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## RECENT CASES

CRIMINAL PROCEDURE — FOURTH AMENDMENT — D.C. CIRCUIT HOLDS THAT EXCLUSIONARY RULE APPLIES TO EVIDENCE OBTAINED AS RESULT OF KNOCK-AND-ANNOUNCE VIOLATIONS COMMITTED DURING EXECUTION OF ARREST WARRANT. — *United States v. Weaver*, No. 13-3097, 2015 WL 5165990 (D.C. Cir. Sept. 4, 2015).

In *Wilson v. Arkansas*,<sup>1</sup> the Supreme Court held that one factor in determining whether a search or seizure is reasonable under the Fourth Amendment is whether, before forcibly entering a home to execute a warrant, law enforcement officers knock and announce their “presence and authority,” thereby providing the resident an opportunity to answer the door.<sup>2</sup> Eleven years later, however, the Court held in *Hudson v. Michigan*<sup>3</sup> that any evidence obtained through a violation of the “knock-and-announce” rule pursuant to a warranted search should not be suppressed under the exclusionary rule.<sup>4</sup> Recently, in *United States v. Weaver*,<sup>5</sup> the D.C. Circuit limited *Hudson*’s application to the search-warrant context, holding that the exclusionary rule does apply to knock-and-announce violations that occur in the execution of *arrest* warrants.<sup>6</sup> In arriving at its conclusion, the D.C. Circuit departed from *Hudson* in distinguishing between search and arrest warrants — a distinction based on a new protected interest under the knock-and-announce rule. But, even accepting these doctrinal developments, the court may have overstated the causal connection between the violation and the evidence obtained.

In 2008, agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) began investigating Michael Weaver; they found marijuana in the trash outside his residence and received information that Weaver had been selling drugs for over a year.<sup>7</sup> The agents obtained a warrant to search Weaver’s residence and found over 500 grams of marijuana in addition to \$38,000 in cash and drug packaging

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<sup>1</sup> 514 U.S. 927 (1995).

<sup>2</sup> *See id.* at 929.

<sup>3</sup> 547 U.S. 586 (2006).

<sup>4</sup> *See id.* at 599. The exclusionary rule is a judicially created remedy for Fourth Amendment violations. *See generally* *Weeks v. United States*, 232 U.S. 383 (1914). It forbids the government from introducing at criminal trial evidence obtained in violation of the Fourth Amendment. *Id.* at 393. The requirements for applying the exclusionary rule, as articulated in *Hudson*, are that the violation must be the but-for cause of the discovery of the evidence, the link between the violation and the discovery must not be too “attenuated,” and the deterrence benefits of applying the rule must outweigh the social costs of excluding the evidence. 547 U.S. at 592–95.

<sup>5</sup> No. 13-3097, 2015 WL 5165990 (D.C. Cir. Sept. 4, 2015).

<sup>6</sup> *See id.* at \*1–2.

<sup>7</sup> *Id.* at \*2.

materials.<sup>8</sup> With this evidence, ATF obtained a warrant for Weaver's arrest in 2010, and prosecutors indicted him on fifty-two separate counts.<sup>9</sup> Agents were unable to locate Weaver until they found his new residence in 2012.<sup>10</sup> Upon arriving, the agents knocked twice, but no one answered.<sup>11</sup> Within a minute of knocking, the agents announced "police" and attempted to enter the apartment with a key they had received from the building's concierge.<sup>12</sup> At no time did they inform Weaver that they had an arrest warrant.<sup>13</sup> Weaver resisted their attempt to enter, but the officers eventually forced their way in and arrested him.<sup>14</sup> During the arrest, the agents smelled marijuana and saw bags of the drug sitting in the kitchen.<sup>15</sup> From these observations, the agents obtained a warrant to search the apartment and found several kilograms of marijuana as well as other drugs and cash.<sup>16</sup> The government charged Weaver with three additional counts: two counts of possession of a controlled substance and one count of possession with intent to distribute.<sup>17</sup>

At trial, the U.S. District Court for the District of Columbia denied Weaver's motion to suppress the evidence seized from his apartment in 2012.<sup>18</sup> First, the court found that, because the agents had knocked and said "police" before entering, there had been no knock-and-announce violation.<sup>19</sup> Second, the court held that even if there were a violation, *Hudson* prevented the application of the exclusionary rule.<sup>20</sup> A jury then found Weaver guilty of possession with intent to distribute marijuana.<sup>21</sup> Weaver appealed the district court's denial of his motion to suppress.<sup>22</sup>

The D.C. Circuit reversed. Writing for the panel, Judge Pillard<sup>23</sup> held both that the officers clearly violated the knock-and-announce rule and that the exclusionary rule is the proper remedy for knock-

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<sup>8</sup> *Id.* ATF also found a series of "unexplained" cash deposits totaling over \$100,000 in Weaver's bank account. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *United States v. Weaver* at 1, Criminal No. 10-096 (D.D.C. June 7, 2013) (memorandum opinion and order denying motion to suppress), ECF No. 40.

