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Fourth Amendment--Nonexigent Home Arrest Entries

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FOURTH AMENDMENT—NONEXIGENT HOME ARREST ENTRIES

Payton v. New York, 100 S. Ct. 1371 (1980).

The question posed but left unsettled by the United States Supreme Court in *Coolidge v. New Hampshire*,[1] "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest,"[2] has been resolved. In a six-to-three decision, the Court in *Payton v. New York*[3] held that the fourth amendment[4] prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

STATEMENT OF FACTS

Defendant Theodore Payton was convicted of murder by a jury in the Supreme Court, New York County. Defendant Obie Riddick, by his plea of guilty to criminal possession of a controlled substance, was convicted before the Supreme Court, Queens County. The defendants' convictions were affirmed,[5] and their appeals were consolidated. On appeal, each defendant claimed that evidence critical to conviction should have been suppressed because it was seized after an entry into the defendant's home with neither the authority of a warrant nor that conferred by exigent circumstances in violation of the fourth amendment.[6]

PAYTON

On January 12, 1970, a service station manager was murdered during an armed robbery by a man carrying a rifle and wearing a ski mask who fled the scene with the weapon and cash. On January 14, 1970, two eyewitnesses to the crime identified Payton as the killer. On January 15, 1970, at approximately 7:30 a.m., four detectives and a police sergeant went to Payton's apartment without first having secured a warrant. The officers observed a light shining from beneath the door of Payton's apartment and heard a radio playing within. The officers knocked at the door but received no response. With the aid of crowbars, the police forced open the door of the apartment. The defendant was not in the apartment. The officers confiscated a .30 caliber shell casing which was in plain view on top of a stereo set. On January 16, 1970, Payton surrendered himself to the police.

In a pretrial suppression hearing, the court did not exclude the shell casing from evidence, holding that the casing had been inadvertently observed while the police were lawfully on the premises to make a warrantless arrest for a felony which they had reasonable grounds to believe the defendant had committed.[7] The Appellate Division affirmed the defendant's conviction for felony murder.[8]

RIDDICK

On March 14, 1974, defendant Riddick was arrested in his home for the commission of two armed robberies in 1971. In June, 1973, the robbery victims identified Riddick from a photograph. In January, 1974, the detective investigating the robberies discovered Riddick's address. At noon on March 14, 1974, he and two other detectives went to Riddick's house without first having procured an arrest warrant. The officers knocked on the door and were admitted into the house by the defendant's three-year-old son. Riddick was sitting in a bed. He acknowledged his identity and was told that he was under arrest, advised of his rights, and instructed to get out of bed. When it then became

[1] 403 U.S. 443 (1971).
[2] Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975).
[3] 100 S. Ct. 1371 (1980).
[4] 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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The fourth amendment is made applicable to the states through the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).
[5] People v. Payton, 55 A.D.2d 858, 390 N.Y.S.2d 768 (1976) (memorandum decision). People v. Riddick, 56 A.D.2d 937, 392 N.Y.S.2d 848 (1976).
[6] People v. Payton, 45 N.Y.2d 300, 308, 380 N.E.2d 224, 227, 408 N.Y.S.2d 395, 398 (1978).
[7] *Id.* at 306, 380 N.E.2d at 226, 408 N.Y.S.2d at 397 n.1. As the court noted, under the code of criminal procedure that was in effect at the time of entry, a peace officer could make a warrantless arrest "when a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." N.Y. CRIM. PROC. LAW § 177 (McKinney).
[8] 55 A.D.2d at 858, 390 N.Y.S.2d at 768.

apparent that the defendant would have to dress, the detective searched the bed, a chest of drawers, and Riddick's clothing. He found a quantity of narcotics and a hypodermic syringe in the top drawer of the chest.

After indictment, Riddick moved to suppress the drugs and syringe on the grounds that the arrest was unlawful because it was made without a warrant and without announcement by police of their purpose before entering his home, which motion was denied.[9] The suppression court held that the arrest was lawful because it was based on probable cause and the search conducted incidental to the arrest was reasonable. Riddick pleaded guilty to a reduced charge; the conviction was affirmed by the Appellate Division.[10]

Procedural History

In a four-to-three decision, the Court of Appeals of New York concluded that the entries made by the police in both cases did not violate the defendants' constitutional protection against unreasonable searches and seizures.[11] The majority opinion written by Judge Jones offered only a truncated analysis resting not on precedent but,

> on what we perceive to be a substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of making an arrest, and on the significant difference in the governmental interest in achieving the objective of the intrusion in the two circumstances.[12]

According to the majority, a search is a more extensive incursion on the householder's privacy, and it must therefore be limited by a warrant. Recognizing that while a seizure of the householder is "unquestionably of grave import," the court reasoned that "there is no accompanying prying into the area of expected privacy attending his possessions and affairs."[13] The court cited *United States v. Watson*[14] for establishing that personal seizure alone does not require a warrant, and concluded that there was a reason to distinguish between an arrest in a public place and an arrest in a residence.[15]

Further, the court balanced the defendants' right to privacy with the governmental objective of the arrest of one reasonably believed to have committed a felony. To support its conclusion that the entries in the defendants' homes to make the arrests were not unreasonable under the fourth amendment test, the court reasoned that "[t]he community's interest in the apprehension of criminal suspects is of a higher order than its concern for the recovery of contraband or evidence."[16]

Finally, the court noted that English common law recognized warrantless entries to make felony arrests,[17] and that New York state had provided statutory authority for such entries since 1881.[18] In addition, thirty other states have enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest.[19] The court also relied on the ALI Model Code of Pre-Arraignment Procedure, which recommends that an officer who is empowered to make an arrest, and has probable cause to believe that the person to be arrested is on private premises, be authorized to demand entry to such premises and thereupon to make an arrest.[20]

Three dissents were filed in the case. All concluded that the police need a warrant to enter a home in order to arrest a person unless there are exigent circumstances. Two of the dissenters, Judges Wachtler and Fuchsberg, concurred with the reasoning of the third,[21] Judge Cooke, who spoke for all three dissenters.

