RECEIVED by MSC 10/16/2018 11:37:17 AM

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No. 156901

v.

JENNIFER MARIE HAMMERLUND,
Defendant-Appellant.

Trial Court No. 15-09717-FH
Court of Appeals No. 333827

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

D.J. HILSON
President
Prosecuting Attorneys Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training, and Appeals

TIMOTHY A. BAUGHMAN (P24381)
Special Assistant Prosecuting Attorney
1442 St. Antoine
Detroit, MI 48226
313 224-5792

RECEIVED by MSC 10/16/2018 11:37:17 AM

Table of Contents

Index of Authorities . . . -ii-

Statement of the Question . . . -1-

Statement of Facts . . . -1-

Summary of Argument . . . -2-

Argument

I.

In order to protect the physical integrity of—and a citizen's privacy interest in—the home, nonconsensual, nonexigent entries to arrest are prohibited. It is constitutionally permissible for a police officer to command, make a show of force, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest . . . -3-

A. Introduction . . . -3-

B. Evidence relating to the person of an individual arrested on probable cause but after an entry to his or her dwelling in violation of *Payton*, discovered outside the home, is the fruit of the arrest, not the improper entry into the dwelling . . . -4-

C. *Payton* and *Harris* do not admit of such a notion as a constructive entry . . . -11-

1. Warrantless felony arrests from *Watson* to *Harris*: a warrantless arrest on probable cause is not improper even if the entry to achieve it is not authorized . . . -12-

2. Payton cannot be violated unless there is an entry into the defendant's residence—there is no such thing as "constructive entry" . . . -19-

a. "[T]he breach of the entrance to an individual's home": the invention of the virtual entry cannot be justified under *Payton* and *Harris* . . . -20-

b. Achieving an arrest in a public place *avoids* violating *Payton* rather than "circumventing" it . . . -26-

D. The principle of litigating only that which actually happened . . . -28-

E. "Doorway" arrests are permissible . . . -30-

F. Conclusion . . . -31-

Relief . . . -32-

RECEIVED by MSC 10/16/2018 11:37:17 AM

Index of Authorities

Case **Page**

Federal Cases

Abel v. United States,
362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960) 13

Atwater v. City of Lago Vista,
532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) 10

Brower v. Inyo County,
489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) 23

California v. Hodari D.,
499 U.S. 621, 111 S. Ct.1547, 113 L. Ed. 2d 690 (1991) 23, 24, 258

Carroll v. United States,
267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925) 13

Dorman v. United States,
435 F.2d 385 (CA DC, 1970) 16, 17

Draper v. United States,
358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959) 13

Elder v. Holoway,
510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994) 21

Ewolski v. City of Brunswick,
287 F.3d 492 (CA 6, 2002) 25

Gerstein v. Pugh,
420 U.S. 103, 95 S. Ct.854, 43 L. Ed. 2d 54 (1975) 13

Graves v. Mahoning Cty.,
821 F.3d 772 (CA 6, 2016) 10

Henry v. United States,
361 U.S. 98, 80 S. Ct.168, 4 L. Ed. 2d 134 (1959) 13

I.N.S. v. Delgado,
466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 284 (1984) 28

RECEIVED by MSC 10/16/2018 11:37:17 AM

Ker v. California,
374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963) 13

Knight v. Jacobson,
300 F.3d 1272 (CA 11, 2002) 22

Martin v. Mitchell,
280 F.3d 594 (CA 6, 2002) 7

Menuel v. City of Atlanta,
25 F.3d 990 (CA 11, 1994) 24, 25

Michigan v. Chesternut,
486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988) 22

Mosby v. Senkowski,
470 F.3d 515 (CA 2, 2006) 7

New York v. Harris,
495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) . . . . passim

Payton v. New York,
445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) . . . . passim

Steagald v. United States,
451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981) 18

United States v. Al-Aaazwy,
784 F.2d 890 (CA 9, 1985) 25

United States v. Allen,
813 F.3d 76 (CA 2, 2016) 22

United States v. Berkowitz,
927 F.2d 1376 (CA 7, 1991) 22

United States v. Briley,
726 F.2d 1301 (8th Cir.1984) 27

United States v. Carrion,
809 F.2d 1120 (CA 5, 1987) 22

RECEIVED by MSC 10/16/2018 11:37:17 AM

United States v. De La Cruz,
835 F.3d 1 (CA 1, 2016) 7

United States v Gori,
230 F.3d 44 (CA 2, 2000) 26

United States v Morgan,
743 F.2d 1158 (CA 6, 1984) 20, 21, 22, 23

United States v. Santana,
427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976) 13, 14

United States v. Smith,
73 F.3d 1414 (6th Cir.1996) 10

United States v. Watson,
423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976) 12, 13, 14

Virginia v. Moore,
553 U.S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008) 8, 9, 12

State Cases

Michigan Gun Owners, Inc. v. Ann Arbor Public Sch.,
—Mich.—, 2018 WL. 3614337 (2018) 11, 12

People v. Adams,
150 Mich. App. 181 (1986) 27

People v. Catania,
427 Mich. 447 (1986) 27

People v. Garvin,
88 N.E.3d 319 (NY, 2017) 22

People v. Gillam,
479 Mich. 253 (2007) 3, 4, 11, 12

People v. Gillam,
477 Mich. 969 (2006) 3

People v. Glenn-Powers,
296 Mich. App. 494 (2012) 9

People v. Hamilton,
465 Mich. 526 (2002) 11

People v. Hammerlund,
501 Mich. 1086 (2018) 3

People v. Hammerlund,
No. 333827, 2017 WL. 4654568 (2017) 10

People v Jackson,
17 A.D.3d 148 (1st Dep't, 2005) 7

People v. Johnson,
431 Mich. 683 (1988) 17

People v. Jones,
810 N.E.2d 415 (NY, 2004) 7

People v. Padilla,
28 A.D.3d 236 (1st Dept, 2006) 7

People v. Temelkoski,
509 Mich. 960 (2018) 12

People v. Temelkoski,
500 Mich. 1010 (2017) 12

People v. Worthington,
—Mich.—, 2018 WL. 4607840 (2018) 10

Woodman ex rel. Woodman v. Kera LLC,
486 Mich. 228 (2010) 4

Other Authority

Baughman, *The Emperor's Old Clothes: a Prosecutor's Reply to Mr. Leitman Concerning Exclusion of Evidence for Statutory Violations*, 1999 L. R. Mich. St. U 11

LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* (5th Ed.) . . . 10, 17, 27, 30

RECEIVED by MSC 10/16/2018 11:37:17 AM

RECEIVED by MSC 10/16/2018 11:37:17 AM

Statement of the Question

I.

In order to protect the physical integrity of—and a citizen's privacy interest in—the home, nonconsensual, nonexigent entries to arrest are prohibited. Is it constitutionally permissible for a police officer to command, make a show of force, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest?

Amicus answers: "YES"

Statement of Facts

Amicus supports the statement of facts by the People, appellee.

