Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Hot & Fresh Pursuit

Table Of Contents:

Bailey v Swindell	(Page 3)
Lange v California	(Page 9)
Payton v New York	(Page 28)
People v Gilbert	(Page 52)
State v Campbell	(Page 67)
US v Santana	(Page 78)

940 F.3d 1295
United States Court of Appeals, Eleventh Circuit.

Kenneth BAILEY, Plaintiff - Appellant,

v.

Shawn T. SWINDELL, in his individual capacity, Michael Ramirez, in his individual capacity, Sheriff of Santa Rosa County Florida, Defendants - Appellees, Wendell Hall, Defendant.

No. 18-13572
|
October 16, 2019

Synopsis

Background: Arrestee brought civil rights action against arresting officer for allegedly violating his Fourth Amendment rights in connection with an arrest effected inside his parents' home. The United States District Court for the Northern District of Florida, No. 3:15-cv-00390-MCR-CJK, granted officer's motion for summary judgment, and arrestee appealed.

The Court of Appeals, Newsom, Circuit Judge, held that officer violated suspect's clearly established Fourth Amendment rights, and thus was not protected by qualified immunity, in entering home in order to effect a warrantless arrest.

Reversed and remanded.

Attorneys and Law Firms

***1297** Keith William Weidner, Taylor Warren & Weidner, PA, Charles Phillip Hall, Phil Hall, P.A., Pensacola, FL, for Plaintiff-Appellant.

Joe Longfellow, III, Jeannette M. Andrews, J. Craig Knox, Andrews Crabtree Knox & Andrews, LLP, Lacey Delori Corona, Nelson Mullins Broad and Cassel, Tallahassee, FL, Ginger Barry Boyd, Broad & Cassel, Destin, FL, for Shawn T. Swindell.

Timothy Michael Warner, Warner Law Firm, PA, Panama City, FL, for Michael Ramirez and Sheriff of Santa Rosa County Florida.

William Gerard Warner, Warner Law Firm, PA, Panama City, FL, for Michael Ramirez.

Lisa Truckenbrod, Law Office of Lisa Truckenbrod, Tallahassee, FL, for Shawn T. Swindell and Sheriff of Santa Rosa County Florida.

Appeal from the United States District Court for the Northern District of Florida, D.C. Docket No. 3:15-cv-00390-MCR-CJK

Before WILSON and NEWSOM, Circuit Judges, and PROCTOR,[*] District Judge.

Opinion

NEWSOM, Circuit Judge:

What began as a relatively low-key consensual encounter between Santa Rosa County Sheriff's Deputy Shawn Swindell and Kenneth Bailey escalated quickly into a forceful arrest. Taking the facts in the light most favorable to Bailey, as we must given the case's procedural posture, the short story goes like this: Swindell showed up at Bailey's parents' home requesting to speak with Bailey about an earlier incident involving his estranged wife. When Bailey came to the door, Swindell asked to talk to him alone, but Bailey declined. After the two argued briefly, Bailey went back inside the house. Then, presumably fed up with Bailey's unwillingness to cooperate, Swindell pursued him across the threshold and (as Bailey describes it) "tackle[d] [him] ... into the living room" and arrested him.

Bailey sued, arguing that his arrest violated the Fourth Amendment. The district court granted summary judgment in Swindell's favor, and Bailey now appeals on two grounds. First, Bailey disputes that Swindell had probable cause to arrest him in the first place. Second, Bailey contends that in any event—*i.e.*, even assuming that probable cause existed—Swindell unlawfully arrested him inside his parents' home ***1298** without a warrant. Unsurprisingly, Swindell disagrees on both counts and, further, asserts that he is entitled to qualified immunity.

Without deciding whether Bailey's arrest was supported by probable cause—or, as it goes in the qualified-immunity

context, "arguable probable cause"—we reverse. Even assuming that Swindell had probable cause, he crossed what has been called a "firm" and "bright" constitutional line, and thereby violated the Fourth Amendment, when he stepped over the doorstep of Bailey's parents' home to make a warrantless arrest.

I

A

The seeds of the confrontation between Swindell and Bailey were planted when Swindell responded to a request from police dispatch to investigate an argument between Bailey and his estranged wife, Sherri Rolinger.[1] The argument had occurred when Bailey stopped by the couple's marital home to retrieve a package. Bailey no longer lived in the home with Rolinger and their two-year-old son, as the couple was embroiled in a contentious divorce. When Bailey rang the doorbell—seemingly more than once—he woke the boy, who started to cry. Rolinger came to the door but refused to open it and told Bailey to leave. Bailey responded that he wasn't leaving without his package, and Rolinger eventually informed him that she had put it in the mailbox. Bailey retrieved the package and departed.

Rolinger went to her mother's house and called 911 to report the incident to police. In response to the call, Deputy Andrew Magdalany was dispatched to interview Rolinger, and Swindell went to talk to Bailey. At some point before Swindell reached Bailey, he called Magdalany and gathered additional details about the encounter and the surrounding circumstances. Magdalany told Swindell, for instance, that in the three months since Bailey's separation from his wife, he had visited the marital residence repeatedly, moved items around in the house, and installed cameras without his wife's knowledge. Magdalany also explained that Rolinger was "fear[ful]" and believed that her husband had "snapped." Even so, he told Swindell that he had not determined that Bailey had committed any crime.

Armed with this information, Swindell approached Bailey's parents' home—where Bailey was living—knocked on the door, and told Bailey's mother Evelyn that he wanted to speak to Bailey.[2] Bailey came to ***1299** the door and stepped out onto the porch, accompanied by his brother Jeremy. Bailey, Evelyn, and Jeremy all remained on the porch during the encounter, although only Bailey spoke with Swindell. Swindell immediately advised Bailey that he was not under arrest. Shortly thereafter, Swindell retreated off the porch to establish what he described as a "reactionary gap" between himself and Bailey—a distance that Jeremy estimated could have been as far as 13 feet. Swindell asked Bailey to speak with him privately by his patrol car, but Bailey declined, saying that he wasn't comfortable doing so. Swindell then told Evelyn and Jeremy to go back inside so that he could talk to Bailey alone, but they, too, refused. Bailey asked Swindell why he was there, but Swindell initially didn't respond; he eventually said that he was there to investigate, although he never clarified exactly what he was investigating. Frustration growing, Swindell then repeatedly demanded—at a yell—that Evelyn and Jeremy return to the house and that Bailey talk to him by his patrol car, but no one complied.

