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Payton v. New York: The Supreme Court Reverses the Common Law Warrantless Arrest Requirements

Ann McEntire

PAYTON V. NEW YORK: THE SUPREME COURT REVERSES THE COMMON LAW WARRANTLESS ARREST REQUIREMENTS

INTRODUCTION

In *Payton v. New York*[1] the Supreme Court held that a warrant is required for arrests in a home or dwelling. In doing so the Court moved to harmonize the fourth amendment protection for both arrests and searches. The purpose of this comment will be to explore the protection provided by the fourth amendment in the context of arrests, and to discuss the areas of warrantless arrests not yet resolved.

I. THE FACT SITUATIONS

The Supreme Court's decision in *Payton* was the result of two New York cases.[2] In both cases, *People v. Payton*[3] and *People v. Riddick*,[4] the police acted with probable cause, but without arrest or search warrants, when they went to the defendants' homes to make ordinary felony arrests. The New York trial judge in each case refused to suppress incriminating evidence seized after entry into the homes.

The issue presented to the Supreme Court was the constitutionality of New York statutes authorizing police officers to enter a home or dwelling with necessary force, but without a warrant, to make a routine felony arrest.[5]

In *Payton* police went to the defendant's apartment in the early morning hours without a warrant to arrest him for the murder of a gas station attendant. The officers observed light under the door and music coming from inside. There was no response to their knock on the metal door. The officers called for assistance and approximately thirty minutes later they used crowbars to open the door. Upon entering the apartment and searching for the suspect, the police discovered in plain view a shell casing which they seized. The motion to suppress the casing was denied.

In *Riddick* police officers went to the suspect's apartment without a warrant to arrest him for two armed robberies. The officers knocked on the door and it was answered by Riddick's three-year-old son. Riddick was sitting in

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

2. The New York cases of People v. Payton and People v. Riddick were consolidated by the Supreme Court on appeal.

3. People v. Payton, 84 Misc.2d 973, 376 N.Y.S.2d 779 (Sup. Ct. 1974).

4. People v. Riddick, 56 A.D.2d 937, 392 N.Y.S.2d 848 (1977).

5. N.Y. CRIM. PROC. LAW §§ 177, 178 (McKinney 1971). The Court cited the applicable portions:

> [Section 177] A peace officer may, without a warrant, arrest a person, . . . 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it. [Section 178] To make an arrest, as provided in the last section [Section 177], the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

bed with a sheet over him several feet from the door. The officers identified themselves, declared their purpose, and then entered the bedroom and placed Riddick under arrest. Before allowing him to dress they searched a chest of drawers two feet from the bed. The search turned up narcotics and related paraphernalia. Riddick was subsequently indicted on narcotics charges and a motion to suppress the evidence was denied.

The New York Court of Appeals affirmed the convictions in a single opinion holding the seizures were proper because the police were authorized by state statute to make warrantless arrests in a home and to use necessary force to gain entry to effect the arrest.[6]

Although many Supreme Court opinions concerning fourth amendment problems have alluded to the question of the constitutionality of warrantless home arrests,[7] and although the Court has ruled on warrantless arrests in public places,[8] the question had repeatedly been reserved by the Court for resolution. Consistent with its custom of restricting its holding to a narrowly defined question, the Court's opinion in *Payton* leaves other related questions unanswered.

II. BACKGROUND

A. *Fourth Amendment Protection*

The fourth amendment by its first clause extends protection against unreasonable searches and seizures executed without a warrant.[9] The amendment was interpreted in *Boyd v. United States*[10] as applying to all invasions by the government of "the sanctity of a man's home and the privacies of life."[11] It is well settled that the fourth amendment was directed at physical entry of the home.[12] The Court has, however, extended fourth amendment protection to citizens outside of the home.[13]

Prior judicial decisions construing the first clause of the fourth amendment are numerous, but have been primarily applicable to invasions for the purposes of searches and seizures of evidence, not persons. These cases have held warrantless searches and seizures presumptively unreasonable,[14] but

6. People v. Payton, 45 N.Y.2d 300, 309-310, 380 N.E.2d 224, 228, 408 N.Y.S.2d 395, 399 (1978).

7. *See* United States v. Santana, 427 U.S. 38 (1976); United States v. Watson, 423 U.S. 411 (1976); Gerstein v. Pugh, 420 U.S. 103 (1975); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

8. United States v. Watson, 423 U.S. 411 (1976).

9. U.S. CONST. amend. IV reads:

> 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.

