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United States v. Langford

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UNITED STATES V. LANGFORD

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I. INTRODUCTION

A factor in determining if a search is reasonable under the Fourth Amendment is whether police officers knock and announce their presence before forcibly entering a home to execute a search warrant.[1] If police officers do not knock and announce their presence, any evidence obtained in the search may be rendered inadmissible at trial.[2] In *United States v. Langford*, however, the United States Court of Appeals for the Seventh Circuit held that when police officers conducted a search of a home pursuant to a warrant without first knocking and announcing their presence, the evidence obtained was not inadmissible at trial.[3] The court reached this result by expanding the inevitable discovery exception to the exclusionary rule.[4] Traditionally, when applying the inevitable discovery exception, courts look to whether the evidence obtained in violation of the knock and announce rule inevitably would have been discovered in a separate, untainted investigation.[5] *Langford*, however, applied the exception to the *same* investigation, reasoning that if police are executing a warrant, discovery of evidence inside the house is inevitable.[6] *Langford* effectively nullifies any requirement to have police knock and announce their presence before ex-

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1. Wilson v. Arkansas, 514 U.S. 927, 930 (1995).
2. *See* sources cited *infra* note 25.
3. United States v. Langford, 314 F.3d 892 (7th Cir. 2002).
4. *Id.*
5. United States v. Dice, 200 F.3d 978, 986 (6th Cir. 2000).
6. *Langford*, 314 F.3d at 894-95.

ecuting a warrant. Without a remedy for violating that right, police officers have less incentive to honor it.

This comment will argue that *United States v. Langford* was wrongly decided. The Seventh Circuit should return to the traditional standard: evidence obtained in violation of the knock and announce rule should be admissible only if a second, separate investigation would likely have uncovered the evidence.[7] The traditional standard preserves the policies underlying the knock and announce rule, which include decreasing the potential for violent encounters between police officers and the occupants of a home, lessening the risk of needless private property damage, and protecting occupants' privacy rights.[8]

Part I of this Comment describes the evolution of the knock and announce rule and the policy reasons underlying it. Part I also discusses the independent source and inevitable discovery exceptions to the exclusionary rule. Part II describes the *Langford* decision. Part III explains why *Langford* essentially repeals the knock and announce rule, thereby undermining the important policies served by it.

II. The Fourth Amendment, The Knock and Announce Rule, and The Exclusionary Rule

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[9] In determining the scope of this right, courts often look to the common law at the time the Constitution was framed.[10] For example, in *Wilson v. Arkansas*, the Supreme Court examined the common law to determine whether the Fourth Amendment required police officers

7. *Dice*, 200 F.3d at 986.

8. *Id.* at 982.

9. U.S. Const. amend. IV.

10. Wilson v. Arkansas, 514 U.S. 927, 931 (1995). In *Wilson*, the defendant filed a motion to suppress evidence seized during a search asserting that the search was invalid because, among other things, the officers failed to "knock and announce" before entering her home. The Arkansas Supreme Court affirmed petitioner's conviction on appeal rejecting the defendant's argument that the Fourth Amendment requires officers to knock and announce prior to entering the residence. The U.S. Supreme Court reversed, holding that "[the] common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Id.* at 930.

to knock and announce their presence before entering a home pursuant to a warrant.[11] Several English cases had established the general principle that an officer may enter a person's house if he first requests admission and informs the occupant of his purpose.[12] The Court noted that most states adopted the knock and announce principle early on in both court decisions and statutes.[13] Consequently, the Supreme Court held that the knock and announce rule is one of several factors considered in assessing the reasonableness of a search or seizure.[14] The Court specifically held that "[g]iven the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure."[15]

Several important policies are furthered by the knock and announce rule. First, if police officers do not knock and announce their presence the potential for violent encounters between police officers and occupants of a home are increased because the occupants might react violently when faced with an intruder.[16] The practice also curbs the needless destruction of private property because police officers can avoid forcibly entering a home if they knock and announce their presence.[17] Finally, the rule protects an individual's right to privacy in his or her home.[18]

In *Wilson*, the Supreme Court stated that the knock and announce rule should not be rigidly applied.[19] The Court recognized that police officers may enter a home without knocking and an-

11. *Wilson*, 514 U.S. at 931.