Bailey then announced that he was heading inside and turned back into the house. Without first announcing an intention to detain Bailey, Swindell charged after him and "tackle[d] [him] ... into the living room," simultaneously declaring, "I am going to tase you." Importantly for our purposes, by that time Bailey was—as he, Evelyn, and Jeremy all testified—already completely inside the house. Swindell then proceeded to arrest Bailey.

B

Bailey sued for false arrest under the Fourth Amendment, but the district court rejected his claim.[3] In particular, the court reasoned that when Bailey retreated into his house, he at least arguably obstructed Swindell in the lawful exercise of his duty, and thereby violated Fla. Stat. § 843.02, which makes resisting an officer without violence a first-degree misdemeanor. Accordingly, the court granted Swindell qualified immunity and granted summary judgment in his favor.

Significantly, the district court failed to address Bailey's argument—which he reiterates on appeal—that even assuming that probable cause existed, Swindell violated "clearly established" law when he arrested Bailey inside his parents' home without a warrant.[4] We agree and accordingly reverse.

***1300 II**

To obtain the benefit of qualified immunity, a government official "bears the initial burden of establishing that he was acting within his discretionary authority." *Huebner v. Bradshaw*, 935 F.3d 1183, 1187 (11th Cir. 2019) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002)). Where, as here, it is undisputed that this requirement is satisfied, the burden shifts to the plaintiff to "show both (1) that [he] suffered a violation of a constitutional right and (2) that the right [he] claims was 'clearly established' at the time of the alleged misconduct." *Id.*

Bailey contends that his arrest violated clearly established Fourth Amendment law for two distinct reasons. First, he asserts that Swindell lacked probable cause to arrest him. Second, he argues that, in any event, Swindell impermissibly arrested him inside his home without a warrant.

A

It is clear, of course, that "[a] warrantless arrest without probable cause violates the Constitution." *Marx v. Gumbinner*, 905 F.2d 1503, 1505 (11th Cir. 1990) (citation omitted). But if "reasonable officers in the same circumstances and possessing the same knowledge as the [d]efendant[ ] could have believed that probable cause existed," then the absence of probable cause is not "clearly established," and qualified immunity applies. *Von Stein v. Brescher*, 904 F.2d 572, 579–80 (11th Cir. 1990). In that circumstance, what we have called "arguable probable cause" suffices to trigger qualified immunity. *Skop*, 485 F.3d at 1137.[5]

Swindell contends, and the district court held, "that Deputy Swindell had arguable probable cause to arrest Bailey for violating Fla. Stat. § 843.02." We needn't decide whether the district court was correct in so holding because we ultimately conclude that Bailey's arrest was effectuated inside Bailey's home without warrant, consent, or exigent circumstances. Such an arrest violates the Fourth Amendment even if supported by probable cause. For present purposes, therefore, we will simply assume—without deciding—that Swindell had probable cause.

B

When it comes to warrantless arrests, the Supreme Court has drawn a "firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Accordingly, while police don't need a warrant to make an arrest in a public place, ***1301** the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to" arrest him. *Id.* at 576, 100 S.Ct. 1371. Swindell doesn't dispute *Payton*'s rule as a general matter, but he insists that this case is controlled by the Court's pre-*Payton* decision in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)—which, he says, holds that "standing in a doorway or on a porch is considered a public place, wherein there is no expectation of privacy or need to obtain a warrant to initiate an arrest." Br. for Appellee at 50. Although the facts of this case do bear some superficial similarity to those in *Santana*, we find ourselves constrained to reject Swindell's argument.

In *Santana*, officers who had just conducted a sting operation and arrested a heroin dealer returned to arrest the dealer's supplier. 427 U.S. at 40, 96 S.Ct. 2406. As the officers approached, they saw the suspect, Dominga Santana, in her doorway roughly 15 feet away holding a brown paper bag. *Id.* The officers "got out of their van, shouting 'police,' and displaying their identification." *Id.* Santana retreated through the door and into her house, but the officers followed and took her into custody. *Id.* at 40–41, 96 S.Ct. 2406. The Supreme Court approved the warrantless arrest because it was supported by probable cause and, importantly here, because it began in a "public place." *Id.* at 42, 96 S.Ct. 2406 (quotation marks omitted). For the Court, the fact that the arrest continued into Santana's home after beginning on the threshold presented no difficulty because the police there were engaged in a case of "true hot pursuit"—an exigent circumstance that justifies a departure from the usual warrant requirement. *Id.* at 42–43, 96 S.Ct. 2406 (quotation marks omitted).

While this case similarly involves an arrest in or around a doorway, *Santana* does not stand for the proposition that the Fourth Amendment authorizes any warrantless arrest that begins near an open door. Santana's arrest was initiated while she was standing—at least partly—outside her house, and she only subsequently retreated within it. Bailey, by contrast, was —again, taking the facts in the light most favorable to him—

completely inside his parents' home before Swindell arrested him. Swindell neither physically nor verbally, and neither explicitly nor implicitly, initiated the arrest until Bailey had retreated fully into the house. As we will explain, that means that this case is controlled by *Payton*, not *Santana*.