10. 116 U.S. 616 (1886).

11. *Id.* at 630.

12. United States v. United States District Court, 407 U.S. 297 (1972).

13. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Katz v. United States, 389 U.S. 347 (1967).

14. Coolidge v. New Hampshire, 403 U.S. 443 (1971). *See also* Camara v. Municipal Court, 387 U.S. 523 (1967); Johnson v. United States, 333 U.S. 10, 14 (1948).

have utilized a balancing test to evaluate the reasonableness of a search or seizure conducted without a warrant.[15] The Court has balanced the need to search without a warrant, usually due to time constraints, against the invasion of privacy entailed by the search.[16] From this balancing test some exceptions to the warrant requirement have been developed. Such doctrines as exigent circumstances,[17] plain view,[18] and search incident to arrest,[19] may be invoked in determining the reasonableness of dispensing with the search warrant requirement.

B. *Arrests are Seizures for Fourth Amendment Purposes*

While case law on warrantless searches is extensive, few decisions on arrest warrant requirements have been rendered by the Supreme Court. The Court has stated that a warrantless arrest of a person is a seizure and, therefore, must be reasonable.[20] While the Court has stated that warrants are favored, there are few decisions relating to the arrest warrant requirement, and it was bypassed in a number of cases by resolving those decisions on other grounds.[21]

C. *Warrantless Arrests*

The lack of judicial decisions and the confusion concerning the arrest warrant requirement is due, in part, to the widespread acceptance of an officer's authority to make a warrantless arrest. Justice White cited an early case, *Kurtz v. Moffitt*,[22] in his opinion in *United States v. Watson*:[23] "The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the several States to be in force in cases of felony punishable by the civil tribunals."[24]

United States v. Watson[25] dealt with the question of warrantless arrests in public places. Justice White, writing for the Court, held that warrantless

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15. *See* Johnson v. United States, 330 U.S. 10, 14 (1948):
> 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 Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . 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.

16. Camara v. Municipal Court, 387 U.S. 523 (1967).

17. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

18. *See* Harris v. United States, 390 U.S. 234 (1968).

19. *See* Chimel v. California, 395 U.S. 752 (1969).

20. *E.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Beck v. Ohio, 379 U.S. 89 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959).

21. *Accord*, Gerstein v. Pugh, 420 U.S. 103 (1974); *see* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Beck v. Ohio, 379 U.S. 89 (1964); Ker v. California, 387 U.S. 23 (1963).

22. 115 U.S. 487, 504 (1885).

23. 423 U.S. 411 (1976).

24. *Id.* at 419. *See also* ALI CODE OF PRE-ARRAIGNMENT PROCEDURE 308 (Proposed Official Draft) (1975).

25. 423 U.S. 411 (1976).

arrests in public places are not violative of the fourth amendment. Justice White based this ruling upon two grounds: 1) the common law decisions expounding the validity of warrantless arrests in public places; and 2) the acceptance of this precedent by both Congress and a majority of the states. This decision pertained only to warrantless arrests in public places and did not address the issue of warrantless arrests in private residences.

A step toward resolution of this question was taken in the decision announced in *United States v. Santana*.[26] Although this case was resolved under the exigent circumstances exception, the Court held that an arrest without a warrant was proper when it began in a public place and ended inside the defendant's home. In this case, the Court reasoned that a warrantless arrest which was initiated outside the defendant's residence and ended inside the doorway to the residence could not be thwarted by the defendant's retreat into her home.

The United States Court of Appeals for the District of Columbia addressed the question of warrantless home arrests in *Dorman v. United States*[27] by declaring them unconstitutional.[28] Prior to *Payton*, however, the Supreme Court had not directly addressed this particular issue.