Cooke relied heavily on Justice Stewart's plurality opinion in *Coolidge v. New Hampshire*[22] for his assertion that a warrantless arrest in the home is per se unreasonable in the absence of exigent circumstances. According to Cooke, "[r]easoning that

[9] 56 A.D.2d at 937, 392 N.Y.S.2d at 848. The law in effect at that time provided that with respect to arrest without a warrant "in order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present." N.Y. Crim. Proc. Law § 140.15 (McKinney).

[10] 56 A.D.2d at 937, 392 N.Y.S.2d at 848.

[11] 45 N.Y.2d at 312, 380 N.E.2d at 230, 408 N.Y.S.2d at 401.

[12] *Id.* at 310, 380 N.E.2d at 228–29, 408 N.Y.S.2d at 400.

[13] *Id.*, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

[14] 423 U.S. 411 (1976).

[15] 45 N.Y.2d at 310, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

[16] *Id.* at 311, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

[17] *Id.* (citing only Hale and Chitty who each promoted the proposition that at common law the constable could enter a house to effect a warrantless felony arrest, providing he had probable cause).

[18] *Id. See* N.Y. Crim. Pro. Law §§ 177–78 (McKinney).

[19] 45 N.Y.2d at 312, 380 N.E.2d at 230, 408 N.Y.S.2d at 401 (citing ALI Model Code of Pre-Arraignment Proc. (1975)).

[20] ALI Model Code of Pre-Arraignment Proc. § 120.6(1) (1975).

[21] These dissents concern extraneous issues.

[22] 403 U.S. 443 (1970).

the intrusion which attends entry into the home to effect a warrantless arrest is somehow less egregious than entry to conduct a search, the majority simply reads the warrant requirement out of the Fourth Amendment."[23] Cooke rejected the premise of the majority's opinion that searches and seizures are to be treated differently. "The bifurcated standard between search and arrest announced today accords an individual's bare possessions a greater quantum of protection than his very person . . . ."[24]

Relying on cases which concerned searches, Judge Cooke concluded that since the purpose of the fourth amendment is to guard against arbitrary governmental invasions of the home, "the neccessity of prior judicial approval should control any contemplated entry, regardless of the purpose for which that entry is sought."[25] Judge Cooke focused on the sanctity of a private home[26] and noted that the warrant requirement minimizes "nonconsensual entry into the home by overzealous police officers who may occasionally lose sight of the citizen's expectation of privacy."[27] Accordingly, Judge Cook would reverse the decision of the majority.

The Circuit Court Decisions

The state court's rationale conflicts with the circuit court opinions which have dealt with the issue of non-exigent home arrest entries. As Justice Stevens noted in the majority opinion in *Payton v. New York*, five of the seven United States Courts of Appeals that have considered the question have expressed the opinion that such arrests are unconstitutional.[28] The reasoning of each of these five circuits is similar in that each has explicitly or implicitly rejected the bifurcated standard between a search and an arrest. A statement which was mere dicta in *Coolidge*, that "searches and seizures inside a man's house without a warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances,' "[29] is the doctrine of these five circuits.

Dorman v. United States[30] is the most significant of the circuit court opinions. In deciding the propriety of a warrantless peaceable entry into the home of a suspect whom police had probable cause to believe was an armed felon, the District of Columbia Circuit structured the rationale later embraced by the majority of the circuits which have faced the issue of warrantless home entries. The *Dorman* court held that warrantless entry of a dwelling was per se unreasonable absent certain exigent circumstances which would justify the police bypassing the magistrate. The court elucidated a number of considerations that are material in determining whether entry is reasonable under the circumstances: (1) a grave offense is involved; (2) the suspect is believed to be armed; (3) a clear showing of probable cause to believe the suspect committed the crime involved; (4) strong reason to believe that the suspect is in the premises; (5) the suspect is likely to escape; (6) peaceable entry; (7) the time of entry.[31]

The *Dorman* decision placed search and arrest on the same constitutional footing and listed considerations material to the finding of exigent circumstances. According to the *Dorman* court the warrant requirement rests on the concept that a judicial officer, and not the prosecutor or police, should determine whether an entry to search or arrest should be made.[32] Subject to the exception for exigent circumstances, the Constitution prohibits invasion of the home by unconsented entry unless need is established by a warrant.[33]

The two elements of the *Dorman* rationale, the rejection of the bifurcated standard and the per se unreasonableness of warrantless entries (qualified only by the existence of exigent circumstances), are the hallmark of the other four circuit opinions which have held warrantless entries to be unconstitutional. The Sixth Circuit adopted this rationale in *United States v. Killebrew*,[34] when it faced the issue of the lawfulness of a warrantless entry and search of a suspected felon's motel room by the police. The entry in question was held unlawful because no exigent circumstances existed which

[23] 45 N.Y.2d at 321, 380 N.E.2d at 236, 408 N.Y.S.2d at 406 (Cooke, J., dissenting).

[24] *Id.* at 320, 380 N.E.2d at 235, 408 N.Y.S.2d at 406.

[25] *Id.* at 321, 380 N.E.2d at 235, 408 N.Y.S.2d at 407.