Payton involved two consolidated cases. In the first, officers showed up at Theodore Payton's apartment to arrest him the day after they had "assembled evidence sufficient to establish probable cause" that he had murdered a man. 445 U.S. at 576, 100 S.Ct. 1371. When Payton didn't answer his door, the officers broke in with the intention of arresting him. *Id.* Although they determined that Payton wasn't home, they discovered evidence of his crime in plain view, and Payton later turned himself in. *Id.* at 576–77, 100 S.Ct. 1371. In the second case, officers obtained the address of Obie Riddick, whose robbery victims had identified him as their assailant. *Id.* at 578, 100 S.Ct. 1371. Without obtaining a warrant, the officers knocked on Riddick's door, saw him when his young son opened it, and entered the house and arrested him on the spot. *Id.* Both Payton and Riddick were convicted based on evidence discovered in the course of the officers' warrantless entries into their homes, and the New York Court of Appeals affirmed both convictions. *Id.* at 579, 100 S.Ct. 1371. The Supreme Court reversed both, holding that "[a]bsent exigent circumstances"—and even assuming the existence of probable ***1302** cause—the threshold of the home "may not reasonably be crossed without a warrant." *Id.* at 590, 100 S.Ct. 1371.

Our precedent reconciling *Santana* and *Payton* is clear. We have expressly refused to read *Santana* "as allowing physical entry past *Payton*'s firm line ... without a warrant or an exigency." *McClish v. Nugent*, 483 F.3d 1231, 1246 (11th Cir. 2007). *Santana*'s description of "the doorway of [a] house" as a "public place," 427 U.S. at 40, 42, 96 S.Ct. 2406 (quotation marks omitted), we have said, shouldn't be misinterpreted to mean that officers have a right to enter and arrest anyone standing in an open doorway without a warrant. *McClish*, 483 F.3d at 1247. Instead, we have explained, it simply means that a person standing in a doorway is in "public" in the sense that he puts himself in the "the plain view" of any officers observing from the street. *Id.* (quoting *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004)). In so doing, the suspect "may well provide an officer with a basis for finding probable cause or an exigency," but he does not "surrender or forfeit every reasonable expectation of privacy ... including ... the right to be secure within his home from a warrantless arrest." *Id.*; *see also Moore v. Pederson*, 806 F.3d 1036, 1050 n.14 (11th Cir. 2015) (observing that "*McClish* clearly established that an officer may not execute a warrantless arrest without probable cause and either consent or exigent circumstances, even if the arrestee is standing in the doorway of his home when the officers conduct the arrest"). The bottom line, post-*Payton*: Unless a warrant is obtained or an exigency exists, "any physical invasion of the structure of the home, by even a fraction of an inch, [is] too much." *Kyllo v. United States*, 533 U.S. 27, 37, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (quotation marks and citation omitted).

In order to prevail based on *Santana*, then, Swindell would have to point to some exigent circumstance, but the exigencies present in *Santana* are absent here. *Santana* primarily involved the "hot pursuit" exception to the warrant requirement, and the Court there separately alluded to the risk that evidence would be destroyed. *Id.* at 43, 121 S.Ct. 2038. Neither of those exigencies, however, can justify Bailey's arrest.[6]

In *Santana*, the suspect's arrest was "set in motion in a public place," a crucial element of the hot-pursuit exception. *Id.* at 43, 121 S.Ct. 2038. It was only after officers shouted "police" that Santana retreated fully inside her house. *Id.* at 40, 121 S.Ct. 2038. Bailey's arrest, by contrast, wasn't initiated in public, and therefore can't qualify as a "true hot pursuit." *Id.* at 42, 121 S.Ct. 2038 (quotation marks omitted). Swindell gave no indication that he intended to arrest Bailey before he threatened to tase him and simultaneously tackled him from behind. Taken in the light most favorable to Bailey, the facts demonstrate that the threat and tackle occurred only *after* Bailey had retreated entirely into the house, so "hot pursuit" provides no justification for the warrantless entry here. If *Santana* were understood to cover warrantless arrests "set in motion" *inside* a home, then the hot-pursuit exception would quite literally swallow *Payton*'s rule.

***1303** The *Santana* Court also relied in part on "a realistic expectation that any delay would result in destruction of evidence." *Id.* at 43, 121 S.Ct. 2038 (citation omitted). Swindell's counsel expressly disclaimed any reliance on this kind of exigency at oral argument—and with good reason, as the circumstances here posed no risk that any evidence would be destroyed. Indeed, with respect to the charge for which Bailey was arrested—resisting Swindell's initial effort to detain him, in violation of Fla. Stat. § 843.02—there wasn't any physical evidence; rather, all relevant evidence existed in the minds of Swindell, Bailey, Evelyn, and Jeremy.[7]

Because Swindell can point to no exigency, he violated the Fourth Amendment when he crossed the threshold to effectuate a warrantless, in-home arrest.

* * *

Of course, Swindell loses the cover of qualified immunity only if the constitutional right that he violated was "clearly established" at the time of the events in question. *McClish*, 483 F.3d at 1237. It was.

Qualified immunity "operates 'to protect officers from the sometimes hazy border[s]' " of constitutional rules. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (quotation mark omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). In so doing, it "liberates government agents from the need to constantly err on the side of caution." *Holmes v. Kucynda*, 321 F.3d 1069, 1077 (11th Cir. 2003). Here, though, Swindell crossed a constitutional line that—far from being hazy—was "not only firm but also bright." *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038. That line—no warrantless in-home arrests absent exigent circumstances—was drawn unambiguously in *Payton*, traces its roots in more ancient sources, and has been reaffirmed repeatedly since. *See, e.g.*, *Kirk v. Louisiana*, 536 U.S. 635, 636, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002); *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038; *Welsh v. Wisconsin*, 466 U.S. 740, 754, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *see also Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948). And to be clear, Swindell can't point to *Santana* as a source of uncertainty in the law. The defendant in *McClish* ruined that chance; he made the same "What about *Santana*?" argument, and we indulged it there, 483 F.3d at 1243, but in so doing we expressly rejected it on a going-forward basis, *id*. at 1243–48. Finally, to the extent that any ambiguity remained, we expressly reiterated *McClish*'s holding in *Moore*, explaining—in terms that apply here precisely—that a warrant (or exception) is *always* required for a home arrest "even if the arrestee is standing in the doorway of his home when the officers conduct the arrest." 806 F.3d at 1050 n.14.

