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ARREST WARRANTS REQUIRED FOR ARRESTS WITHIN THE HOME—PAYTON V. NEW YORK

The fourth amendment\(^1\) requires law enforcement officers to obtain a search warrant before entering a home to search for fruits and instrumentalities of a crime\(^3\) or before conducting a wiretap for conversations of a criminal nature.\(^3\) Despite these broad protections accorded a person's possessions and thoughts, until recently the United States Supreme Court had never required law enforcement officers to obtain an arrest or search warrant before entering a home to arrest its residents.\(^4\) This anomaly in fourth amendment law has been the subject of much judicial commentary.\(^5\)

1. U.S. Const. amend. IV 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.

2. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (warrantless search of a home is per se unreasonable subject only to a few specifically established exceptions); Vale v. Louisiana, 399 U.S. 30, 33 (1970) (no exceptions present to uphold the warrantless search of a home); Taylor v. United States, 286 U.S. 1, 6 (1932) (search without a warrant is unreasonable); Agnello v. United States, 269 U.S. 20, 32 (1925) (the search of a private dwelling without a warrant is abhorrent to our laws). For a discussion of the various exceptions that allow law enforcement officials to search premises without a warrant, see C. Whitebread, Criminal Procedure 133-140, 152-170, 197-225 (1st ed. 1980) [hereinafter cited as Whitebread].

3. See, e.g., Berger v. New York, 388 U.S. 41 (1967). In Berger, the Court held that a search warrant particularly describing the conversations to be seized by wiretapping devices must be obtained "before the innermost secrets of one's home or office [can be] invaded." Id. at 63.

4. In Payton v. New York, 445 U.S. 573 (1980), the Court stated that the question of whether a warrant is needed to arrest a suspect in his home had been expressly left open in prior decisions. Id. at 592. See United States v. Watson, 423 U.S. 411, 418 n.6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975); Jones v. United States, 357 U.S. 493, 499-500 (1958).

5. See United States v. Watson, 423 U.S. 411, 427-28 (1976) (Powell, J., concurring). Justice Powell wrote: "Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches." Id. at 429.

Justice Stewart, writing for the majority in Coolidge v. New Hampshire, 403 U.S. 443 (1971), stated:
   If it is reasonable for the police to make a warrantless nighttime entry for the purpose of arresting a person in his bed, then surely it must be reasonable as well to make a warrantless entry to search for and seize vital evidence of a serious crime. . . . If we were to agree with MR. JUSTICE WHITE that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest . . . then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution.

Id. at 479-80.
In Payton v. New York, the Court rectified this incongruous situation, holding that absent exigent circumstances, police officers will be required to obtain an arrest warrant before entering a home to arrest a resident of the home. This decision overturned statutes in twenty-three states and settled an issue extensively debated in the federal courts of appeals. In addition, this holding reversed what many commentators and courts considered “textbook law for centuries”—the right of law enforcement officers to arrest without a warrant in the home.

This Note supports the Payton Court’s decision to require arrest warrants for arrests within a home, but criticizes the Court’s failure to set forth adequate standards for future applications of its holding. Due to the Court’s failure to establish such standards, a discussion of possible alternative guidelines is presented. Finally, Payton’s impact on the preliminary hearing is discussed.

**Facts and Procedural History**

Payton v. New York was a consolidation of two New York cases that both upheld the police officer’s right to effect warrantless arrests within a home. The defendant in the first case, Theodore Payton, had been charged with murder. Two days after the victim’s death, a police investigation uncov-
ered sufficient evidence to establish probable cause to believe Payton committed the murder. Early the next morning, police arrived at Payton’s home in the Bronx without an arrest warrant. They knocked, but when no one answered, they forcibly entered the unoccupied apartment and seized a 30-caliber shell casing. Payton later surrendered to police and moved in a pre-trial hearing to suppress the admission of the shell casing. The lower court denied his request, holding that the New York Code of Criminal Procedure authorized the warrantless entry.

The second case consolidated in Payton concerned the narcotics conviction of Obie Riddick. In this case, police entered Riddick’s apartment to arrest him for his participation in two armed robberies that had occurred almost two years earlier. The police officers failed to obtain an arrest warrant before entering; yet, because the robbery victims had identified Riddick almost one year earlier as their assailant, the officers had ample time to do so. While in the apartment, police seized narcotics and related paraphernalia. At a pre-trial hearing to suppress the evidence, the trial