[26] *Id.* at 323, 380 N.E.2d at 237, 408 N.Y.S.2d at 408.

[27] *Id.* at 323-24, 380 N.E.2d at 327, 408 N.Y.S.2d at 408.

[28] 100 S. Ct. at 1374 (footnote omitted).

[29] 403 U.S. at 477-80.

[30] 435 F.2d 385 (D.C. Cir. 1970). The case involved a nighttime warrantless entry by police into the home of an armed robbery suspect some few hours after the crime was committed and after they had received an eyewitness identification of the suspect. The Assistant State's Attorney had been unable to locate a magistrate for the issuance of an appropriate warrant.

[31] *Id.* at 392-93.

[32] *Id.* at 389. *See also* Accarino v. United States, 179 F.2d 456, 458 (D.C. Cir. 1949).

[33] 435 F.2d at 391.

[34] 560 F.2d 729 (6th Cir. 1977). The same court had previously embraced the *Dorman* rationale in United States v. Shye, 492 F.2d 886 (6th Cir. 1977).

would excuse the absence of the warrant.[35] Similarly, the Eighth Circuit relied on the exigent circumstances doctrine in *United States v. Houle*[36] to conclude that a warrantless search and seizure conducted on private premises violated the fourth amendment.

The Ninth Circuit, in *United States v. Prescott*,[37] also accepted the exigent circumstances doctrine. *Prescott* concerned a forcible entry made to arrest a suspect whom federal agents had probable cause to believe committed a felony. The court remanded the case for determination of the existence of exigent circumstances, without which the warrantless arrest would be unreasonable. In deciding that a warrant is required absent exigent circumstances, the court expressly refused to distinguish between a search and an arrest: "The sanctity of the home is no less threatened when the object of police entry is the seizure of a person than a thing. . . . The distinction between a search warrant and an arrest warrant is an artificial one. The Fourth Amendment makes no distinction."[38]

The Second Circuit took the *Dorman* rationale one step further in *United States v. Reed*.[39] The Second Circuit declared that "warrantless felony arrests by federal agents effected in the suspect's home, in the absence of exigent circumstances, *even when based upon statutory authority* and probable cause, are unconstitutional."[40] *Reed* concerned the warrantless entry by U.S. Drug Enforcement Administration agents into the home of a suspected felon. Under the Comprehensive Drug Abuse Prevention and Control Act of 1970, D.E.A. agents are empowered to make warrantless arrests if they have probable cause.[41] According to the court in *Reed*, an arrest in the home is too substantial an invasion to allow without a warrant even if it was accomplished under statutory authority and with probable cause.[42] Significantly, Justice Stevens cited *Dorman* and *Reed* in his majority opinion in *Payton* as persuasive and in accord with the Court's fourth amendment decisions.[43]

Three other circuits have assumed without deciding that warrantless home arrests are unconstitutional. In *United States v. Bradley*,[44] the First Circuit relied on *Dorman* in finding exigent circumstances to uphold the arrest of the defendants in their apartment by federal undercover narcotics agents.[45] The Third Circuit, embracing *Dorman*, found exigent circumstances to uphold a warrantless arrest of a suspected drug dealer in her apartment by agents of the Bureau of Narcotics and Dangerous Drugs in *United States v. Davis*.[46] The court relied on the *Coolidge* dicta that warrantless arrests in the home are per se unreasonable.[47] Similarly, in *Vance v. North Carolina*,[48] the Fourth Circuit embraced the *Dorman* doctrine, and upheld an arrest of a suspected armed robber in his home by police officers with an invalid warrant.[49]

The two circuit courts which have upheld warrantless arrests made in the home relied on statutes. The Fifth Circuit, in *United States v. Williams*,[50] upheld the nighttime warrantless arrest of a suspected kidnapper by F.B.I. agents on the grounds that 18 U.S.C. § 3053 empowers F.B.I. agents to

[35] The defendant in *Killebrew* was suspected of possessing an unregistered firearm. The police had followed the defendant into his hotel room after questioning him in the hallway. The court pointed out that the suspect was not known to be dangerous and no grave offense or crime of violence was threatened or indicated. Nor could the entry be justified on the ground that the suspect might have escaped during the time necessary to obtain a warrant. 560 F.2d at 734.

[36] 603 F.2d 1297 (8th Cir. 1979).

[37] 581 F.2d 1343 (9th Cir. 1978).

[38] *Id.* at 1349-50.

[39] 572 F.2d 412 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978).

[40] *Id.* at 418 (emphasis added).

[41] 21 U.S.C. § 801 (1976). Under the statute an agent may: "Make arrests without warrant for any offense against the United States committed in his presence or for any felony cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony."

[42] 572 F.2d at 423.

[43] 100 S. Ct. at 1380-81.

[44] 455 F.2d 1181 (1972).

[45] *Id.* at 1187.

[46] 461 F.2d 1026, 1031 (3d Cir. 1972). The case concerned a forcible entry into a felony suspect's apartment. The agents in question had received a telephone call from a reliable informant stating that the suspect had gone to pick up a shipment of heroin and would return that evening. A second call from the same informant (one hour after the first) revealed that the suspect had returned and was at the apartment "cutting" the heroin. The agents proceeded without a warrant as the nearest U.S. Commissioner was approximately 45 minutes away, and the agents knew that it took only 15 minutes to cut an ounce of heroin.

[47] *Id.* at 1030.

[48] 432 F.2d 984 (4th Cir. 1970).