Because Swindell violated clearly established Fourth Amendment law, he is not entitled to qualified immunity.

III

We hold that Swindell violated the Fourth Amendment's protection against unreasonable seizures when he arrested Bailey inside his home. We further hold that Bailey's right to be free from a warrantless, in-home arrest was clearly established and that no exception to the warrant ***1304** requirement even plausibly applies in this case. Accordingly, we **REVERSE** the district court's judgment and **REMAND** for further proceedings consistent with this opinion.

All Citations

940 F.3d 1295, 28 Fla. L. Weekly Fed. C 487

Footnotes

* Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

1 Because this case arises on the appeal of the district court's summary judgment for Swindell, we take and construe the facts in the light most favorable to Bailey. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1136 (11th Cir. 2007).

2 Taking the facts in the light most favorable to Bailey, the district court imputed more knowledge to Swindell than it should have. Giving Bailey the benefit of the doubt, Swindell didn't know at the time that he approached Bailey that Bailey and his wife were "embroiled in a contentious divorce," that Bailey "banged on the closed front door and screamed at Sherri Rolinger," that this disturbance was loud enough that "their two-year-son [sic] woke up crying," or that Rolinger was " 'crying' and 'very distraught.' " We must assume that Swindell learned these facts only after arresting Bailey, and that before the confrontation Swindell knew only what dispatch and Magdalany had told him. Indeed, Swindell indicated that all the relevant information he had at the time that he confronted Bailey was contained in the first full paragraph of his offense report, which we reproduce here:

> While speaking with Dep. Magdalany he advised me of the following: [a]ccording to Sherri, she and Kenneth separated approximately 3 months ago[,] and Kenneth moved out. Since this time, Kenneth has continuously harassed Sherri by showing up at their marital home unannounced while she is home and while she is not home. During the incidents where Sherri is not home Kenneth will turn pictures face down, and move things inside the home to let his presence

be known. During this time frame[,] Kenneth had cameras installed inside the home without her knowledge. Sherri also told Dep. Magdalany that Kenneth is not acting right and has "snapped". During tonight's incident, Sherri and Kenneth got into a verbal argument, but at this time Dep. Magdalany had not determined if a crime occurred and was still investigating the incident.

3 Bailey brought other claims that are not before us on appeal. The district court allowed a Fourth Amendment excessive-force claim to go to trial, and the jury returned a verdict for Swindell. Bailey doesn't challenge that verdict on appeal. Nor does Bailey challenge the dismissal of his state-law claims.

4 The district court must have rejected this argument in reaching the result that it did, because Bailey clearly raised it. In particular, Bailey contended that "[i]t would not be enough that Deputy Swindell had a good faith belief, probable cause, or arguable probable cause that a misdemeanor crime had been committed ... [as] Deputy Swindell was not free to enter Mr. Bailey's home for the purpose of either detaining him or arresting him." Continuing, Bailey argued that "it is not easy to see how the warrantless entry ... is anything but a violation of an established right to be free from unreasonable seizure ... in your own home."

5 Some of our decisions have erroneously suggested that the "arguable probable cause" standard applies at the first step of the qualified-immunity analysis, in determining whether a constitutional violation has occurred. *See, e.g.*, *Storck v. City of Coral Springs*, 354 F.3d 1307, 1317 (11th Cir. 2003) ("[V]iewing the facts in the light most favorable to Storck, she has not established a constitutional violation because, at the very least, McHugh had arguable probable cause."). Controlling case law makes clear, however, that "arguable probable cause" is a step-*two* standard. *See Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) ("Sellers-Sampson is entitled to qualified immunity because he had arguable probable cause to arrest Lirio. Put differently, Lirio has not shown that the law of probable cause is so clearly established that no reasonable officer, faced with the situation before Sellers-Sampson, could have believed that probable cause to arrest existed."), *modified*, 14 F.3d 583 (11th Cir. 1994); *see also Huebner*, 935 F.3d at 1190 n.6 ("Accordingly, we needn't reach the question whether McDonough had 'arguable probable cause,' which comes into play only at the second, 'clearly established' step of the qualified-immunity analysis." (citation omitted)).

6 Swindell arguably waived any argument that his warrantless arrest of Bailey was supported by exigent circumstances because he didn't raise the issue in his brief. *See United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) ("Parties must submit all issues on appeal in their initial briefs." (citations omitted)). Read charitably, his citation of *Santana* could be understood to invoke the exigencies on which the Court in that case relied, so we will analyze those circumstances here.

7 Although Swindell didn't present any exigent-circumstances arguments in his brief, he did raise a concern about officer safety at oral argument, contending that Swindell feared that Bailey would return to the porch with a weapon. That argument is not only waived, *see Nealy*, 232 F.3d at 830, but also wholly speculative, as there was no evidence to suggest that anyone had a weapon pre-arrest.

End of Document

141 S.Ct. 2011
Supreme Court of the United States.

Arthur Gregory LANGE, Petitioner
v.
CALIFORNIA

No. 20-18
|
Argued February 24, 2021
|
Decided June 23, 2021

Synopsis

Background: Following denial by the Superior Court, Sonoma County, No. SCR699391, Marjorie L. Carter, J., of defendant's motion to suppress evidence obtained by police officer who made warrantless entry to defendant's garage after he had just parked his car there, defendant was convicted of the misdemeanor offense of driving under the influence of alcohol. Defendant appealed, and the Appellate Division affirmed. Defendant again appealed. The First District Court of Appeal, Jones, Presiding Justice, 2019 WL 5654385, affirmed. Certiorari was granted.