III. PAYTON

In *Payton v. New York*,[29] Justice Stevens delivered the opinion for the Court declaring that warrantless arrests in the home absent some exigent circumstance are violative of the fourth amendment. The Court first discussed the applicability of the fourth amendment to warrantless searches and seizures.[30] It then cited cases holding that an arrest is a seizure of a person and, as such, is afforded protection by the fourth amendment.[31] The Court also reiterated that " 'physical entry into the home is the chief evil against which the wording of the fourth amendment is directed.' "[32]

A. *Intrusiveness of Entries*

Next, the Court considered the nature of the intrusion presented by

26. The case involved an arrest without a warrant which started in a public place (doorway) and ended inside a dwelling. 427 U.S. 38, 41 (1975).

27. 435 F.2d 385 (D.C. Cir. 1969).

28. *Id.*; *accord*, United States v. Reed, 572 F.2d 412 (2d Cir. 1978); Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949). The warrantless home search question has been addressed by United States Courts of Appeals. *See generally* United States v. Erb, 596 F.2d 412 (10th Cir.), *cert. denied*, 100 S. Ct. 97 (1979); United States v. Houle, 603 F.2d 1297 (8th Cir. 1979); United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978). For further discussion of warrantless arrests prior to *Payton*, *see generally* O'Connor, *Fourth Amendment and Warrantless Home Arrests*, N.Y.L.J. 1 (Sept. 1979); Note, *The Constitutionality of Warrantless Home Arrests*, 78 COLUM. L. REV. 1550 (1978); Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 DICK. L. REV. 167 (1977); Comment, *Warrantless Arrests in Homes: Another Crisis for the Fourth Amendment*, 7 FORDHAM URB. L.J. 93 (1978-79).

29. 100 S. Ct. 1371 (1980).

30. *Id.* at 1379.

31. *Id.*

32. *Id.* at 1380 (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)).

both an entry to search and an entry to arrest. Justice Stevens recognized that an entry to search may involve more of an intrusion than an entry to arrest, but, he stated, a difference in degree does not negate the warrant requirement for an arrest.

> The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The fourth amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."[33]

B. *Public v. Private Places*

The issue of warrantless arrests in the home was also addressed by the *Payton* Court. New York argued that the holding in *Watson*[34] required a similar result in the instant case. In *Watson* the Court relied on: 1) the common law rule that warrantless arrests in public places were proper; 2) the fact that a majority of the states followed that rule; and 3) an expression of congressional intent indicating such arrests were reasonable.[35] The Court considered each of the reasons as it applied to warrantless arrests in homes.

C. *The Common Law*

The Court first noted that the common law understanding of an officer's authority must be examined in considering what the framers of the fourth amendment may have felt was reasonable. But, Justice Stevens pointed out, the interpretation of the fourth amendment is an evolving process adjusting the law to changing societal norms and conditions. "Thus, this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the fourth amendment's passage."[36]

Further, the common law rules of arrest were developed mainly in civil damage actions for trespass or false arrest, the Court stated. The modern trend revolves around the application of the exclusionary rule to evidence gained as the result of an arrest or search.[37] The Court cited English cases

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33. 100 S. Ct. at 1381-82 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).
34. 100 S. Ct. at 1382.
35. United States v. Watson, 423 US. 411, 418-23 (1976).
36. 100 S. Ct. at 1382.
37. Application of the exclusionary rule to situations involving illegal arrests concerns the admissibility of evidence at trial, just as in illegal searches and seizures. Payton v. New York, 100 S. Ct. 1371, 1381 (1980). *See* United States v. Crews, 100 S. Ct. 1244 (1980). *See also* Terry v. Ohio, 392 U.S. 1 (1968); Mapp v. Ohio, 367 U.S. 643 (1961). Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The "fruit of the poisonous tree" doctrine is relevant in this context. Wong Sun v. United States, 371 U.S. 471 (1963).

In *Crews*, the Court explained that the defendant is not suppressible.

> "An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction [citations omitted] . . . . Respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct."