[49] *Id.* at 990-91. The warrant in question had been signed by a desk officer on the police force and was therefore invalid. However, the court concluded that the defendant's arrest passed the exigent circumstances test. First, an armed robbery is a grave offense. Second, the police had probable cause. Third, the police had reasonable cause to believe that the defendant was armed. Fourth, the defendant was likely to escape. Fifth, the entry was peaceable.

[50] 573 F.2d 348 (5th Cir. 1978).

make warrantless felony arrests if they have reasonable grounds to believe that the person to be arrested has committed such a felony.[51] In *United States ex rel. Wright v. Woods*,[52] the issue was whether, consistent with the fourth amendment, police without a search or arrest warrant may forcibly enter an apartment being used solely for gambling in order to make arrests for a gambling offense. In upholding the warrantless entry and subsequent arrests, the court declared that "the Constitution has never . . . been read absolutely to require a search or arrest warrant as a precondition to entry into private buildings."[53] Finally, the Tenth Circuit, in *Michael v. United States*,[54] upheld a warrantless arrest in the home without discussing the constitutional issue, relying entirely on statutory grounds.[55]

The Supreme Court Decision

THE MAJORITY OPINION

Justice Stevens, writing for the majority, prefaced the opinion with a detailed statement of facts and a clarification of the issue.[56] Stevens noted that the case presented neither an arrest justified by exigent circumstances nor an entry into a third party's home to make an arrest.[57] In both the *Payton* and *Riddick* cases, the police, having probable cause, made a nonconsensual, warrantless entry into the residence of the suspect in order to make a routine felony arrest.[58]

The second portion of the opinion focused on the language of the fourth amendment. According to the Court, the plain language of the amendment condemns all unreasonable searches or seizures without a warrant.[59] The Court noted: "The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items."[60] The Court concluded that warrantless searches and seizures within a home are presumed unreasonable,[61] and approved the treatment of the issue in *Dorman v. United States*[62] and *United States v. Reed*.[63] The *Dorman* court concluded that an entry to make an arrest implicates the same interest in preserving the privacy of the home as does an entry to search and, therefore, the same level of constitutional protection is justified.[64] The Supreme Court found this reasoning persuasive and in accord with the Court's fourth amendment decisions. Further, the Court noted that any differences in the intrusiveness of the two types of entry were merely ones of degree rather than kind.[65] Finally, the Court stated: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[66]

The third portion of the opinion was devoted to harmonizing the holding of *Watson*, which upheld a warrantless arrest in a public place,[67] with the present decision that a warrantless arrest in the home is a violation of the fourth amendment absent exigent circumstances. Stevens attributed the difference in the decisions to three factors: (1) the tenor of the common law; (2) the treatment of the issues by the state legislatures; (3) congressional judgment.[68]

Stevens explained that in *Watson*, "the Court relied on the well-settled common-law rule that a warrantless arrest in a public place is valid if the arresting officer had probable cause to believe the suspect is a felon."[69] As Stevens accurately pointed out, the common law rule on warrantless home arrests was not as clear as the rule on arrests in

[51] *Id.* at 350.

[52] 432 F.2d 1143 (7th Cir. 1970).

[53] *Id.* at 1146.

[54] 393 F.2d 22 (10th Cir. 1968). *Michael* was decided prior to either *Dorman* or *Coolidge*.

[55] *Id.* at 32–33. 18 U.S.C. § 3052 (1976).

[56] 100 S. Ct. at 1375–78. The issue addressed by the Court was whether an officer may enter a suspect's home to make a warrantless arrest.

[57] *Id.* at 1378. "Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search."

[58] *Id.* at 1375.

[59] *Id.* at 1379. The Court, however, does not elucidate the factors which cause a search and/or seizure to be unreasonable. Query whether a lack of a warrant is dispositive on the issue of reasonableness?

[60] *Id.* The Court fails to note that in its past decisions the rules applicable to searches differ from those applicable to seizures. *Compare* United States v. Watson, 423 U.S. 411, 423–24 (1975) *with* Jones v. United States, 357 U.S. 493, 497 (1958).

[61] 100 S. Ct. at 1380.

[62] 435 F.2d 385 (D.C. Cir. 1969).

[63] 572 F.2d 412.

[64] 100 S. Ct. at 1380–81 (citing Dorman v. United States, 435 F.2d 385). *See* text accompanying notes 30–33 *supra*.

[65] 100 S. Ct. at 1381.

[66] *Id.* at 1382.

[67] 423 U.S. at 416.

[68] 100 S. Ct. at 1382.

[69] *Id.* (footnote omitted).

public places. Rather, an examination of common law commentaries reveals that there has been no definitive rule on the subject.[70] Five commentators who considered the question concluded that warrantless entry into the home to make a felony arrest was legal.[71] Lord Coke, on the other hand, clearly viewed a warrantless entry for the purpose of arrest to be illegal.[72] The remaining common law commentators, while not free from ambiguity, suggest that a warrant was required to effect a valid home arrest.[73] From his analysis of the common law Stevens concluded that the Court lacked the guidance that was present in *Watson*.[74]

Second, Stevens noted that a majority of states permit warrantless entry into the home to arrest even in the absence of exigent circumstances. Twenty-three states authorize such entries by statutes;[75] one state has authorized warrantless arrest entries by judicial decision;[76] fifteen states prohibit such entries;[77] and eleven states have taken no position on the question.[78] However, Stevens contended that these figures reflect a significant decline during the last decade in the number of states permitting warrantless arrests. According to Stevens, virtually all the state courts confronting the constitutional issue directly have held such entries to be invalid absent exigent circumstances. Therefore, Stevens concluded that there was not the virtual unanimity among the states on this question that was present in *Watson* with regard to warrantless arrests in public places.[79] Finally, Stevens asserted that there had been no congressional determination that warrantless entries into the home are reasonable. Thus, the legislative sanction in *Watson* had no counterpart in *Payton*.[80]

[70] This is the consensus of the modern commentators who have carefully studied the early works. Note, *The Constitutionality of Warrantless Home Arrests*, 78 COLUM. L. REV. 1550, 1551–53 (1978). *See also* ALI MODEL CODE OF PRE-ARRAIGNMENT PROC. 308 (Proposed Official Draft 1975); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States, and Ker v. California*, 112 U. PA. L. REV. 499, 502 (1964); Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 DICK. L. REV. 167, 168 n.5 (1977); Recent Development, *Warrantless Arrests by Police Survives a Constitutional Challenge—United States v. Watson*, 14 AM. CRIM. L. REV. 193, 210–11 (1976).