RECEIVED by MSC 10/16/2018 11:37:17 AM

Summary of Argument

This Court has directed that the parties address "whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest." But *New York v. Harris* says that a probable cause based arrest after a *Payton* violation is not unconstitutional, only the improper entry. That relating to the person of the arrestee obtained outside the dwelling—such as a confession, obtained in *Harris*—is not considered the fruit of the entry. Here a statement taken in the police vehicle after Miranda warnings is involved, as well as blood-alcohol results taken later. Neither are subject to suppression under *Harris*, and so issue of "constructive entry" need not be reached. Defendant argues that the arrest was statutorily improper, but under United States Supreme Court authority that does not affect the constitutionality of the arrest of the defendant, and under authority from this Court a statutory violation does not result in suppression unless the legislature has in some fashion signaled that suppression is to follow.

If the constructive-entry issue is reached, then this Court should find that there is no such thing. The concern of *Payton v. New York* was the sanctity of the privacy of the dwelling, and there can be no constructive or "virtual" crossing of the threshold. To find that a person arrested in a public place is properly arrested on probable cause even when ordered or lured there by some artifice or deceit does not circumvent *Payton*, but avoids its violation. An arrest is a seizure of a person on probable cause by use of force achieving their custody, or by a display of force or authority *to which they yield*. Until one or the other occurs, there is no seizure, and if the seizure occurs in a public place, it is valid, even if the person arrested has come out because so directed, or lured by artifice. Only if the police enter can a violation of *Payton* occur.

RECEIVED by MSC 10/16/2018 11:37:17 AM

Argument

I.

In order to protect the physical integrity of—and a citizen's privacy interest in—the home, nonconsensual, nonexigent entries to arrest are prohibited. It is constitutionally permissible for a police officer to command, make a show of force, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest.

A. Introduction

This Court has directed that the parties address "whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest."[1] In its order granting leave to appeal in *People v. Gillam*[2] the Court similarly directed the parties to brief "whether the police conduct in this case constituted a constructive entry into a citizen's home for purposes of a Fourth Amendment search and seizure analysis." The Court's resulting opinion noted that:

> Amicus curiae, the Prosecuting Attorneys Association of Michigan (PAAM), urges us to reject the constructive entry doctrine. It argues that (1) the United States Supreme Court has always held that probable cause rather than a warrant is required for an arrest; (2) in *Payton*, supra, the Court held that a warrant was required not to accomplish the arrest, but rather to invade the privacy of the dwelling; and (3) *Morgan* and its progeny have erred in focusing on arrests without a warrant when the concern expressed in *Payton* was the crossing of thresholds without a warrant.[3]

---

[1] *People v. Hammerlund*, 501 Mich. 1086 (2018).

[2] *People v. Gillam*, 477 Mich. 969 (2006).

[3] *People v. Gillam*, 479 Mich. 253, 261–262 (2007).

But the Court determined that it "need not decide whether to adopt the constructive entry doctrine in this case because, even assuming that the constructive entry doctrine applies, we conclude that defendant here has not established that the police constructively entered his apartment in violation of his Fourth Amendment right to privacy."[4]

Amicus continues to affirm the principles it espoused in *Gillam* as laid out in the Court's opinion, but, as in *Gillam*, it is not necessary for this Court to address the issue of constructive entry, as, assuming that there is such a doctrine as constructive entry—and there should not be—and assuming that such an entry occurred here, and further assuming that the entry was constitutionally improper, there are no fruits of that conduct, and defendant would be entitled to no relief. This Court does not address hypothetical questions to issue advisory opinions.[5]

B. Evidence relating to the person of an individual arrested on probable cause but after an entry to his or her dwelling in violation of *Payton*,[6] discovered outside the home, is the fruit of the arrest, not the improper entry into the dwelling

The Supreme Court in *New York v Harris*[7] considered what should result if the police invade the privacy of a suspect's dwelling to accomplish his or her arrest on probable cause, but without an arrest warrant or exigent circumstances, and by so doing violate the Fourth Amendment through the improper invasion of the privacy of the dwelling.[8] Police officers with

---

[4] *Id.*

[5] *See Woodman ex rel. Woodman v. Kera LLC*, 486 Mich. 228, 264 (2010) (Markman, J., concurring) ("To decide a hypothetical dispute is the equivalent of issuing an advisory opinion, which, with narrow constitutional exceptions, is beyond the scope of th[e] judicial power").

[6] *Payton v. New York*, 445 U.S. 573, 576, 100 S.Ct. 1371, 1375, 63 L.Ed. 2d 639 (1980).

[7] *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed. 2d 13 (1990).

[8] Amicus will return to *Payton* later.

RECEIVED by MSC 10/16/2018 11:37:17 AM

RECEIVED by MSC 10/16/2018 11:37:17 AM

probable cause to believe Harris had committed a murder went to his apartment to arrest him, and had not first obtained an arrest warrant. Harris answered their knock on the door, and, confronted with drawn guns and a display of badges, admitted them. He was given *Miranda* warnings and admitted the murder. He was then taken from the apartment to the police station where he was again given *Miranda* warnings and confessed. A third videotaped statement was taken, but after he had requested interrogation cease. The prosecution conceded that the first statement and third statement were not to be admitted; the issue before the Court was the statement taken at the station house; that is, whether that statement was inadmissible "because the police, by entering Harris' home without a warrant and without his consent, violated *Payton v. New York*" by entering without exigency to arrest him.[9]

The Court held *not*, finding that given that "'[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve,'" exclusion was inappropriate, as "the rule in *Payton* was designed to *protect the physical integrity of the home*; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime."[10] *Payton* had itself "emphasized that our holding in that case stemmed from the 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,'" and as a consequence "drew a line at the *entrance to the home*. . . . The arrest warrant was required to 'interpose the magistrate's determination of probable cause' to arrest before the officers could

---

[9] *Id*., at 1642.

[10] *Id*., at 1642-1643 (emphasis added).

RECEIVED by MSC 10/16/2018 11:37:17 AM

enter a house to effect an arrest."[11] Note the repeated statements that the arrest warrant is required before *entry* of the home to arrest can be made, not as a prerequisite to the arrest of the suspect for whom probable cause exists.

The custody of Harris, being achieved on probable cause, was not in violation of the Fourth Amendment at the time when he confessed at the station house, nor, found the Court, was his statement in any way the "fruit" of the illegal entry—the invasion of privacy of his dwelling. For purposes of the Fourth Amendment, analogized the Court, "the legal issue is the same as it would be had the police arrested Harris on his doorstep, *illegally entered his home* to search for evidence, and later interrogated Harris at the station house. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible."[12] The arrest warrant requirement of *Payton* is "*imposed to protect the home*,"[13] and that which is disconnected from *that* invasion of privacy is not subject so suppression.[14]

Here, defendant seeks suppression of a statement she made outside of the dwelling, in the police car after a waiver of Miranda warnings, as well as breath tests showing her blood alcohol content at .21 and .22. But under *Harris* evidence relating to the arrestee's person obtained outside the dwelling where a *Payton*-violative entry has occurred is not subject to suppression, as it is not considered the fruit of the entry. Defendant's attempt to apply *Payton* in these

---

[11] *Id.*, at 1643 (emphasis supplied).

