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Waiting for the Other Shoe: Hudson and the Precarious State of Mapp

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Waiting for the Other Shoe: *Hudson* and the Precarious State of *Mapp*

By David A. Moran*

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INTRODUCTION

I have no idea whether my death will be noted in the *New York Times*. But if it is, I fear the headline of my obituary will look something like: “Professor Dies; Lost *Hudson v. Michigan*¹ in Supreme Court, Leading to Abolition of Exclusionary Rule.” The very existence of this Symposium panel shows, I think, that my fear is well-grounded.

On the other hand, I am not quite as fearful that *Hudson* foreshadows the complete overruling of *Mapp v. Ohio*² and *Weeks v. United States*³ as I was when I published an article just three months after the *Hudson* decision came down.⁴ The Supreme Court does not seem to be in a hurry to take on the exclusionary rule—at least not directly—and only a tiny handful of lower courts since *Hudson* have applied the reasoning of the *Hudson* majority to deny exclusion of evidence for constitutional violations other than the knock-and-announce rule.⁵

In this Symposium, then, I propose to do two different things. First, in the event that my worst fears are realized and *Hudson* comes to be seen as a historic case leading to a sea change in the law, I want to create a record of some of the background events that led to the decision so that future scholars might understand how it is that I came to litigate the *Hudson* case and how it is that I managed to lose it.

Second, I will review developments since *Hudson* in order to gauge the likelihood that my worst fears will be realized in the foreseeable future. In particular, I will look at the depressing effect *Hudson* seems to have had on the Court’s Fourth Amendment docket, and I will examine the more aggressive approach to *Hudson* that a few lower courts have taken. I will also briefly examine the two Fourth Amendment cases the Court recently agreed to decide next term and consider whether either of those cases is likely to result in any further damage to the exclusionary rule.

Thus, my presentation will focus on the events leading up to *Hudson* and the fallout since *Hudson*, but I will not analyze the opinion, concurrence, or dissent in *Hudson* itself. I will leave that task to others, both because I have already published a fairly lengthy analysis of the various opinions in *Hudson*⁶ and because my involvement in the case makes it difficult for me to step back and reanalyze the decision with any objectivity, even now.

1. *Hudson v. Michigan*, 126 S. Ct. 2159 (2006).

2. *Mapp v. Ohio*, 367 U.S. 643 (1961).

3. *Weeks v. United States*, 232 U.S. 383 (1914).

4. See David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 283 (2006) (positing that the *Hudson* decision “signals the end of the Fourth Amendment as we know it”).

5. See *infra* Part II.B.

6. See Moran, *supra* note 4, at 295–309.

I. WHEN BAD THINGS HAPPEN TO GOOD CASES: HOW BAD TIMING TURNED A FOURTH AMENDMENT FOOTNOTE INTO A POTENTIAL BLOCKBUSTER

If my worst fears are realized, scholars someday will be wondering, “What was Moran thinking when he brought this case to the Supreme Court?” This is my defense.

A. ALL ACCORDING TO PLAN: FINDING BOOKER T. HUDSON, JR. AND THE FIRST ARGUMENT

The first thing that needs to be understood as to how *Hudson* came to be is that the Michigan Supreme Court has been one of the nation’s most consistently conservative courts since the late 1990s.⁷ Because conservative justices dominate, the court has, on occasion, been willing to go farther out on a limb to the right than any other court. In the criminal procedure area, this willingness to be an outlier resulted in two criminal procedure cases reaching the U.S. Supreme Court, *Halbert v. Michigan*⁸ and *Hudson*. Since I was the (winning) attorney for the indigent defendant in *Halbert*, to understand why I got involved in *Hudson* requires me to say a word about *Halbert*.

In 2000, thanks to the Michigan Supreme Court’s decision in *People v. Bulger*,⁹ Michigan became the first and only state since 1963 to deny the assistance of counsel for first-tier direct appeals to most indigent defendants convicted of felonies.¹⁰ According to the Michigan Supreme Court, indigent defendants who plead guilty or nolo contendere to felonies are perfectly capable of figuring out how to file their own applications to appeal their convictions and sentences.¹¹

I argued and lost *Bulger* in the Michigan Supreme Court, and I served as lead counsel in *Halbert*, where the U.S. Supreme Court overruled *Bulger* by a six to three vote. As I litigated the right-to-counsel cases in the lower federal courts and the Supreme Court, it became clear that the most important

7. I’m not the only one to notice this conservatism. See generally Sarah K. Delaney, High Court Study, *Stare Decisis v. the “New Majority”: The Michigan Supreme Court’s Practice of Overruling Precedent, 1998–2002*, 66 ALB. L. REV. 871 (2003) (recognizing that the Michigan Supreme Court is dominated by conservative justices); John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 271 (2001) (noting that “five out of seven Michigan Supreme Court justices are or were members of the conservative Federalist Society”).