[71] 4 W. BLACKSTONE, COMMENTARIES *292; 1 J. CHITTY, CRIMINAL LAW 23 (1816); M. DALTON, THE COUNTRY JUSTICE 186–87 (2d ed. 1619); 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 588–89 (1736); 4 H. STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 359 (1845).

[72] 4 E. COKE, INSTITUTES *177–78. "[N]either the constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony . . . ."

[73] 1 R. BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 87 (6th ed. 1758) ("where one lies under probable suspicion only, and is not indicted, it seems the better opinion . . . that no one can justify the breaking open doors in order to apprehend him . . . ."); 1 E. EAST, PLEAS OF THE CROWN 321–22 (1806) ("yet a bare suspicion of guilt against the party will not warrant proceeding to this extremity [the breaking of doors], unless the officer be armed with a magistrate's warrant . . . ."); 2 W. HAWKINS, PLEAS OF THE CROWN 139 (6th ed. 1787) ("but where one lies under probable suspicion only, and is not indicted, it seems to better opinion . . . that no one can justify the breaking open doors in order to apprehend him."); 1 W. RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS 745 (1819) (rule similar to that of East).

[74] 100 S. Ct. at 1386.

> Whereas the rule concerning the validity of an arrest in a public place was supported by cases directly in point and by the unanimous views of the commentators, we have found no direct authority supporting forcible entries into a home to make a routine arrest and the weight of the scholarly opinion is somewhat to the contrary.

[75] *Id. See* ALA. CODE § 15-10-4 (1977); ALASKA STAT. § 12.25.100 (1972); ARK. STAT. ANN. § 43-414 (1977); FLA. STAT. § 909.19 (1973); HAW. REV. STAT. § 38-803-11 (Supp. 1975); IDAHO CODE § 19-611 (1948); ILL. REV. STAT. ch. 38, § 107-5(d) (1970); LA. CODE CRIM. PRO. ANN. 224 (West 1967); MICH. COMP. LAWS § 764.21 (1968); MINN. STAT. § 544.200 (1953); NEB. REV. STAT. § 29-411 (1974); NEV. REV. STAT. § 171.138 (1977); N.Y. CRIM. PROC. LAW §§ 140.15(4), 120.80(4)-(5) (McKinney 1971); N.C. GEN. STAT. § 40-807 (1955); UTAH CODE ANN. § 77-13-12 (1953); WASH. REV. CODE § 10.31.040 (1961).

[76] *See* Shanks v. Commonwealth, 463 S.W.2d 312, 315 (Ky. 1971).

[77] Four states prohibit such entries by statute, *see* GA. CODE §§ 27-205, 27-207 (1978); IND. CODE §§ 35-1-19-4, 35-2-29-6 (1979); MONT. REV. CODES ANN. § 46-6-401 (1979); S.C. CODE § 23-15-60 (1977). Texas prohibits such entries by common law, *see* United States v. Hall, 468 F. Supp. 123, 131 n.16 (D. Tex. 1979); Moore v. State, 149 Tex. Crim. 229, 193 S.W.2d 204, 207 (1946). Ten other states, Arizona, California, Colorado, Iowa, Kansas, Massachusetts, Oregon, Pennsylvania, West Virginia, and Wisconsin, prohibit such entries on constitutional grounds.

[78] Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Virginia, and Wyoming.

[79] 100 S. Ct. at 1387.

[80] There are federal statutes which in general terms authorize certain government agents to make warrantless arrests. *See* 21 U.S.C. § 878 (1976) (D.E.A. agents); 18 U.S.C. § 3052 (1976) (Secret Service Agents); 18 U.S.C. § 3061 (1976) (Postal Sevice Inspectors); 26 U.S.C. § 7607 (1976) (customs officers). The language of these statutes is similar, *see, e.g.*, 18 U.S.C. § 3052 (1976):

> [Agents have authority to] make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they

In the fourth and final portion of the majority opinion, Stevens rejected the arguments that the warrant requirement will pressure police to seek warrants and make arrests too hurriedly, thus increasing the likelihood of arresting innocent people; that it will divert scarce resources thereby interfering with the ability of the police to conduct thorough investigations; that it will penalize the police for deliberate planning; and that it will lead to more injuries.[81] Stevens rejected the suggestion of the State of New York that a search warrant based upon probable cause to believe that the suspect is at home can adequately protect the privacy interests at stake. New York argued that an arrest warrant requirement was manifestly impractical. Stevens responded to that contention by noting that although an arrest warrant requirement may afford less protection than a search warrant requirement, "it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen."[82] Thus, because no arrest warrant was obtained in either the *Payton* or *Riddick* case, the state court judgments were reversed.