United States v. Crews, 100 S. Ct. at 1251. *See also* Gerstein v. Pugh, 420 U.S. 103 (1974);

concerning an officer's authority to enter a home for service of process. *Semayne's Case*[38] spoke to the issue of forcible entry into a dwelling "either to arrest him or to do other execution of the K.s [King's] process . . . ."[39] Some commentators have argued that this phrase supports the contention that warrants were not necessary. Others believe that the context implies that it was descriptive of the extent of the authority of the King's writ. The Court felt that the language in *Semayne* did, at best, ambiguously authorize warrantless entries.[40]

Proceeding from the language found in *Semayne*, Justice Stevens referred to the views held by various English commentators whose writings on arrests were practically contemporaneous with the framing of the fourth amendment.[41] Stevens concluded that the diversity of views on this issue illustrated that the common law rule concerning warrantless arrests in the home was certainly not as authoritative as the rule on arrests in public places. This diversity of views and the absence of any early English cases on point, coupled with the often repeated adage that "a man's house is his castle" in the common law,[42] led Justice Stevens to the conclusion that the common law and the intent of the framers of the fourth amendment was that arrests should not be made without a warrant unless the arrest was the result of hot pursuit.

D. *Widespread Acceptance of Common Law Rule by the States*

The Court acknowledged that a majority of states have taken a position on warrantless arrests in homes. It noted that 24 states permitted such arrests, 15 states prohibited them, and 11 took no position at all.[43] Justice

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United States v. Blue, 384 U.S. 251 (1966); Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). *Cf.* Dunaway v. New York, 442 U.S. 200 (1979) (confession suppressed after illegal arrest); Brown v. Illinois, 422 U.S. 590 (1975) (confessions or statements obtained during an illegal arrest); Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprints taken after arrest suppressed).

38. 77 Eng. Rep. 194 (K.B. 1603).

39. 100 S. Ct. at 1383.

40. *Id.* at 1383-84.

41. *Id.* at 1385.

42. *Id.* at 1386.

43. *Id.* at 1387. The Colorado Supreme Court's position on warrantless arrests in the home has recently been clarified. In 1971, in People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971), the court held that a police officer could not enter a private residence to effect an arrest without a warrant. In a case decided in 1976 the court held that an arrest warrant must be obtained whenever possible. People v. Hoinville, 191 Colo. 357, 553 P.2d 777 (1976). In People v. Casias, 193 Colo. 66, 563 P.2d 926 (1977), the court held that a warrantless arrest in a home was not valid absent exigent circumstances. The high court adopted the ruling of United States v. Watson, 423 U.S. 41 (1975), in People v. Tangas, 190 Colo. 262, 545 P.2d 1047 (1976), for warrantless arrests in public places.

Prior to 1977 peace officers were required by statute to obtain an arrest warrant whenever practicable. In 1977, however, the state legislature deleted the warrant requirement from the statute authorizing peace officers to make arrests.

> A peace officer may arrest a person when: (a) He has a warrant commanding that such person be arrested; or (b) Any crime has been or is being committed by such person in his presence; or (c) He has probable cause to believe that an offense was committed by the person to be arrested.

COLO. REV. STAT. § 16-3-102(1) (1973). In People v. Coto, 611 P.2d 969 (Colo. 1980), the Colorado Supreme Court reaffirmed its position as reflected in the *Moreno* decision concerning warrantless arrests in the home. *See generally* Moore & Multz, *Arrest, Stop and Frisk: An In-depth Analysis*, 9 COLO. LAW. 646 (1980).

Stevens pointed out that only two of the states permitting warrantless entries which have faced a constitutional challenge upheld those entries. Ten other states have held similar statutes unconstitutional, on either state or federal constitutional grounds.

Even though the weight of state law authority on the question was clear, the Court felt that the kind of unanimity which existed as to warrantless arrests in public places was lacking. "A longstanding, widespread practice is not immune from constitutional scrutiny."[44] Justice Stevens found that the acceptance of the common law rule on warrantless arrests in homes was not sufficient to validate the practice.