13. Id.
14. When police entered Payton’s apartment they searched every room for the suspect. In addition to seizing the shell casing in plain view on top of the stereo, the officers seized a shotgun with ammunition from a closet, and in a dresser drawer found a sales receipt for a Winchester rifle and photographs of the defendant wearing a ski mask. People v. Payton, 45 N.Y.2d 300, 305, 380 N.E.2d 224, 226, 408 N.Y.S.2d 395, 397 (1978).
15. The other items seized from the apartment were voluntarily suppressed by the District Attorney. Id. at 305-06, 380 N.E.2d at 226, 408 N.Y.S.2d at 397.
16. People v. Payton, 84 Misc. 2d 973, 376 N.Y.S.2d 779 (Sup. Ct. 1974). The lower court held that the shell casing had been inadvertently observed by the officers while legally in Payton’s apartment. 45 N.Y.2d at 306, 380 N.E.2d at 226, 408 N.Y.S.2d at 397. Thus, the seizure of the shell casing fell within the “plain view” exception to the search warrant requirement. For a general discussion of plain view seizures, see Whitebread, supra note 2, at 211-225.
17. 84 Misc. 2d at 974-75, 376 N.Y.S.2d at 780-81. Two New York statutes in effect at the time of the officers’ entry into Payton’s apartment authorized the entry. These were N.Y. CRIM. PROC. LAW §§ 177, 178 (McKinney 1964). Section 177 provided: “A peace officer may, without a warrant, arrest a person . . . [w]hen 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 provided: “To make an arrest as provided in the last section, 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.”
18. 445 U.S. at 578.
19. 45 N.Y.2d at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 397-98. The two officers were accompanied by Riddick’s parole officer. The parole officer first entered the home to determine if Riddick was present. When the parole officer saw Riddick, he signaled the waiting policemen. The officers knocked on the door and the defendant’s three-year old son answered.
20. Id. The officers seized this evidence from Riddick’s chest of drawers. This warrantless search of his dresser was upheld as a valid search incident to an arrest. See W. Ringel, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 12.1, at 12-1 (2d ed. 1979) (discussion of the officer’s right to conduct a warrantless search incident to a valid arrest).
judge upheld the warrantless entry to arrest and the subsequent seizure of
evidence, also relying upon New York statutory law.

Intermediate state appellate courts upheld both convictions. The New
York Court of Appeals affirmed on the basis of the historical acceptance of
warrantless entries. After the New York Court of Appeals denied relief,
the petitioners successfully sought review in the United States Supreme
Court, claiming a violation of their fourth amendment rights. In a six to
three decision, the Court reversed the convictions, holding that absent exi-
gent circumstances, the fourth amendment requires police officers to obtain
an arrest warrant before entering a suspect's home to make a routine felony
arrest.

BACKGROUND

Essential to an analysis of Payton is an understanding of the historical
background of the doctrine that arrests within a home should be accompa-
nied by an arrest warrant. This principle has developed through a series of
lower court cases decided predominantly since 1950. Three conceptual

21. 445 U.S. at 578.
22. Id. A revised warrantless arrest statute was in effect on the date of Riddick's arrest.
N.Y. CRIM. PROC. LAW §§ 120.80(4), 140.15(4) (McKinney 1971). Section 140.15(4) provided:
In order to effect an arrest without a warrant a police officer may enter premises in
which he reasonably believes such person to be present, under the same circum-
stances and in the same manner as would be authorized, by the provisions of subdi-
visions four and five of section 120.80, if he were attempting to make such an arrest
pursuant to a warrant of arrest.
Section 120.80(4) provided:
In order to effect the arrest, the police officer may under the circumstances and in
a manner prescribed in this subdivision, enter any premises in which he reasonably
believes the defendant to be present. Before such entry, he must give, or make
reasonable effort to give, notice of his authority and purpose to an occupant
thereof. . .

23. People v. Payton, 55 A.D.2d 859, 390 N.Y.S.2d 769 (1976); People v. Riddick, 56
24. People v. Payton, 45 N.Y.2d at 311-12, 380 N.E.2d at 229-30, 408 N.Y.S.2d at 400-01
(1978).
26. Chief Justice Burger and Justice Rehnquist joined in the dissent written by Justice
White. 445 U.S. at 603 (White, J., dissenting). Justice Rehnquist filed his own dissenting opin-
ion. Id. at 620 (Rehnquist, J., dissenting).
27. 445 U.S. at 603.
28. The question of whether warrantless arrests within a home are constitutional has been
asked only recently. As Justice White noted in his dissent, nineteenth century litigators failed to
raise the question "because warrantless arrest entries were so firmly accepted at common law." 445 U.S. at 611 (White, J., dissenting). The failure to raise this issue also can be explained by
the nonexistence of the exclusionary rule during the nineteenth century. Without such a rule,
litigators had little to gain by raising this issue because the law held then, as it does today, that
an invalid arrest will not deny a court jurisdiction over the arrestee. See notes 109-111 and
accompanying text infra. See generally Ann.Cas. 1912B, 566, noting that Commonwealth v.
trends emanated from these cases: a rejection of the common law "power to arrest" theory, acceptance of a bifurcated analytic framework, and the emergence of a balancing of interests approach.

Rejection of the "Power to Arrest" Theory

The first concept found in the pre-Payton case law is a rejection of the common law doctrine of the power to arrest. Under that doctrine, a warrantless arrest was deemed lawful if the officer had probable cause to believe the arrestee had committed a felony. Because the common law gave law enforcement officers the power to arrest without a warrant, some lower courts assumed that this power was exercisable anywhere, even inside an arrestee's home.