JUSTICE WHITE'S DISSENT

Justice White, in his dissent in which the Chief Justice and Justice Rehnquist joined, rejected the "hard-and-fast rule"[83] adopted by the majority that officers may never enter a home during the daytime to arrest for a dangerous felony absent exigent circumstances unless they have first obtained a warrant. Rather, White would substitute "a clear and simple rule": "After knocking and announcing their presence, police may enter the home to make a daytime arrest without a warrant when there is probable cause to believe that the person to be arrested committed a felony and is present in the house."[84] According to White, this rule would best comport with the common law background, the traditional practice in the states, and the history and policies of the fourth amendment, unlike the rule formulated by the majority in a decision which "virtually ignores these centuries of common-law development, and distorts the historical meaning of the Fourth Amendment."[85]

White rejected Stevens' interpretation of the common law. First, White noted that there are two maxims that seem inconsistent: "Every man's house is his castle" and "The King's keys unlock all doors." The first of these applies to civil process, and the second to criminal process.[86] Although the Crown had power to enter a dwelling in criminal cases, the cases do not directly address the question of whether a constable could break doors to arrest without authorization by a warrant.[87]

White concurred with the majority that commentators have differed as to the scope of the constable's inherent authority, when not acting under a warrant, to break doors in order to arrest. Relying principally on Blackstone, White then concluded that *probably* the majority of the commentators would permit arrest entries on probable suspicion even if the person arrested were not in fact guilty. These authors, according to White, would have permitted the type of home arrest entries that occurred in *Payton* due to the existence of probable cause.[88]

According to White, not only did the majority opinion misinterpret the common law, but it misinterpreted the history of the fourth amendment as well. The fourth amendment, in White's opinion, was not intended to outlaw the type of police conduct at issue. Rather, the fourth amendment was directed towards safeguarding the rights at common law and restricting the warrant practice which gave officers vast new powers beyond their inherent authority. The inherent authority of the officers at common law included, according to White, relying principally on Blackstone, the power to break down doors in making warrantless felony arrests.[89]

White supported his attack on the majority opinion with evidence that by 1931, twenty-four of twenty-nine state codes authorized warrantless ar-

have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

It is unclear whether these statutes are applicable in the context of a warrantless home arrest.

[81] 100 S. Ct. at 1388.

[82] *Id.*

[83] *Id.* at 1397 (White, J., dissenting).

[84] *Id.*

[85] *Id.*

[86] Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 798, 800 (1924).

An early dictum in the year book says: "For a felony, or suspicion of felony, one may break into the dwelling house to take the felon for it is the common weal and to the interest of the King to take him; but it is otherwise as to debt or trespass; the sheriff or any other may not break into his dwelling to take him, for it is only for the private interest of the party."

[87] *Id.* (citing Y.B. 13 Edw. 4, f. 9a (1455)) (White, J., dissenting). The only relevant cases concern execution of the king's writ.

[88] *Id.*

[89] *Id.* at 1392.

rest entries, and by 1975, thirty-one of thirty-seven state codes authorized warrantless home felony arrests.[90] White believed that the consensus among the states was entitled to more deference than the majority opinion provided. The federal statutes dealing with powers of warrantless arrest are also relevant.[91] Focusing on 18 U.S.C. § 3052 (1976), White remarked: "Particularly in light of the accepted rule at common law and among the States permitting warrantless home arrests, the absence of any explicit exception for the home from § 3052 is persuasive evidence that Congress intended to authorize warrantless arrests there as well as elsewhere."[92] In White's opinion, the federal statutes can be read to authorize the type of police conduct at issue. The majority opinion found no guidance in the statutes.

White devoted the second portion of his dissent to developing the rule which he would implement. He called for a realistic assessment of the extent of the invasion of privacy. The inquiry must be "whether the incremental intrusiveness that results from an arrest's being made *in the dwelling* is enough to support an inflexible constitutional rule requiring warrants for such arrests whenever exigent circumstances are not present."[93] White's rule has four restrictions—felony, knock and announce, daytime, and stringent probable cause—all of which constitute "powerful and complementary protections for the privacy interests associated with the home."[94] Further, White noted that these limitations on warrantless arrest entries are satisfied on the facts presented to the Court.

White also asserted that his rule would not hamper effective law enforcement, while the majority rule was seriously flawed in this regard. Under the majority rule, police officers will delay making arrests and will be faced with the difficult task of determining whether exigent circumstances exist.[95] Further, the uncertainty inherent in the exigent circumstances determination burdens the judicial system as well. According to White, under the majority decision, whenever the police have made a warrantless home arrest there will be the possibility of endless litigation with respect to the existence of exigent circumstances.[96]

[90] *Id.* at 1393. *See* note 80 *supra.*
[91] *See* note 77 *supra.*
[92] 100 S. Ct. at 1394 (White, J., dissenting).
[93] *Id.* at 1395.
[94] *Id.*
[95] *Id.* at 1396.
[96] *Id.* at 1397 (citing United States v. Watson, 423 U.S. 411 1975) ("whether it was practicable to get a warrant, whether the suspect was about to flee, and the like").

Analysis

The Court in *Payton v. New York* held that warrantless entries into the home for purposes of arrest are per se unreasonable absent exigent circumstances. Thus the Court placed searches and arrests on the same constitutional footing. The *Payton* decision has critical implications for the reach of the fourth amendment. First, the Court necessarily rejected the illogical bifurcated treatment of arrests and searches which it had developed in earlier fourth amendment decisions. Second, by embracing the *Dorman* rationale that warrantless arrest entries are per se unreasonable absent exigent circumstances, the Court provided a workable standard for the judiciary and law enforcement officials to determine when a warrant is necessary.