E. *Congressional Expression*

The Court briefly addressed congressional expressions concerning warrantless arrests in homes, stating that no congressional manifestations of the reasonableness of such arrests had been called to its attention. Justice Stevens stated that none of the federal statutes cited in *Watson* indicated a position on warrantless arrests in the home. He ended his consideration by saying "[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."[45]

F. *Warrant Requirement*

Lastly, the majority spoke to the argument concerning the practicality of a warrant requirement. New York had argued that such a requirement would impose an unreasonable burden on the police and contribute to more arrests of innocent persons and hasty investigations. Justice Stevens' reply to this argument was to point to a lack of evidence that effective law enforcement had suffered in those states which required such a warrant. Further, he noted that in this instance the constitutional command was to be accorded priority over policy considerations.

New York had also argued that if a warrant were required to protect the privacy interests involved, a search warrant, rather than an arrest warrant, would be required. While Justice Stevens conceded that an arrest warrant provided less protection than a search warrant in terms of the intrusion into the home, he stated that the protection of an arrest warrant would suffice. "Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[46]

Justice Blackmun, in a concurring opinion, advocated the use of a balancing test on fourth amendment issues. He felt that in balancing the government's interests and the individual's interests, the correct result was

44. 100 S. Ct. at 1387.
45. *Id.* at 1388.
46. *Id.*

reached both in *Payton* and in *Watson*.[47]

IV. THE DISSENT

Justice White wrote the dissenting opinion in which Chief Justice Burger and Justice Rehnquist joined. Justice White developed the common law authority of an officer to arrest, concluding that the framers of the fourth amendment intended to extend the same inherent powers to law enforcement officers as those possessed by officers before the adoption of the amendment. Their concern about warrants was directed to the writs of assistance which enlarged the authority of the officer leading the abuses which were obnoxious to the colonists.[48]

Justice White then examined prior judicial decisions on warrantless arrest entries. He noted the lack of case law prior to the 1900's and suggested that the lack was due to the acceptance at common law of warrantless arrest entries.[49] He also pointed to the adoption of state codes of criminal procedure endorsing the inherent authority of a peace officer to arrest without a warrant.[50]

Justice White cited *Commonwealth v. Phelps*[51] as the first United States judicial holding on the subject. In that case the Massachetts Supreme Court held such arrests constitutional. He suggested that the assumption of the constitutionality of such arrests was responsible for the long standing acceptance of the practice.[52] Justice White then cited *Jones v. United States*[53] and *Coolidge v. New Hampshire*[54] which, in dicta, questioned the constitutionality of warrantless entries to arrest during the night.[55]

Justice White's response to the majority's failure to find guidance in any federal statutes was to note the existence of a statute authorizing federal agents to make warrantless arrests.[56] To Justice White, the absence of any language concerning homes indicated that Congress felt an explicit grant of authority to enter a home to arrest was not necessary.

White reiterated the principle that the fourth amendment protects people, not places.[57] He also asserted that the protections developed under the

47. *Id.* at 1388-89 (Blackmun, J., concurring).
48. *Id.* at 1391 (White, J., dissenting).
49. *Id.* at 1393.
50. *Id.*
51. 209 Mass. 396, 95 N.E. 868 (1911).
52. 100 S. Ct. at 1393.
53. 357 U.S. 493 (1958).
54. 403 U.S. 443 (1971).
55. [I]f Mr. Justice White is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption. Such a re-examination "would confront us with a grave constitutional question, namely whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he has committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment".

Id. at 480 (citing Justice White's dissent in Chimel v. California, 395 U.S. 752, 770 (1969) (White, J., dissenting)).
56. 100 S. Ct. at 1394 (citing 18 U.S.C. § 3052 (1976)).
57. *Id.* at 1395.

common law and the requirement of probable cause provide adequate protection of the individual's interests.[58]

Finally, Justice White criticized the decision for its effect on law enforcement. He raised issues concerning the average police officer's ability to evaluate circumstances as to exigency and the resulting endless litigation. He also commented on the possibility that a warrant obtained immediately after probable cause has arisen might go stale.[59]

V. UNRESOLVED ISSUES

A. *The Arrest Warrant Requirement*

The Court in *Payton* held that the fourth amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."[60] The questions not addressed by the Court included: 1) whether a warrantless arrest could be made under exigent circumstances; and 2) the authority of police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect. Other related unresolved problems are: 3) the requirements for an arrest warrant which would authorize entry into the home; and 4) the nature of the interests to be protected.