The Supreme Court, Justice Kagan, held that the flight of a suspected misdemeanant does not always justify a warrantless entry into a home, abrogating *City of Bismarck v. Brekhus*, 908 N.W.2d 715, *Com. v. Jewett*, 471 Mass. 624, 31 N.E.3d 1079, *People v. Wear*, 229 Ill.2d 545, 323 Ill.Dec. 359, 893 N.E.2d 631, *Middletown v. Flinchum*, 95 Ohio St.3d 43, 765 N.E.2d 330, *State v. Ricci*, 144 N. H. 241, 739 A. 2d 404.

Vacated and remanded.

Justice Kavanaugh filed a concurring opinion.

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Kavanaugh joined in part.

Chief Justice Roberts filed an opinion concurring in the judgment, in which Justice Alito joined.

***2013** *Syllabus*[*]

****1** This case arises from a police officer's warrantless entry into petitioner Arthur Lange's garage. Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer began to follow Lange and soon after turned on his overhead lights to signal that Lange should pull over. Rather than stopping, Lange drove a short distance to his driveway and entered his attached garage. The officer followed Lange into the garage. He questioned Lange and, after observing signs of intoxication, put him through field sobriety tests. A later blood test showed that Lange's blood-alcohol content was three times the legal limit.

The State charged Lange with the misdemeanor of driving under the influence. Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The Superior Court denied Lange's motion, and its appellate division affirmed. The California Court of Appeal also affirmed. It concluded that Lange's failure to pull over when the officer flashed his lights created probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal. And it stated that Lange could not defeat an arrest begun in a public place by retreating into his home. The pursuit of a suspected misdemeanant, the court held, is always permissible under the exigent-circumstances exception to the warrant requirement. The California Supreme Court denied review.

Held: Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always—that is, categorically —justify a warrantless entry into a home. Pp. 2016 – 2025.

(a) The Court's Fourth Amendment precedents counsel in favor of a case-by-case assessment of exigency when deciding whether a suspected misdemeanant's flight justifies a warrantless home entry. The Fourth Amendment ordinarily requires that a law enforcement officer obtain a judicial warrant before entering a home without permission. *Riley v. California*, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430. But an officer may make a warrantless entry when "the exigencies of the situation," considered in a case-specific way, create "a compelling need for official action and no time to secure a warrant." *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865; *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696. The Court has found that such exigencies may exist when an officer must act

to prevent imminent injury, the destruction of evidence, or a suspect's escape.

The *amicus* contends that a suspect's flight always supplies the exigency needed to justify a warrantless home entry and that the Court endorsed such a categorical approach in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300. The Court disagrees. In upholding a warrantless entry made during a "hot pursuit" of a felony suspect, the Court stated that Santana's "act of retreating into her house" could "not defeat an arrest" that had "been set in motion in a public place." *Id.*, at 42–43, 96 S.Ct. 2406. Even assuming that *Santana* treated fleeing-felon cases categorically, that statement still does not establish a flat rule permitting warrantless home entry whenever a police officer pursues a fleeing misdemeanant. *Santana* did not resolve the issue of misdemeanor pursuit; as the Court noted in a later case, "the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established" one way or the other. *Stanton v. Sims*, 571 U.S. 3, 8, 10, 134 S.Ct. 3, 187 L.Ed.2d 341.

**2 Misdemeanors run the gamut of seriousness, and they may be minor. States tend to apply the misdemeanor label to less violent and less dangerous crimes. The Court has held that when a minor offense (and no flight) is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. See *Welsh v. Wisconsin*, 466 U.S. 740, 742–743, 104 S.Ct. 2091, 80 L.Ed.2d 732. Add a suspect's flight and the calculus changes—but not enough to justify a categorical rule. In many cases, flight creates a need for police to act swiftly. But no evidence suggests that every case of misdemeanor flight creates such a need.

The Court's Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. When the totality of circumstances shows an emergency—a need to act before it is possible to get a warrant—the police may act without waiting. Those circumstances include the flight itself. But pursuit of a misdemeanant does not trigger a categorical rule allowing a warrantless home entry. Pp. 2016 – 2022.

(b) The common law in place at the Constitution's founding similarly does not support a categorical rule allowing warrantless home entry whenever a misdemeanant flees. Like the Court's modern precedents, the common law afforded the home strong protection from government intrusion and it generally required a warrant before a government official could enter the home. There was an oft-discussed exception: An officer, according to the common-law treatises, could enter a house to pursue a felon. But in the misdemeanor context, officers had more limited authority to intrude on a fleeing suspect's home. The commentators generally agreed that the authority turned on the circumstances; none suggested a rule authorizing warrantless entry in every misdemeanor-pursuit case. In short, the common law did not have—and does not support—a categorical rule allowing warrantless home entry when a suspected misdemeanant flees. Pp. 2022 – 2025.

Vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined, and in which THOMAS, J., joined as to all but Part II–A. KAVANAUGH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which KAVANAUGH, J., joined as to Part II. ROBERTS, C. J., filed an opinion concurring in the judgment, in which ALITO, J., joined.

Attorneys and Law Firms

Jeffrey L. Fisher, Stanford, CA, for the petitioner.

Deputy Solicitor General Samuel T. Harbourt, San Francisco, CA, for the respondent supporting vacatur, by Amanda K. Rice, Detroit, MI, appointed by this Court as amicus curiae.

Erica L. Ross for the United States, as amicus curiae, by special leave of the Court, supporting affrmance.

Peter Goodman, Law Office of Peter Goodman, San Francisco, CA, Brian H. Fletcher, Counsel of Record, Jeffrey L. Fisher, Counsel of Record, Pamela S. Karlan, Stanford Law School, Supreme Court, Litigation Clinic, Stanford, CA, for the petitioner.

Xavier Becerra, Attorney General of California, Michael J. Mongan, Solicitor General, Lance E. Winters, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Samuel T. Harbourt, Counsel of Record, Helen H. Hong, Deputy Solicitors General, Donna M. Provenzano, Supervising Deputy Attorney General, Kimberly M. Castle, Associate Deputy Solicitor General, State of California Department of Justice, San Francisco, CA, for the respondent.