[12] *Id.*, (emphasis supplied).

[13] *Id.*, at 1644 (emphasis supplied).

[14] *Id.*

circumstances on a "but/for" causation basis—that "but for" the alleged improper constructive entry the arrest would not have occurred, and thus the evidence would not have been obtained—runs headlong into *Harris*, where precisely the same argument could be made. But the exclusionary rule is not applied on this basis, and *Harris* makes plain that fruit of the seizure of the person, obtained outside the dwelling, is not the fruit of an improper entry in this circumstance—when it occurs—be the entry real or constructive.

Cases since *Harris* make the point. Many reject claims that statements made outside the dwelling where an improper entry to arrest has occurred must be suppressed, as these are indistinguishable from *Harris*.[15] And, of course, the logic of *Harris* applies to other evidence found incident the arrest of the person rather than in the dwelling. Evidence found in a search incident arrest of the defendant's person falls within *Harris,*[16] as do lineup identifications.[17]

---

[15] *See e.g.*, *Mosby v. Senkowski*, 470 F.3d 515, 521 (CA 2, 2006)(quoting *Harris* that "'where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.' Such a statement is 'not the product of being in unlawful custody. Neither [is] it the fruit of having been arrested in the home rather than someplace else'"); *United States v. De La Cruz*, 835 F.3d 1, 7 (CA 1, 2016) ("the *Harris* Court held that . . . the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects ... protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime. . . . So it is here").

[16] *See e.g. People v. Padilla*, 28 A.D.3d 236 (1st Dept, 2006); *People v Jackson*, 17 A.D.3d 148 (1st Dep't, 2005).

[17] See *Martin v. Mitchell*, 280 F.3d 594, 607 (CA 6, 2002) ("Martin argues that his counsel should have moved to suppress evidence that he contends was the fruit of his . . . warrantless arrest at the apartment he shared with Pedro [pointing out that] absent exigent circumstances, police officers are required to secure an arrest warrant prior to arresting a suspect in his home. . . . Martin does not argue that the police lacked probable cause to arrest him. Thus . . . .his identification by Foster and Pedro's statement to police were not suppressible fruits of this tainted action"); *People v. Jones*, 810 N.E.2d 415 (NY, 2004).

RECEIVED by MSC 10/16/2018 11:37:17 AM

Defendant's statement and the blood-alcohol results are not the fruit of any improper constructive entry, if one occurred (and one did not).

Defendant seeks to avoid *Harris* by arguing that the arrest was statutorily improper:

> unlike the defendant in *Harris*, [defendant] was not in legal custody when Officer Staman interrogated her in the back of the police car and later administered breath tests. This is so because in addition to violating her rights under *Payton*, the arrest also violated Michigan law: failure to report an accident to fixtures is a 90-day misdemeanor that, unless committed in the officer's presence, is not an arrestable offense. See MCL 764.15 (authorizing arrest for misdemeanor punishable by fewer than 93 days imprisonment only if committed in officer's presence).[18]

Defendant overstates the matter somewhat; the offense *is* arrestable, but not without a warrant, because punishable by fewer than 93 days imprisonment. And so a statutory violation occurred. But this does not change the application of *Harris*. An arrest on probable cause is a constitutional arrest, even if made in violation of state statute. The United States Supreme Court has made this point clear. In *Virginia v. Moore*[19] the Court considered "whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law." Moore was arrested where under state law a summons should instead have been issued, and cocaine was found in a search incident arrest. The arrest, because made on probable cause, was consistent with the constitution, a fact unaffected by the violation of state law, and so

---

[18] Defendant's supplemental brief, p. 14.

[19] *Virginia v. Moore*, 553 U.S. 164, 166, 128 S. Ct. 1598, 1601, 170 L. Ed. 2d 559 (2008).

RECEIVED by MSC 10/16/2018 11:37:17 AM

the search incident arrest did not violate the Fourth Amendment.[20] So here. The statutory violation does not affect the constitutional analysis, and so exclusion is not appropriate.[21]

[20] "[W]hile States are free to regulate . . . arrests however they desire, state restrictions do not alter the Fourth Amendment's protections. . . . When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety." *Id*., at 1607, 1608.

[21] See also *People v. Glenn-Powers*, 296 Mich. App. 494, 504 (2012) ("even if we were to agree with defendant that the court rule creates a requirement that probation-violation proceedings must be commenced by either a summons or an arrest warrant, and that the warrant must be sworn to, a violation of such a requirement still would not amount to a Fourth Amendment violation that would render the arrest, and the subsequent search, constitutionally infirm").

RECEIVED by MSC 10/16/2018 11:37:17 AM

Defendant has not argued that the statutory violation alone should cause exclusion,[22] but amicus would note that, as the trial judge and Court of Appeals pointed out, unless the statute itself carries an exclusionary sanction for its violation, exclusion of evidence should not occur.[23] This Court has so said.

> [T]hat the officer did not have probable cause to arrest defendant for OUIL, third offense (a felony), does not render the arrest unconstitutional. Instead, that the officer did have probable cause to arrest defendant for OUIL (a misdemeanor) means the arrest did

---

[22] Nor has defendant-appellant argued that the misdemeanor arrest was unconstitutional because the offense did not occur in the officer's presence. *See, e.g.*, *People v. Worthington*, —Mich.—, 2018 WL 4607840, at 1 (2018), Viviano, J., concurring: "The dissent . . . raises and develops two arguments that the prosecutor has not addressed . . . . But it is not our role to find and develop unpreserved arguments on behalf of litigants." Nonetheless, amicus would point out that:

> [I]t's an open question at the Supreme Court, it turns out, "whether the Fourth Amendment" requires officers to get a warrant "for purposes of misdemeanor arrests" committed "[outside] the [ir] presence." *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n. 11, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) (quotation omitted).
>
> But it's not an open question at our court. The "requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest," we have explained, "is not mandated by the Fourth Amendment." *United States v. Smith*, 73 F.3d 1414, 1416 (6th Cir.1996).
>
> ***
>
> Other circuits agree with our approach. . . . So have commentators. See, e.g., LaFave, [3 SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT] § 5.1(c).
>
> *Graves v. Mahoning Cty.*, 821 F.3d 772, 778–779 (CA 6, 2016) (internal citations omitted).

[23] "[E]ven though Officer Staman was under the misimpression that the crime of failure to report damages to fixtures was a 93–day misdemeanor, as the trial court ruled, 'the plain language of MCL 764.15 does not create a remedy of exclusion.' As this plain reading of the statute is consistent with our previous case law, the court did not err in denying application of the exclusionary rule based solely on violation of the statute." *People v. Hammerlund*, No. 333827, 2017 WL 4654568, at 2 (2017).