8. *Halbert v. Michigan*, 545 U.S. 605 (2005).

9. *People v. Bulger*, 614 N.W.2d 103 (Mich. 2000).

10. In 1963, the Supreme Court held in *Douglas v. California*, 372 U.S. 353 (1963), that the Fourteenth Amendment Due Process and Equal Protection Clauses guaranteed indigent defendants the assistance of counsel for first-tier direct appeals from felony convictions. *Id.* at 357.

11. See *Bulger*, 614 N.W.2d at 113–15 (concluding that indigents would have meaningful access to Michigan appellate courts because of the simplicity of plea proceedings and appeals).

argument I had on my side was that no other state or federal court had gone as far as the Michigan Supreme Court had in denying counsel to indigents.

It was through this lens that I viewed the Michigan Supreme Court's 1999 decision in *People v. Stevens*¹² as extremely vulnerable. In *Stevens*, the Michigan Supreme Court held, over the dissent of two justices, that evidence found inside a home following a knock-and-announce violation was not subject to the exclusionary rule because, according to the majority, had the police bothered to knock and announce pursuant to the warrant, they would have "inevitably discovered" the same evidence.¹³

At the time *Stevens* came down, no other state or federal court had ever held that exclusion was an unavailable remedy for a knock-and-announce violation. Indeed, the U.S. Supreme Court had itself twice excluded evidence following violations of the federal knock-and-announce rule¹⁴ decades before the Court finally recognized in 1995 that the knock-and-announce rule is incorporated into the Fourth Amendment's reasonableness clause.¹⁵

Not only was *Stevens* an outlier, it was a harshly criticized outlier. Professor LaFave, for one, devoted several pages of his seminal Fourth Amendment treatise to excoriating the logic of the *Stevens* decision, characterizing the majority as adopting an "Alice-in-Wonderland version of inevitable discovery"¹⁶ under which the police can always claim, "'if we hadn't done it wrong, we would have done it right.'"¹⁷

12. *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999).

13. As the majority held in *Stevens*:

Given that the evidence would have been inevitably discovered, allowing the evidence in does not put the prosecution in any better position than it would be in had the police adhered to the knock-and-announce requirement. However, excluding the evidence puts the prosecution in a worse position than it would have been in had there been no police misconduct. Therefore, the inevitable discovery exception to the exclusionary rule should be available to the prosecution in the present case.

Id. at 62.

14. See *Sabbath v. United States*, 391 U.S. 585, 586 (1968) ("We hold that the method of entry vitiated the arrest and therefore that the evidence seized in the subsequent search incident thereto should not have been admitted at petitioner's trial."); *Miller v. United States*, 357 U.S. 301, 313-14 (1958) ("Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.");

15. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

16. 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 273 (4th ed. 2004).

17. *Id.* at 272 (quoting *State v. Topanotes*, 76 P.3d 1159, 1164 (Utah 2003)). For examples of other commentators who criticized *Stevens*, see, for example, 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, 174-75 (2004); Robin L. Gentry, Note, *Why Knock? The Door Will Inevitably Open: An Analysis of People v. Stevens and the Michigan*

I admit I was surprised when the Seventh Circuit issued a decision in 2002 adopting the logic of *Stevens*.¹⁸ But I still thought the Supreme Court, if given an opportunity to review the issue, would view *Stevens* as a radical misinterpretation of the inevitable discovery doctrine. My confidence was based on the fact that other state and federal appellate courts continued to routinely exclude evidence found after knock-and-announce violations, and at least ten of those courts had explicitly rejected the inevitable discovery argument that *Stevens* had accepted.¹⁹

I hope I can be forgiven, then, for thinking that *Stevens* was a prime candidate for overruling in the U.S. Supreme Court. Beginning in 2001, I decided to look for a case to accomplish just that.

As a law professor specializing in criminal procedure, I get invited to give a lot of speeches to groups of practicing criminal defense attorneys. Starting in 2001, no matter what the subject of my speech, I always threw in an aside in which I harshly criticized *Stevens* and then said something like, "And if any of you have a case with a clear knock-and-announce violation that you cannot win because of *Stevens*, give me a call and I'll file a cert petition for you."

In February 2005, just as I was preparing to argue *Halbert*, I received a call out of the blue from a Detroit attorney named Richard Korn. Mr. Korn told me that he had been at one of my speeches some years earlier, and he was wondering if my offer was still valid. He went on to explain that the Michigan Supreme Court had just denied his application for leave to appeal the conviction of his client, one Booker T. Hudson, Jr., who had been convicted of cocaine possession after a knock-and-announce violation. I agreed to take a look at the file.

When the file arrived a few days later, I realized that the case was the perfect vehicle to challenge *Stevens*. First, there was never any dispute that a knock-and-announce violation occurred since the officer who led the team that executed the warrant on Mr. Hudson's home candidly admitted in a suppression hearing that he had no information justifying dispensing with the requirement, that no one had knocked on the door, and that the police officers immediately burst through the door without waiting after yelling,

Supreme Court's Departure From Fourth Amendment Protection, 46 WAYNE L. REV. 1659, 1659-60 (2000).