Characteristic of these decisions is Commonwealth v. Phelps, where the focus of the court's analysis was whether the requisite probable cause to arrest was present; the question of whether the entry into the home to arrest without a warrant was constitutionally permissible was ignored.

Eventually, courts rejected the theory that the power to arrest is a power exercisable in all locations. In Accarino v. United States, for example, the United States Court of Appeals for the District of Columbia restricted warrantless entries of homes to arrest defendants by requiring officers to use reasonable judgment in deciding whether a warrant should be obtained. In Accarino, the court refused to uphold the warrantless entry into the home to arrest the defendant because it found the entry unreasonable in light of the nonviolent nature of the defendant's crime. The court observed, however, ...
that exceptional circumstances (such as the commission of a violent crime) could justify an otherwise similar warrantless entry. A recognition that exceptional circumstances could signal a different result forms the groundwork for decisions employing the balancing approach discussed below. In addition, Accarino and similar decisions are significant because they focused on the propriety of entering a home without a warrant, instead of hinging their analyses on the probable cause requirement, the key consideration under a power to arrest theory.

Acceptance of a Bifurcated Analysis

Once courts shifted their focus of analysis away from the probable cause requirement and toward the intrusion into the home, a bifurcated analysis of an arrest within the home became possible. Viewed as a two-step procedure, a home arrest requires that the officer first enter the home and search for the arrestee, and only thereafter undertake an arrest. Thus, under a bifurcated analysis, two bodies of constitutional law apply to this process—the law of searches and the law of arrests.

The two-pronged analysis of an arrest within a home was first set forth in Morrison v. United States. In Morrison, the court of appeals held that mere authority to make a warrantless arrest is insufficient to justify an entry into the home to search for the accused. The court explained that the entry into the home is a search independent of the eventual arrest. Nine years later, in Warden v. Hayden, the United States Supreme Court appeared to accept the bifurcated arrest analysis. In that case, an armed robbery suspect fled into his home five minutes after the robbery occurred. Police officers, chasing the suspect, entered the home. The Court upheld the warrantless entry, stating that the circumstances made it reasonable for the officers to enter without a warrant to search for the defendant. The

36. Id.
37. See notes 47-55 and accompanying text infra.
38. The two-step analysis of an arrest is applicable even when the suspect answers the door after police knock. Obviously, the officer need not search the home for the arrestee; yet, a search is still inherent in this situation because the officer cannot know, until he knocks, if the defendant will answer the door. See Dorman v. United States, 435 F.2d 385, 391 (D.C. Cir. 1970).
40. Id. at 452.
41. Id. Massachusetts is in accord with this view. For example, in Commonwealth v. Forde, 367 Mass. 798, 805, 329 N.E.2d 717, 722 (1975), the court stated that "the distinction between an entry to search and an entry to arrest is slight, for the latter may be characterized as a search for a person rather than a search for things."
42. 387 U.S. 294 (1967).
43. Id. at 296-97.
44. The Court stated: We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without a warrant was invalid. Under
Warden Court, in effect, gauged the validity of the warrantless search rather than the validity of the warrantless arrest, thereby implicitly recognizing the two-part analysis. Thus, Warden implied that a search warrant is needed to search a home for an arrestee absent exigent circumstances.

The Balancing of Interests Approach

The acceptance of the bifurcated arrest analysis formed the groundwork necessary for the development of a balancing of interests approach. Because the bifurcated analysis provided that the initial entry into the home comprised a search, it was logical for courts next to examine the law governing search warrants when confronting cases of warrantless arrests within a home. The first court to make such an examination utilized the balancing of interests approach.

The balancing of interests approach was borrowed from fourth amendment case law concerning administrative searches of homes. The United States Supreme Court established this approach in Camara v. Municipal Court. In Camara, the Court weighed the homeowner's right of privacy against the city's need to inspect homes for housing code violations. Balancing these interests, the Court held that the homeowner's privacy should be invaded only if a search warrant had been issued or if an emergency situation was present. Under the balancing approach, then, the court issuing the search warrant stands as a check between a citizen and overzealous law enforcement officials.

In the leading case, Dorman v. United States, the Camara balancing approach was applied to a situation involving a warrantless arrest within a home. Id. at 298-99 (emphasis added).

45. Decisions failing to grasp the distinction between the entry of the home to arrest and the arrest itself have tended to reach results contrary to the Payton holding. See, e.g., cases cited in note 30 supra.


49. 387 U.S. at 539-40. Cf. Johnson v. United States, 333 U.S. 10, 13-14 (1948) (a neutral magistrate, not an overzealous officer, should determine when a home may be entered to search and seize evidence).