<sup>19</sup> *Id.* at 16-17.

<sup>20</sup> *Id.* at 17.

<sup>21</sup> *United States v. Weaver*, Criminal No. 10-096 (D.D.C. Oct. 2, 2013) (judgment), ECF No. 60.

<sup>22</sup> *Weaver*, 2015 WL 5165990, at \*3.

<sup>23</sup> Judge Rogers joined Judge Pillard's opinion.

and-announce violations occurring during the execution of an arrest warrant.<sup>24</sup> The court stated that the agents failed to comply with the knock-and-announce rule because, as the government conceded on appeal, they “fail[ed] to announce their purpose before entering.”<sup>25</sup> The court determined that violations of the knock-and-announce rule committed in the execution of an arrest warrant are fundamentally different from violations committed in the execution of a search warrant.<sup>26</sup>

To support this distinction, the court highlighted the unique interest in the privacy of the home.<sup>27</sup> The court noted that, while “officers armed with a search warrant have a judicially-sanctioned prerogative to invade the privacy of the home,”<sup>28</sup> in the arrest-warrant context, “[l]aw enforcement officers’ authority . . . to enter and search a home is both more conditional and more circumscribed than their authority under a search warrant.”<sup>29</sup> “In executing an arrest warrant,” the court asserted, “officers may enter an individual’s home only when they have reason to believe the arrestee is there, may look only where a person might reasonably be found, and must stop searching once they locate him.”<sup>30</sup> Because officers executing an arrest warrant do not have the same authority to enter the home, the court reasoned that *Hudson’s* holding — that the exclusionary rule does not apply to knock-and-announce violations pursuant to a search warrant — did not necessarily apply to Weaver’s situation.<sup>31</sup>

To determine whether the exclusionary rule would apply, the court employed *Hudson’s* two-step analysis.<sup>32</sup> First, the court found that the knock-and-announce violation was the “immediate cause” of the officers “intruding further within a home than they otherwise would and

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<sup>24</sup> *Weaver*, 2015 WL 5165990, at \*2, \*3.

<sup>25</sup> *Id.* at \*3.

<sup>26</sup> *Id.* at \*1.

<sup>27</sup> *See id.* at \*7 (“An individual’s interest in protecting the privacy of his home is of the highest order.”). The court asserted that “[t]he interests the knock-and-announce rule protects correspondingly differ, depending on the type of warrant law enforcement officers are executing.” *Id.*

<sup>28</sup> *Id.* at \*1.

<sup>29</sup> *Id.* at \*8.

<sup>30</sup> *Id.* (citation omitted). Thus, “[i]f an arrestee is found away from home . . . the privacy of his home remains inviolate. . . . Any prerogative an arrest warrant may confer to enter a home is thus narrow and highly contingent on the particular circumstances of the arrest.” *Id.* at \*1.

<sup>31</sup> *Id.* at \*7–8.

<sup>32</sup> Under the two-step framework, a court first asks whether the violation is the but-for cause of obtaining the evidence and whether the violation is not too “attenuated” from a protected interest, *Hudson v. Michigan*, 547 U.S. 586, 592–94 (2006), and second applies the balancing test in *United States v. Calandra*, 414 U.S. 338 (1974), to determine whether the social costs of excluding the evidence outweigh the benefit of deterring future violations, *Hudson*, 547 U.S. at 594–99 (citing *Calandra*, 414 U.S. 338). *See* John B. Rayburn, Student Work, *What Is “Blowing in the Wind”? Reopening the Exclusionary Rule Debate*, 110 W. VA. L. REV. 793, 805–07 (2008) (discussing the *Calandra* balancing test).

obtaining evidence that they are not authorized to see,” because, absent the violation, Weaver could have surrendered at the door.<sup>33</sup> Moreover, because the knock-and-announce rule “enables the arrestee to minimize the scope of [the] intrusion” into his home, the court determined that suppressing evidence obtained after a violation of the rule “directly serves the interests protected by the rule.”<sup>34</sup>