12. *Id.*

13. *Id.* at 932-33. ("The common-law knock and announce principle was woven quickly into the fabric of early American law. Most of the States that ratified the Fourth Amendment had enacted constitutional provisions or statutes generally incorporating English common law").

14. *Id.* at 934.

15. *Id.* The constitutional standard articulated in *Wilson* is codified in 18 U.S.C. § 3109 (2004).

16. United States v. Dice, 200 F.3d 978, 982 (6th Cir. 2000); *see also* United States v. Cantu, 230 F.3d 148, 151 (5th Cir. 2000).

17. *Dice*, 200 F.3d at 982.

18. *Id.*

19. *Wilson*, 514 U.S. at 934. This view conforms to the conventional totality of the circumstances analysis applied under the Fourth Amendment.

nouncing their presence if doing so would trump other interests.[20] For example, an "unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given."[21] Consequently, there are three main exceptions to the knock and announce rule.[22] Police officers need not knock and announce their presence if the occupants already know the police are there, if the police reasonably believe someone in the house faces imminent bodily harm, or if the police believe evidence is about to be destroyed.[23] However, absent the above mentioned exigent circumstances, police officers must knock, announce their presence, and give the occupants a reasonable time to respond before entering and searching a dwelling to ensure that the fruits of the search will be admitted into evidence.[24]

Assuming none of the exceptions to the knock and announce rule apply, the remedy for violating the knock and announce rule is the exclusionary rule,[25] which bars the use of unconstitutionally obtained evidence.[26] In *Weeks v. United States*, the Supreme Court reasoned that admitting the fruits of an illegal search or seizure would render the Fourth Amendment meaningless.[27] In *Mapp v. Ohio*, the Court stated that the purpose of the exclusionary rule is to deter violations and compel respect for the Fourth Amendment.[28] In *Nix*

20. *See id.* at 935.

21. *Id.* at 936.

22. *Id.*; *Dice*, 200 F.3d at 983.

23. *Dice*, 200 F.3d at 986.

24. *Wilson*, 514 U.S. at 931-32.

25. *See* Sabbath v. United States, 391 U.S. 585, 586 (1968) (holding that evidence should not have been admitted at trial because it was obtained in violation of the knock and announce rule); United States v. Watson, 63 Fed. Appx. 216 (6th Cir.) (holding that the "no-knock" entry into defendant's apartment was not justified, and that evidence seized during the ensuing search must be suppressed); United States v. Gallegos, 314 F.3d 456 (10th Cir. 2002) (holding that evidence obtained in violation of the knock and announce rule should be suppressed); United States v. Ruminer, 786 F.2d 381, 383 (10th Cir. 1986) (holding that if the record clearly established that the officers failed to knock and announce before forcibly entering the dwelling, and that no exigent circumstances were shown, the evidence seized must be suppressed as the fruit of an unlawful search).

26. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

27. *Weeks*, 232 U.S. at 394 (stating that admitting illegally obtained evidence effectively validates Fourth Amendment violations).

28. *Mapp*, 367 U.S. at 656 (citing Elkins v. United States, 364 U.S. 206 (1960)).

v. Williams, the Supreme Court noted that the exclusionary rule can be socially costly because criminals may avoid conviction, but that the rule is nevertheless needed to deter police from violating the Fourth Amendment.[29] The Court also stated that the exclusionary rule is necessary to prevent the government from benefiting from Fourth Amendment violations.[30] Accordingly, courts typically hold that evidence obtained in violation of the knock and announce rule is inadmissible against criminal defendants.[31]

There are exceptions to the exclusionary rule, including the independent source exception and the inevitable discovery exception.[32] Similar policy considerations underlie these two exceptions. However, different elements are required to satisfy each.[33] If either of the exceptions applies, evidence obtained in violation of the knock and announce rule is then admissible.