Opinion

Justice KAGAN delivered the opinion of the Court.

***2016** The Fourth Amendment ordinarily requires that police officers get a warrant before entering a home without permission. But an officer may make a warrantless entry when "the exigencies of the situation" create a compelling law enforcement need. *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). The question presented here is whether the pursuit of a fleeing misdemeanor suspect always—or more legally put, categorically—qualifies as an exigent circumstance. We hold it does not. A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case.

I

This case began when petitioner Arthur Lange drove past a California highway patrol officer in Sonoma. Lange, it is fair to say, was asking for attention: He was listening to loud music with his windows down and repeatedly honking his horn. The officer began to tail Lange, and soon afterward turned on his overhead lights to signal that Lange should pull over. By that time, though, Lange was only about a hundred feet (some four-seconds drive) from his home. Rather than stopping, Lange continued to his driveway and entered his attached garage. The officer followed Lange in and began questioning him. Observing signs of intoxication, the officer put Lange through field sobriety tests. Lange did not do well, and a later blood test showed that his blood-alcohol content was more than three times the legal limit.

****3** The State charged Lange with the misdemeanor of driving under the influence of alcohol, plus a (lower-level) noise infraction. Lange moved to suppress all evidence obtained after the officer entered his garage, arguing that the warrantless entry had violated the Fourth Amendment. The State contested the motion. It contended that the officer had probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal. See, *e.g.*, Cal. Veh. Code Ann. § 2800(a) (West 2015) (making it a misdemeanor to "willfully fail or refuse to comply with a lawful order, signal, or direction of a peace officer"). And it argued that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry. The Superior Court denied Lange's motion, and its appellate division affirmed.

The California Court of Appeal also affirmed, accepting the State's argument in full. 2019 WL 5654385, *1 (2019). In the court's view, Lange's "fail[ure] to immediately pull over" when the officer flashed his lights created probable cause to arrest him for a misdemeanor. *Id.*, at *7. And a misdemeanor suspect, the court stated, could "not defeat an arrest which has been set in motion in a public place" by "retreat[ing] into" a house or other "private place." See *id.*, at *6–*8 (internal quotation marks omitted). Rather, an "officer's 'hot pursuit' into the house to prevent the suspect from frustrating the arrest" is always permissible under the exigent-circumstances "exception to the warrant requirement." *Id.*, at *8 (some internal quotation marks omitted). That flat rule resolved the matter: "Because the officer was in hot pursuit" of a misdemeanor suspect, "the officer's warrantless entry into [the suspect's] driveway and garage [was] lawful." ***2017** *Id.*, at *9. The California Supreme Court denied review.

Courts are divided over whether the Fourth Amendment always permits an officer to enter a home without a warrant in pursuit of a fleeing misdemeanor suspect. Some courts have adopted such a categorical rule, while others have required a case-specific showing of exigency.[1] We granted certiorari, 592 U. S. ——, 141 S.Ct. 617, 208 L.Ed.2d 227 (2020), to resolve the conflict. Because California abandoned its defense of the categorical rule applied below in its response to Lange's petition, we appointed Amanda Rice as *amicus curiae* to defend the Court of Appeal's judgment. She has ably discharged her responsibilities.

II

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As that text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). That standard "generally requires the obtaining of a judicial warrant" before a law enforcement officer can enter a home without permission. *Riley v. California*, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (internal quotation marks omitted). But not always: The "warrant requirement is subject to certain exceptions." *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943.

****4** One important exception is for exigent circumstances. It applies when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *King*, 563 U.S., at 460, 131 S.Ct. 1849 (internal quotation marks omitted). The exception enables law enforcement officers to handle "emergenc[ies]"—situations presenting a "compelling need for official action and no time to secure a warrant." *Riley*, 573 U.S., at 402, 134 S.Ct. 2473; *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). Over the years, this Court has identified several such exigencies. An officer, for example, may "enter a home without a warrant to render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury," or to ensure his own safety. *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943; *Riley*, 573 U.S., at 388, 134 S.Ct. 2473. So too, the police may make a warrantless entry to "prevent the imminent destruction of evidence" or to "prevent a suspect's escape." *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943; *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (internal quotation marks omitted). In those circumstances, the delay required to obtain a warrant would bring about "some real immediate and serious consequences"—and so the absence of a warrant is excused. ***2018** *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (quoting *McDonald v. United States*, 335 U.S. 451, 460, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (Jackson, J., concurring)).

Our cases have generally applied the exigent-circumstances exception on a "case-by-case basis." *Birchfield* v. *North Dakota*, 579 U. S. 438, ——, 136 S.Ct. 2160, 2174, 195 L.Ed.2d 560 (2016). The exception "requires a court to examine whether an emergency justified a warrantless search in each particular case." *Riley*, 573 U.S., at 402, 134 S.Ct. 2473. Or put more curtly, the exception is "case-specific." *Id.*, at 388, 134 S.Ct. 2473. That approach reflects the nature of emergencies. Whether a "now or never situation" actually exists—whether an officer has "no time to secure a warrant"—depends upon facts on the ground. *Id.*, at 391, 134 S.Ct. 2473 (internal quotation marks omitted); *McNeely*, 569 U.S., at 149, 133 S.Ct. 1552 (internal quotation marks omitted). So the issue, we have thought, is most naturally considered by "look[ing] to the totality of circumstances" confronting the officer as he decides to make a warrantless entry. *Id.*, at 149, 133 S.Ct. 1552.

