller*, the application of the exclusionary rule to knock and announce violations was not central to the decision. In the opinion, it was merely presented as a given and was not contested by the dissent. The petitioner argued that his arrest was illegal. See Brief for Petitioner in *Miller* v. *United States* (October Term 1957, No. 126), pp. 14-15. The knock and announce violation was given as one reason for the arrest's illegality. See *id*., at 15-16. The argument that illegality of the arrest requires exclusion is cursory, see *id*., at 28-29, and it contains no discussion of a causal connection between the illegality and obtaining the evidence. The United States did not even address the exclusionary rule, as it simply argued that the arrest and resulting search was legal. See Brief for United States in *Miller* v. *United States* (October Term 1957, No. 126), pp. ii, 8-13, 27-29.

The lack of discussion on the role of the exclusionary rule highlights a key difference between *Miller* and the present case.

This Court has been more willing to impose the exclusionary rule on the federal government than on the states. For example, this Court waited 47 years between the decision to impose the Fourth Amendment exclusionary rule on the federal government, see *Weeks* v. *United States*, 232 U. S. 383 (1914) and deciding to do the same to the states. See *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Another example is this Court's willingness to apply the exclusionary rule for violations of the Federal Rules of Criminal Procedure. In *Mallory* v. *United States*, 354 U. S. 449, 453, 455-456 (1957), this Court suppressed a confession because of the failure to comply with Rule 5(a)'s requirement for prompt arraignment after arrest. *Mallory*, along with *McNabb* v. *United States*, 318 U. S. 332 (1943), was an exercise of this Court's supervisory power. See *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 354 (1994). This Court has also invoked its supervisory power to enjoin federal agents from turning evidence seized in violation of Rule 41(c) over to state officials. See *Rea* v. *United States*, 350 U. S. 214, 216-217 (1956).

While the use of supervisory power to exclude evidence must be used with restraint, see *United States* v. *Payner*, 447 U. S. 727, 734-735 (1980); *Lopez* v. *United States*, 373 U. S. 427, 440 (1963), this Court will apply the exclusionary rule to the federal government for lesser wrongs than a violation of the Constitution. Since *Miller* only applied to the federal government, it had far less effect on the criminal justice system than would a decision applying the exclusionary rule to knock and announce today. The enforcement of the criminal law is primarily a function of the states. See *Payne* v. *Tennessee*, 501 U. S. 808, 824 (1991). Applying a federal criminal rule to the states through the Constitution vastly expands that rule's influence and importance. The *Miller* Court's automatic application of the exclusionary rule does not decide the much more important question before the Court today.

Miller was decided before many significant developments in the law of the exclusionary rule. It was part of a bygone era

of jurisprudence much more supportive of the exclusionary rule than modern case law. In addition to its deterrent effect, exclusion was also justified on the ground that the courts should not be accomplices to government illegality. See *Elkins* v. *United States*, 364 U. S. 206, 222-223 (1960); *McNabb*, 318 U. S. 345. This has been all but rejected, as deterrence is now the " 'prime purpose' of the rule, if not the sole one . . . ." *United States* v. *Janis*, 428 U. S. 433, 446 (1976) (quoting *United States* v. *Calandra*, 414 U. S. 338, 347 (1974)). The exclusionary rule was also once seen as an "essential part" of the Fourth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643, 657 (1961). Also, some supported the exclusionary rule through a combination of the Fourth and Fifth Amendments. See *id.*, at 661-663 (Black, J., concurring); *Agnello* v. *United States*, 269 U. S. 20, 33-34 (1925). These arguments are no longer valid. See *United States* v. *Leon*, 468 U. S. 897, 906 (1984).

Many exceptions to the rule were developed after *Miller*. While the independent source doctrine has a long pedigree, see *Segura* v. *United States*, 468 U. S. 796, 805 (1984), the other decisions limiting the exclusionary rule came after *Miller* and *Sabbath* were decided. See, *e.g.*, *Calandra*, *supra*; *Janis*, *supra*; *Rakas* v. *Illinois*, 439 U. S. 128 (1978) (standing); *Stone* v. *Powell*, 428 U. S. 465 (1976) (relitigation on habeas); *United States* v. *Leon*, 468 U. S. 897 (1984) (good-faith reliance on warrant).[2]

Sabbath adds nothing new to the exclusionary rule analysis. Like *Miller*, the case turned on whether the police violated knock and announce procedure under 18 U. S. C. § 3109. See *Sabbath*, 391 U. S., at 588. The *Sabbath* Court noted *Miller*'s "extensive analysis" of the common law knock and announce rule, see *id.*, at 589, and like *Miller*, summarily ordered the exclusion of evidence because of a knock and announce

---

2. The inevitable discovery rule is "closely related" to the independent source doctrine, but it is still a separate rule, see *Nix* v. *Williams*, 467 U. S. 431, 443 (1984), that was formulated after *Miller* and *Sabbath*.

violation. See *id.*, at 586, 591. This simple application of *Miller*, decided before knock and announce was incorporated into the Fourth Amendment, and before this Court's further development of the exclusionary rule, has little bearing on the present case.