RECEIVED by MSC 10/16/2018 11:37:17 AM

RECEIVED by MSC 10/16/2018 11:37:17 AM

> not violate the Fourth Amendment protection against unreasonable seizures. Because the arrest did not violate the Fourth Amendment, the exclusionary rule does not apply here.
>
> A number of decisions establish that statutory violations do not render police actions unconstitutional. . . . The question in such cases is whether the Legislature intended to apply the drastic remedy of exclusion of evidence. In several recent decisions we have found such intent lacking.[24]

No constitutional violation occurred here, and, assuming only for the sake of argument that an improper constructive entry into the premises occurred, the defendant's statement and the blood-alcohol results are not the fruit of that entry, and are not subject to suppression. This should end the inquiry.[25] But should the Court reach the question, amicus, as indicated, adheres to the position staked out in *Gillam*, and addressed below.

C. *Payton* and *Harris* do not admit of such a notion as a constructive entry

The Court has asked the parties, and any amicus, to address "whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest."[26] This asks in

---

[24] *People v. Hamilton*, 465 Mich. 526, 533-534 (2002). See Baughman, *The Emperor's Old Clothes: a Prosecutor's Reply to Mr. Leitman Concerning Exclusion of Evidence for Statutory Violations*, 1999 L. R. MICH. ST. U. DET. C. L. 701 (1999).

[25] Under these circumstances, judicial modesty would seem to call for leaving the constructive entry question to another day. *Cf. Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch.*, —Mich.—, 2018 WL 3614337, at 14 (2018) (Clement, J., concurring).

[26] This statement of the question to be briefed accepts that defendant *was* arrested in a public place, as held by the Court of Appeals. Defendant has never argued that she was arrested in a public place but compelled, coerced, or enticed to leave her home, and that this is improper under the Fourth Amendment, arguing instead that an improper entry was made. See Defendant's Application, p. 8 ("Ms. Hammerlund Was Not in a Public Place When Officer Staman Grabbed Her Arm"). This Court has said that if "it is 'of no consequence'" that an appellant has not made an argument "best we ditch the adversarial system of law today," for "the

RECEIVED by MSC 10/16/2018 11:37:17 AM

another manner the question of whether there is such a thing as a constructive entry asked in *Gillam*. There is no such thing as a constructive entry, and those cases that take a contrary view do so only by wrenching *Payton* loose from its doctrinal moorings.

1. Warrantless felony arrests from *Watson* to *Harris*: a warrantless *arrest* on probable cause is not improper even if the entry to achieve it is not authorized

The United States Supreme Court has never wavered in its view that the *sine qua non* for arrest is not a warrant but probable cause, an arrest warrant not being required to satisfy the Fourth Amendment.[27] Any doubt on the point was laid to rest not only in *Moore*, but even previously in *United States v Watson*.[28] There Watson was arrested in a public place without warrant for possession of stolen mail—credit cards—though there was ample time for the postal inspector to secure an arrest warrant. The 9th Circuit found the arrest unconstitutional because warrantless; the Supreme Court disagreed. The Court observed that the "ancient common-law rule" was that "a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."[29] As to the holding of the 9th Circuit that an arrest

---

Court will always know not only the better answer than any supplied by the parties but even the better questions than those asked by the parties." *Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch*., supra, 2018 WL 3614337, at 8. *But see People v. Temelkoski*, 509 Mich. 960 (2018), decided on an issue not raised by the appellant, but by the Court itself. *See People v. Temelkoski*, 500 Mich. 1010 (2017) (order directing supplemental briefing).

[27] *See Virginia v. Moore*, supra.

[28] *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed. 2d 598 (1976).

[29] *Id*., at 823. In support the Court cited a number of sources: "10 HALSBURY'S LAWS OF ENGLAND 344-345 (3d ed. 1955); 4 W. BLACKSTONE, COMMENTARIES 292; 1 J. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883); 2 M. Hale, PLEAS OF THE CROWN 72-

warrant must be obtained when practicable, the Court noted that not only was there "nothing in the Court's prior cases indicating that under the Fourth Amendment a warrant is required to make a valid arrest for a felony," but that "[i]ndeed, the relevant prior decisions are uniformly to the contrary."[30]

Saying that in *Watson* "we held that the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment," the Court in *United States v Santana*[31] next considered a factual variant; that is, "whether, when the police first sought to arrest Santana, she was in a public place." A narcotics officer had made arrangements for a narcotics purchase; his contact stated a price and that on receipt of the money "we will go down to Mom Santana's for the dope." The two drove to Santana's residence, and the go-between took

---

74; Wilgus, *Arrest Without a Warrant*, 22 MICH.L.REV. 541, 547-550, 686-688 (1924); *Samuel v. Payne,* 1 Doug. 359, 99 Eng.Rep. 230 (K.B.1780); *Beckwith v. Philby,* 6 Barn. & Cress. 635, 108 Eng.Rep. 585 (K.B.1827)."

[30] *Id.* The Court made reference to several of its prior decisions. *Carroll v. United States*, 267 U.S. 132, 156, 45 S.Ct. 280, 286, 69 L.Ed. 543 (1925): "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony . . . ."; *Henry v. United States*, 361 U.S. 98, 80 S.Ct.168, 4 L.Ed. 2d 134 (1959): "The necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest"; *Abel v. United States*, 362 U.S. 217, 232, 80 S.Ct. 683, 693, 4 L.Ed. 2d 668 (1960): "the Court sustained an administrative arrest made without 'a judicial warrant within the scope of the Fourth Amendment'"; *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327 (1959): the question "was whether there was probable cause for the warrantless arrest. If there was, the Court said, 'the arrest, though without a warrant, was lawful . . . .'". See also *Ker v. California*, 374 U.S. 23, 34-35, 83 S.Ct. 1623, 1630, 10 L.Ed.2d 726 (1963) (opinion of Clark, J.); *Gerstein v. Pugh,* 420 U.S. 103, 113, 95 S.Ct.854, 862, 43 L.Ed.2d 54 (1975)(the Court "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant").

[31] *United States v. Santana*, 427 U.S. 38, 39-41, 96 S.Ct. 2406, 2408-2409, 49 L.Ed.2d 300 (1976).

RECEIVED by MSC 10/16/2018 11:37:17 AM

the money, went inside the house, and returned with several glassine envelopes containing heroin. The go-between was promptly arrested, and said that "Mom" had the money used for the buy. Other officers then went to Santana's house where they saw her standing in the doorway with a brown paper bag in her hand. They shouted "police" and displayed identification, but as they approached Santana retreated into the vestibule of the home. The officers followed her and arrested her in the vestibule, discovering more heroin, which she dropped as she tried to pull away. In her pockets was a portion of the marked money employed for the buy.[32] The Court concluded that the warrantless arrest was proper because while standing in the doorway Santana was in a "public" place, as "she was not in an area where she had any expectation of privacy. . . . She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. . . .Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in Watson."[33] Nor did her act of retreating into the home disable the police from accomplishing the arrest, held the Court.[34]

Santana was thus but an application of *Watson*, Santana being considered to have been in a public place when observed, retreating into the dwelling on the arrival of the police to make the arrest. But what of the situation where on police arrival the person to be arrested is *not* in a public place, but instead inside the premises? This was the question before the Court in *Payton v*

---

[32] *Id.*, at 2408-2409.

[33] *Id.*, at 2409 (emphasis added).

[34] *Id.*

RECEIVED by MSC 10/16/2018 11:37:17 AM

New York,[35] involving two cases combined for review, and the answer of the Court reveals that a warrant is required *not* to accomplish the arrest in this circumstance—the seizure of the person of the arrestee—but rather to invade the privacy of the dwelling to achieve that arrest, as also revealed by the later case of *New York v. Harris*, previously discussed.

In the first case, the police had probable cause to believe Payton had committed a murder two days earlier, and went to his apartment to arrest him. They did not first obtain a warrant. Though lights could be seen and music heard coming from the apartment, the police received no response to knocks on the door, and eventually used crowbars to break open the door and enter. Payton was not there, but a .30-caliber shell casing was observed and seized, and admitted into evidence at Payton's murder trial.[36] In the companion case, the police had probable cause to arrest one Riddick for armed robbery. Without first obtaining an arrest warrant, officers went to his home, and knocked on the door, which was answered by Riddick's young son. Through the open door Riddick could be seen sitting in bed covered by a sheet. The officers entered and arrested Riddick, and opened a chest of drawers before allowing Riddick to access them to dress. There they found found narcotics and paraphernalia, leading to Riddick's indictment on drug charges.[37]

The concern of the Court expressed in its opinion was *not* the warrantless arrests of Payton and Riddick, but rather the *manner* in which those arrests had been accomplished—by entry into the dwelling without warrant. In other words, the opinion reveals that the *sole* concern

---

[35] *Payton v. New York,* supra.

[36] *Id.*, 1375.

[37] *Id.*, at 1376.

RECEIVED by MSC 10/16/2018 11:37:17 AM

of the Court was the warrantless crossing of the threshold. That the persons of Payton and Riddick were seized without an arrest warrant was of no constitutional moment; of concern instead was the *entry* into the premises to achieve that result, as the Court's discussion makes plain. Indeed, the Court began its analysis with the principle that the "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'. . . .we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort."[38] Justice Stevens's opinion for the Court relied heavily on the opinion of Judge Leventhal of the District of Columbia Circuit in *Dorman v. United States*.[39] There Judge Leventhal distinguished warrantless arrests in public places from warrantless *entries* into the suspect's dwelling to accomplish the arrest, taking the view that "'[a] greater burden is placed . . . on officials who enter a home or dwelling without consent. *Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment*.'"[40] Judge Leventhal, continued the Court, analogized the situation to entry of dwellings to search for weapons or contraband, which is unconstitutional without warrant (or some exception to the warrant requirement) "even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within."[41] This being so, Judge Leventhal reasoned that "the constitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of

---

[38] *Id*., at 1379-1380.

[39] *Dorman v. United States*, 435 F.2d 385 (CA DC, 1970)(en banc).

[40] *Id*., at 1380 (emphasis supplied)(quoting from *Dorman*).

[41] *Id*., at 1381

RECEIVED by MSC 10/16/2018 11:37:17 AM

arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended."[42] The Court agreed with this analogy, concluding that the two intrusions—the one to search for evidence of a felony on probable cause, the other to search for the felon on probable cause—"share this fundamental characteristic: *the breach of the entrance to an individual's home*. . . . 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."[43]

The Court thus held that in order to make a nonconsensual entry into premises in order to arrest a resident the police need an arrest warrant and reason to believe the person to be arrested is there; no search warrant is needed, for the Court also held that "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."[44]

---

[42] *Id*.

[43] *Id*., at 1382.

[44] *Id*., at 1388. Indeed, that it is the privacy of the dwelling rather than the probable-cause based seizure of the person that is the concern of the Fourth Amendment is demonstrated by the fact that a search warrant showing probable cause to believe a person for whom there is probable cause to arrest is present will justify an entry into their premises to search them out, even absent consent, exigency, or an arrest warrant. *See People v. Johnson*, 431 Mich. 683 (1988); 3 LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* (5th Ed.), § 6.1(b).

RECEIVED by MSC 10/16/2018 11:37:17 AM

This concern for warrantless invasions into the dwelling can be seen also in *Steagald v United States*,[45] considering entry not into the suspect's dwelling but that of a third party in order to arrest the suspect. Here an arrest warrant for one Lyons was outstanding. An informant gave the police a telephone number where Lyons could be reached, and after ascertaining the address associated with the telephone number the police converged at that location to search for and arrest Lyons. The search, undertaken without a search warrant, failed to turn up Lyons, but cocaine was discovered leading to the indictment of Steagald (later, warranted searches based on this discovery turned up more cocaine). Involved, then, was not the constitutional interest of the person sought to be arrested, but of the privacy of the dwelling of a person not suspected of any crime: "Here, of course, the agents had a warrant-one authorizing the arrest of Ricky Lyons. However, the Fourth Amendment claim here is not being raised by Ricky Lyons. Instead, the challenge to the search is asserted by a person not named in the warrant who was convicted on the basis of evidence uncovered during a search of his residence for Ricky Lyons. Thus, the narrow issue before us is whether an arrest warrant-as opposed to a search warrant-is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances."[46] The Court concluded not, holding that while an arrest warrant is sufficient to protect the privacy of the

---

[45] *Steagald v. United States*, 451 U.S. 204, 101 S.Ct 1642, 68 L.Ed. 2d 38 (1981).

[46] *Id.*, at 1647-1648.

RECEIVED by MSC 10/16/2018 11:37:17 AM

dwelling of the person sought to be arrested, it does nothing to protect the privacy of the dwelling of third parties whose homes might be searched to discover the person sought to be arrested.[47]

And then there is the Court's analysis in *New York v. Harris*, making plain that it is the improper entry, not the seizure of the person, that was the concern in *Payton*, as amicus has pointed out previously.

2. Payton cannot be violated unless there is an entry into the defendant's residence—there is no such thing as "constructive entry"

Defendant was arrested in a public place, a given in this Court's statement of the issue asking whether an officer may "compel, coerce, or otherwise entice a person" to "enter a public place" to be arrested. It is not impermissible under the Fourth Amendment for officers without first obtaining an arrest warrant to go to a suspect's residence for the purpose of making an arrest, nor is it impermissible for them to there arrest on probable cause without warrant in a public place. The Court has asked whether an officer may "compel, coerce, or otherwise entice a person located in his or her home to enter a public place" where they are then arrested. The answer is there is no such thing as a constructive entry under *Payton*, which, by its very terms, requires a warrant for entry—not for the seizure of the person of the arrestee—because "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." An arrest warrant is required before entry of the suspect's premises to accomplish the arrest not to

[47] Of course, given that the privacy interest protected is that of the third party and not the person sought to be arrested, had the officers discovered Lyons in Steagald's house without obtaining a search warrant (or an arrest warrant, for that matter), Lyons would not have been able to complain about the absence of a search warrant, not having a protected interest in Steagald's home; nor would he have been able to complain regarding the lack of an arrest warrant, had that been the case, for he was not in his own home where, under *Payton*, an arrest warrant would be required.

RECEIVED by MSC 10/16/2018 11:37:17 AM

RECEIVED by MSC 10/16/2018 11:37:17 AM

protect against unreasonable seizures of the person, but to "minimize the danger of needless intrusions of *that sort*," "*that sort*" referring to physical entries into the home. Those courts that have taken a contrary view are mistaken. This Court should set its face against any such notion of a constructive entry.

a. "[T]he breach of the entrance to an individual's home": the invention of the virtual entry cannot be justified under *Payton* and *Harris*

If, as *Payton* says, the Fourth Amendment concern with non-exigent, non-consensual entries into the dwelling to arrest is not the warrantless seizure of the person of the arrestee, but "the breach of the entrance to an individual's home," so that "the Fourth Amendment has drawn a firm line at the entrance to the house," from where comes the notion of a constructive entry? How does the "firm line at the entrance" become virtual? The doctrine perhaps had its unfortunate beginnings with *United States v Morgan*.[48] There officers investigated a complaint about target shooting in a public park, and on arriving heard the sound of automatic-weapon fire. Several individuals, including Morgan, were seen placing guns into the trunk of a car, and were asked to leave the park, which they did.

Before the car left, an unidentified observer approached an officer and told him that the individuals in the car had said that they would "kill any law that tries to arrest them," and the best thing for the officers to do was to "go get some help." This individual also told the officers that the trunk of the car was filled with machine guns, pistols, and shotguns. By this time the car had left, and a police dispatch was put out, resulting in an officer following the vehicle to the home of the mother of Morgan. This officer saw the occupants of the vehicle take an assortment of

[48] *United States v Morgan*, 743 F.2d 1158 (CA 6, 1984).

weapons into the home. The local chief and officers, along with the original officers who had arrived at the park, arrived at the home and surrounded it. Spotlights were shined on the house, and Morgan was summoned with a bullhorn to come out. He appeared in the doorway with a pistol in his hand and was directed to put it down; after first raising it, he set it down inside the door when directed again to put it down, and came outside. There he was arrested and a loaded pistol taken from his person. The pistol set down inside the door of the premises was seized from inside the house, and the house was searched and other weapons seized. The basis of the federal charges against Morgan was the possession of the pistol he had set down inside the house before coming outside.

The pistol was suppressed by the trial court, which found no exigent circumstances justifying the entry of the premises to search for and seize it. The pistol found on Morgan's person did *not* form the basis of any criminal charge and was not the subject of the motion to suppress. The matter could thus have ended with affirmance of the trial court's ruling regarding the warrantless search of the premises after Morgan's arrest. But the 6th Circuit opinion affirming did not stop there. The government had argued that reasonable suspicion for an investigation existed, and that once Morgan came to the door with a gun in his hand the police were justified in arresting him. The court responded that Morgan was under arrest "as soon as the police surrounded the Morgan home, and therefore, the arrest violated *Payton* because no warrant had been secured."[49] Morgan was under arrest while inside because the police show of force and authority was such that "'a reasonable person would have believed he was not free to

---

[49] *Id.*, at 1164.

RECEIVED by MSC 10/16/2018 11:37:17 AM

leave,'"[50] and, concluded the court, for purposes of application of *Payton* the "important consideration" is "the location of the arrested person, and not the arresting agent, which determines whether an arrest occurs within a home."[51] Though there was no entry into the home before Morgan's arrest outside it, "the constructive entry accomplished the same thing, namely, the arrest of Morgan."[52] But the so-called constructive entry did not accomplish the *actual* entry into the premises, and as the Court said in *Harris*, "the rule in *Payton* was designed to *protect the physical integrity of the home*." That *Payton* was not concerned with the warrantless arrest of the person inside the home was not discussed, nor was the language of that opinion that the "line is drawn at the entrance" to the dwelling mentioned. *Morgan*—and its progeny—erred in focusing on warrantless arrests when the concern of the Fourth Amendment expressed in *Payton* is warrantless crossings of threshholds.[53]

---

[50] *Id.*

[51] *Id.*, at 1166. Amicus is aware that this language is contained in *Elder v. Holoway*, 510 U.S. 510, 114 S.Ct. 1019, 127 L.Ed. 2d 344 (1994), which also cites *United States v. Al-Azzawy*, infra. But the correctness of this formulation was neither before the Court nor decided in *Holloway*; the only issue there was whether an appellate court in considering a judgment based on qualified immunity should consider case authority not presented to or considered by the trial court. *Al-Azzawy* was not considered by the district court, and the Supreme Court held that a reviewing court is to consider "all relevant precedents, not simply those cited to or discovered by the district court." But the Court did not address in any fashion whether *Al-Azzawy* was itself correctly decided.

[52] *Id.*

[53] *See similarly United States v. Allen*, 813 F.3d 76 (CA 2, 2016), rejected and distinguished by *People v. Garvin*, 88 N.E.3d 319 (NY, 2017), cert. den. October 1, 2018. Contrary to *Allen* see *Knight v. Jacobson*, 300 F.3d 1272, 1277 (CA 11, 2002); *United States v. Berkowitz*, 927 F.2d 1376, 1386–1388 (CA 7, 1991); *United States v. Carrion*, 809 F.2d 1120, 1128 (CA 5, 1987).

RECEIVED by MSC 10/16/2018 11:37:17 AM

RECEIVED by MSC 10/16/2018 11:37:17 AM

Moreover, *Morgan's* explanation of when the arrest occurred in that case, which was never tenable, is obsolete. The United States Supreme Court has since carefully analyzed when a Fourth Amendment seizure of the person occurs—the Amendment does not use the term "arrest" at all—in a series of cases culminating in *California v Hodari D.*[54] There the defendant ran at the sight of police officers and was pursued, throwing a rock of crack cocaine during the pursuit, which the police recovered. He claimed the police lacked cause to seize him, and that the cocaine should be suppressed. But had he been seized when he discarded the cocaine? The Court answered not. A seizure of the person can occur by use of actual physical force or by a show of authority. When force is employed, at the common law "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient."[55] But where a show of authority of show of force is the claimed basis of arrest, then the question becomes whether at the outset "as with respect to application of physical force, a seizure occurs even though the subject *does not yield. We hold that it does not*."[56] Rather, an "arrest requires *either* physical force (as described above) *or,* where that is

[54] *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct.1547, 113 L.Ed. 2d 690 (1991). The cases leading to *Hodari* are *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988) and *Brower v. Inyo County*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989).

[55] The Court was careful to say that this sort of "momentary" arrest would not continue unless control of the arrestee was achieved: "To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example, Pertoso had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest." *Id.*, at 1550.

[56] *Id.*, 1550 (emphasis supplied).

absent, *submission* to the assertion of authority."[57] The key holding of *Morgan* that it is "the location of the arrested person, and not the arresting agent, that determines whether an arrest occurs within a home" is absolutely mistaken; when a show of authority or force is made, the arrest occurs *when the individual sought to be arrested yields* to the custody of the police. When an actual entry into the premises is not made by the police, no notion of constructive entry can invent an invasion of privacy of the dwelling—which is precisely that which *Payton* protects, *not* the warrantless arrest of the individual—of those premises where as a matter of actual fact none has occurred. And, as *Harris* shows, even an unlawful entry to achieve a lawful arrest will not result in suppression of that connected to the person of the individual arrested, obtained outside the home.

Menuel v City of Atlanta [58] makes the point. The sister of the deceased phoned 911 to request emergency assistance because the deceased was behaving violently and erratically. On their arrival, officers were told by the deceased's brother that the deceased had choked their father earlier in the evening, and remained inside the home. They knocked on the door, and the decedent suddenly opened it and lunged at the two officers, swinging a butcher knife, forcing their retreat from the front porch. The deceased withdrew into her father's bedroom, and locked the door. Screams were heard inside the premises, prompting concern on the part of the officers for the safety of other occupants of the house. The officers gathered in a hallway outside the bedroom and tried unsuccessfully to persuade the decedent to surrender. At some point the family asked the officers to leave; given the assault on the officer that had occurred, the police

[57] *Id.*, at 1551 (emphasis in original).

[58] *Menuel v. City of Atlanta*, 25 F.3d 990 (CA 11, 1994).

RECEIVED by MSC 10/16/2018 11:37:17 AM

declined. A plan was undertaken to distract the decedent by knocking on the window while other officers came through the bedroom door to restrain her. Unfortunately, when the officers entered the deceased opened fire on them with a .25 caliber handgun; the police retreated, and the deceased came into the hall and fired again. She was killed by return fire from the police.

The court observed that the Supreme Court had not had occasion to apply *Hodari D.* to a case of "encirclement" and assertion of authority, and found that no arrest had occurred.

> [A] potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death. The potential for the confined person to commit sudden, unexpected, and lethal violence commends the formula in *Hodari D.,* which places the law, as it judges the police, in no better position that the police, as they judge the suspect.
>
> Because the decedent was intransigent and because she neither yielded to physical force (none was applied to her before the fatal shooting) nor submitted to a display of authority (much of which was applied before the shooting), *Hodari D.* compels the conclusion that no seizure, reasonable or unreasonable, occurred before the shooting.[59]

There are, on the other hand, several federal cases finding a constructive entry on the ground that an arrest occurred when a home was surrounded, but before any submission by the person to be arrested to a show of authority made by the police.[60] These cases should not be followed; rather, when police come to premises to arrest and demand that the person to be

---

[59] 25 F3d at 995.

[60] See e.g. *Ewolski v. City of Brunswick*, 287 F.3d 492, 506 (CA 6, 2002)(stating that the surrounding of the house constituted an arrest of the person to be arrested, a decision inconsistent with *Menuel*, and, despite its claim of consistency with *Hodari D.*, inconsistent with that case); *United States v. Al-Aaazwy*, 784 F.2d 890, 892-893 (CA 9, 1985)(pre-dating *Hodari*, and mistakenly focusing on the location of the person to be arrested at the time of the show of authority rather than on the location when submission to the show of authority occurs).

RECEIVED by MSC 10/16/2018 11:37:17 AM

arrested come out, no arrest occurs unless and until that person *submits* to the exercise of authority and comes out, and in such case the "firm line drawn at the entrance to the house" by the Fourth Amendment simply has not been crossed—and the Fourth Amendment is unconcerned with the warrantless seizure of the person, being concerned instead that this seizure occur only with probable cause. If the individual to be arrested does *not* submit to the show of authority or force, then if the police *enter* without a warrant to achieve the arrest the "firm line drawn at the entrance to the house" *has* been crossed and whether any circumstances justify its violation without warrant may be litigated. But until the threshold is crossed, no warrantless entry has occurred. There *is no* constructive or virtual entry, only an actual one.

b. Achieving an arrest in a public place *avoids* violating *Payton* rather than "circumventing" it

Those courts that have created the fiction of a constructive entry have done so in large part because they take the view that achieving the warrantless arrest of someone who is inside premises when the police arrive without entering the premises somehow "circumvents" the rule of *Payton*:

> [I]f the police could circumvent *Payton* simply by forcing the occupants of a home to step outside, *Payton's* warrant and probable cause requirements would be meaningless.[61]

This is a rather remarkable statement. Arrests outside the dwelling are constitutional only if based on probable cause. The constitutional protection afforded to the individual's interest in the privacy of his own home is applicable to a warrantless *entry* for the purpose of arresting a resident of the house, "because it is inherent in such an entry that a search for the suspect may be

[61] See e.g. *United States v Gori*, 230 F.3d 44, 62 (CA 2, 2000), Sotomayer, J., dissenting.

RECEIVED by MSC 10/16/2018 11:37:17 AM

required before he or she can be apprehended," and so "a line is drawn at the entrance to the home." And, again, "the rule in *Payton* was designed to protect the physical integrity of the home." Ordering a person to be arrested to leave their home, or achieving that result by trick or artifice, *avoids* the invasion of privacy of the dwelling—*if* the individual to be arrested *submits* to the show of authority, or trick, or artifice—and leaves the premises. If not, the police may not enter, and if they do, the *Payton* issue is presented. But whether it be by artifice, ruse, or show of authority to which the individual acquiesces, the accomplishment of an arrest in a public place is, if based on probable cause, perfectly proper, and *avoidance* of the invasion of the privacy of the dwelling is hardly unseemly for some odd reason.

Oddly, some courts have suggested that a ruse to lure the person to be arrested out of the premises, or to gain entry into the premises with consent, where the warrantless arrest then occurs, is impermissible, though *Payton's* holding is 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."[62] But this makes no sense. Many undercover operations involve entry into premises by misrepresentation of identity and purpose, and entries of this sort are unremarkable, and have been upheld by this Court.[63] And amicus is completely at a loss to understand the assertion that achieving arrests outside the dwelling renders "*Payton's* warrant

---

[62] *See, e.g.,United States v. Briley,* 726 F.2d 1301, 1304 (CA 8,1984) (stating that a "misrepresentation may even invalidate . . . consent if the consent was given in reliance on the officer's deceit"). *But see People v. Adams*, 150 Mich. App. 181 (1986), where the Court of Appeals rejected such a view, where the police used defendant's sister to get him to come outside, where he was then arrested without warrant, and it was found that no "constructive entry" occurred.

[63] *See, e.g., People v. Catania*, 427 Mich. 447 (1986). *See also* 4 LaFave, § 8.2(m),(n).

RECEIVED by MSC 10/16/2018 11:37:17 AM

and probable cause requirements meaningless." Plainly, the probable cause requirement is hardly "meaningless," as in any arrest probable cause is the *sine qua non* for constitutional validity; further, the warrant requirement is not "meaningless" but *inapplicable*, as its predicate, an entry into the dwelling to achieve the arrest, simply *has not happened.*

D. The principle of litigating only that which actually happened

The fictive constructive entry principle invented by courts such as the *Morgan* court runs afoul of the principle that one may only litigate that which actually happened, not that which might have happened if people had acted differently. For example, Immigration and Naturalization Service agents entered worksites to determine whether any illegal aliens were employed in *I.N.S. v Delgado*.[64] Acting under warrant, the agents surveyed the members of the workforce, with several agents stationing themselves at the exits during the interviews. During the interviews the employees continued with their work and were free to walk about the factory. The 9th Circuit held that the entire work force was seized for the duration of the surveys because the stationing of agents at the doors to the building meant that "a reasonable worker 'would have believed that he was not free to leave.'"[65] In the course of reversing this holding, the Supreme Court rejected the claim that stationing agents by the exits constituted a seizure of those in the factory because so doing led to a reasonable belief that if one tried to leave the premises, he or she would be stopped. But no one was tried to leave and was seized, and the Court said that the

---

[64] *I.N.S. v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 284 (1984).

[65] *Id.*, at 1761.

RECEIVED by MSC 10/16/2018 11:37:17 AM

workers could "only litigate what happened to them," not what *might* have occurred if they had behaved differently.[66]

Similarly with *Hodari D.* itself. One could argue that a person is constructively seized when the police order that person to stop or chase them, and that any item abandoned during the pursuit is the fruit of this constructive seizure because if the person *had* submitted at the outset to the show of authority, the seizure would have been unjustified by reasonable suspicion or probable cause, and a search of the person would have been improper. But in *Hodari* the defendant was not actually seized before he threw the cocaine, and had he been seized may not have been searched at all. To contest the validity of a seizure and search there must first *be* a seizure and search, and there was none in *Hodari D.* To consider the circumstances such as those presented here to be constructive entries is logically the same as considering a person to be seized when the police first make a show of authority. But one *may only litigate what actually happened, not what might have happened if he or she had behaved differently.* Just as Hodari could not litigate the reasonableness of a seizure that had not occurred, or claim that an illegal search of his person "would have" occurred if he had submitted to the police, as these things simply had not happened, so it cannot be said that the police "would have" entered the defendant's premises here in violation of *Payton* had she not come to the door to retrieve her license, or that if they had there would be fruit of that entry (and there was none here). Had she not done so, and the police gone in, the question would be presented. But that is simply *not what happened*, and history should not become fiction.

---

[66] *Id.*, at 1765.

RECEIVED by MSC 10/16/2018 11:37:17 AM

RECEIVED by MSC 10/16/2018 11:37:17 AM

E. "Doorway" arrests are permissible

Again, this Court's posing of the question assumes an arrest in a public place, the question being how defendant's presence in that place was achieved. Amicus would simply note, then, with regard to so-called "doorway" arrests, the following from Professor LaFave:

> [The position] that the "police are prohibited from arresting a suspect while the suspect is standing in the doorway of his house," even if "the police never crossed the threshold," because it "is not the location of the arresting officer that is important," but rather "the location of the arrestee." . . .is unsound from the standpoint of both principle and pragmatism. For one thing, it is certainly contrary to the language of *Payton* which, again, merely says that the "threshold may not reasonably be crossed without a warrant." "There is nothing in *Payton* which prohibits the person from surrendering at his doorway," nor does that decision support "the broad proposition … that the use of the voice to convey a message of arrest constitutes … an entry barred by the fourth amendment." Secondly, this position is contrary to the rationale of *Payton*. . . . *notwithstanding Payton's choice of an arrest warrant rather than a search warrant where third-party premises are not involved, the warrant requirement makes sense only in terms of the entry, rather than the arrest*; the arrest itself is no "more threatening or humiliating than a street arrest." This certainly means that if the arrest can be accomplished without entry,it should be deemed lawful notwithstanding the absence of a warrant, even if the arrestee was just inside rather than on the threshold at the time. Thirdly, the . . . position is undesirable as a practical matter, for it means that whether a particular warrantless arrest turns out to be lawful or not will often depend upon nothing more than whether the arresting officer had the prescience to testify that the defendant was "in" the doorway rather than "at" it, or "on" the threshold rather than "by" it. Finally, even if courts could be expected to sort out the "in"-"at" and "on"-"by" distinctions on a regular basis, one cannot help but wonder why that burden should be imposed upon them.
>
> As the Supreme Court concluded in *Frazier v. Cupp*, *it is hardly desirable that Fourth Amendment issues be resolved by resort to "metaphysical subtleties*."(These last two points, it might be suggested, also lend some support to the notion that if the arrestee

> does not retreat from the door but the police officer merely reaches in to manifest the fact of arrest, such a de minimis breaking of the vertical plane above the threshold should not itself make the warrantless arrest unlawful; *otherwise the legality of doorway arrests would have to be determined by resort to plumb bob and quaint distinctions drawn from the "entry" ingredient of common law burglary*.)
>
> ***
>
> Permitting the police to make a warrantless arrest of a person who answers the door (or who is properly summoned to the door, about which more later) makes great sense simply because it can be expected that in the vast majority of such confrontations the person will submit to the police. That being so, the police are quite properly relieved from having to obtain arrest warrants in a large number of cases in advance, and the warrant process is thereby not overtaxed (thus giving greater assurance it will not become a mechanical routine). But if in a particular case in which there were no exigent circumstances to start with the intended arrestee at the door elects to exercise the security of the premises by not submitting to the arrest, then it is hardly unfair that the police should be required to withdraw and return another time with a warrant.[67]

F. Conclusion

Payton establishes a rule to "to protect the physical integrity of the home," precluding non-exigent non-consensual *entries* into home to make arrests. The rule has nothing whatever to do with warrantless arrests—seizures of the person—based on probable cause, which are perfectly permissible under the Constitution. Where no entry occurs, the physical integrity of the home remains protected. This Court should firmly set its face against the notion of constructive entry, which is inconsistent with the very rationale of *Payton*, should it reach the question, which it need not, there being nothing subject to suppression in any event.

---

[67] 3 LaFave,§ 6.1 (emphasis supplied)

RECEIVED by MSC 10/16/2018 11:37:17 AM

RECEIVED by MSC 10/16/2018 11:37:17 AM

Relief

Wherefore, amicus submits that the Court of Appeals should be affirmed.

Respectfully submitted,

D.J. HILSON
President
Prosecuting Attorneys Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

/s/TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney
Rm. 1113
1441 St. Antoine
Detroit, MI 48226