The question here is whether to use that approach, or instead apply a categorical warrant exception, when a suspected misdemeanant flees from police into his home. Under the usual case-specific view, an officer can follow the misdemeanant when, but only when, an exigency—for example, the need to prevent destruction of evidence—allows insufficient time to get a warrant. The appointed *amicus* asks us to replace that case-by-case assessment with a flat (and sweeping) rule finding exigency in every case of misdemeanor pursuit. In her view, those "entries are categorically reasonable, regardless of whether" any risk of harm (like, again, destruction of evidence) "materializes in a particular case." Brief for Court-Appointed *Amicus Curiae* 31. The fact of flight from the officer, she says, is itself enough to justify a warrantless entry. (The principal concurrence agrees.) To assess that position, we look (as we often do in Fourth Amendment cases) both to this Court's precedents and to the common-law practices familiar to the Framers.

A

The place to start is with our often-stated view of the constitutional interest at stake: the sanctity of a person's living space. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). At the Amendment's "very core," we have said, "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Collins* v. *Virginia*, 584 U. S. ——, ——, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9 (2018) (internal quotation marks omitted). Or again: "Freedom" in one's own "dwelling is the archetype of the privacy protection secured by the Fourth Amendment"; conversely, "physical entry of the home is the chief evil against which [it] is directed." *Payton v. New York*, 445 U.S. 573, 585, 587, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (internal quotation marks omitted). The Amendment thus "draw[s] a firm line at the entrance to the house." *Id.*, at 590, 100 S.Ct. 1371. What lies behind that line is of course not inviolable. An officer may always enter a home with a proper warrant. And as just described, exigent circumstances allow even warrantless intrusions. See *ibid.*; *supra*, at 2017 - 2018. But the contours of that or any other warrant exception permitting home entry are "jealously and carefully drawn," in keeping with the "centuries-old principle" that the "home is entitled to special protection." ***2019** *Georgia v. Randolph*, 547 U.S. 103, 109, 115, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (internal quotation marks omitted); see *Caniglia* v. *Strom*, 593 U. S. ——, ——, 141 S.Ct. 1596, 1600, —— L.Ed.2d —— (2021) ("[T]his Court has repeatedly declined to expand the scope" of "exceptions to

the warrant requirement to permit warrantless entry into the home"). So we are not eager—more the reverse—to print a new permission slip for entering the home without a warrant.

****5** The *amicus* argues, though, that we have already created the rule she advocates. In *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), the main case she relies on, police officers drove to Dominga Santana's house with probable cause to think that Santana was dealing drugs, a felony under the applicable law. When the officers pulled up, they saw Santana standing in her home's open doorway, some 15 feet away. As they got out of the van and yelled "police," Santana "retreated into [the house's] vestibule." *Id.*, at 40, 96 S.Ct. 2406. The officers followed her in, and discovered heroin. We upheld the warrantless entry as one involving a police "hot pursuit," even though the chase "ended almost as soon as it began." *Id.*, at 43, 96 S.Ct. 2406. Citing "a realistic expectation that any delay would result in destruction of evidence," we recognized the officers' "need to act quickly." *Id.*, at 42–43, 96 S.Ct. 2406. But we framed our holding in broader terms: Santana's "act of retreating into her house," we stated, could "not defeat an arrest" that had "been set in motion in a public place." *Ibid.* The *amicus* takes that statement to support a flat rule permitting warrantless home entry when police officers (with probable cause) are pursuing any suspect—whether a felon or a misdemeanant. See Brief for *Amicus Curiae* 11, 26. For support, she points to a number of later decisions describing *Santana* in dicta as allowing warrantless home entries when police are "in 'hot pursuit' of a fugitive" or "a fleeing suspect." *E.g.*, *Steagald v. United States*, 451 U.S. 204, 221, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *King*, 563 U.S., at 460, 131 S.Ct. 1849. The concurrence echoes her arguments.

We disagree with that broad understanding of *Santana*, as we have suggested before. In rejecting the *amicus*'s view, we see no need to consider Lange's counterargument that *Santana* did not establish *any* categorical rule—even one for fleeing felons. See Brief for Petitioner 7, 25 (contending that *Santana* is "entirely consistent" with "case-by-case exigency analysis" because the Court "carefully based [its] holding on [the] specific facts" and "circumstances"). Assuming *Santana* treated fleeing-felon cases categorically (that is, as *always* presenting exigent circumstances allowing warrantless entry), see, *e.g.*, *Stanton v. Sims*, 571 U.S. 3, 8, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*); *McNeely*, 569 U.S., at 149, 133 S.Ct. 1552; *King*, 563 U.S. at 460, 131 S.Ct. 1849, it still said nothing about fleeing misdemeanants. We said as much in *Stanton*, when we approved qualified immunity for an officer who had pursued a suspected misdemeanant into a home. Describing the same split of authority we took this case to address, we stated that "the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established" (so that the officer could not be held liable for damages). 571 U.S., at 6, 10, 134 S.Ct. 3. In other words, we found that neither *Santana* nor any other decision had resolved the matter one way or the other. And we left things in that unsettled state. See 571 U.S., at 10, 134 S.Ct. 3. *Santana*, we noted, addressed a police pursuit "involv[ing] a felony suspect," 571 U.S., at 9, 134 S.Ct. 3; whether the same approach governed a ***2020** misdemeanor chase was an issue for a future case.