These problems arise, in part, from the distinction between arrest and search warrants. Probable cause must be shown before a warrant will issue, whether it be an arrest warrant or a search warrant. Beyond the basic requirement of probable cause, the types of information necessary for each are different. An arrest warrant will be issued after showing facts sufficient to convince a magistrate that a crime has been committed and the person for whom the warrant is being sought probably committed the crime. It does not specify where or at what time the person is to be arrested.

The issuance of a search warrant, on the other hand, must be supported by evidence that shows that the items sought are seizable because they are connected with criminal activity and that the items will be found in the place to be searched.[61] Since the location of the items may change, a search warrant must be sought and executed immediately to prevent "staleness."

1. Staleness of Arrest Warrants

In both *Watson* and *Payton* the arrest warrant requirement was discussed as an unreasonable burden on law enforcement officers. Justice Powell suggested in his concurring opinion in *Watson* that if police officers procured a warrant as soon as they had probable cause, and then postponed the arrest in order to develop more evidence, they run the risk of the warrant growing

58. Justice White named four restrictions which he felt were adequate safeguards: felony, knock and announce, daytime, and stringent probable cause. *Id.*

59. *Id.* at 1397. Most problems with warrants growing stale are associated with search warrants, not arrest warrants. *See* United States v. Watson, 423 U.S. 411, 449 (1976) (Marshall, J., dissenting). *But see id.* at 432 (Powell, J., concurring).

60. 100 S. Ct. at 1375.

61. *See generally* Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

stale.[62] He explained the possibility of staleness as being more remote for arrest warrants than search warrants, but that such a possibility did exist.[63] Justice White in his dissenting opinion in *Payton* also noted the possibility of an arrest warrant growing stale.[64] Justice Marshall pointed out in *Watson* that

> [t]here is no requirement that a search warrant be obtained the moment police have probable cause to search. The rule is only that present probable cause be shown and a warrant obtained before a search is undertaken [citations omitted]. The same rule should obtain for arrest warrants, where it may even make more sense.[65]

In view of the differing opinions expressed above, it would appear that there may be future problems with arrest warrants, especially on the issue of staleness.

2. Entry into Third Party Home to Arrest

Another problem surfacing after *Payton* is whether the police may enter a third party's home without either a search warrant or arrest warrant to arrest a suspect. Further, even if the police enter with an arrest warrant, is a search warrant also necessary, if a warrant is required at all?

First, it would seem that if the fourth amendment is indeed directed towards the protection of "the sanctity of a man's home,"[66] it would also protect the sanctity of any home, regardless of whether or not it was the suspect's home. The Third Circuit Court of Appeals held in *Fisher v. Volz*[67] that the police may not enter a third party's home to arrest a suspect.[68] In cases concerning searches of third party's homes, the suspect may receive fourth amendment protection if he has a reasonable expectation of privacy there.[69]

The second question pertaining to the necessity of a search warrant in addition to an arrest warrant in order to enter and arrest in a third party's home appears to be easily answered. In entering a third party's home to arrest a suspect, the police are, in essence, entering to search for the suspect.[70] In the absence of exigent circumstances "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[71] If entry into a third party's home to arrest a suspect

62. United States v. Watson, 423 U.S. 411, 432 (1976) (Powell, J., concurring).

63. "But in some cases the original grounds supporting the warrant could be disproved by subsequent investigation that at the same time turns up wholly new evidence supporting probable cause on a different theory. In those cases the warrant could be stale because based upon discredited information." *Id.* at 432 n.5 (Powell, J., concurring).

64. 100 S. Ct. at 1397 (White, J., dissenting).

65. United States v. Watson, 423 U.S. 411, 449 (1976) (Marshall, J., dissenting).

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

67. 496 F.2d 333 (3d Cir. 1974).