18. *United States v. Langford*, 314 F.3d 892, 894-95 (7th Cir. 2002), *cert. denied*, 540 U.S. 1075 (2003).

19. See *United States v. Dice*, 200 F.3d 978, 984-86 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1220 (8th Cir. 1993); *Mazepink v. State*, 987 S.W.2d 648, 657-58 (Ark. 1999), *cert. denied*, 528 U.S. 927 (1999); *Kellom v. State*, 849 So. 2d 391, 396 (Fla. Dist. Ct. App. 2003); *People v. Tate*, 753 N.E.2d 347, 351-52 (Ill. App. Ct. 2001); *State v. Lee*, 821 A.2d 922, 931-46 (Md. 2003); *State v. Taylor*, 733 N.E.2d 310, 312 (Ohio Ct. App. 1999); *Commonwealth v. Rudisill*, 622 A.2d 397, 400 n.7 (Pa. Super. Ct. 1993); *State v. Lee*, 836 S.W.2d 126, 128-30 (Tenn. Crim. App. 1991); *Price v. State*, 93 S.W.3d 358, 370-72 (Tex. App. 2003).

"Police! Search Warrant!"²⁰ Given this testimony, the prosecutor at the suppression hearing conceded that there was a knock-and-announce violation.²¹

A second reason I thought the case was ideal was that Mr. Hudson was convicted of a relatively minor offense, simple possession of five rocks of crack cocaine, for which he received no jail time at all. At the time of the raid, Mr. Hudson was a middle-aged man living with his wife in a single-family home in Detroit. I thought Mr. Hudson would be about as sympathetic as any criminal defendant trying to suppress evidence could be to the Court.

So I filed a petition for certiorari in April 2005. On June 27, 2005, just four days after ruling in my favor in *Halbert*, the Court granted the petition in *Hudson*.²²

As I explained in my earlier article, I really thought the case was simply about the inevitable discovery doctrine and the knock-and-announce rule, not about the continuing vitality of the exclusionary rule itself.²³ I wrote a brief that was all about the proper contours of the inevitable discovery doctrine and the need to suppress evidence in order to compel police officers to comply with the knock-and-announce rule. I cited *Mapp* and *Weeks* only in passing and just for the proposition that other remedies would not be effective in enforcing the knock-and-announce requirement.²⁴

My understanding of what the case was about was borne out by the oral argument on January 9, 2006. There was no hint in that argument that the Court, or even any Justice, was prepared to reconsider *Mapp* and *Weeks*. The argument went well, or so I thought. It seemed clear to me (and to several journalists who observed the argument) that a majority of the Court, including, in particular, Justice Sandra Day O'Connor, was prepared to reverse and bring Michigan back into line with all of the other jurisdictions (except the Seventh Circuit) that suppressed evidence as a result of knock-and-announce violations.²⁵

20. See Petition for Writ of Certiorari at 7–9, *Hudson v. Michigan*, 547 U.S. 586 (2006) (No. 04-1360) (testimony of Officer Jamal Good).

21. *Id.* at 9–10 (concession of prosecutor).

22. *Hudson v. Michigan*, 545 U.S. 1138 (2005) (order granting petition for certiorari).

23. See Moran, *supra* note 4, at 298–99.

24. Brief of Petitioner at 36, 40, 42, *Hudson v. Michigan*, 126 S. Ct. 2166 (2006) (No. 04-1360) (citing *Mapp v. Ohio*, 367 U.S. 643, 651–52, 655 (1961) and *Weeks v. United States*, 232 U.S. 383, 393 (1914)).

25. See Moran, *supra* note 4, at 299 & n.78. Both Linda Greenhouse of the *New York Times* and Charles Lane of the *Washington Post* wrote after the decision came out that it appeared that a majority including Justice O'Connor was prepared to rule in Mr. Hudson's favor after the first argument and that this majority was apparently lost when Justice O'Connor was replaced by Justice Alito. Linda Greenhouse, *Court Limits Protection Against Improper Entry*, N.Y. TIMES, June 16, 2006, at A28; Charles Lane, *Court Eases "No Knock" Search Ban; Illegally Collected Evidence Allowed*, WASH. POST, June 16, 2006, at A1.

Twenty-two days later, on January 31, 2006, Samuel A. Alito was sworn in to replace Justice O'Connor. At that point, I began to get nervous. If the vote in *Hudson* was five to four with Justice O'Connor in the majority, I knew I would be getting a reargument order shortly after Justice Alito took office. So, I held my breath.