51. 435 F.2d 385, 387-88 (D.C. Cir. 1970). Here, the petitioner robbed a clothing store. In the process of the robbery, petitioner left behind his pants, which contained his identification. Police found this information and went to Dorman's home without a warrant to arrest him.
suspect's home.\textsuperscript{52} The \textit{Dorman} court propounded seven factors to use in determining when a homeowner's right to privacy should yield to society's right to apprehend suspects quickly.\textsuperscript{53} Because \textit{Dorman} has been widely accepted,\textsuperscript{54} these factors are often used to balance the interests involved in home arrest cases. Indeed, within one year after the \textit{Dorman} decision, the United States Supreme Court, citing \textit{Dorman} favorably, commented in dicta on the constitutionality of warrantless home arrests.\textsuperscript{55}

Various factors have emerged from case law to support the requirement that arrests within a home be made pursuant to an arrest warrant. It was within this historical context that the Court rendered its decision in \textit{Payton}.

\section*{The \textit{Payton} Decision}

In \textit{Payton}, the United States Supreme Court held that, absent exigent circumstances, an arrest warrant is required before a police officer may enter a home to arrest a resident of that home.\textsuperscript{56} Writing for the six justice majority, Justice Stevens maintained that the prohibition of warrantless arrests within a home was a logical corollary of the well-accepted rule that warrantless searches of a person's home are impermissible.\textsuperscript{57} The majority reasoned that an entry to arrest "implicat[ed] the same interest in preserving the privacy and sanctity of the home"\textsuperscript{58} as did an entry to seek and seize property. Any difference between the two forms of entry into the home was, the Court observed, only one of degree, not of kind.\textsuperscript{59} The Court concluded

\textsuperscript{52.} Before the \textit{Dorman} court discussed the balancing of interests approach, it found that an arrest within a home involves both a search of the home and an arrest. \textit{Id.} at 389-93.

\textsuperscript{53.} \textit{Id.} at 392-93. These seven factors include: (1) the gravity of the offense; (2) the danger the offender poses to the community; (3) a strong showing of probable cause to arrest; (4) strong reason to believe the suspect is within the home about to be entered; (5) the likelihood that the suspect will escape if the home is not entered immediately; (6) the peacefulness of the entry; and (7) the time of entry. See text accompanying notes 104-107 infra.


\textsuperscript{55.} \textit{Coolidge} v. New Hampshire, 403 U.S. 443 (1971). In \textit{Coolidge}, the Court reasoned that if the state could seize a person without an arrest warrant then logic would dictate that it be able to seize an object without a warrant. Thus, a holding that warrantless arrests within a home are constitutional would render the fourth amendment warrant requirement a nullity. \textit{Id.} at 479-90. However, as the Court noted, this discussion constituted mere dictum. \textit{Id.} at 481.

\textsuperscript{56.} 445 U.S. at 590.

\textsuperscript{57.} \textit{Id.} at 586-90.

\textsuperscript{58.} \textit{Id.} at 588.

\textsuperscript{59.} \textit{Id.} at 589.
that because a search warrant is needed to enter a home to search for property, an arrest warrant is similarly needed to enter a home to arrest the home's resident.60

In support of its decision, the Court refuted the state's argument that a historical analysis of the problem would lead to the conclusion that arrest warrants are not required for arrests within the home.61 Rather, it explained that no single common law position existed in favor of warrantless arrests within a home.62 Moreover, while the Court acknowledged that many states have enacted statutes permitting warrantless arrests within the home,63 it also noted the recent state trend to reject the validity of such entries were reasonable.64 Finally, the Court stated that Congress had never determined that such entries were reasonable.65 Thus, the Court concluded that a historical analysis was not dispositive of the issue.

CRITIQUE OF THE DECISION

Although the Payton decision correctly expanded fourth amendment protections, it is flawed in two respects. First, Payton unnecessarily suggested that the Court might be withdrawing from the principles of fourth amendment privacy set forth in Katz v. United States.66 Second, the Court failed to provide adequate guidelines for future applications of its holding.

Several reasons support the conclusion that the Payton decision correctly expanded fourth amendment protections. First, the decision rectified a previous incongruous situation in which a warrant was a prerequisite to enter a home and seize the resident's property but not to effect his or her arrest.67 In addition, the decision reaffirmed prior Court emphasis of the sanctity of the home as a cherished American right worthy of judicial protection.68 Fur-

60. Id. at 590.
61. Id. at 591-601. Prior to Payton, several commentators had predicted that a historical analysis of the issue of warrantless arrests within a home would lead to the conclusion that arrest warrants would not be required. See People v. Ramey, 16 Cal. 3d 263, 278 n.2, 545 P.2d 1333, 1342-43 n.2, 127 Cal. Rptr. 629, 641 n.2 (1976) (Clark, J., dissenting); Haddad, supra note 50, at 523; Comment, Watson and Santana: Death Knell for Arrest Warrants?, 28 Syracuse L. Rev. 787, 807 (1977).
62. 445 U.S. at 591-98.
63. Id. at 598-600.
64. Id.
65. Id.
67. See note 5 supra.
68. The fourth amendment has been characterized as "basic to a free society." Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Wolf v. Colorado, 338 U.S. 25, 27 (1949). When courts have interpreted fourth amendment protections, they have recognized the unique privacy interests of the home. See, e.g., United States v. United States Dist. Court, 407 U.S. 297, 315 (1972) (physical entry of the home is the chief evil against which the wording of the fourth amendment is directed); Silverman v. United States, 365 U.S. 505, 511 (1961) (at the very core of the fourth amendment stands the right of persons to retreat into their own home and there
ther, Payton infused new meaning into the arrest warrant requirement, and therefore will promote fourth amendment protection. Prior to Payton, arrest warrants had rarely been used in the United States. As a result of Payton, however, the use of arrest warrants is likely to increase. Finally, Payton should provide greater protection for the innocent arrestee. For example, after an unjustified arrest, it is common for no complaint to be filed against the arrestee and for the arrestee subsequently to be released. Moreover, occasionally police arrest the wrong person because they are misinformed about the name or address of a suspect. Under Payton's arrest warrant requirement, these situations might be avoided as detached judicial officers pass judgment on probable cause and in the process detect police mistakes. Thus, following Payton, the fourth amendment can truly be read to be the protector of a person and not just the protector of his or her property.