Second, the court found that the benefits of deterring the violation outweighed the social costs of suppressing the evidence.<sup>35</sup> While the social cost of excluding probative evidence was the same as in *Hudson*, the court emphasized the heightened privacy interest in the arrest-warrant context, in addition to greater police incentives to violate that interest, as reasons for an increased need for deterrence.<sup>36</sup> The court concluded that “[b]ecause application of the exclusionary rule here would result in appreciable deterrence, the benefits of applying the rule outweigh its acknowledged social costs.”<sup>37</sup>

Judge Henderson dissented. She emphasized the limited role of the exclusionary rule in modern Fourth Amendment analysis and argued that *Hudson*’s holding ought to be read broadly.<sup>38</sup> Thus, “[t]here is but ‘one uniform knock-and-announce rule,’”<sup>39</sup> and there was no need for a new application of the *Hudson* two-step framework. Judge Henderson attacked the majority’s distinction between search warrants and arrest warrants, noting that the majority’s argument rested on the notion that if Weaver had surrendered himself at the door, the officers would have been unable to enter the apartment.<sup>40</sup> Prior precedent, she argued, indicated that officers would still have been able to search parts of the apartment to verify that there were no potential threats.<sup>41</sup> Thus, the majority’s claimed distinction did not in fact afford Weaver any greater protection.

Even if there were a difference between search and arrest warrants, Judge Henderson argued, the evidence should not have been ex-

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<sup>33</sup> *Weaver*, 2015 WL 5165990, at \*12. According to the court, the knock-and-announce rule not only “provid[es] the arrestee with an opportunity to compose himself or get dressed, but also enables the arrestee to preserve the privacy of his ‘castle’ by surrendering himself at the door.” *Id.* at \*9.

<sup>34</sup> *Id.* at \*12.

<sup>35</sup> *Id.* at \*13–14.

<sup>36</sup> *Id.* at \*13 (“Those costs [of excluding evidence] are real, but they are outweighed by a privacy interest and opportunity to deter its violation that is substantially stronger here than the negligible privacy interest and deterrence value in *Hudson*.”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at \*17–18, \*19 (Henderson, J., dissenting) (“[S]uppression is a ‘last resort, not [a] first impulse.’” *Id.* at \*17 (second alteration in original) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

<sup>39</sup> *Id.* at \*18 (quoting *United States v. Southerland*, 466 F.3d 1083, 1086 (D.C. Cir. 2006)).

<sup>40</sup> *Id.* at \*21.

<sup>41</sup> *Id.* at \*24.

cluded because the violation was too attenuated from the interests traditionally protected by the knock-and-announce rule.<sup>42</sup> To establish sufficient causality, it is necessary to prove that the violation impinged on a protected interest.<sup>43</sup> However, Judge Henderson contended that the violation in Weaver's case did not implicate Weaver's safety, property, or dignity interests; therefore, the violation was too attenuated to justify legal causality.<sup>44</sup> In weighing the costs and benefits of applying the exclusionary rule, Judge Henderson argued that the majority had failed to show that excluding evidence in cases like Weaver's would deter police officers from violating the knock-and-announce rule.<sup>45</sup> She maintained that officers already have incentives to announce their presence for safety reasons.<sup>46</sup> Additionally, accepting the majority's claim that violations of the knock-and-announce rule in the execution of arrest warrants would be rare, she concluded that the costs of excluding the evidence would outweigh the slight benefit of deterrence.<sup>47</sup>

The *Weaver* majority included in its analysis of the knock-and-announce rule a new distinction nowhere found in the reasoning or holding of *Hudson*. In doing so, the court identified a novel interest protected by the knock-and-announce rule: the privacy of the home. The distinction between search and arrest warrants, and the new protected interest, make little sense given the premise underlying the knock-and-announce rule — that an officer *will* enter the home. Moreover, even granting that the knock-and-announce rule protects an interest in the privacy of one's home, the court likely overstated the causal connection between the rule's violation and the seizure of the evidence.

The question in *Hudson* was whether the exclusionary rule should be applied to information obtained after a knock-and-announce violation occurring during the execution of a search warrant.<sup>48</sup> To determine if the exclusionary rule should apply, the Court asked two questions: first, whether the violation was sufficiently causally related to the information obtained, and second, applying the balancing test established in *United States v. Calandra*,<sup>49</sup> whether the benefits of excluding the evidence outweigh the social costs of losing probative evi-

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<sup>42</sup> *Id.* at \*21. According to Judge Henderson, "[t]he interests that the knock-and-announce requirement does protect — safety, property and dignity — 'have nothing to do with the seizure of the evidence.'" *Id.* (quoting *Hudson*, 547 U.S. at 594).