Indeed, the Court quickly ordered reargument in one case just seventeen days after Justice Alito joined it.²⁶ A second reargument order came out in another case in March,²⁷ but as March turned into April, I became reasonably confident that *Hudson* would not be reargued. After all, the Court's argument calendar was scheduled to end on April 26, 2006. By the time I spoke to a student group at the Michigan State University College of Law on April 14, I felt confident enough to answer a question as to the likelihood that Justice Alito's appointment would affect the outcome in *Hudson* with a flat statement that I would have heard by then if the case was going to be reargued.

Boy, was I wrong. On Wednesday, April 19, 2006, I received a phone call from Denise McNerney, the assistant clerk at the Court, and the conversation went almost exactly like this:

McNerney: David, I'm calling to inform you that the Court has ordered reargument in *Hudson v. Michigan*.

Me: Bummer.

McNerney: So, how about next Wednesday?

Me: (Pause). Denise, you must be kidding.

Fortunately, my opponent, Timothy Baughman of the Wayne County Prosecutor's Office, and I agreed that it was out of the question for us to travel to Washington and reargue the case in one week. The Court relented, and Ms. McNerney called back a short time later to inform us that the case was set for reargument twenty-nine days later, on May 18, 2006—some three weeks after the Court had otherwise completed its oral argument calendar.

B. THE REARGUMENT: ALL ABOUT MAPP

I estimate that I have delivered some two hundred appellate arguments to state and federal courts in my career, but none of them could have prepared me for what I encountered at the reargument. The questioning seemed much more aggressive than it was at the first argument, but that was not what was so surprising.

What so surprised me was the line of questioning Justice Scalia developed at the very end of my argument:

Justice Scalia: What about—you talk about deterrence. What about their not getting promoted? I assume that—that police departments, even if you have some maverick officers, that the

26. *Garcetti v. Ceballos*, 546 U.S. 1162 (2006) (setting the case for reargument).

27. *Kansas v. Marsh*, 547 U.S. 1037 (2006) (setting the case for reargument).

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

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

Justice Scalia: Why? Really? [Y]ou know, I'm the police commissioner and I have a policy that you—you obey the law, you knock and announce, and—and I know that this particular officer disregards it all the time. You really think that's not going to go in his record?

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

Justice Scalia: *Mapp* was a long time ago. It was before 1983 was being used, wasn't it?

Mr. Moran: It was before 1983 was . . . being used. But I don't think section 1983 has changed the landscape here. I—I don't think *Mapp* is ripe for overruling, and in fact, the Criminal Justice Legal Foundation, one of the *amici* for the other side, concedes that tort remedies cannot, at this time, substitute for the exclusionary rule.²⁸

Until that moment, I honestly had no clue that the entire exclusionary rule had come into play. I do not think some of the Justices yet realized it, either. After I sat down, one of my co-counsel told me that Justice Souter had actually snorted when Justice Scalia asked if the threat of a withheld promotion could deter officers from committing Fourth Amendment violations.

The rest, as they say, is history. Justice Scalia's majority opinion in *Hudson* contained a full-frontal attack on the rationale of the exclusionary rule; and it treated *Mapp* as an outdated precedent because of the increased availability of civil remedies and the alleged improvements in "police professionalism" since *Mapp*.²⁹ As Justice Scalia so colorfully put it in explaining why *Mapp* can no longer be seen as controlling,

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be

28. Transcript of Oral Argument at 31–33, *Hudson*, 126 S. Ct. 2159 (No. 04-1360).

29. *Hudson*, 126 S. Ct. at 2166–68.

forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.³⁰

It seems clear that *Hudson* would have amounted to an outright overruling of *Mapp* were it not for Justice Kennedy's strange concurring opinion. In the first paragraph of that concurrence, he wrote that, despite his decision to sign on to the parts of Justice Scalia's majority opinion denigrating *Mapp* and thereby providing the fifth vote for those statements, "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."³¹

Despite Justice Kennedy's anodyne reassurances, just about everyone who read *Hudson* when it came down in June 2006 understood that the continuing vitality of the exclusionary rule was most certainly in doubt.³² In my earlier article written just a few months after *Hudson* came down, I described the exclusionary rule as "on life support" and suggested that the Court could well overrule *Mapp* itself "within a few years."³³ In the next section, I will examine how the exclusionary rule has fared since I made that prediction.

30. *Id.* at 2167.

31. *Id.* at 2170 (Kennedy, J., concurring). I attempted in my earlier article to discern exactly what Justice Kennedy was thinking when he simultaneously signed on to the key parts of Justice Scalia's majority opinion and wrote his separate concurrence. See Moran, *supra* note 4, at 303–04. I do not have any better idea what he was thinking now than I did then, so I will not give it another shot here.