Despite its desirable conclusion, the Payton decision failed to apply the fourth amendment principles established in Katz v. United States, a failure the Payton dissenters noted. In Katz, the Court rejected the antiquated notion that the defendant's location at the time of the search or arrest determines if his or her fourth amendment rights were violated. Instead, the Court held that the fourth amendment protects a person's reasonable expectations of privacy regardless of where he or she was located at the time of the alleged fourth amendment violation. Thus, Katz requires that a court focus its analysis on the defendant's reasonable expectations of privacy.
The *Payton* Court, however, did not. As the dissenters noted, the court created the impression that it was retreating from *Katz* by emphasizing the place of the arrest—the home—rather than the defendant's expectations of privacy. Obviously, the fact that these arrests occurred within the sanctity of the defendants' homes was at the crux of the *Payton* decision. Nevertheless, the Court could have avoided the implication that it was subtly reverting to a pre-*Katz* place-oriented reading of the fourth amendment by incorporating *Katz* into its opinion. Incorporating *Katz* would not have altered the Court's decision because both defendants, it could be argued, had reasonable expectations of privacy in their homes. Thus, the Court could have reached the same result without creating an apparent inconsistency between *Katz* and *Payton* and without lending credence to a view that it is eroding the analytic foundation of *Katz*.

The second flaw in the *Payton* decision was the Court's failure to provide guidelines as to what would constitute exigent circumstances sufficient to overcome the warrant requirement. The Court declined to discuss exigent circumstances because the New York Court of Appeals had treated both cases consolidated in *Payton* as routine arrests allowing ample time to obtain a warrant. The decision not to discuss exigent circumstances is faulty for two reasons. First, because the New York Court of Appeals refused to mandate a warrant requirement for arrests within the home, that court necessarily ignored the possibility that sufficient exigent circumstances were present. Hence, the failure of the New York court to discuss exigent circumstances does not necessarily mean that those circumstances were absent. Second, as one of the dissenting state judges noted, Payton had allegedly committed a violent crime and was still armed and dangerous. Because these facts might potentially be characterized as exigent circumstances (indeed, attor-

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76. United States v. Reed, 572 F.2d 412, 422 (2d Cir. 1978), stands for the proposition that a criminal defendant has a reasonable expectation of privacy in his or her home. The *Reed* court held that requiring an arrest warrant for arrests within a home is consistent with *Katz*. *Id.* at 422-23. *Accord*, United States v. Prescott, 581 F.2d 1343, 1348-49 (9th Cir. 1978) (while the fourth amendment protects people not places, special emphasis is afforded the protection of people in their homes).

77. 445 U.S. at 582-83.

78. *Id.* at 583.

79. People v Payton, 45 N.Y.2d 300, 315, 380 N.E.2d 224, 232, 408 N.Y.S.2d 395, 403 (1978) (Wachtler, J., dissenting). If the seven factor analysis set forth in Dorman v. United States, see notes 104-07 and accompanying text infra, were applied in *Payton*, four of the seven factors would be present: (1) the offense of murder is serious; (2) the suspect was dangerous; (3) the likelihood of escape was great; and (4) there were strong reasons to believe Payton was inside the apartment because a light was visible and music audible within the apartment. *Id.* at 315, 380 N.E.2d at 232, 408 N.Y.S.2d at 403. Because of the existence of these factors, a court might have held that there were sufficient exigent circumstances to override the warrant requirement.
neys for the state had so argued), the Court should have discussed factors sufficient to overcome the arrest warrant requirement. 80

By drawing on lower court opinions such as United States v. Dorman 81 and its progeny, the Payton Court could have easily established a set of guidelines for determining when law enforcement officers may legally forgo obtaining an arrest warrant. A flexible balancing of interests framework would have been a valuable asset for law enforcement officers. As Justice White stated in his dissent, 82 “[t]he policeman on his beat must now make subtle discriminations that perplex even judges in their chambers.” 83 Without judicial guidance, an officer’s decision about when to enter a home without a warrant will be even more difficult than it was prior to Payton.