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at \*25.

<sup>46</sup> *Id.* at \*24.

<sup>47</sup> *See id.* at \*24–25.

<sup>48</sup> *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

<sup>49</sup> 414 U.S. 338 (1974).

dence.<sup>50</sup> The *Hudson* Court recognized that the knock-and-announce rule furthered three interests: “the protection of human life” by avoiding violence resulting from an unannounced entry, “the protection of property” by preventing officers from needlessly breaking into the home, and the protection of “those elements of privacy and dignity that can be destroyed by a sudden entrance.”<sup>51</sup> Under this framework, the Court held that the exclusionary rule should not apply because the three violated interests “ha[d] nothing to do with the seizure of the evidence”<sup>52</sup> and the social costs of applying the rule vastly outweighed any potential deterrence to police officers.<sup>53</sup>

*Weaver* distinguished *Hudson* on the ground that the knock-and-announce violation in *Weaver* occurred in the execution of an arrest warrant, rather than a search warrant.<sup>54</sup> On the basis of this distinction, the *Weaver* court added the privacy of the home to the list of interests protected by the knock-and-announce rule, reasoning that *Weaver* could have surrendered to the officers at the door and avoided their entrance into his home.<sup>55</sup>

*Hudson* offers scant support for the idea that the interests protected by the knock-and-announce rule depend on the type of warrant being executed. *Hudson* used broad, categorical language in concluding that the exclusionary rule should not apply to knock-and-announce violations.<sup>56</sup> The question addressed in *Hudson* did not expressly draw a distinction between search warrants and arrest warrants,<sup>57</sup> nor did the Court cabin its discussion of the three protected interests to the search-warrant context.<sup>58</sup> In fact, the Court drew the three protected interests from the traditional purposes of the knock-and-announce rule, not a situation-specific prudential analysis.<sup>59</sup> Prior to *Weaver*, scholars universally recognized that *Hudson* stood for the proposition that no

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<sup>50</sup> See *supra* note 32 and accompanying text.

<sup>51</sup> *Hudson*, 547 U.S. at 594. In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the case that incorporated the knock-and-announce requirement into the Fourth Amendment, the Court justified the rule in part on the basis that it would prevent unnecessary property damage from breaking and entering. *Id.* at 935–36. The *Hudson* Court expanded upon *Wilson* to include the three listed protected interests. *Hudson*, 547 U.S. at 594.

<sup>52</sup> *Hudson*, 547 U.S. at 594.

<sup>53</sup> *Id.* at 599.

<sup>54</sup> *Weaver*, 2015 WL 5165990, at \*5–7.

<sup>55</sup> *Id.* at \*9.

<sup>56</sup> See, e.g., *Hudson*, 547 U.S. at 590 (“The issue here is remedy. *Wilson* specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement. That question is squarely before us now.” (citation omitted)); *id.* at 599 (“In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrents against them are substantial . . .”).

<sup>57</sup> See *id.* at 588.

<sup>58</sup> See *id.* at 593–94.

<sup>59</sup> See *id.* at 594.

knock-and-announce violations were subject to the exclusionary rule,<sup>60</sup> causing some commentators to lament that the Court did not consider the privacy of the home in its analysis.<sup>61</sup> Perhaps even more striking is that the vast majority of circuits that have faced the question of applying *Hudson* to arrest warrants have had no qualms in doing so.<sup>62</sup> While it is true that the Court in *Hudson* may never have considered arrest warrants at all, there is nothing in its reasoning or holding that invites the distinction drawn by the court in *Weaver*.

Furthermore, the idea that the knock-and-announce rule protects a resident's interest in the privacy of the entirety of his home does not fit well with the rule's premise. As articulated in *Wilson*, the knock-and-announce rule appears to presume that police will "ent[er] into a dwelling"<sup>63</sup> or be admitted.<sup>64</sup> If the knock-and-announce rule applies only in situations in which officers *will* pass the threshold of a home, it is incongruous that the rule would protect an interest in the complete privacy of one's home, as the *Weaver* court seemed to suggest. Unlike the interests stated in *Hudson*, which serve to make an already legitimate entry as safe as possible and avoid unnecessary damage and embarrassment, the *Weaver* interest acts to determine whether an entry is legitimate in the first place. Thus, the *Weaver* court's suggestion that, in the case of an arrest warrant, no entry need have been made departs from the apparent presumption of the knock-and-announce rule.