Chief Justice Burger, in *Nix v. Williams*, stated that "[t]he independent source [exception] allows the admission of evidence by means wholly independent of any constitutional violation."[34] To prevail under this exception, the government must prove that evidence discovered during or as a consequence of an illegal search was later obtained from an independent lawful source.[35] In contrast, the inevitable discovery exception provides that illegally obtained evidence may be admitted if the government proves that the

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29. Nix v. Williams, 467 U.S. 431, 442-43 (1984).

30. *Id.* at 443. Prosecutors would be able to convict based upon illegally obtained evidence.

31. *See supra* note 25.

32. *Nix*, 467 U.S. at 431; *Dice*, 200 F.3d 978 (6th Cir. 2000).

33. *Nix*, 467 U.S. at 459.

34. *Nix*, 467 U.S. at 443 (emphasis added).

35. Murray v. United States, 487 U.S. 533 (1988). In *Murray*, federal agents investigated the defendant who they suspected was conducting illegal drug activities out of a warehouse. The federal agents illegally searched the warehouse and found several bales of marijuana. The agents then obtained a search warrant upon an affidavit that did not refer to what they had seen in the warehouse and seized the bales of marijuana. At trial, the defendant's motion to suppress the evidence as a violation of the Fourth Amendment was denied and the defendant was convicted. The court stated that the independent source exception precluded the suppression of evidence because it was later discovered pursuant to a valid warrant not based upon the illegal search. However, the Supreme Court remanded the case to determine whether the federal agents would have sought a warrant absent the illegal search to ensure that the warrant was genuinely independent. This exemplifies that the evidence must be obtained by means independent of the illegality.

evidence *would have been* obtained pursuant to an independent untainted investigation.[36] Both exceptions ensure that the government is put in the same, not a worse, position than that in which it would have been absent a constitutional violation.[37] Suppressing such evidence would unfairly disadvantage the government because the prosecution could not introduce the evidence at trial even though it would have been obtained constitutionally.[38]

The facts of *Nix v. Williams* illustrate the appropriate application of the inevitable discovery exception. In *Nix*, while some police officers were searching an area close to where a young girl's body eventually was found, other police officers were driving the defendant to the police station.[39] The police officers escorting the defendant elicited statements from him that led to the discovery of the young girl's body, which ended the search by the other police officers.[40] The defendant was convicted based upon evidence of the condition of the young girl's body.[41] The defendant later challenged his conviction, arguing that the evidence of the victim's body should have been suppressed because it was obtained illegally.[42] The defendant claimed that the body was discovered as a result of his statements, which were improperly obtained because he was represented by counsel and should not have been questioned without his attorney present. Agreeing that his statements had been obtained unconstitutionally, the Supreme Court held that the evidence of the victim's body nonetheless was properly admitted because it inevitably *would have been* discovered in the separate police search.[43] Thus, suppressing the evidence would unfairly disadvantage the government because the body would have been discovered absent the defendant's statements.[44]

Nix v. Williams highlights the difference between the independent source exception and the inevitable discovery exception.

36. United States v. Leake, 95 F.3d 409 (6th Cir. 1996); *Nix*, 467 U.S. at 444. The government has the burden of proof by a preponderance of the evidence.
37. *Nix*, 467 U.S. at 443.
38. *Id.* at 435.
39. *Id.* at 436.
40. *Id.* at 436-37.
41. *Id.*
42. *Id.* at 441.
43. *Nix*, 467 U.S. at 449-50.
44. *Id.*

Under both exceptions, there are two investigations that could potentially yield evidence. In one investigation, evidence is discovered in violation of the Constitution. In the second investigation under the independent source exception, the evidence is also seized through a wholly independent and constitutional source; whereas in the second investigation under the inevitable discovery exception, the evidence *would have been* seized through a wholly independent and constitutional investigation. In *Nix*, the court correctly applied the inevitable discovery exception and admitted evidence of the victim's body because it would have been found in the separate, untainted police search of the area. In contrast, *United States v. Langford* misapplies the inevitable discovery exception by admitting evidence that was obtained in the same, tainted investigation.

III. *UNITED STATES V. LANGFORD*

In *United States v. Langford*, the Seventh Circuit applied the inevitable discovery exception to the exclusionary rule in such a manner that the exception swallowed the knock and announce rule. The court held that when police officers conduct a search pursuant to a warrant, the fruits of the search may be allowed into evidence, notwithstanding a violation of the knock and announce rule.[45] Since the search was conducted pursuant to a warrant, the court reasoned that absent the illegality—violating the knock and announce rule—the search would have yielded the same evidence.[46] Thus, the police are not required to follow the knock and announce rule in any case where they have a warrant.

The facts of *Langford* were as follows: in December of 2000, Detective Luke Schmitt received information that drugs were being sold from the defendant's residence. Over the next twelve weeks, Detective Schmitt observed the residence and collected facts sufficient to establish probable cause.[47] He then secured a warrant to search the defendant's residence for drugs and weapons.[48] On the morning of March 27, 2001, Detective Schmitt executed the war-

45. United States v. Langford, No. IP01-0050-CR-01-T/F, 2001 U.S. Dist. LEXIS 24509 (S.D. Ind. Nov. 5, 2001).

46. *Id.* at *3-*4.

47. *Id.*

48. *Id.* at *8-*9.

rant with the assistance of the Special Weapons and Tactics ("S.W.A.T.") team.[49] Detective Schmitt, who was in an armored vehicle in close proximity to the defendant's bedroom window, announced three times over a loudspeaker that the officers were there to execute a search warrant.[50] The announcement took ten to fifteen seconds and "shortly, if not immediately, thereafter, [the] S.W.A.T. team officers near the rear of the house detonated a loud flash-bang device."[51] The police again announced their presence and purpose for seeking entry.[52] When the occupants of the house did not respond, the officers broke down the front door and entered and searched the residence.[53] The police officers discovered a handgun, and the defendant was subsequently charged with being a felon in unlawful possession of a handgun.[54]

The defendant filed a motion to suppress the gun on the ground that the search violated the Fourth Amendment.[55] In particular, the defendant argued the officers violated the knock and announce rule because they did not knock on the door or wait a reasonable amount of time between announcing their presence and entering his residence.[56] The United States District Court for the Southern District of Indiana held that the police officers did not violate the knock and announce rule and denied the motion to suppress the gun.[57] According to the court, "the fact that the officers did not physically knock on the door before entering [the residence] is of no significance" because the Fourth Amendment

49. *Id.* at *9-*10 ("The SWAT team was called to assist in serving the search warrant because Schmitt had information that the occupants of 45 South Iris were armed").

50. *Id.* at *10.

51. *Id.* at *10-*11.

52. *Id.* at *11.

53. *Id.* at *11.

54. *Id.* at *2. The defendant violated 18 U.S.C. § 922(g), which specifically provides:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

55. *Langford*, No. IP01-0050-CR-01-T/F, 2001 U.S. Dist. LEXIS 24509, at *12.

56. *Id.* at *13.

57. *Id.* at *64.

requires only that the officers announce their presence and purpose.[58] The court further stated that the officers waited a reasonable amount of time before entering the defendant's house given the period of time that elapsed between the first announcement, the blast, the second announcement, and the noise of the battering ram smashing against the front door.[59] The court considered two additional factors. First, there was an increased risk to law enforcement officials because it was likely the occupants of the house were armed. Second, the suspects might have destroyed evidence if the officers waited any longer before they entered the house.[60]

The defendant appealed to the Seventh Circuit, arguing *inter alia* that the police officers violated the knock and announce rule, requiring suppression of the gun.[61] Writing for the court, Judge Posner concluded that it was irrelevant whether the knock and announce rule was violated since a violation of the rule does not require the exclusion of evidence seized pursuant to a warrant.[62] Judge Posner reasoned that the inevitable discovery exception allows evidence seized in unlawful searches to be admitted at trial if the police would have discovered such evidence had they obeyed the law.[63] The court concluded that once the police obtained a search warrant, any evidence on the premises inevitably would have been discovered in executing the warrant.[64] In this case, even if they followed the knock and announce rule, the police would have discovered the gun because they had a search warrant.[65] The court further stated that the purpose of the inevitable discovery exception

58. *Id.*

59. *Id.* at *66-67.

60. *Id.* at *68-*69.

61. United States v. Langford, 314 F.3d 892, 893 (7th Cir. 2002).

62. *Id.* In a departure from the judiciary's traditional conservatism, the court decided this case on an issue not put before them. The issue before the court was whether the knock and announce rule was violated. The court instead found that the inevitable discovery exception applied, although the issue was not raised by either party. Thus the police officers did not have to comply with the knock and announce rule for the evidence to be admitted.

63. *Id.* at 895.

64. *Id.* at 894. The court, citing *United States v. Jones*, reasoned that "it is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant." *Id.* at 894.

65. *Id.* at 895.

is to prevent the exclusionary rule from "over deter[ring]"[66] Specifically the court stated that:

> The fruits of an unlawful search are not excludable if it is clear that the police would have discovered those fruits had they obeyed the law. That is the "inevitable discovery" rule . . . without it the exclusionary remedy would over deter; and it is fully applicable here. Armed with a valid search warrant, the police in our case would have discovered the defendant's gun even if they had given him enough time to answer their knock before they broke the front door down.[67]

The court also stated that the exclusionary rule was not necessary to deter police from violating the Constitution because 42 U.S.C. § 1983[68] and the *Bivens* doctrine[69] provide adequate remedies for a violation of the knock and announce rule.[70] Thus, the court held that the gun was admissible.[71]

The court concluded that the knock and announce rule was not intended to protect individuals against searches or to exclude evidence seized during those searches.[72] Specifically the court stated that:

> [T]he knock-and-announce rule is not intended to protect people against being subjected to searches or to limit the obtaining of evidence by means of searches; it is not a rule that, like the Fourth Amendment itself, is intended to provide a privilege to withhold evidence. Therefore there is no logic to using it to exclude evidence obtained by a search.[73]

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66. *Id.*

67. *Langford*, 314 F.3d at 895 (citations omitted).

68. 42 U.S.C. § 1983 allows damages against officials who, acting under color of state law, violate a person's constitutional rights. Monroe v. Pape, 365 U.S. 167 (1961).

69. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (allowing monetary damages against federal officials for the violation of a constitutional right).

70. *Langford*, 314 F.3d at 895.

71. *Id.* at 895. In *Langford*, the appropriate remedy would have been a § 1983 claim because *state* officials allegedly violated the defendant's constitutional rights. A *Bivens* claim would be appropriate if *federal* officials had violated the Fourth Amendment.

72. *Id.* at 895.

73. *Id.* at 895.

The court, however, provided no support for these statements.

IV. Eviscerating the Knock and Announce Rule

The court in *United States v. Langford* made several grievous errors. First, the court incorrectly applied the inevitable discovery exception. Second, the court inaccurately characterized the policies underlying the inevitable discovery exception and the knock and announce rule. Moreover, the court removed the incentive for police officers to comply with the knock and announce rule, which undermines the protections the knock and announce rule is meant to provide.[74] Finally, the court suggested alternate remedies that are illusory. In sum, *Langford* eviscerated the knock and announce rule as applied to searches pursuant to a warrant.[75]

The Seventh Circuit erroneously applied the inevitable discovery exception to the exclusionary rule because it failed to examine whether the gun would have been inevitably discovered in a separate, untainted investigation. Assuming *arguendo*, that the defendant's gun was found in violation of the knock and announce rule,[76] the remedy for such a violation would be suppression of the

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74. The holding in *United States v. Langford* is drastic in its effect on the knock and announce rule. This is evidenced by the split between the Seventh Circuit's opinion and Judge Evans' opinion in response to Langford's petition for rehearing en banc:

> Although I have voted to deny the petition for rehearing en banc, I do so without full confidence in the panel's conclusion that a violation of the "knock-and-announce" rule can never, under any circumstances, support a challenge to a search under the Fourth Amendment.

United States v. Langford, 60 Fed. 621 (7th Cir. 2003).

75. U.S. v. Dice, 200 F.3d 978, 986 (6th Cir. 2000) ("[T]he requirement that officers reasonably wait is a crucial element of the knock-and-announce rule. To remove the exclusionary bar from this type of knock-and-announce violation whenever officers possess a valid warrant would in one swift move gut the constitution's regulation of *how* officers execute such warrants.").

76. The court did not examine whether the knock and announce rule was violated because it simply looked at the warrant to apply the inevitable discovery exception. However, the district court found that the knock and announce rule was not violated under the totality of the circumstances. The district court's opinion is consistent with the Supreme Court's recent ruling in United States v. Banks, 124 S. Ct. 521 (2003). In *Banks* the police forcibly entered Banks' home fifteen to twenty seconds after they knocked and announced their presence. The court held that the knock and announce rule was not violated because fifteen to twenty seconds was a reasonable amount of time to wait when the police believed there was a threat that the evidence would be destroyed. Here, the Seventh Circuit could have decided that the knock and announce rule was not violated and therefore the evidence was admissible instead of drastically

gun.[77] The gun, however, would be admissible if it would inevitably have been obtained from another lawful source.[78] In *Langford*, there was no separate lawful source.[79] Therefore, the inevitable discovery exception was inapplicable.

The court also mischaracterized the policy underlying the inevitable discovery exception. The court stated the exception is to prevent the exclusionary rule from "over deter[ring]."[80] However, in *Nix v. Williams*, where the inevitable discovery exception was first enunciated, the Supreme Court stated that the policy for the exception is to prevent the government from being placed in a worse position than it would have been absent any police misconduct.[81] Thus, an exception to the exclusionary rule should allow the government to use evidence that it obtained or would have obtained legally through a separate search, instead of permitting it to use evidence that was the result of an unlawful search that—-had it been conducted lawfully—-would have also yielded the evidence.

The court's misapplication of the inevitable discovery exception eliminates the incentive for police officers to comply with the knock and announce rule. According to the court's analysis, evidence obtained pursuant to a warrant is admissible irrespective of whether police officers comply with the knock and announce rule. The police accordingly have no meaningful incentive to comply with the rule when they have a warrant.[82] Moreover, there are alternatives to the knock and announce rule, such as the "sneak and peak"[83] or "no-knock"[84] warrant, so there is no need for the court to eliminate the incentive for police to follow the rule.

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changing the dynamic between the knock and announce rule, the exclusionary rule, and the inevitable discovery exception.

77. Miller v. United States, 357 U.S. 301, 314 (1958); *Dice*, 200 F.3d at 982.

78. *See* discussion *supra* Section II; *see also* United States v. Leake, 95 F.3d 409, 412 (6th Cir. 1996); Nix v. Williams, 467 U.S. 431, 444 (1984).

79. *Langford*, 314 F.3d at 895.

80. *Id.*

81. *Nix*, 467 U.S. at 444.

82. *See* United States v. Dice, 200 F.3d 978, 986 (6th Cir. 2000) ("[T]he knock-and-announce rule would be meaningless since an officer could obviate illegal entry in every instance simply by looking to the information used to obtain the warrant. Officers, in executing a valid search warrant, could break in doors of private homes without sanction.").

83. The "sneak and peak" warrant allows government officials to conduct a search without notice to the individual. Uniting and Strengthening America by Providing Ap-

In *Langford,* the court also undermines the policies behind the knock and announce rule.[85] When a police officer barges into someone's home uninvited and without notice, there is an increased potential for violence, which is precisely what the knock and announce rule seeks to prevent.[86] There are a myriad of measures that individuals may take to protect themselves from an unexpected intruder which may threaten the safety of both police officers and occupants.[87] This is illustrated by the injuries, and

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propriate Tools Required to Intercept and Obstruct Terrorism Act, 18 U.S.C. § 3103a (2001). The USA Patriot Act specifically states:

> § 3103a. Additional grounds for issuing warrant
>
> (a) In general. In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States.
>
> (b) Delay. With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if—
>
> (1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result . . .;
>
> (2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication . . . or . . . any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and
>
> (3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.

Although the USA Patriot Act was enacted in response to the events of September 11, it is being used in regular criminal prosecutions. *See generally* John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-terrorism Initiatives*, 51 AM. U.L. REV. 1081 (2002).

84. A "no-knock" warrant allows police officers to enter a home without knocking and announcing their presence.

85. *See* discussion *supra* Section I.

86. *See supra* note 16. *See also* Irma S. Raker, *The New "No Knock" Provision and its Effect on the Authority of the Police to Break and Enter*, 20 AM. U. L. REV. 467, 469 (1970-71) ("The policy reasons underlying the announcement rule were to prevent sudden, unannounced invasions of the privacy of citizens . . . to safeguard the officer who might otherwise be killed by a 'fearful householder' unaware of the officer's identity or purpose.").

87. See United States v. Ramirez, 523 U.S. 65, 69 (1998) (defendant fired a gun because he thought his home was being burglarized when, in fact, police where executing a warrant).

even deaths, that have occurred when police officers attempt to serve "no knock" warrants.[88] For example, police officers in Seattle entered a home without first knocking and announcing their presence; thus, they did not give the suspect an opportunity to surrender.[89] The suspect was shot seven times and subsequently died.[90] It may be argued that "no knock" warrants are typically issued when there is a reasonable suspicion that suspects are armed and there already exists an increased potential for violence. However, consider the case in New York, where an elderly woman died of a heart attack when police entered her apartment without first knocking and announcing their presence.[91] In that case, a fatality occurred because a "no knock" warrant was executed with the assumption that there was an increased potential for violence when in fact none existed. Such cases demonstrate that removing the incentive for police officers to comply with the knock and announce rule is dangerous to both occupants and police officers.

The probability that property will be destroyed is also significantly increased if the police do not knock, announce their presence, and wait a reasonable amount of time for someone to respond before breaking down the door.[92] *Langford* perfectly illustrates this point because while the officers attempted to adhere to the knock and announce rule, the presence of armored vehicles on the property and the use of bombs and battering rams eventually led to the destruction of property.[93] In general, forcible entries are likely to result in the destruction of property.

Lastly, it is well established that individuals have a right to privacy in their home.[94] The Supreme Court has recognized this right

88. *See* Whitehead & Aden, *supra* note 83 ("A legion of tragic incidents resulting from execution of "no-knock warrants" demonstrate the potential dangers inherent in serving such warrants.").

89. Jennifer Sullivan & Christopher Schwarzen, *Family Seeks Inquest in Fatal Shooting of Fugitive by Police: Snohomish Medical Examiner Says Office has no Jurisdiction Over McCord Case*, SEATTLE TIMES, Oct. 18, 2003, at B1.

90. *Id.*

91. *See* William Glaberson, *Two Suits Filed Over Police No-Knock Raids at Wrong Homes*, N.Y. TIMES, Sep. 11, 2003, at B2.

92. United States v. Dice, 200 F.3d 978 (6th Cir. 2000); Wilson v. Arkansas, 514 U.S. 927 (1995).

93. *Langford*, 314 F.3d 892.

94. Payton v. New York, 445 U.S. 573, 585 (1980). The Court stated:

to privacy and has been reluctant to intrude upon it.[95] However, if police officers are allowed to enter a home without notice, an occupant may be confronted with strangers while performing familial, religious, intimate, or otherwise private undertakings.[96] This point is illustrated in *United States v. Banks*, where police officers knocked and announced their presence, but entered after only fifteen to twenty seconds following their announcement.[97] Once inside the house, police officers found Banks "obviously" emerging from a shower.[98]

In addition to undermining the policies underlying the knock and announce rule, the rule as articulated in *Langford* may also breed distrust of law enforcement officials. Because *Langford* eliminates the incentive for police officers to adhere to the knock and announce rule, it creates a risk that police officers will no longer adhere to the rule. If police officers fail to follow the knock and announce rule, society may view this as a blatant disregard for individual rights and the rule of law.

Finally, the Seventh Circuit stated that it is not necessary to exclude evidence to deter police officers from violating the knock and announce rule because § 1983 and *Bivens* provide defendants

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> It is thus perfectly clear that the evil the [Fourth] Amendment was designed to prevent was broader than the abuse of a general warrant . . . Almost a century ago the Court stated in resounding terms that the principles reflected in the Amendment "reached farther than the concrete form" of the specific cases that gave it birth, and "apply to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life."

Id. (citations omitted).

See also Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("[W]e do not think [state statutes] reach into the *privacy of one's own home* . . . a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.") (emphasis added).

95. *See generally Payton*, 445 U.S. at 573; *Stanley*, 394 U.S. at 557.

96. *Payton*, 445 U.S. at 617 (White, J., dissenting) ("The knock-and-announce [rule] . . . protect[s] individuals against the fear, humiliation, and embarrassment of being roused from their beds in states of . . . undress. [It] allow[s] the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling.").

97. 124 S. Ct. 521 (2003).

98. *Id.*; Laura Loh, *On the Law; Seconds Make a Difference With Search Warrants*, L.A TIMES, May 3, 2002, at 2 ("Officers found [Banks] in the hallway, naked and soapy.").

with sufficient remedies.[99] There is, however, no empirical evidence suggesting that civil suits against law enforcement officials effectively deter Fourth Amendment violations. Moreover, plaintiffs who bring civil suits face numerous obstacles. First, jurors tend to favor police and are therefore unlikely to award damages for constitutional violations even when such violations result in serious physical injury or substantial property damage.[100] Second, police officers can seek qualified immunity, effectively raising the standard of liability.[101] Last, defendants often lack the resources necessary to pursue civil litigation because there is no right to counsel in civil cases[102] and private lawyers are typically reluctant to pursue hard-to-win cases on a contingency basis.[103] Criminal defendants are therefore, unlikely to bring a § 1983 or *Bivens* claim.

It may be argued that as a matter of good practice, police officers would still knock and announce their presence prior to entering a home. However, it is insufficient to leave the decision to uphold the Fourth Amendment right against unreasonable searches and seizures to the discretion of law enforcement officials. Warrants require the signature of a neutral and detached judge so

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99. *Langford*, 314 F.3d at 895. The court lumps together remedies against both federal and state officials. The remedies, however, are significantly different and difficult to obstain.

100. Tara L. Senkel, Note, *Civilians Often Need Protection From the Police: Let's Handcuff Police Brutality*, 15 N.Y.L. SCH. J. HUM. RTS. 385, 403-04 (1999) ("[P]olice officers are often viewed by jurors as being credible witnesses because of the position they hold") (citations omitted).

101. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974); Wilson v. Layne, 526 U.S. 603 (1999).

102. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25-27 (1981).

103. *See* Drew C. Phillips, *Contingency Fees: Rules and Ethical Guidelines*, 11 GEO. J. LEGAL ETHICS 233, 237 (1998).

> When determining whether a contingent fee arrangement is appropriate, "the lawyer should evaluate (1) the likelihood of a favorable outcome, [and] (2) the time frame in which the recovery is likely to occur." So, in theory, if a lawyer takes a case on a contingent basis, the client should feel comfortable that the lawyer will work efficiently and diligently, and that there is a reasonable probability of a successful outcome.

Id. (citations omitted).

See also Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 472 (1998) ("Where receipts come from the contingency fee, the effort is to secure the fee with a minimum investment of resources . . . the plaintiffs' firm seeks early resolution, minimum investment of time, and use of the lowest cost workers.").

that the interests of the government in obtaining evidence and enforcing the law are balanced against individual rights.[104] Following the same logic, the decision to knock and announce should not be left in the hands of law enforcement agents who are bound to consider crime detection more important than the Fourth Amendment rights of individuals.

V. Conclusion

The Seventh Circuit's application of the inevitable discovery exception in *United States v. Langford* should not be adopted. In analyzing whether the inevitable discovery exception to the exclusionary rule applied, the court only considered whether the search was pursuant to a warrant. The court held that the evidence seized in the search was admissible simply because the search was pursuant to a warrant.[105] In applying the inevitable discovery exception in this manner, the court removed the incentive for police officers with a warrant to comply with the knock and announce rule since any evidence found will be admissible as a result of the police having obtained the warrant. The court's application is also inconsistent with the policies underlying the knock and announce rule and the exclusionary rule. Therefore, if a court finds that there has been a violation of the knock and announce rule, it should apply the inevitable discovery exception to admit evidence obtained only if the evidence would have been discovered through a wholly separate search.

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104. United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

> [T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

Id.

105. United States v. Langford, 314 F.3d 892 (7th Cir. 2002).