Ultimately, the Court will be unable to avoid a discussion of exigent circumstances. As prosecutors seek to prevent the exclusion of evidence following warrantless home arrests, they will argue that exigent circumstances were present to validate the arrest. But, because the facts of Payton presented a sufficient basis to discuss the exigent circumstances exception to the arrest warrant requirement, the Court should have taken the opportunity to avoid lower court confusion and conflicts.

**Alternatives and Impact**

Due to the Payton Court’s failure to discuss the exigent circumstances exception to the arrest warrant requirement, this Note anticipates the potential contours of that exception. This discussion illustrates that the Court’s failure to illuminate the exigent circumstances exception leaves Payton’s repercussions on law enforcement unclear. Finally, Payton’s impact on the preliminary hearing is discussed.

**Exigent Circumstances**

Although the Court failed to provide guidance as to what factors would constitute exigent circumstances sufficient to overcome the arrest warrant requirement, an examination of the case law suggests four possible criteria. 84 Specifically, police officers may be able to circumvent the warrant requirement when time is insufficient to obtain one, when they are in hot pursuit of a suspect, when the arrest arises from a continuous investigation or when the facts indicate that, in the balance, a homeowner’s right of privacy outweighs society’s interest in apprehending criminal suspects.

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80. The Court could have established factors sufficient to obviate the arrest warrant requirement and then remanded the cases for a determination of the necessary facts.
82. 445 U.S. at 603 (White, J., dissenting).
83. Id. at 618-19.
84. It could be argued that the Court failed to discuss the exigent circumstances exception because a considerable body of lower case law exists on the subject. See notes 92-102 & 107-111 infra.
Time to Obtain a Warrant

The first possible exigent circumstance is the existence of insufficient time to obtain a warrant. The Court treated the arrests in Payton as routine arrests for which police had ample time to procure warrants.\(^5\) Thus, the Court implied that whenever time exists to obtain a warrant, a warrant will be constitutionally required. The post-Payton decision, People v. Montgomery,\(^6\) is in accordance with this reading of Payton. The Montgomery court found that police had waited seven days to arrest the defendant and then had failed to obtain an arrest warrant before entering the defendant's home.\(^7\) Because ample time existed to obtain a warrant, the court held the arrest invalid.\(^8\)

Still, the question remains—what time is ample to obtain a warrant? In the pre-Payton decision, United States v. Shye,\(^9\) the United States Court of Appeals for the Sixth Circuit rejected the argument that a lengthy delay between the time officers establish probable cause to arrest and the time they actually arrest the suspect always indicates that there was ample time to obtain a warrant. In Shye, the officers admittedly decided to forgo obtaining a warrant;\(^10\) however, the court upheld the warrantless arrest because an unexpected and intervening event necessitated the quick arrest.\(^11\) Thus, when an officer has exercised undue delay in obtaining a warrant, his or her intrusion into a home to arrest will nevertheless be valid if the entry is in response to an arrestee's unexpected actions.\(^12\) A simple computation of time expiring between the finding of probable cause and the arrest is inadequate.

Hot Pursuit

Past Supreme Court decisions indicate that an entry into the home to arrest following a chase of a defendant could also become an exception to the Payton arrest warrant requirement. In Warden v. Hayden,\(^3\) a decision con-

\(^{85}\) 445 U.S. at 583.
\(^{86}\) 84 Ill. App. 3d 695, 405 N.E.2d 1275 (1st Dist. 1980).
\(^{87}\) Id. at 696, 405 N.E.2d at 1277.
\(^{88}\) Id. at 701, 405 N.E.2d at 1280.
\(^{89}\) 492 F.2d 886 (6th Cir. 1974).
\(^{90}\) Id. at 888.
\(^{91}\) Id. at 892. The unexpected and intervening event which necessitated the warrantless entry into the apartment was the sudden opening of the apartment door and the announcement from someone within that several men were departing. Prior to this announcement, the officers had received no response when they knocked on the apartment door and had heard no noise inside the apartment. Id. at 888.
\(^{92}\) Cf. McDonald v. United States, 335 U.S. 451 (1948) (warrantless arrest invalidated because officers waited several months to arrest petitioner and because they were not responding to an emergency situation in making the arrest); Johnson v. United States, 333 U.S. 10 (1948) (warrantless arrest invalidated because police had time to obtain a warrant).
cerned primarily with search warrants, the Court upheld a warrantless entry into a home because the arresting officers were in hot pursuit of the arrestee. Specifically, the suspect had been seen just five minutes before police followed him into his home. Furthermore, in United States v. Santana, the Court upheld a warrantless arrest that occurred in a doorway as the defendant attempted to flee into her home. The Court ruled that a retreat into the home during a chase did not invalidate a warrantless arrest.

Despite wide acceptance of the hot pursuit doctrine, a pursuit into the home may not always be a valid exception. If the police officer waits outside the home with the intention of arresting the suspect on his doorstep, the arrest warrant requirement is not dislodged by subsequent pursuit into the suspect's home. For example, in Accarino v. United States the court rejected the hot pursuit argument, noting that the officers waited until the arrestee was on his doorstep before approaching him. The Court reasoned that if an emergency created the need to effect a warrantless arrest, the officers caused it.