32. For a sampling of some of the early scholarly commentary recognizing that *Hudson* was a threat to the exclusionary rule itself, see, e.g., Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 788 (2007) (recognizing that the majority opinion in *Hudson* "clearly implies that the exclusionary rule's days are numbered"); Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751, 751 (2007) (recognizing that the "long-range effect" of *Hudson* "may be the actual demise of the exclusionary rule itself"); Erwin Chemerinsky, *An Overview of the October 2005 Supreme Court Term*, 22 TOURO L. REV. 873, 879 (2007) (concluding that after *Hudson*, "the continued existence of the exclusionary rule [and] the exceptions that will be created, all depend on Justice Kennedy"); Thomas Y. Davies, *An Account of Mapp v. Ohio that Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 619 (2007) (recognizing that *Hudson* had put the exclusionary rule in doubt); David J.R. Frakt, *Fruitless Poisonous Trees in a Parallel Universe: Hudson v. Michigan, Knock-and-Announce, and the Exclusionary Rule*, 34 FLA. ST. U. L. REV. 659, 715–30 (2007) (arguing that *Hudson* threatens to remove the exclusionary sanction from large categories of Fourth Amendment violations, including, *inter alia*, violations for which there will be no excludable fruit and violations where the police could have performed the same search lawfully); Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 28 n.76 (arguing that the Court's refusal to exclude evidence in *Hudson* and *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), "signals growing doubts about the future viability of the exclusionary rule itself").

33. Moran, *supra* note 4, at 295, 307–09.

II. TWENTY MONTHS OF SILENCE: WHEN (IF EVER) WILL *MAPP* BE TESTED?

Anyone who read Justice Scalia's majority opinion to mean that a direct assault on *Mapp* would soon be forthcoming must have been disappointed by the two terms that have (nearly) passed since *Hudson* was decided. Not only has the Court not taken any Fourth Amendment cases directly presenting the *Mapp* issue, the Court has hardly taken any Fourth Amendment cases at all. It is as if the Court wishes to stay away from a divisive subject until it is clear there is a majority prepared to act.

Until the past few months, the federal courts of appeals and state supreme courts had also reacted cautiously to *Hudson*. Those courts had, of course, applied *Hudson* to deny exclusionary relief to victims of knock-and-announce violations. Only in the past few months have a few courts begun to apply *Hudson*'s rationale to new situations.³⁴ It is these cases, I believe, that will finally force the Court's hand, but not until after the crucial presidential election of November 2008.

A. WHY THE COURT IS AVOIDING A *MAPP* SHOWDOWN FOR NOW

In my earlier article, I suggested that the Court might deny petitions directly raising the *Mapp* issue because Justice Kennedy's concurring opinion creates uncertainty.³⁵ I now believe this is true. In fact, I believe the Court, for nearly two years, avoided taking criminal cases presenting Fourth Amendment issues as a class because most of the members of the Court did not want to be confronted with an opportunity to reaffirm or overrule *Mapp* squarely until the composition of the Court changes.

For nearly a century, the Court heard and decided, on average, four Fourth Amendment cases per year.³⁶ In the six terms immediately preceding *Hudson* (and including the *Hudson* term itself), the Court decided thirty cases in which the Fourth Amendment was the basis of decision, and twenty-one of those thirty cases (seventy percent) were criminal cases, that is, cases in which a criminal defendant was attempting to suppress evidence.³⁷

34. See *infra* Part II.B.

35. As I put it then, "Perhaps the uncertainty in Justice Kennedy's position will cause both the other four justices in the *Hudson* majority and the four justices in the *Hudson* dissent to vote to deny the petition." Moran, *supra* note 4, at 308. I also hedged my bet by suggesting that perhaps a bloc of four justices might feel confident enough about Justice Kennedy's position on *Mapp* to vote to accept a petition squarely putting *Mapp* into play. *Id.* at 308–09.

36. In his dissent in *Hudson*, Justice Breyer noted that the Court had decided 332 Fourth Amendment cases in the 88 years between 1914, when *Weeks* was decided, and 2002. *Hudson v. Michigan*, 126 S. Ct. 2159, 2176 (Breyer, J., dissenting) (citing W. GREENHALGH, *THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS 27–130* (2d ed. 2003)).

37. The twenty criminal cases, not including *Hudson*, decided from October 2000 Term to October 2005 Term were *Samson v. California*, 547 U.S. 843 (2006); *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Georgia v. Randolph*, 547 U.S. 103 (2006); *United States v. Grubbs*, 547 U.S. 90 (2006); *Illinois v. Caballes*, 543 U.S. 405 (2005); *Hübel v. Sixth Judicial District Court*, 542 U.S. 177

After *Hudson* was decided, however, the Court seemed to lose its appetite for a steady diet of Fourth Amendment cases for nearly two years. In the October 2006 Term, the Court heard argument in exactly one Fourth Amendment case³⁸ and peremptorily reversed in two more.³⁹ Only one of those three cases, *Brendlin v. California*, was a criminal matter; the question considered in that case, whether passengers in a vehicle stopped by the police are seized and thereby have “standing” to complain about the legality of the stop, could have just as easily arisen in a civil suit as in a criminal case.⁴⁰ More to the point, the question presented in *Brendlin* was a narrow one that offered the parties (and the Justices) no opportunity to argue the merits of the exclusionary rule.