Hudson's reliance on *Miller* and *Sabbath* is part of a larger argument. He contends that since a knock and announce violation makes the search or arrest illegal, the exclusionary rule must apply. See Pet. Brief at 15. Besides the substantial conflict between this contention and the independent source and inevitable discovery doctrines, the argument also overstates the relationship between a Fourth Amendment violation and the exclusionary rule. The exclusionary rule is not a "necessary corollary" to the Fourth Amendment. See *Leon*, 468 U. S., at 905-906. The question of whether to impose the exclusionary sanction is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983). This issue is resolved weighing the costs and benefits of excluding the evidence in that case, see *Leon*, *supra*, at 906-907, which never occurred in *Miller* and *Sabbath*. A careful weighing of the costs and benefits of exclusion in this case shows that the exclusionary rule should not apply to knock and announce violations.

III. The exclusionary rule should not be extended to cover knock and announce violations.

The balancing of interests necessary to determine whether to apply the exclusionary rule, see *United States* v. *Leon*, 468 U. S. 897, 906-907 (1984), should be made in the context of the general balance of interests behind the rule. When applied to the standard situation like the use of the fruits of a warrantless search without probable cause, or a *Terry* v. *Ohio*, 392 U. S. 1 (1968) violation, as evidence of guilt, the exclusionary rule is just barely acceptable. Although it contains genuine

costs and uncertain benefits, the rule can still be justified, although just barely. See Part I, *supra*. The "drastic measure," *United States* v. *Janis*, 428 U. S. 433, 459 (1976), of excluding evidence because of a Fourth Amendment violation should not be employed if there is any genuine increase in costs or decrease in benefits relative to the balance struck in *Mapp* v. *Ohio*, 367 U. S. 643 (1961). For example, good faith reliance on a warrant, see *Leon*, *supra*, at 922, or use of the evidence at a deportation hearing, see *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1409 (1984), justify exceptions to the exclusionary rule. The "normal" application of the exclusionary rule is balanced on a knife's edge. Any substantial push means that the rule should not apply.

The exclusionary rule is not applied mechanically to every Fourth Amendment violation. Those asking to use this extraordinary sanction should bear a heavy burden of justification. "Although we have held that these costs [of excluding evidence] to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's 'costly toll,' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364-365 (1998) (footnote omitted) (quoting *United States* v. *Payner*, 447 U. S. 727, 734 (1980)).

A knock and announce violation lacks the characteristics that justify exclusion. The exclusionary rule's deterrent operates to remove "inducements to unreasonable invasions of privacy . . . ." *Leon*, 468 U. S., at 900. If there is no causal connection between the police illegality and the evidence, then the exclusionary rule should not apply. The knock and announce rule presents this lack of cause and effect, which is a sufficient reason to decline to impose the exclusionary sanction.

The inevitable discovery rule and the independent source doctrine demonstrate this limit to the exclusionary rule. Under the independent source doctrine, a prior illegal search does not

require suppressing evidence "if police had an 'independent source' for discovery of the evidence." *Segura* v. *United States*, 468 U. S. 796, 805 (1984). This rule starts with the decision in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920). See *Segura*, *supra*, at 799. *Silverthorne* held that the government could not use information from papers found through an illegal search as the basis for a subpoena of books and records held by the victim of that search. See 251 U. S., at 391-392. In dismissing the government's contention that it could use the information, Justice Holmes noted, "The government now, while in form repudiating and condemning the illegal seizure, seeks to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Id.*, at 391. This highlights the cause-effect relationship that is central to the exclusionary rule's deterrent.

The exclusionary rule is premised on the government getting the evidence through illegal means. The independent source doctrine addresses what happens when there is a break in the chain between the government's illegality and the evidence. "If knowledge of [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the government from its wrong cannot be used by it in the way proposed." *Id.*, at 392. If the causal relationship between the illegality and the relevant evidence is broken, the exclusionary rule's deterrence is compromised, and there is less reason for exclusion.

This principle was taken to its logical conclusion in the inevitable discovery case, *Nix* v. *Williams*, 467 U. S. 431 (1984). *Nix* held that the exclusionary rule did not apply to suppress the body of a murder victim that was found through illegal questioning, because the discovery of the body was inevitable even if the illegal questioning had never taken place. See *id.*, at 449-450. This was derived from the independent source rule of *Silverthorne* and *Wong Sun* v. *United States*, 371 U. S. 471 (1963). See 467 U. S., at 442. Although this was not a Fourth Amendment case, the same exclusionary rule princi-

ples applied. See *id*., at 442, 446. "The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Id*., at 442-443. *Nix* began by analyzing the "fruit of the poisonous tree" doctrine. The purpose behind this rule is to deter police misconduct by making sure that "the prosecution is not to be put in a better position than it would have been in if no illegality had transpired." *Id*., at 443. The Court took this principle to the next logical step and developed the rationale for inevitable discovery doctrine. "By contrast, the derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." *Ibid*. (emphasis in original).