Continuous Police Investigations

An offshoot of the hot pursuit exception to the arrest warrant requirement is the concept of a continuous police investigation. The post-Payton decision of the Illinois Supreme Court in People v. Abney recognized continuous police investigation as an exception to the arrest warrant requirement. There, police interviewed the victim of a beating shortly after the attack, learning the assailant's name and discovering that the assailant walked toward his home after the assault. Within one and one half hours after the attack, officers entered the defendant's home without a warrant. The supreme court upheld the warrantless entry, noting that any delay in obtaining a warrant would have impeded a promising police investigation and stress-
ing that there was no unjustified delay in completing the arrest which would have given the officers time to obtain a warrant. Thus, at least in Illinois, continuous investigative pursuits leading to the arrestee’s home have become an exception to the Payton arrest warrant requirement.

The Dorman Factors

The fourth determination the courts might make is based on the factors outlined by Dorman v. United States, that balance the homeowner’s right to privacy against society’s right to apprehend suspects quickly. These seven factors include: (1) the gravity of the offense; (2) the danger the offender poses to the community; (3) a strong showing of probable cause to arrest; (4) strong reason to believe the suspect is within the home about to be entered; (5) the likelihood that the suspect will escape if the home is not entered immediately; (6) the peacefulness of the entry; and (7) the time of the entry. These factors have already received wide acceptance and may prove a helpful tool for courts faced with this issue in the future.

Impact

Until the courts determine which, if any, of the four criteria discussed above constitute exigent circumstances sufficient to overcome the arrest warrant requirement, the question of Payton’s impact on the law will remain unanswered. Before this position can be fully understood, the underlying doctrine of arrest challenges must be examined. The United States Supreme Court has held that once a person is arrested, police may conduct a warrantless search. This warrantless search incident to a valid arrest is one of the exceptions to the fourth amendment search warrant requirement.

Stuck v. State, 255 Ind. 350, 264 N.E.2d 611 (1970) (warrantless entry upheld because police were involved in a continuous investigation and arrest occurred shortly after the offense was committed); Nilson v. State, 272 Md. 179, 321 A.2d 301 (1974) (warrantless entry upheld where it occurred one hour after the offense).

103. 81 Ill. 2d at 170, 407 N.E.2d at 548.


105. A post-Payton decision, State v. Rubert, 46 Or. App. 843, 612 P.2d 771 (1980), considered the likelihood of immediate escape factor. The Rubert court held that an officer must reasonably explain why an escape is expected or this factor will not excuse the failure to obtain a warrant. Id. at 845, 612 P.2d at 772-73. Accord, State v. Olson, 287 Or. 157, 165, 598 P.2d 670, 674 (1979) (because suspect had no reason to believe police knew of his involvement in the crime, there was no danger of his immediate escape); Laasch v. State, 84 Wis. 2d 587, 592, 267 N.W.2d 278, 282 (1978) (defendant had been released from jail for two weeks so police could not reasonably assert that she feared she would flee).

106. 435 F.2d at 392-93.

107. See note 54 supra. Following Payton, the Illinois Supreme Court applied these factors in People v. Abney, 81 Ill. 2d 159, 407 N.E.2d 543 (1980).

treatment of evidence uncovered during such searches is the key to Payton's impact. This evidence is admissible only if the arrest is valid; hence, if an arrest is invalid, the evidence will be excluded from the trial pursuant to the exclusionary rule. It is because they seek to invoke the exclusionary rule that defendants challenge the validity of their arrests. If the exclusionary rule did not exist, an arrest challenge, even if sustained would be of little value to a defendant since an invalid arrest will not deny the court jurisdiction over the defendant or void a conviction.

It is readily apparent that if the lower courts adopt an expansive interpretation of the exigent circumstances exception, more warrantless arrests will be held valid. Consequently, less evidence will be suppressed and Payton will affect the outcome of fewer individual cases. Conversely, a restrictive reading of what constitutes exigent circumstances will result in more warrantless arrests being found invalid, thereby increasing Payton's impact.

One indication that the courts might adopt a restrictive interpretation is that of the three courts to consider the question of warrantless home arrests since Payton, only one court upheld the warrantless arrest. Nevertheless, until more decisions are reached, the question of Payton's impact on law enforcement will remain unanswered. Although the Payton decision's impact on law enforcement is still unclear, its adverse impact on the preliminary hearing requirement is certain. The right to a post-arrest preliminary hearing was established in Gerstein v. Pugh. In requiring preliminary hearings, the Gerstein Court reasoned that because it did not require police to obtain an arrest warrant before arresting a suspect, it would require a post-

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109. The exclusionary rule provides that all evidence obtained through means that violate the United States Constitution will be excluded from criminal prosecutions. Thus, if an arrest is obtained through unconstitutional means, any evidence seized as a result of that arrest will be excluded from the arrestee's trial. The exclusionary rule was first applied in federal prosecutions only. Weeks v. United States, 232 U.S. 383 (1914). Since 1961, however, the exclusionary rule has been applied to the states as well. Mapp v. Ohio, 367 U.S. 643 (1961). See generally Exclusionary Rule: A Panel, 61 F.R.D. 259 (1972); S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 WASH. U.L.Q. 621 (1976); Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 JUD. 214 (1978).