For October 2007 Term, the argument calendar is now full, and the Court has granted certiorari in only one Fourth Amendment case, *Virginia v. Moore*.⁴¹ Like *Brendlin*, *Moore* is a criminal case that presents a question that goes directly to the scope of the constitutional right itself, namely whether the Fourth Amendment is violated when a police officer arrests a defendant for a minor offense when state law generally prohibits officers from performing custodial arrests for that offense.⁴²

While I suppose it is theoretically possible that *Moore* might have been decided on exclusionary-rule grounds, the briefing and the arguments in that case steered well clear of raising any questions about the legitimacy of *Mapp*. When *Moore* was argued on January 14, 2008, *Hudson* was never mentioned, and no Justice even hinted that the Court was considering using *Moore* as a vehicle to re-examine *Mapp*.

In sum, the Court had largely stayed away from Fourth Amendment cases the past two terms and, in particular, had stayed far away from any

(2004); *Thornton v. United States*, 541 U.S. 615 (2004); *United States v. Flores-Montano*, 541 U.S. 149 (2004); *Illinois v. Lidster*, 540 U.S. 419 (2004); *Maryland v. Pringle*, 540 U.S. 366 (2003); *United States v. Banks*, 540 U.S. 31 (2003); *Kaupp v. Texas*, 538 U.S. 626 (2003); *Kirk v. Louisiana*, 536 U.S. 635 (2002); *United States v. Drayton*, 536 U.S. 194 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Knights*, 534 U.S. 112 (2001); *Kyllo v. United States*, 533 U.S. 27 (2001); *Florida v. Thomas*, 532 U.S. 774 (2001); *Arkansas v. Sullivan*, 532 U.S. 769 (2001); and *Illinois v. McArthur*, 531 U.S. 326 (2001). The nine civil cases were: *Muehler v. Mena*, 544 U.S. 93 (2005); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Devenpeck v. Alford*, 543 U.S. 146 (2004); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Board of Education v. Earls*, 536 U.S. 822 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

38. *Brendlin v. California*, 127 S. Ct. 2400 (2007).

39. *L.A. County v. Rettele*, 127 S. Ct. 1989 (2007); *Scott v. Harris*, 127 S. Ct. 1769 (2007).

40. The Court unanimously concluded in *Brendlin* that passengers in a vehicle stopped by the police are seized within the meaning of the Fourth Amendment. *Brendlin*, 127 S. Ct. at 2407.

41. *Virginia v. Moore*, 128 S. Ct. 28 (2007) (order granting certiorari).

42. The precise question presented in *Moore* is as follows: “Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?” Petition for Writ of Certiorari, *Moore*, 128 S. Ct. 28 (No. 06-1082), at i.

Fourth Amendment cases that might put *Mapp* into play. Indeed, the Court had not even taken any cases that might have provided an opportunity to extend *Hudson's* anti-exclusionary rhetoric to contexts beyond the knock-and-announce rule.

The reason the Court was reticent to take on such cases after *Hudson*, I suggest, is the lingering uncertainty as to what would actually happen if the Court had a chance to overrule *Mapp* or extend *Hudson*. It takes four Justices to grant certiorari, of course, and there were four Justices in *Hudson* who seemed prepared to overrule *Mapp* then and there.

But if those four Justices were to grant certiorari in a case in which the question presented is something like, "Should *Mapp v. Ohio* be overruled?" or "Should the rationale of *Hudson* be extended to cases where the police could have obtained a warrant but failed to do so?" they could not be certain which Justice Kennedy would show up on the conference day after arguments. Perhaps it would be the same Justice Kennedy who supported the parts of Justice Scalia's opinion in *Hudson* that denigrated the exclusionary rule. If that Justice Kennedy showed up, there would be a majority to overrule *Mapp* or, at the very least, to extend *Hudson* so far as to make *Mapp* largely meaningless.

But perhaps the Justice Kennedy who would show up after argument would be the same Justice Kennedy who issued a separate concurrence in *Hudson* stating that the exclusionary rule is not in doubt. If that Justice Kennedy showed up, granting certiorari in such a case could result in a ringing reaffirmation of *Mapp* or, at least, a strong refusal to extend *Hudson* beyond the knock-and-announce context.

By the same token, the four dissenters in *Hudson* would likely loathe to grant certiorari in any such case, because they also do not know which Justice Kennedy would show up to the post-argument conference. Thus, while there are clearly four Justices who are poised to overrule *Mapp* entirely or severely undercut it by extending *Hudson*, and four more Justices who are equally ready to reaffirm *Mapp* and/or limit *Hudson* to its narrow context, there were not four Justices who were willing to risk granting certiorari in any such cases until and unless Justice Kennedy tipped his hand or there was a change in personnel on the Court.