In rejecting the differential treatment of searches and seizures in fourth amendment analysis, the Court resolved an issue which had troubled it since its decision in *Coolidge v. New Hampshire.*[97] The plurality opinion in *Coolidge* offered as dicta the assertion that warrantless searches and arrests are per se unreasonable absent exigent circumstances.[98] This statement, however, conflicted with the Court's previous decisions on the reasonableness of warrantless searches and arrests.

The Court's position on warrantless searches was clear by the time *Coolidge* was decided. In *Jones v. United States,*[99] the Court stated that "it is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify search without a warrant."[100] This position finds support in the language of Justice Jackson in *Johnson v. United States*:

> When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with.[101]

Thus, a warrantless search is unreasonable absent exigent circumstances or unless performed incident to a valid arrest.[102]

[97] 403 U.S. 443 (1971).
[98] *Id.* at 477–80.
[99] 357 U.S. 493 (1958).
[100] *Id.* at 497 (citing Agnello v. United States, 269 U.S. 20, 33 (1925)).
[101] 333 U.S. 10, 14–15 (1948).
[102] Coolidge v. New Hampshire, 403 U.S. at 474–75. *See* Chimel v. California, 395 U.S. 752 (1969).

The Court took an opposite stance in its decisions on the reasonableness of warrantless arrests prior to *Payton*. In *Gerstein v. Pugh*,[103] the Court acknowledged that "while the Court has expressed a preference for the use of arrest warrants when feasible . . . it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant."[104] Moreover, in *United States v. Watson*,[105] the Court upheld the daytime warrantless public arrest of a felony suspect by a postal inspector who was acting under statutory authority.[106]

Despite the Court's confirmation of the bifurcated treatment of searches and seizures in *Watson*, neither that decision nor the Court's earlier fourth amendment decisions dictate an opposing result in *Payton v. New York*. *Payton* is a case of first impression, since the Court reserved the issue of warrantless arrests in the home in *Watson*.[107] In addition, the *Payton* Court was able to draw upon the well-developed body of law concerning the privacy of the home[108] as well as its search and seizure decisions.

The Court failed to explain why warrantless searches and warrantless arrests, which once demanded separate standards, should now be analyzed under the same rubric, except for its equation of warrantless searches and home arrests on the basis of their shared characteristic of invasion of the private home.[109] Justice Stevens was not troubled by the Court's previous differential treatment of searches and seizures.[110] Indeed, in *Payton*, Stevens stated simplistically that "searches and seizures inside a home without a warrant are presumptively unreasonable," relying on the *Coolidge* dicta for this assertion.[111] Nonetheless, the Court attempted to fill this gap in its reasoning by relying on *Dorman v. United States* and *United States v. Reed* for the proposition that warrantless searches and seizures in the home are per se unreasonable.[112] The Court's position is further supported by its concern for the privacy and sanctity of the home expressed in earlier fourth amendment decisions.[113] Perhaps the Court's recognition of individual privacy interests is an adequate basis to differentiate *Payton* from prior decisions upholding warrantless arrests outside the home. The majority, however, can be criticized for characterizing the issue of warrantless home arrests as "well-settled,"[114] when in fact only the *Payton* decision settled the issue.

Despite the failure to explain its reasoning, the majority cannot be criticized for doing away with the differential treatment of searches and seizures of its earlier fourth amendment decisions. A judicial rule affording more protection to tangible items in an individual's home than to the individual himself is plainly illogical. In *Dorman*, Judge Leventhal aptly stated "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and sanctity of the home, and justify the same level of constitutional protection."[115]

By recognizing the individual's interest in the privacy of his home, therefore, the Court implicitly balanced those interests with the government's interests in law enforcement in *Payton*. Central to the holding prohibiting a warrantless and nonconsensual entry into a suspect's home for an arrest is the determination that the individual's privacy interest in his home outweighs the competing governmental interest in making arrests based on probable cause. The District of Columbia Circuit's decision in *Dorman* provides the mechanism for applying this balancing test in the form of a set of factors to determine the existence of exigent circumstances, the exception to the rule. Indeed, the court has recognized that there are situations where the government's need to proceed without a warrant outweighs the individual's privacy interest, as evidenced by the following statement from *Johnson v.*

[103] 420 U.S. 103 (1975).

[104] *Id.* at 113 (citations omitted).

[105] 423 U.S. at 416. The subsequent warrantless search of Watson's car could not have been made absent a valid arrest or consent of Watson.

[106] *Id.* at 418 n.6.

[107] *Id.* at 415. Title 18 U.S.C. § 3061(a)(3) expressly empowers the Board of Governors of the Postal Service to authorize Postal Service Officers and employees to make warrantless felony arrests if based on probable cause. The statute is silent as to the question of warrantless entry. *See* note 80 *supra*.

[108] *See* 100 S. Ct. at 1381-82.

[109] *Id.* at 1381. "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home." *Id.* (quoting United States v. Reed, 572 F.2d 412, 423 (2d Cir. 1978)).

[110] "The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items." 100 S. Ct. at 1379.

[111] *Id.* at 1380.

[112] *Id.* at 1380-81. *See* note 109 *supra*.

[113] 100 S. Ct. at 1382. "At the very core (of the fourth amendment) stands the right of a man to retreat into his own home and there be free from unreasonable Government intrusion." *Id.* (quoting Silverman v. United States, 365 U.S. 505, 511 (1965)).

[114] *Id.* at 1381.

[115] 435 F.2d 385, 390 (D.C. Cir. 1970).