Even accepting the idea that the knock-and-announce rule protects the privacy of the home, there is reason to suppose the *Weaver* court overstated the causal connection between the violation and the discov-

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<sup>60</sup> See, e.g., Mark A. Summers, *The Constable Blunders but Isn't Punished: Does Hudson v. Michigan's Abolition of the Exclusionary Rule Extend Beyond Knock-and-Announce Violations?*, 10 BARRY L. REV. 25, 37 (2008) ("Because the[] [protected] interests are the same in every knock-and-announce rule case, there are no knock-and-announce violations where applying the exclusionary remedy would be justified."); James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1839-41 (2008) ("The same premises belie a restriction of *Hudson* to evidence found from warranted searches." *Id.* at 1839.). In fact, many scholars have viewed *Hudson* even more expansively to mark the beginning of the end for the exclusionary rule. See, e.g., Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 778 (2006) (describing *Hudson* as "ominous for the future of the exclusionary rule" because its "remarks apply well beyond violation of the 'knock-and-announce' rule").

<sup>61</sup> See Daniel A. Gutin, Note, *Technical Knockout: Hudson v. Michigan and the Unfortunate Demise of the Knock-and-Announce Rule*, 44 AM. CRIM. L. REV. 1239, 1240 (2007) ("[T]he majority did not give adequate weight to the interests protected by the knock-and-announce rule, including the privacy of the home, which before *Hudson*, had always been regarded as sacrosanct.").

<sup>62</sup> See, e.g., *United States v. Pelletier*, 469 F.3d 194, 198 (1st Cir. 2006); see also Summers, *supra* note 60, at 37 & n.107 (finding that of the nine circuits that had considered knock-and-announce violations up to that point, all had applied the *Hudson* rule categorically as the First Circuit did in *Pelletier*).

<sup>63</sup> *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

<sup>64</sup> *Id.* at 932.

ery of the evidence. As the dissent observed, the majority's distinction between search warrants and arrest warrants rested on the idea that arrestees could surrender themselves outside of their dwellings and thereby avoid a search of their interiors.<sup>65</sup> First, the "clear and strong causal connection" the court identified<sup>66</sup> assumes that arrestees would come to the door to be arrested at the threshold if given the opportunity to do so. Second, the court did not fully account for precedent recognizing police officers' authority to enter the home to execute an arrest warrant and to conduct protective sweeps of areas close to the arrest. For example, the Court in *Payton v. New York*<sup>67</sup> stated that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."<sup>68</sup> As part of this authority, police officers can conduct protective sweeps of nearby areas.<sup>69</sup> The D.C. Circuit itself had previously recognized that these sweeps could be conducted in adjacent rooms, including the entirety of a small apartment, without suspicion even if the suspect had surrendered just inside the front door.<sup>70</sup> If the officers had the ability to enter Weaver's apartment regardless of whether Weaver surrendered himself at the door, then the court overstated the causal connection that it claimed distinguished its circumstances from those in *Hudson*.

In sum, although the *Weaver* court rightly recognized that the requirements for search and arrest warrants "protect distinct privacy interests,"<sup>71</sup> it is not clear from precedent that "correspondingly"<sup>72</sup> the interests protected by the knock-and-announce rule differ depending on the type of warrant being executed. Additionally, the court relied on incorrect implicit assumptions in declaring a "clear and strong causal connection" between the violation and the evidence obtained.<sup>73</sup> The result, allowing the exclusion of any evidence observed during an arrest at a home after a knock-and-announce violation, seems to introduce uncertainty into the rule's attenuation analysis.

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<sup>65</sup> *Weaver*, 2015 WL 5165990, at \*21 (Henderson, J., dissenting).

<sup>66</sup> *Id.* at \*12 (majority opinion).

<sup>67</sup> 445 U.S. 573 (1980).

<sup>68</sup> *Id.* at 603.

<sup>69</sup> *Maryland v. Buie*, 494 U.S. 325, 334 (1990) ("We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.").

<sup>70</sup> *See* *United States v. Thomas*, 429 F.3d 282, 287–88 (D.C. Cir. 2005).

<sup>71</sup> *Weaver*, 2015 WL 5165990, at \*7.

<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at \*12.