I must concede that the Court's recent decision to grant certiorari in *Herring v. United States*⁴³ calls the above analysis into question, but not by very much. *Herring*, which will be heard in October 2008 Term, is a criminal case and it clearly concerns the proper scope of the exclusionary rule. The issue in *Herring* is whether evidence found during a search incident to an arrest should be excluded when the arresting officer relied on information negligently provided by other law enforcement officers to conclude that

43. *Herring v. United States*, 492 F.3d 1212 (11th Cir. 2007), cert. granted, 76 U.S.L.W. 3425 (U.S. Feb. 19, 2008) (No. 07-513).

there were grounds to arrest the defendant.⁴⁴ In *Arizona v. Evans*, the Court held that when an officer relied on a quashed warrant that erroneously remained in a computer database to arrest a defendant, the evidence found incident to arrest would not be excluded because the exclusionary rule is designed to deter “police misconduct, not mistakes by court employees.”⁴⁵

Herring, then, could be resolved in one of two ways. Either the Court could treat the case as simply a variation on *Evans* and decide whether the exclusionary rule should apply when the mistake leading to arrest is made not by a court employee but by a fellow officer, or the Court could use *Herring* to cut back dramatically on, or eliminate completely, the exclusionary rule itself.

It seems quite clear to me that the Court granted certiorari in *Herring* to do the former, not the latter. The strongest indication that the Court does not view *Herring* as a vehicle to overrule *Mapp* and *Weeks* is the Government’s brief in response to the certiorari petition. While that brief repeatedly cites *Hudson* for the proposition that the exclusionary rule is to be applied grudgingly, it never suggests that the exclusionary rule itself should be in play.⁴⁶ In other words, exactly as in *Moore*, the Government’s argument at the certiorari stage would have made the Justices reasonably confident that they could vote to grant certiorari without having to confront *Mapp* and *Weeks* directly.⁴⁷

B. FORCING THE COURT’S HAND: MORE AGGRESSIVE APPROACHES TO HUDSON IN THE LOWER COURTS

Ultimately, the Court will have to determine the scope of *Hudson*. Is it a decision peculiarly limited to the knock-and-announce rule, as Justice Kennedy’s concurrence suggested, or does the aggressively anti-*Mapp* language of Justice Scalia’s majority opinion portend a broad assault on the exclusionary rule? Even if the Court seems reluctant now to answer that question, very recent developments in the lower courts make it increasingly likely that *Mapp*’s fate will be sealed within a few years.

I will examine three decisions from the federal courts of appeals that have come down in the last few months and use them to show that anti-

44. Petition for Writ of Certiorari at *9, *United States v. Herring*, No. 07-513, 2007 WL 3045540 (filed Oct. 11, 2007).

45. *Arizona v. Evans*, 514 U.S. 1, 7, 14–15 (1995).

46. Brief for the United States in Opposition at *8, *10, *11, *14, *21, *United States v. Herring*, No. 07-513, 2008 WL 194291 (filed Jan. 18, 2008).

47. Just six days after granting certiorari in *Herring*, the Court granted certiorari in another Fourth Amendment case, *Arizona v. Gant*, 162 P.3d 640 (Ariz. 2007), cert. granted, 76 U.S.L.W. 3451 (U.S. Feb. 25, 2008) (No. 07-542). The issue in *Gant* is whether the police may search a car incident to arrest when the defendant was arrested outside the car and was fully secured at the time of a search. *Id.* Since *Gant* involves the propriety of police conduct instead of the remedy to be applied to that conduct, it would be even less likely than *Herring* to be a vehicle for the Court to revisit *Mapp*.

exclusionary judges in the lower courts are not waiting for the Court to explain *Hudson*. Instead, these judges are taking the initiative to expand the *Hudson* rationale beyond the knock-and-announce context.

First, in *United States v. Nichols*,⁴⁸ a Sixth Circuit panel relied in part on *Hudson* to hold that a criminal defendant who claims that the police engaged in racial profiling in violation of the Equal Protection Clause cannot invoke the exclusionary rule because civil lawsuits sufficiently deter police violations.⁴⁹ The panel observed that the *Hudson* majority spoke of “the exclusionary rule in broad terms” while criticizing the rule’s “costly toll upon truth-seeking and law enforcement objectives.”⁵⁰ According to the panel, “*Hudson* reinforces our view that suppression is an extreme remedy, and that—prior to adopting such a remedy—a court must be convinced of the inadequacy of civil suits to safeguard against constitutional violations.”⁵¹ *Nichols* thus apparently represents the first application by a federal circuit of the anti-exclusionary rationale of *Hudson* to a context outside the Fourth Amendment.⁵²

Second, a divided Ninth Circuit panel used *Hudson*’s rationale in *United States v. Ankeny* to hold that suppression is not an available remedy for *any* complaint that the police executed a warrant in an unreasonable manner.⁵³ In *Ankeny*, the defendant complained that the police executed the warrant unreasonably by using a flash-bang device and firing rubber bullets.⁵⁴ But, the majority rejected this contention:

The police had a warrant, the validity of which is not questioned, and the guns, money, and other contraband were not hidden. Even without the use of a flash-bang device, rubber bullets, or any of the other methods that Defendant challenges, “the police would have

48. *United States v. Nichols*, No. 06–5862, 2008 WL 123815 (6th Cir. Jan. 15, 2008).