110. See, e.g., United States v. Crews, 445 U.S. 463, 474 (1980) (illegal arrest of petitioner will not deny a court the right to try petitioner); Frisbie v. Collins, 342 U.S. 519, 522 (1952) (even if a defendant is forcibly abducted and brought to trial, the court still has the power to try); Ker v. Illinois, 119 U.S. 436, 444 (1886) (by implication) (Illinois courts have jurisdiction to try defendant even though he was forcibly abducted in Peru); Vance v. North Carolina, 432 F.2d 984, 990 (4th Cir. 1970) (the rationale behind the refusal to void the defendant's conviction entirely is the assumption that if the invalid arrest had not occurred, the defendant would have been arrested eventually anyway).

111. The three post-Payton cases are: People v. Abney, 81 Ill. 2d 159, 407 N.E.2d 543 (1980); People v. Montgomery, 84 Ill. App. 3d 695, 405 N.E.2d 1275 (1st Dist. 1980); State v. Rubert, 46 Or. App. 843, 612 P.2d 771 (1980). Only the Abney decision upheld the warrantless arrest.

arrest preliminary hearing to determine if probable cause existed for the arrest.\textsuperscript{113} The \textit{Payton} decision could be used to undercut this hearing requirement for arrests occurring within the home. For example, it could be argued that once a pre-arrest warrant is required, the reason for conducting a \textit{Gerstein} preliminary hearing vanishes.\textsuperscript{114} Based on \textit{Payton}, courts might determine that a defendant arrested in his home pursuant to an arrest warrant is not entitled to a preliminary hearing.

It might be argued that because a pre-arrest warrant and a post-arrest preliminary hearing were both designed to establish whether probable cause to arrest the defendant existed, the substitution of one for the other should make no difference. This argument, however, is faulty. By its very nature, the preliminary hearing provides the defendant several advantages that a pre-arrest warrant procedure could never provide. First, the defendant is present at this hearing.\textsuperscript{115} Witnesses are examined at the preliminary hearing\textsuperscript{116} and in states such as Illinois, defendants also are provided with a transcript of the hearing.\textsuperscript{117} This transcript is a valuable discovery tool and also can be used to impeach witnesses at the trial should inconsistencies arise in a witness's testimony.\textsuperscript{118} In contrast, a pre-arrest warrant procedure is an \textit{ex parte} hearing. Thus, while the theoretical underpinnings of an arrest warrant and a preliminary hearing are the same, the ramifications of the two procedures are quite different.

Due to these substantive differences between the two procedures courts or lawmakers may determine that the preliminary hearing requirement should remain intact despite the \textit{Payton} decision. If this determination is not made, criminal defendants arrested within their homes might soon be faced with the uncomfortable prospect of losing their right to a preliminary hearing.

\textbf{Conclusion}

Based upon \textit{Payton}, a police officer will be required to obtain an arrest warrant before entering a home to arrest the home's resident. Because this decision finally places the law of arrests within a home on the same constitutional ground as the law of searches within a home, the decision represents a

\begin{thebibliography}{9}
\bibitem{113} \textit{Id.} at 113-14.
\bibitem{114} The argument that the \textit{Gerstein} preliminary hearing requirement will not apply if the defendant was arrested pursuant to an arrest warrant also was suggested in 2 W. \textsc{LaFaye}, \textsc{Search and Seizure} § 5.1, at 247-48 (1st ed. 1978).
\bibitem{115} K. \textsc{Wells} \& P. \textsc{Weston}, \textsc{Criminal Procedure and Trial Practice} 48-49 (1st ed. 1977).
\bibitem{116} \textit{Id.}
\bibitem{117} People v. Moore, 51 Ill. 2d 79, 281 N.E.2d 294 (1972) (indigent defendant is entitled to a free copy of his preliminary hearing transcript).
\bibitem{118} K. \textsc{Wells} \& P. \textsc{Weston}, \textsc{Criminal Procedure and Trial Practice} 49 (1st ed. 1977).
\end{thebibliography}
correct and desirable expansion of fourth amendment rights. Two factors, however, might curtail this expansion of personal liberty for criminal defendants. First, because the Court created an exception to the arrest warrant rule and then refused to define that exception, the possibility exists that lower courts may readily find exceptions to the *Payton* arrest warrant rule. If this occurs, *Payton*’s desirable impact on law enforcement will be minimal. In addition, *Payton* leaves the status of preliminary hearings in doubt. If the courts determine that defendants arrested within their homes pursuant to a warrant are no longer entitled to a preliminary hearing, these defendants will lose a valuable discovery tool—a preliminary hearing transcript. Thus, criminal defendants faced with the prospect of losing their preliminary hearing might find *Payton* to curtail rather than expand their liberties.

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