Two reasons support this corollary to the independent source doctrine. First, the extra harm caused by the loss of evidence that would have been found tips the balance of interests against exclusion. Second, applying the exclusionary rule in this situation would lead to overdeterrence. The law of search and seizure is complex, which creates problems for the exclusionary rule's deterrent. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 731 (1970); see also Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L. Rev. 736, 740-741 (1972). Police cannot be expected to know with certainty the Fourth Amendment consequences of every search and seizure. "We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson* v. *Creighton*, 483 U. S. 635, 644 (1987). The possible illegality of the search or seizure must be a part of every officer's calculations. If the exclusionary rule can put law enforcement in a worse position than if the activity never happened, then officers will be deterred from doing legal activities. The very costly exclusionary rule must deter accurately if it is to be imposed. See *supra*, at 9. It should not

apply where it threatens to deter legal conduct in the pursuit of law enforcement.

These principles apply with equal force to the knock and announce rule. There is no legitimate connection between the knock and announce violation and the discovery of evidence. The knock and announce rule is only relevant when police are conducting an otherwise valid search or effecting a lawful arrest.[3] If the suspect would not have destroyed the evidence after a knock and announce, then the situation is the same as the inevitable discovery rule. Since the police would have found the evidence without the violation, applying the exclusionary rule would put the police in a worse position than if the violation had never occurred. As there is no practical difference between *Nix* and this situation, the exclusionary rule would not apply.

Although the same cannot be said if the suspect were to destroy the evidence after a knock and announce, the analysis does not change. While the exclusionary rule seeks to deter police illegality, it cannot be used to encourage or reward criminal behavior. One reason that the exclusionary rule does not apply to deportation proceedings is that applying the rule would force courts to shut their eyes to an ongoing crime. "The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime." See *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1047 (1984). Similarly, the exclusionary rule does not prevent the use of illegally obtained evidence to impeach the defendant, because the exclusionary rule cannot act as a shield that allows perjury to go unchallenged. See *United States* v. *Havens*, 446 U. S. 620, 626-627 (1980). Destroying property in anticipation of a lawful seizure is a crime. See 18 U. S. C. § 2232(a). The courts cannot shut their eyes to this criminal activity when deciding whether to

---

3. If the search or seizure violates the Fourth Amendment for some other reason, then knock and announce is unnecessary for suppression.

apply the exclusionary rule. Also, averting the destruction of the evidence is grounds for dispensing with the knock and announce rule. See *Richards* v. *Wisconsin*, 520 U. S. 385, 394 (1997). The possibility that a knock and announce would lead to the destruction of evidence cannot be a legitimate ground to distinguish the inevitable discovery rule.

Applying the exclusionary rule to knock and announce cases will lead to the destruction of evidence. Since a violation will lead to the suppression of evidence from an otherwise legal search, officers will be more likely to knock and announce absent the most clearly compelling exigent circumstances. Officers will not be willing to take the risk of suppression in the many situations that they cannot predict the outcome with certainty, even though a failure to knock and announce may be upheld by the courts. This will lead to the destruction of evidence in situations where exigent circumstances would justify dispensing with knock and announce, a classic example of overdeterrence. See *supra*, at 9-10.

The *Nix* Court noted that where an officer knows that discovering the evidence is inevitable, "he will try to avoid engaging in any questionable practice" because "there will be little to gain from taking dubious 'shortcuts' to obtain the evidence." 467 U. S., at 445-446. In this situation, even without the threat of the exclusionary rule, "[s]ignificant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct." *Ibid.*

This consideration applies with even greater force to the knock and announce rule. In addition to the alternative incentives mentioned in *Williams*, police have a more substantial incentive to comply with the knock and announce—safety. Along with preserving privacy and property, the knock and announce rule also helps protect the safety of the officers and the occupants of the dwelling being entered. See, *e.g.*, *State* v. *Bamber*, 630 So. 2d 1048, 1052 (Fla. 1994); 2 W. LaFave,

Search and Seizure § 4.8(b), p. 665 (4th ed. 2004). "The unannounced breaking and entering into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measure which he otherwise would not have taken had he not known that a warrant had been issued to search his home." *State* v. *Carufel*, 112 R. I. 664, 668-669, 314 A. 2d 144, 147 (1974). This risk of an armed encounter with a frightened civilian is more incentive to comply with the knock and announce rule than the exclusionary rule could ever provide.

Applying the exclusionary rule to knock and announce violations has significantly higher costs than those normally associated with the rule. It will suppress evidence that would have been discovered absent the violation, and will lead to the destruction of evidence by suspects. The benefits of the rule are also much smaller than normal, as officers already have substantial incentives to knock and announce absent exigent circumstances. Since the balance of interests supporting the exclusionary rule are tenuous at best in normal circumstances, there is no justification for imposing this drastic remedy on the knock and announce rule.

CONCLUSION

The decision of the Michigan Court of Appeals should be affirmed.

October, 2005

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation