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Court of Appeals Sanctions Warrantless Arrest Based on Probable Cause

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While some delay and disruption may occur as a result of the implementation of CPL § 190.52,[166] the experience of another state with a similar statute suggests that the existence of a right to counsel will not effect a dramatic alteration in the grand jury process in New York.[167] In the final analysis, the amendments represent a responsive effort on the part of the legislature to revitalize the grand jury system.[168] In light of the potential for procedural problems, however, it is suggested that the courts should monitor the effects of the amendment to ensure that it operates in the manner intended by the legislature.

Leah Kaplan

Court of Appeals sanctions warrentless arrest based on probable cause

It is well established that a warrantless "street arrest" does not violate the fourth amendment proscription against unreasonable searches and seizures[169] if the arresting officer has reasonable cause

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or where an attorney accompanies his client to a police lineup. Naftalis, *Need for Representation at Grand Jury Inquiries,* Nat'l L.J., Oct. 2, 1978, at 19, col. 3, 47, col. 4.

[166] In testifying before a congressional committee, Charles Ruff, the last Watergate special prosecutor stated:

> [T]he mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed, most prosecutors would admit . . . that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel.

Quoted in Gerstein & Robinson, *Remedy for the Grand Jury: Retain but Reform,* 64 A.B.A.J. 337, 339 (1978).

[167] Although the analogous Massachusetts statute, MASS. ANN. LAWS ch. 277, § 14A (1977), has no provision for the expulsion of "unruly counsel" it appears that the grand jury process in Massachusetts remains essentially unaffected. *See* Burke, *supra* note 156, at 2, col. 1.

[168] It is interesting to note that when Governor Carey vetoed an identical grand jury reform bill in 1975 he stated that the witness' right to confer with counsel outside the grand jury room rendered the proposed procedural change unnecessary. Governor's Disapproval Memorandum No. 118 (1975), *reprinted in* [1975] N.Y. Legislative Index 478. Upon approving the 1978 bill, however, Governor Carey observed that it was needed to ensure fairness and "encourage confidence in the grand jury system." Governor's Memorandum on Approval of ch. 447, N.Y. Laws (June 19, 1978), *reprinted in* [1978] N.Y. Laws A-285, 286.

[169] U.S. CONST. amend. IV. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person to be seized.

In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court held the prohibitions of the fourth amendment applicable to the states through the due process clause of the fourteenth amendment.

to believe that the suspect has committed a felony.[170] Until recently, however, it remained uncertain whether the police could effect a warrantless arrest in a suspect's home in the absence of exigent circumstances.[171] In *People v. Payton*,[172] the Court of Appeals resolved this question by holding that the fourth amendment does not prohibit the police from entering a suspect's home to make a warrantless felony arrest based on probable cause.[173]

The *Payton* Court consolidated the appeals of two defendants who challenged the admission of evidence at their trials which was

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[170] United States v. Watson, 423 U.S. 411, 417 (1976); People v. De Bour, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976); People v. Schneider, 58 App. Div. 2d 817, 396 N.Y.S.2d 272 (2d Dep't 1977); People v. Stroller, 53 App. Div. 2d 816, 385 N.Y.S.2d 292 (1st Dep't 1976); *see* CPL § 140.10 (1971).

[171] *See* United States v. Watson, 423 U.S. 411, 418 n.6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975). Some commentators view *Watson* as an indication that warrantless felony arrests in the home are permissible. Comment, *Forcible Entry To Effect A Warrantless Arrest—The Eroding Protection Of The Castle*, 82 DICK. L. REV. 167, 185 (1977); Note, *Watson and Santana: Death Knell For Arrest Warrants?*, 28 SYRACUSE L. REV. 787, 788 (1977). *Watson*, however, involved an arrest in a public place, and the Supreme Court did not squarely address the question whether a warrantless arrest in a private home would be valid absent extenuating circumstances. 423 U.S. at 418 n.6. *See generally* Comment, Watson *and* Ramey: *The Balance of Interests In Non-Exigent Felony Arrests*, 13 SAN DIEGO L. REV. 838 (1976); 14 AM. CRIM. L. REV. 193 (1976). The Court of Appeals for the Second Circuit recently held that a warrantless arrest in a suspect's home is unlawful absent exigent circumstances. United States v. Reed, 572 F.2d 412 (2d Cir. 1978); *accord* United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977).

It is clear that the police need not secure a warrant to enter forcibly and arrest a suspect in his home if "exigent circumstances" exist. *E.g.*, People v. Richardson, 36 App. Div. 2d 603, 318 N.Y.S.2d 891 (1st Dep't), *aff'd mem.*, 29 N.Y.2d 802, 277 N.E.2d 412, 327 N.Y.S.2d 364 (1971); People v. McIlwain, 28 App. Div. 2d 711, 281 N.Y.S.2d 218 (2d Dep't 1967) (mem.). Factors often used to determine whether these circumstances do exist include:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect "is reasonably believed to be armed"; (3) "a clear showing of probable cause . . . to believe that the suspect committed the crime"; (4) "strong reason to believe that the suspect is in the premises being entered"; (5) "a likelihood that the suspect will escape if not swiftly apprehended"; and (6) the peaceful circumstances of the entry.

United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978) *(quoting* Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970)); *see* United States v. Jarvis, 560 F.2d 494, 498 (2d Cir. 1977); CPL §§ 120.80(4), 140.15(4) (1971).

[172] 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978), *aff'g* 56 App. Div. 2d 937, 392 N.Y.S.2d 848 (2d Dep't) (mem.), and 55 App. Div. 2d 859 (1st Dep't 1976) (mem.), *aff'g* 84 Misc. 2d 973, 376 N.Y.S.2d 779 (Sup. Ct. N.Y. County 1974).

[173] 45 N.Y.2d at 305, 380 N.E.2d at 225, 408 N.Y.S.2d at 396. *See* People v. Smith, 31 App. Div. 2d 863, 297 N.Y.S.2d 225 (3d Dep't 1969); People v. Kisin, 28 App. Div. 2d 654, 280 N.Y.S.2d 615 (1st Dep't 1967); CPL § 140.10 (1971); note 169 *supra*. With respect to the criteria used by the courts in evaluating whether "probable cause" exists, see People v. Oden, 36 N.Y.2d 382, 329 N.E.2d 188, 368 N.Y.S.2d 508 (1975); People v. Wharton, 60 App. Div. 2d 291, 400 N.Y.S.2d 840 (2d Dep't 1977).

obtained when the police entered their homes to effect an arrest.[174] In defendant Payton's case, the police went to the suspect's home after two eyewitnesses identified him as the man who had killed a service station manager during the course of a robbery.[175] After no one answered in response to their knock,[176] the police forcibly entered and found a rifle shell casing lying in plain view.[177] Similarly, in the case of defendant Riddick, the police found narcotics in the suspect's home after entering for the purpose of arresting him for armed robbery.[178] In both cases, the defendant moved to suppress the incriminating evidence, arguing that the arrests were unlawful since the police had ample opportunity to secure warrants but had failed to do so.[179] The motions were denied[180] and both defendants

[174] 45 N.Y.2d at 305-07, 380 N.E.2d at 225-27, 408 N.Y.S.2d at 396-98.

[175] *Id.* at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 396.

[176] *Id.* The police heard a stereo playing and saw a light shining in Payton's apartment. When no one responded to their knock, the officers summoned the Emergency Services Department and the door was forced open ½ hour later. *Id.* at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 396-97.

[177] *Id.* at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 397; *see* note 180 *infra.* After noticing the shell casing, the police searched the entire apartment and found a shotgun, ammunition, a sales receipt for a rifle and an incriminating photograph. Payton surrendered to the police the next day. 45 N.Y.2d at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 397.

[178] 45 N.Y.2d at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 398. In June of 1973, the defendant Riddick was identified as the perpetrator of two 1971 armed robberies. Although the police ascertained the suspect's address after a 6-month investigation, they waited until Mar. 14, 1974 before making the arrest. *Id.*, 380 N.E.2d at 227, 408 N.Y.S.2d at 397-98. While waiting for Riddick to dress after the arrest had been made, a detective searched a chest of drawers next to the defendant's bed and found narcotics and a hypodermic syringe. *Id.*

[179] *Id.* at 308, 380 N.E.2d at 227, 408 N.Y.S.2d at 398. In the case of the defendant Payton, the police waited until the morning after the suspect was identified before attempting to apprehend him. Moreover, after they arrived at the defendant's apartment, the police had enough time to contact the Emergency Services Department and wait an additional ½ hour for their arrival. *Id.* at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 396-97. Similarly, in defendant Riddick's case, the police waited 2 months before effecting an arrest. *Id.* at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 398.

[180] *Id.* at 305-06, 308, 380 N.E.2d at 226, 227, 480 N.Y.S.2d at 397, 398. In defendant Payton's case, the lower court found that the police were lawfully in the suspect's apartment, despite the absence of an arrest warrant. The court also concluded that the shell casing, which was inadvertently observed in "plain view," was admissible evidence. *Id.* at 306, 380 N.E.2d at 226, 408 N.Y.S.2d at 397; *see* Harris v. United States, 390 U.S. 234, 236 (1967) (per curiam); People v. Boone, 41 App. Div. 2d 783, 341 N.Y.S.2d 41 (3d Dep't 1973) (mem.); People v. Velez, 88 Misc. 2d 378, 392, 388 N.Y.S.2d 519, 529 (Sup. Ct. N.Y. County 1975). The other objects, which included a shotgun, had been discovered only after a full-scale search, *see* note 177 *supra,* and were suppressed on concession of the prosecution. 45 N.Y.2d at 305-06, 380 N.E.2d at 226, 408 N.Y.S.2d at 397. The trial court, however, permitted testimony from a gun shop owner who had been traced through a receipt found during the search. The defendant's contention that this testimony should have been excluded as the fruit of an unlawful search was rejected, since, in the lower court's view, the police would have located the witnesses through ordinary investigative practices. *Id.* at 313-14, 380 N.E.2d at 231, 408 N.Y.S.2d at 402; *see* People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346

subsequently were convicted.[181] The appellate division affirmed.[182]

On appeal, the Court of Appeals affirmed the convictions, finding that exigent circumstances are not a necessary predicate for effecting a warrantless arrest within a suspect's home.[183] Writing for the majority,[184] Judge Jones distinguished arrests without warrants from warrantless searches, reasoning that entering a home to make an arrest represents a lesser "incursion on the householder's domain" than entering to conduct a search of the premises.[185] While warrantless searches are unreasonable per se absent extentuating circumstances, Judge Jones perceived no ground for applying the stringent requirements governing searches to cases involving in-home arrests.[186] Instead, personal seizure within a private residence was viewed to be analogous to an arrest effected in a public place

N.Y.S.2d 793, *cert. denied*, 414 U.S. 1050 (1973); People v. Sciacca, 57 App. Div. 2d 846, 393 N.Y.S.2d 999 (2d Dep't 1977) (mem.); People v. McLaughlin, 48 App. Div. 2d 722, 367 N.Y.S.2d 362 (3d Dep't 1975). *See generally* Maguire, *How To Unpoison The Fruit—The Fourth Amendment and the Exclusionary Rules*, 55 J. CRIM. L.C. & P.S., 307 (1964); Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968). In defendant Riddick's case, the lower court found that the narcotics were uncovered in a search incident to a lawful arrest and therefore were admissible at trial. 45 N.Y.2d at 308, 380 N.E.2d at 227, 408 N.Y.S.2d at 398; *see* Chimel v. California, 395 U.S. 752 (1969); People v. Weintraub, 35 N.Y. 2d 351, 320 N.E.2d 636, 361 N.Y.S.2d 897 (1974); People v. Lewis, 26 N.Y.2d 547, 260 N.E.2d 538, 311 N.Y.S.2d 905 (1970); People v. Merola, 30 App. Div. 2d 963, 294 N.Y.S.2d 301 (2d Dep't 1968) (mem.).

[181] 45 N.Y.2d at 306, 308, 380 N.E.2d at 226, 227, 408 N.Y.S.2d at 397, 398. Defendant Payton was tried and found guilty. Defendant Riddick, on the other hand, pled guilty to a reduced charge after his suppression motion was denied.

[182] 56 App. Div. 2d at 938; 55 App. Div. 2d at 859.

[183] 45 N.Y.2d at 305, 380 N.E.2d at 225, 408 N.Y.S.2d at 396.

[184] Judge Jones was joined in his majority opinion by Chief Judge Breitel and Judges Jasen and Gabrielli. Judges Wachtler, Fuchsberg, and Cooke dissented in separate opinions.

[185] 45 N.Y.2d at 310, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

[186] *Id.* Generally, warrantless searches are unreasonable per se. *See* Katz v. United States, 389 U.S. 347 (1967); People v. Gonzalez, 39 N.Y.2d 122, 127, 347 N.E.2d 575, 579, 383 N.Y.S.2d 215, 219 (1976); People v. Kreichman, 37 N.Y.2d 693, 697, 339 N.E.2d 182, 186, 376 N.Y.S.2d 497, 502 (1975); People v. Bennett, 47 App. Div. 2d 322, 325, 366 N.Y.S.2d 639, 642 (1st Dep't 1975). In exceptional circumstances, however, warrantless searches have been approved. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967) (search of escape route during "hot pursuit"); People v. Erwin, 42 N.Y.2d 1064, 369 N.E.2d 1170, 399 N.Y.S.2d 637 (1977) (search incidental to lawful arrest); People v. Prochilo, 41 N.Y.2d 759, 363 N.E.2d 1380, 395 N.Y.S.2d 635 (1977) (search for dangerous weapons); People v. Vaccaro, 39 N.Y.2d 468, 348 N.E.2d 886, 384 N.Y.S.2d 411 (1976) (search under "exigent circumstances"); People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, *cert. denied*, 426 U.S. 953 (1976) (search of premises in "emergency" situation); People v. Di Stefano, 38 N.Y.2d 640, 345 N.E.2d 548, 382 N.Y.S.2d 5 (1976) (search revealing evidence in "plain view"); People v. Kreichman, 37 N.Y.2d 693, 339 N.E.2d 182, 376 N.Y.S.2d 497 (1975) (automobile searches); People v. Esposito, 37 N.Y.2d 156, 332 N.E.2d 863, 371 N.Y.S.2d 681 (1975) (searches by government border patrol); People v. Pittmen, 14 N.Y.2d 885, 200 N.E.2d 774, 252 N.Y.S.2d 89 (1964) (mem.) (seizure of abandoned property).

where warrants are not required.[187] In addition, the *Payton* majority concluded that it is reasonable to permit entries for warrantless arrests based upon "probable cause" since the high public interest in the apprehension of criminals outweighs the privacy interest of the individual suspect.[188]

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[187] The Court noted that:

> [i]n view of the minimal intrusion on the elements of privacy of the home which results from entry on the premises for making an arrest (as compared with the gross intrusion which attends the arrest itself), we perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence.

45 N.Y.2d at 310, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

[188] *Id.* at 311, 380 N.E.2d at 229, 408 N.Y.S.2d at 400. Judge Jones noted that warrantless entries to apprehend felons generally are accepted in English common law and have been authorized by statute in New York since 1881. *Id.* at 311, 380 N.E.2d at 229, 408 N.Y.S.2d at 400 (citing CHITTY, CRIMINAL LAW 22-23 (3d Am. ed. 1836)); 2 HALE, HISTORIA PLACITORUM CORONAE, HISTORY OF PLEAS OF CROWN 92 (1st Am. ed. 1847)); *see* CPL § 140.15 (1971). In addition, the *Payton* majority observed that several other jurisdictions have enacted similar legislation. 45 N.Y.2d at 312 & n.4, 380 N.E.2d at 230 & n.4, 401 N.Y.S.2d at 401 & n.4 (citing A.L.I., MODEL OF PRE-ARRAIGNMENT PROCEDURE, COMMENTARY, APP. XI (1975)); *see, e.g.*, CAL. PENAL CODE § 844 (Deering 1971); FLA. STAT. ANN. § 901.19(1) (West 1973); IND. CODE ANN. § 35-1-19-6 (Burns 1973); IOWA CODE ANN. § 755.9 (West 1950); MICH. STAT. ANN. § 28.880 (1972). *See also* A.L.I., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 120.6[1] (1975).

The Court also upheld the lower court's use of the inevitable discovery doctrine to permit testimony at defendant Payton's trial from a gun store owner who had been located through an illegally obtained sales receipt. *See* note 179 *supra*. Significantly, the majority noted that "inevitable" discovery does not mean that the evidence would certainly have been discovered without the aid of unlawfully secured information. 45 N.Y.2d at 313, 380 N.E.2d at 230-31, 408 N.Y.S.2d at 402. Instead, the Court stated the doctrine requires the prosecutor to show a "very high degree of probability that the evidence in question would have been obtained independently of the tainted source." *Id.*, 380 N.E.2d at 231, 408 N.Y.S.2d at 402. Applying this standard to the facts in *Payton*, Judge Jones found that the prosecution had met this burden by demonstrating that it was normal police procedure to contact the U.S. Treasury Department, which has a list of all gun shops, in an effort to find the purchaser of a weapon used in a crime. Since the witness who testified in the *Payton* trial was listed in the federal registry, Judge Jones concluded that the police would have located him even if they had never found the sales receipt in the defendant's apartment. *Id.* at 313-14, 380 N.E.2d at 231, 408 N.Y.S.2d at 402. Judge Wachtler, in a separate dissenting opinion, criticized the majority's conclusion, noting that it was unlikely the police would have found the gun dealer without the "tainted" receipt. 45 N.Y.2d at 316-17, 380 N.E.2d at 232-33, 408 N.Y.S.2d at 403-04 (Wachtler, J., dissenting). In Judge Wachtler's view, the inevitable discovery doctrine should be limited to circumstances where "the police [have] only to look in the 'next most reasonable place'" in order to find the evidence. *Id.* at 317, 380 N.E.2d at 233, 408 N.Y.S.2d at 404 (Wachtler, J., dissenting) (quoting People v. Fitzpatrick, 32 N.Y.2d 499, 507, 300 N.E.2d 139, 142, 346 N.Y.S.2d 793, 797 (1973)). Judge Wachtler was particularly concerned that, under the majority's "high probability" standard, the police would always "be able to show that they could have obtained the evidence lawfully by employing some other technique, no matter how hypothetical." *Id.* at 317, 380 N.E.2d at 233, 408 N.Y.S.2d at 404 (Wachtler, J., dissenting). In another dissenting opinion, Judge Fuchsberg expressed similar dissatisfaction with the majority's expansive interpretation of the "inevitable discovery" doctrine. 45 N.Y.2d at 318, 380 N.E.2d at 234, 408 N.Y.S.2d at 405 (Fuchsberg, J., dissenting). Arguing that the diluted standard articulated by the majority makes "sidestepping of constitutional safe-

Dissenting in one of three separate opinions, Judge Cooke objected to the majority's use of a dual standard to evaluate the propriety of warrantless arrests and warrantless searches.[189] Reasoning that the fourth amendment prohibits *all* unreasonable governmental intrusions upon the privacy of the home, Judge Cooke contended that the entries made for the purpose of seizing a suspect's person should be subject to the same constitutional safeguards that govern entries made for the search and seizure of property.[190] To require neither a warrant nor exigent circumstances as predicate for an in-home arrest, in Judge Cooke's view, was tantamount to "read[ing] the Fourth Amendment out of the Constitution."[191]

It is submitted that the *Payton* majority's approval of warrantless entries represents a serious erosion of the right of privacy guaranteed by the Constitution. In the context of searches, it has been consistently held that, absent exigency,[192] the prior approval of a detached magistrate is necessary to protect the privacy rights of individuals from invasion by overzealous law enforcement officials.[193] In light of this presumption in favor of warrants, there ap-

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guards . . . all too easy," Judge Fuchsberg would have required the prosecutor to prove beyond a reasonable doubt that the evidence would have been uncovered in a lawful manner. *Id.* at 319, 380 N.E.2d at 234, 408 N.Y.S.2d at 405 (Fuchsberg, J., dissenting).

[189] 45 N.Y.2d at 319-20, 380 N.E.2d at 234-35, 408 N.Y.S.2d at 406 (Cooke, J., dissenting).

[190] *Id.* at 321, 380 N.E.2d at 235-36, 408 N.Y.S.2d at 407 (Cooke, J., dissenting). Judge Cooke stated that the majority's view "accorded an individual's bare possessions a greater quantum of protection than his very person, reviving the values of an era in which property interests were exalted over personal liberties." *Id.* at 320, 380 N.E.2d at 235, 408 N.Y.S.2d at 406 (Cooke, J., dissenting).

[191] *Id.* at 321, 380 N.E.2d at 236, 408 N.Y.S.2d at 407 (Cooke, J., dissenting). Judge Cooke also argued that requiring a warrant in the absence of exigent circumstances would not unduly hamper law enforcement. *Id.* at 323, 380 N.E.2d at 237, 408 N.Y.S.2d at 408 (Cooke, J., dissenting); *cf.* People v. Spinelli, 35 N.Y.2d 77, 82, 315 N.E.2d 792, 795, 358 N.Y.S.2d 743, 746 (1974) (inconvenience to the police is not sufficient reason to ignore the warrant requirement).

[192] Most of the judicially-created exceptions to the general rule requiring warrants prior to police searches are based upon the presence of "exigent" circumstances which preclude the possibility of obtaining a warrant. *See* note 188 *supra.*

[193] *See, e.g.,* Gerstein v. Pugh, 420 U.S. 103, 112-13 (1975) (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948)); McDonald v. United States, 335 U.S. 451 (1948); People v. Clements, 37 N.Y.2d 675, 339 N.E.2d 170, 376 N.Y.S.2d 480 (1975). In *Johnson,* the Supreme Court stated:

> The point of the Fourth Amendment . . . , is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the

pears to be no justification for permitting a policeman's opinion of what constitutes probable cause to be the sole determining factor when the entry is made for seizing a person rather than conducting a search.[194] Moreover, in articulating a dual standard, the *Payton* majority appears to have overlooked the critical relationship between arrests and searches.[195] In addition to a lawful arrest serving as a predicate for a warrantless search of the suspect's "grab area,"[196] the police may seize any evidence or contraband in plain view once they are lawfully on the premises.[197] Thus, the practical effect of the *Payton* rule is that if the police have probable cause to arrest a suspect, they may enter his home and conduct a limited search without having to secure the approval of a "detached magistrate."

This result is particularly troublesome when the arrest is for a possessory crime involving narcotics or illegal weapons.[198] In such cases, knowledge that the suspect had contraband in his home would not alone be sufficient to permit police to enter and search

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Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[194] The Supreme Court has observed:

It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . . .

Boyd v. United States, 116 U.S. 616, 630 (1886).

[195] While the arrest itself has little legal significance for the criminal defendant, it serves as a focal point for many of his constitutional rights. Under the exclusionary rule, evidence obtained incident to an unlawful arrest may not be used against the defendant. People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975); *see* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961). In addition, post-arrest statements made by the suspect without knowledge of his constitutional rights generally are suppressed. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); People v. Gary, 31 N.Y.2d 68, 286 N.E.2d 263, 334 N.Y.S.2d 883 (1972). The Supreme Court, however, consistently has held that an "illegal arrest or detention does not void a subsequent conviction." Gerstein v. Pugh, 420 U.S. 103, 119 (1975); *see* Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

[196] *E.g.*, Chimel v. California, 395 U.S. 752 (1969); People v. Weintraub, 35 N.Y.2d 351, 320 N.E.2d 636, 361 N.Y.S.2d 897 (1974); People v. Lewis, 26 N.Y.2d 547, 260 N.E.2d 538, 311 N.Y.S.2d 905 (1970). In *Chimel*, the Court defined the "grab area" as the "area 'within [the suspect's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763.

[197] *E.g.*, Harris v. United States, 390 U.S. 234 (1967); People v. Boone, 41 App. Div. 2d 783, 341 N.Y.S.2d 41 (3d Dep't 1973) (mem.); People v. Velez, 88 Misc. 2d 378, 388 N.Y.S.2d 519 (Sup. Ct. N.Y. County 1976).

[198] There are a number of possessory crimes which rise to the level of felonies. *E.g.*, N.Y. PENAL LAW §§ 220.06, .09, .12, .16, .18, .21 (McKinney Supp. 1978-1979) (possession of drugs); *id.* § 221.20 (possession of marihauna); *id.* §§ 265.02-.04 (possession of a dangerous weapon).

without a warrant.[199] Under *Payton,* however, the police can circumvent the search warrant requirement by predicating a warrantless entry on "probable cause" to arrest for possession of contraband, and, once inside the home, may conduct a limited search and seize incriminating evidence in plain view or within the suspect's "grab area."[200] Since the *Payton* decision increases the number of situations in which the police may conduct a warrantless search of private premises, it appears inconsistent with prior cases holding warrantless searches "reasonable" only when conducted under exigent circumstances.[201] In this respect, the *Payton* decision raises serious constitutional questions meriting consideration by the Supreme Court.[202]

Ernest R. Stolzer

GENERAL MUNICIPAL LAW

Gen. Mun. Law § 50-e: Liberalized notice of claim requirements applicable to claims that accrued within 1 year of the amendment's effective date

Where a notice of claim is mandated by statute[203] as a condition

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[199] People v. Sciacca, 57 App. Div. 2d 846, 393 N.Y.S.2d 999 (2d Dep't 1977); People v. Schwab, 52 App. Div. 2d 732, 382 N.Y.S.2d 158 (4th Dep't 1976) (mem.); People v. Chestnut, 43 App. Div. 2d 260, 351 N.Y.S.2d 26 (3d Dep't 1974), *aff'd mem.*, 36 N.Y.2d 971, 335 N.E.2d 865, 373 N.Y.S.2d 564 (1975); People v. Pits, 84 Misc. 2d 708, 377 N.Y.S.2d 407 (Sup. Ct. N.Y. County 1975).

[200] *See* notes 196-197 *supra.* The *Payton* decision raises an additional analytical problem when applied in the context of warrantless entries to arrest for possessory crimes. In such instances, the police would be on the premises lawfully, since they have probable cause to believe that the suspect has committed a felony by possessing contraband. Under the "plain view" doctrine, the police ordinarily would be permitted to seize any immediately visible evidence. *See* People v. Jackson, 41 N.Y.2d 146, 150, 359 N.E.2d 677, 681, 391 N.Y.S.2d 82, 85 (1976). The courts have consistently suppressed evidence found in "plain view," however, when its discovery was not entirely inadvertent or unexpected. *E.g.*, People v. Spinelli, 35 N.Y.2d 77, 315 N.E.2d 792, 358 N.Y.S.2d 743 (1974). It is submitted that when the police enter under *Payton* to arrest for a possessory crime, their "reasonable" belief that the suspect possesses such contraband would negate the element of "inadvertence." Thus, although this contraband may have been found in plain view, it logically should be suppressed.

[201] *See* notes 171 & 186 *supra.* The Court of Appeals has noted that "where there is 'ample time for the law enforcement officials to secure a warrant' the warrantless seizure of evidence, even if it is in plain view, is unreasonable." People v. Jackson, 41 N.Y.2d 146, 150, 359 N.E.2d 677, 681, 391 N.Y.S.2d 82, 85 (1976) (citing People v. Spinelli, 35 N.Y.2d 77, 81, 315 N.E.2d 792, 795, 358 N.Y.S.2d 743, 747 (1974)).

[202] *See* note 171 and accompanying text *supra.* In view of the potential constitutional and analytical problems inherent in the *Payton* decision, it is hoped that the lower courts will scrutinize warrantless arrests carefully before according them legal effect.

[203] The purpose of notice of claim statutes is to prevent fraud and permit prompt and