49. In *Whren v. United States*, 517 U.S. 806 (1996), the Court held that a defendant who claimed that the police selected him for seizure because of his race was making an equal protection argument and not a Fourth Amendment argument so long as the police had probable cause to justify the seizure. *Id.* at 813. The Court in *Whren* did not indicate whether a defendant making such an equal protection claim could invoke the exclusionary rule.

50. *Nichols*, 2008 WL 123815, at *4 (quoting *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006)).

51. *Id.*

52. The Michigan Supreme Court—the same court that gave us *People v. Stevens* in the first place—has recently relied on *Hudson* to hold that a defendant who has been questioned in violation of the Sixth Amendment right to counsel cannot suppress the testimony of a witness found as a result of the illegal questioning. *People v. Frazier*, 733 N.W.2d 713, 722–25 (Mich. 2007).

53. *United States v. Ankeny*, 502 F.3d 829, 835 (9th Cir. 2007).

54. *Id.* at 836.

executed the warrant they had obtained, and would have discovered the [evidence] inside the house.”⁵⁵

Thus, under *Ankeny*'s rationale, any challenge to the unreasonable manner in which authorities carry out a Fourth Amendment search or seizure cannot result in exclusion so long as the same evidence would have been found had the search or seizure been reasonable. This holding greatly expands the reach of *Hudson* beyond the knock-and-announce context.⁵⁶

The third and perhaps most aggressive use of *Hudson* by a federal appellate court is the Seventh Circuit's recent decision in *United States v. Cazares-Olivas*.⁵⁷ In *Cazares-Olivas*, federal agents attempted to obtain a telephonic warrant for a nighttime raid, but neither the judge who approved the raid over the phone nor the agents who requested the warrant actually prepared any piece of paper amounting to a warrant. Relying on *Hudson*, the panel held that the absence of any warrant was not fatal because the same search would have been carried out had the judge actually prepared a warrant after the telephone conversation.⁵⁸

I do not, of course, expect any lower court to take it upon itself to announce that *Mapp* has been overruled and will no longer be applied in that circuit or that state.⁵⁹ But, as *Nichols*, *Ankeny*, and *Cazares-Olivas* demonstrate, the broad anti-exclusionary language in the majority opinion in *Hudson* naturally will lead some federal appellate and state supreme court judges to expand *Hudson* to new and different contexts.

In short, while the Court may not have any desire at the moment to revisit *Mapp* and *Hudson*, there will soon be plenty of cases that may force the Court to act. But, I think the Court will wait at least another year to do so.

CONCLUSION: RESOLUTION IN 2009?

Ultimately, I believe the presidential election of November 2008 will determine the fate of *Mapp* and, therefore, whether *Hudson* is ultimately seen as a big case or a mere footnote. The current uncertainty as to the fate

55. *Id.* at 837–38 (quoting *Hudson*, 126 S. Ct. at 2164) (alteration in original). The dissenting judge argued, relying on Justice Kennedy's concurrence that *Hudson* should not be extended beyond the knock-and-announce context. *Id.* at 842–43 (Reinhardt, J., dissenting).

56. In sharp contrast to *Ankeny*, the Minnesota Supreme Court recently rejected a prosecutor's argument that *Hudson* should be extended so as to render exclusion inapplicable for home searches unconstitutionally performed at night. *State v. Jackson*, 742 N.W.2d 163, 178 (Minn. 2007).

57. *United States v. Cazares-Olivas*, 515 F.3d 726 (7th Cir. 2008).

58. *Id.* at 729.

59. I sincerely doubt that any federal circuit judges will be so bold as to declare *Mapp* overruled before the Court does so itself, though I would have said the same thing about *Miranda* before the Fourth Circuit's decision in *Dickerson*. See *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) (concluding that Congress in 1968 had effectively overruled *Miranda v. Arizona*, 384 U.S. 436 (1966)), *rev'd*, 530 U.S. 428 (2000).

of the exclusionary rule hinges on the composition of the court as it stands now.

The next President is almost certain to replace several of the current Justices. If any of the *Hudson* dissenters are replaced by a law-and-order Republican President, it is hard to see how *Mapp* would survive. If any of those in the *Hudson* majority are replaced by a civil-libertarian Democratic President, it seems likely that a strong reaffirmation of *Mapp* would follow.

My prediction, then, is that the fate of *Mapp* will be decided this November when the returns come in. And, as somebody who worries more than he should about what his obituary will say, I'll be staying up late.