68. *Id.*

69. *See* Jones v. United States, 362 U.S. 257 (1960) (Suspect held to have standing to object to search of apartment owned by third party).

70. Rotenberg & Tanzer, *Searching for the Person to be Seized*, 35 OHIO ST. L.J. 56 (1974).

71. Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). "Search warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things', and as a

is considered to be a search, then it can be assumed that the rules governing consent to search would be applicable to arrest situations.[72]

3. Additional Requirement for Arrests in the Home

Justice Stevens concludes the majority opinion in *Payton* by stating that an arrest warrant implicitly carries with it the authority to enter a suspect's home to make an arrest. Thus, a search warrant is not necessary for the limited purpose of making an arrest.[73] Because the Court in *Payton* found the reasoning of two courts of appeals persuasive,[74] language from those cases would indicate that something more than an arrest warrant would be required.[75] For example, Judge Leventhal reasoned in *Dorman* that an entry into a home to arrest also entails a search for the suspect.[76] While Judge Leventhal does not state that a search warrant is necessary, he does not explicitly preclude that possibility.

Even if a search warrant is not required for entry into the suspect's home to arrest, the dissent expressed concern that under *Payton* police officers will not only have to show probable cause for the arrest, but will also be required to show a reasonable belief that the suspect is in the home at the time of execution of the warrant.[77]

B. *Nature of the Interests to be Protected*

The Court in *Payton* relied on the right to privacy as the interest to be protected in requiring warrants for home arrests. Of paramount importance in this decision is the clearly defined, historical "zone of privacy" which the home represents.

The individual's reasonable expectation of privacy is not expressly addressed in *Payton*.[78] The narrowness of the question to which the Court limited itself precluded any discussion of one's reasonable expectation of privacy. Thus, other areas in which an individual may have a reasonable expectation of privacy are left open as to the arrest warrant requirement.[79]

If the Court were to apply the principles developed in search and seizure cases with respect to areas in which an individual has a reasonable expectation of privacy, the warrant requirement for arrests would be ex-

constitutional matter they need not even name the person from whom the things will be seized." Zurcher v. Stanford Daily, 436 U.S. 547, 555 (1977). *See also* LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L. FOR. 255.

72. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Stoner v. California, 376 U.S. 483 (1964).

73. 100 S. Ct. at 1388.

74. United States v. Reed, 572 F.2d 412 (2d Cir. 1978); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1969).

75. 100 S. Ct. at 1380-81.

76. *Id.*

77. *Id.* at 1395.

78. The reasonable expectation of privacy concept was first enunciated by the Court in Katz v. United States, 389 U.S. 347 (1967).

79. Areas which might be called into question are: places of employment, private clubs, motor homes, third party's homes, and hotel or motel rooms.

tended to other places besides the home.[80]

C. *Exigent Circumstances*

Nor did the Court address the question of whether exigent circumstances would permit a warrantless arrest in a home.[81] The United States Court of Appeals for the Third Circuit has addressed the issue in *United States v. Williams*,[82] in which the court held that a warrantless arrest is unlawful in the absence of exigent circumstances.[83]

In *Mincey v. Arizona*[84] the Supreme Court indicated that the State has the burden of proving exigent circumstances for a warrantless *search* of a suspect's apartment conducted after his arrest. If the Court were to follow its reasoning in search and seizure cases,[85] one could logically assume that warrantless arrests under exigent circumstances are permissible.

In addition, the Court held the warrantless entry to arrest and search in *Warden v. Hayden*[86] was legal since exigent circumstances existed. In *Santana* the Court again stated that exigent circumstances would justify the warrantless entry into a suspect's home for the purpose of arresting him. Justice Marshall, dissenting in *Santana*, warned that police should not be allowed to create exigent circumstances in order to avoid obtaining an arrest warrant.[87]

VI. UNWARRANTED DECISION?

Perhaps the most unsettling characteristic of the holding in *Payton* is its reversal of the long accepted common law practice. As the Court pointed out, numerous state codes and model codes have endorsed warrantless arrests.[88] In *Watson* the Court noted that section 120.1 of the Model Code of Prearraignment Procedure formulated by the American Law Institute provides for warrantless arrests,[89] and "thus adopts the traditional and almost universal standard for arrest without a warrant."[90]

In his concurring opinion in *Watson*, Justice Powell examined the intru-

80. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (automobile is an area in which the individual has a reasonable expectation of privacy); Mancusi v. DeForte, 392 U.S. 364 (1968) (expectation of privacy extends to business offices); Stoner v. California, 376 U.S. 483 (1964) (search of hotel room without warrant and without guest's consent was violative of fourth amendment); Jones v. United States, 362 U.S. 257 (1960).

81. 100 S. Ct. at 1378. In People v. Caldwell, 102 Cal. App.3d 461, 162 Cal. Rptr. 397 (1980), the California Supreme Court held that a warrantless arrest in a home was justified by exigent circumstances. Exigent circumstances were defined as emergencies requiring swift action to prevent imminent danger to life or serious damage to property or to forestall the imminent escape of a suspect or destruction of evidence.

82. 612 F.2d 735 (3d Cir. 1979). The Court defined exigent circumstances as those situations involving hot pursuit, fleeing-suspect, and destruction of evidence.

83. *Id.* at 739.

84. 437 U.S. 385 (1978).

85. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

86. Warden v. Hayden, 387 U.S. 294 (1967). *See also* Vale v. Louisiana, 399 U.S. 30 (1970).

87. Santana v. United States, 427 U.S. 38, 48-49 (1975) (Marshall, J., dissenting).

88. 100 S. Ct. at 1386-87.

89. United States v. Watson, 423 U.S. 411, 422 (1976).

90. *Id.*

siveness of a search as compared to an arrest. He concluded that the intrusion of an arrest may have a more serious effect on the arrestee than a search might have. Logically, arrests should be subject to the same warrant requirements as searches. Justice Powell stated, however: "But logic sometimes must defer to history and experience. The Court's opinion emphasizes the historical sanction accorded warrantless felony arrests."[91]

Justice Marshall's dissent in *Watson*, however, indicated a weakness in this historical argument. He pointed out that felonies have changed in their meaning since the adoption of the fourth amendment. Many crimes which are now classified as felonies would have been misdemeanors under the common law.[92] Marshall's argument that the Court is historically wrong when it states that the policy derived from the common law of allowing warrantless arrests for felonies has survived is most persuasive.[93]

VII. CONCLUSION

The result in *Payton* is logical if viewed from the perspective of the protection provided by the fourth amendment for similar types of intrusions into the home. The problem with the decision originates from its reversal of a long standing, widely accepted common law practice.

While those engaged in law enforcement may perceive the *Payton* decision as another technical restriction placed upon them or as erecting one more obstacle to efficient enforcement of the laws, the ruling is consistent with the warrant requirements for searches and, as such, is proper.

The long standing, widespread practice of allowing warrantless arrests for felonies must bow to changing societal conditions and values. As Justice Marshall commented in his dissent in *Watson*, crimes classified as felonies today are in many instances different in nature than felonies under the English common law. The necessity for obtaining an arrest warrant should not hinge on a legislature's classification of a crime as a felony or a misdemeanor for penalty purposes.[94]

This long overdue ruling on the question of warrantless home arrests will be welcomed by many. But it also heralds the beginning of the clarification process for those related issues which remain unresolved, such as warrantless arrests in the home under exigent circumstances, entry into a third party's home to make an arrest, and other areas (besides public places) in which a warrantless arrest might be made.

Ann McEntire

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91. *Id.* at 429 (Powell, J., concurring).

92. *Id.* at 438-41 (Marshall, J., dissenting). *See generally* Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541 (1924).

93. As a matter of substance, the balance struck by the common law in accomodating the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy decreed that only in the most serious of cases could the warrant be dispensed with. This balance is not recognized when the common-law rule is unthinkingly transposed to our present classifications of criminal offenses.

United States v. Watson, 423 U.S. 411, 441-42 (Marshall, J., dissenting).

94. *Id.*