No. 04-1360

In The Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

SUPPLEMENTAL BRIEF FOR PETITIONER

DAVID A. MORAN
Counsel of Record
WAYNE STATE UNIVERSITY LAW SCHOOL
471 W. Palmer Street
Detroit, Michigan 48202
(313) 577-3973

TIMOTHY O'TOOLE
633 Indiana Avenue, N.W.
Washington, DC 20004
(202) 628-1200

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2611

MICHAEL J. STEINBERG
KARY L. MOSS
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6814

RICHARD D. KORN
645 Griswold Street
Suite 1717
Detroit, Michigan 48226
(313) 223-1000

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

SUPPLEMENTAL BRIEF

Petitioner files this Supplemental Brief in order to cite and discuss *State v. Ramos*, 130 P.3d 1166 (Idaho Ct. App. 2005), and *Georgia v. Randolph*, 574 U.S. ___, 126 S. Ct. 1515 (2006), both decided after the close of briefing in this case.

In *Ramos*, the Idaho Court of Appeals joined at least ten other state and federal appellate courts in expressly rejecting a claim that exclusion of evidence found inside a home is not an "appropriate remedy" for a violation of the knock and announce rule. 130 P.3d at 1171-72; *see also* Petitioner's Brief at 16-17 (listing cases from other jurisdictions).* In so holding, the court in *Ramos* observed that this Court has twice "held that the appropriate remedy for failing to properly knock and announce as required by federal statute is suppression of any evidence found pursuant to search after the entry." 130 P.3d at 1172 (citing *Sabbath v. United States*, 391 U.S. 585, 588-91 (1968), and *Miller v. United States*, 357 U.S. 301, 306-14 (1958)). The court also noted that the Idaho Supreme Court had earlier held that refusal to suppress such evidence "would completely nullify the knock-and-announce statutes and would create a dangerous situation for citizens and police officers alike." *Id.* (citing *State v. Rauch*, 586 P.2d 671, 679 (Idaho 1978)).

---

* As Petitioner noted in his brief at 17, courts in almost all other American jurisdictions, except Michigan and the Seventh Circuit, continue to suppress evidence seized inside homes following knock and announce violations, as this Court did in *Miller* and *Sabbath*, without even entertaining arguments as to whether such suppression is "appropriate."

In *Randolph*, the respondent's wife told a police officer that her husband had "items of drug evidence" inside the home, and she consented to the officer's request to enter and retrieve that evidence over the husband's vocal objection. 126 S. Ct. at 1519. In affirming the Georgia Supreme Court's judgment suppressing the evidence because the officer should not have relied on Mrs. Randolph's consent, this Court observed that a co-tenant in Mrs. Randolph's position "may be able to deliver evidence to the police . . . and can tell the police what he knows, for use before a magistrate in getting a warrant." *Id.* at 1524 (citing *Coolidge v. New Hampshire*, 403 U.S. 441, 487-89 (1971)).

Therefore, the Court's judgment in *Randolph* suppressing the evidence, like this Court's many earlier decisions discussed in Petitioner's Brief at 30-31, is impossible to square with Respondent's "causation" theory. Under Respondent's theory, the officer's reliance on Mrs. Randolph's consent would not have been the "but-for" cause of the discovery of the evidence because the officer would have obtained the same evidence had he not relied on Mrs. Randolph's consent. That is, had the officer not relied on Mrs. Randolph's consent, he would have either asked the willing Mrs. Randolph to retrieve the evidence (just as the wife did in *Coolidge*), or he would have ordered Mr. Randolph to remain where he was while the police obtained a warrant. *See Illinois v. McArthur*, 531 U.S. 326, 331-32 (2001) (approving this procedure on facts essentially identical to those in *Randolph*). Thus, under Respondent's theory, the "but-for" cause of the police discovery of the evidence in *Randolph* was Mrs. Randolph's decision to tell the officer that her husband had narcotics evidence in the home, not the officer's reliance on Mrs. Randolph's consent.

Randolph is notable, therefore, in that the Court, as it has done many times before, ordered suppression of evidence in a case in which it is clear that the police could have obtained the same evidence constitutionally. *See* 126 S. Ct. at 1530 (Breyer, J., concurring) (noting that "the officers might easily have secured the premises and sought a warrant permitting them to enter") (citing *McArthur*, *supra*); *see also id.* at 1542-43 (Thomas, J., dissenting) (observing that, like Mrs. Coolidge, Mrs. Randolph could have "simply retrieved the straw from the house and given it to Sergeant Murray. . . . Drawing a constitutionally significant distinction between what occurred here and Mrs. Randolph's independent production of the relevant evidence is both inconsistent with *Coolidge* and unduly formalistic"). To put it simply, *Randolph* is yet another example of a case in which this Court plainly did not apply Respondent's proposed "but-for" causation test.

As Petitioner has pointed out, suppression is especially necessary in cases such as *Randolph* and the instant case when the police are faced with a choice between obtaining evidence constitutionally or unconstitutionally and choose the unconstitutional course. Without suppression as a remedy in such circumstances, the police will never have an incentive to act constitutionally. *See, e.g., United States v. Boatwright*, 822 F.2d 862, 865 (9th Cir. 1987).

CONCLUSION

For the reasons set forth in Petitioner's brief and reply brief, the judgment of the Michigan Court of Appeals should be reversed, and the case should be remanded to that court with instructions to reverse Petitioner's conviction.

Respectfully submitted,

DAVID A. MORAN
Counsel of Record
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. Palmer Street
Detroit, Michigan 48202
(313) 577-3973

TIMOTHY O'TOOLE
633 Indiana Avenue, N.W.
Washington, DC 20004
(202) 628-1200

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2611

MICHAEL J. STEINBERG
KARY L. MOSS
AMERICAN CIVIL LIBERTIES
UNION FUND OF MICHIGAN
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6814

RICHARD D. KORN
645 Griswold Street
Suite 1717
Detroit, Michigan 48226
(313) 223-1000

Counsel for Petitioner

Date: April 2006