United States: "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for a search may be dispensed with."[116] Furthermore, this method of weighing competing individual and governmental interests provides a workable standard for the judiciary and law enforcement officials to determine when a warrant is necessary. *Payton* makes the Court's definition of "exigent circumstances" in its decisions on the reasonableness of warrantless searches applicable to warrantless home arrests. In future decisions, the Court may specifically apply its fourth amendment search decisions to cases involving warrantless home arrests. The principal ground for criticism of the majority opinion is the inordinate amount of space devoted to a fruitless analysis of the common law. In an attempt to distinguish *Watson*, Justice Stevens became embroiled in a dispute with Justice White as to the nature and significance of the common law. Justice Stevens concluded that the issue of the validity of a warrantless home entry for the purpose of a felony arrest was not definitively settled by the common law,[117] yet he asserted that the common law provided important considerations for disposing of the issue.[118] That an unsettled common law can shed light on the issue in *Payton* is difficult to conceive.[119]

Justice Stevens' appraisal of the common law relied on *Semayne's Case* for the proposition that "in all cases when the King is a party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter."[120] Stevens characterized this passage as one which "cannot be said unambiguously to endorse warrantless entries."[121]

There is sharp disagreement among common law commentators regarding the authority of peace officers to forcibly enter to make an arrest. Lord Coke believed that "neither the constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony . . . ."[122] Blackstone, however, took an opposite view:

> The constable . . . hath great original and inherent authority with regard to arrests. He may, without warrant, arrest anyone for a breach of the peace committed in his view, and carry him before a justice of the peace. And in the case of felony actually committed, as a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors . . . .[123]

Dalton[124] and Hale[125] concurred with Blackstone, as did Chitty[126] and Stephen.[127] The works of Burn, Foster, and Hawkins are not free from ambiguity, but suggest that a warrant was required to effect a valid home arrest.[128] East noted: "But though a felony have actually been committed, yet a bare suspicion of guilt against the party will not warrant proceeding to this extremity [breaking doors], unless the officer be armed with a magistrate's warrant on such suspicion."[129] From these commentaries Justice Stevens concluded that Lord Coke's view was authoritative, and the Framers must have intended that a warrant was required to enter a residence.[130] White countered this conclusion with his assertion that the majority of commentators would permit warrantless arrest entries if based on probable cause. According to White, such entries were not unreasonable at common law.[131]

[116] 333 U.S. at 14–15.

[117] 100 S. Ct. at 1386.

[118] "An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable." *Id.* at 1382–83.

[119] *See* Note, *supra* note 70, which reveals that "examination of the major common-law commentaries reveals, however, that there has been no definitive rule on the subject;" and concludes "the common law therefore does not indicate the Framers' view of the constitutionality of a warrantless home arrest."

[120] 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603).

[121] 100 S. Ct. at 1383.

[122] 4 E. Coke, *supra* note 72, at *177.

[123] W. Blackstone, *supra* note 71.

[124] M. Dalton, *supra* note 71.

[125] 1 M. Hale, *supra* note 71.

[126] 1 J. Chitty, *supra* note 71.

[127] 4 H. Stephen, *supra* note 71.

[128] 1 R. Burn, *supra* note 73, at 69 (1775); M. Foster, Crown Law 320–21 (1762); 2 W. Hawkins, *supra* note 73, at 138–39.

[129] 1 E. East, *supra* note 73, at 322. *See also* 1 W. Russell, *supra* note 73.

[130] 100 S. Ct. at 1385.

> It is obvious that the common-law rule on warrantless arrests was not as clear as the rule on arrests in public places. Indeed, particularly considering the prominence of Lord Coke, the weight of authority as it appeared to the Framers was to the effect that a warrant was required . . . .

[131] *Id.* at 1391–92 (White, J., dissenting). "Probably the majority of commentators would permit arrest entries on probable suspicion even if the person arrested were

Hence the Justices engaged in an unprofitable battle of experts on the common law. In his dissent, Justice White relied on the concept of the inherent power of the peace officer to arrest and search at common law, which power was unaffected by the fourth amendment.[132] Probably the most illuminating observation throughout this exercise was that of Justice Stevens that "our study of the relevant common law does not provide the same guidance that was present in *Watson*."[133]

Conclusion

Payton v. New York is a watershed in the Court's search and seizure decisions. The holding eliminates the illogical bifurcated treatment of warrantless searches and arrests, which had the effect of according the individual's property greater protection than the individual. More importantly, *Payton* provides a mechanism for balancing the competing interests of government and the individual, taking into account those exigent circumstances which would justify a warrantless home arrest.

The alternative rule espoused by Justice White, by contrast, provides no protection for individual privacy. Indeed, Justice White's rule is a potentially dangerous tactical weapon for the unscrupulous law enforcement official. Justice White contended that his four restrictions of entry only for a felony arrest, knock and announce, daylight entry, and stringent probable cause would more than adequately protect individual privacy. The thrust of the fourth amendment's protections of individual privacy is not, however, the individual who "surrender[s] at his front door, thereby maintaining his dignity."[134] By his lack of cooperation, the individual who attempts to flee or hide gives the police officer permission to follow under Justice White's rule.[135] Hence this rule allows the police officer to manufacture circumstances which shall be deemed exigent for purposes of warrantless entry and arrest. Under the majority rule in *Payton*, however, the government may enter the individual's home to arrest him only with a warrant or where exigent circumstances demand entry. The police can neither determine probable cause nor create exigent circumstances.

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not in fact guilty.... It was not generally considered "unreasonable" at common law for officers to break down doors in making warrantless felony arrests." *Id.*

[132] *Id.* at 1392.

[133] *Id.* at 1386 (opinion of the majority).

[134] *Id.* at 1395–96 (White, J., dissenting).

[135] *Id.* at 1396 n.14.