Key to resolving that issue are two facts about misdemeanors: They vary widely, but they may be (in a word) "minor." *Welsh*, 466 U.S., at 750, 104 S.Ct. 2091. In California and elsewhere, misdemeanors run the gamut of seriousness. As the *amicus* notes, some involve violence. California, for example, classifies as misdemeanors various forms of assault. See Cal. Penal Code Ann. § 241 (West Cum. Supp. 2021); Brief for *Amicus Curiae* 15a–16a. And across the country, "many perpetrators of domestic violence are charged with misdemeanors," despite "the harmfulness of their conduct." *Voisine* v. *United States*, 579 U. S. 686, ——, 136 S.Ct. 2272, 2276, 195 L.Ed.2d 736 (2016). So "a 'felon' is" not always "more dangerous than a misdemeanant." *Tennessee v. Garner*, 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). But calling an offense a misdemeanor usually limits prison time to one year. See 1 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 1.8(c) (4th ed. Supp. 2020). States thus tend to apply that label to less violent and less dangerous crimes. In California, it is a misdemeanor to litter on a public beach. See Cal. Penal Code Ann. § 374.7(a) (2020). And to "negligently cut" a plant "growing upon public land." § 384a(a)(2), (f). And to "willfully disturb[ ] another person by loud and unreasonable noise." § 415(2). And (last one) to "artificially color[ ] any live chicks [or] rabbits." § 599(b). In forbidding such conduct, California is no outlier. Most States count as misdemeanors such offenses as traffic violations, public intoxication, and disorderly conduct. See, *e.g.*, Tex. Transp. Code Ann. § 545.413(a), (d) (West 2011) (driving without a seatbelt); Ill. Comp. Stat., ch. 610, § 90/1 (West 2018) (drinking alcohol in a railroad car); Ark. Code Ann. § 5–71–207(a)(3), (b) (2016) (using obscene language likely to promote disorder). So the *amicus*'s (and concurrence's) rule would cover lawbreakers of every type, including quite a few hard to think alarming.

**6 This Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. In *Welsh*, officers responded to a call about a drunk driver only to discover he had abandoned his vehicle and walked home. See 466 U.S., at 742–743, 104 S.Ct. 2091. So no police pursuit was necessary, hot or otherwise. The officers just went to the driver's house, entered without a warrant, and arrested him for a "nonjailable" offense. *Ibid.* The State contended that exigent circumstances supported the entry because the driver's "blood-alcohol level might have dissipated while the police obtained a warrant." *Id.*, at 754, 104 S.Ct. 2091. We rejected that argument on the ground that the driver had been charged with only a minor offense. "[T]he gravity of the underlying offense," we reasoned, is "an important factor to be considered when determining whether any exigency exists." *Id.*, at 753, 104 S.Ct. 2091. "[W]hen only a minor offense has been committed" (again, without any flight), there is reason to question whether a compelling law enforcement need is present; so it is "particularly appropriate" to "hesitat[e] in finding exigent circumstances." *Id.*, at 750, 104 S.Ct. 2091. And we concluded: "[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense" is involved. *Id.*, at 753, 104 S.Ct. 2091.[2]

**7 *2021 Add a suspect's flight and the calculus changes —but not enough to justify the *amicus*'s categorical rule. We have no doubt that in a great many cases flight creates a need for police to act swiftly. A suspect may flee, for example, because he is intent on discarding evidence. Or his flight may show a willingness to flee yet again, while the police await a warrant. But no evidence suggests that every case of misdemeanor flight poses such dangers. Recall that misdemeanors can target minor, non-violent conduct. See *supra*, at 2019 – 2020. *Welsh* held that when that is so, officers can probably take the time to get a warrant. And at times that will be true even when a misdemeanant has forced the police to pursue him (especially given that "pursuit" may cover just a few feet of ground, see *supra*, at 2018 - 2019). Those suspected of minor offenses may flee for innocuous reasons and in non-threatening ways. Consider from the casebooks: the man with a mental disability who, in response to officers asking him about "fidgeting with [a] mailbox," retreated in "a hurried manner" to his nearby home. *Carroll v. Ellington*, 800 F.3d 154, 162 (C.A.5 2015). Or the teenager "driving without taillights" who on seeing a police signal "did not stop but drove two blocks to his parents' house, ran inside, and hid in the bathroom." *Mascorro v. Billings*, 656 F.3d 1198, 1202 (C.A.10 2011). In such a case, waiting for a warrant is unlikely to hinder a compelling law enforcement need. See *id.*, at 1207 ("The risk of flight or escape was somewhere between low and nonexistent[,] there was no evidence which could have potentially been destroyed[,] and there were no officer or public safety concerns"). Those non-emergency situations may be atypical. But they reveal the overbreadth—fatal in this context—of the *amicus*'s (and concurrence's) rule, which would treat a dangerous offender and the scared teenager the same. In misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry.

Our Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. That approach will in many, if not most, cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances, as described just above, include the flight itself.[3] But the need to pursue a misdemeanant *2022 does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.

B

The common law in place at the Constitution's founding leads to the same conclusion. That law, we have many times said, may be "instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable." *E.g.*, *Steagald*, 451 U.S., at 217, 101 S.Ct. 1642. And the Framers' view provides a baseline for our own day: The Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *United States v. Jones*, 565 U.S. 400, 411, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012); see *Jardines*, 569 U.S., at 5, 133 S.Ct. 1409. Sometimes, no doubt, the common law of the time is hard to figure out: The historical record does not reveal a limpid legal rule. See, *e.g.*, *Payton*, 445 U.S., at 592–597, 100 S.Ct. 1371. Here, we find it challenging to map every particular of the common law's treatment of warrantless home entries. But the evidence is clear on the question before us: The common law

did not recognize a categorical rule enabling such an entry in every case of misdemeanor pursuit.

****8** Like our modern precedents, the common law afforded the home strong protection from government intrusion. As this Court once wrote: "The zealous and frequent repetition of the adage that a 'man's house is his castle' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." *Id.*, at 596–597, 100 S.Ct. 1371 (footnote omitted); see *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1604) ("[T]he house of every one is as to him as his castle and fortress, as well for his defen[s]e against injury and violence, as for his repose" (footnote omitted)); 3 W. Blackstone, Commentaries on the Laws of England 288 (1768) ("[E]very man's house is looked upon by the law to be his castle of defen[s]e and asylum").[4] To protect that interest, "prominent law lords, the Court of Common Pleas, the Court of King's Bench, Parliament," and leading treatise writers all "c[a]me to embrace" the "understanding" that generally "a warrant ***2023** must issue" before a government official could enter a house. Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1238–1239 (2016); see Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 642–646 (1999). That did not mean the Crown got the message; its officers often asserted power to intrude into any home they pleased—thus adding to the colonists' list of grievances. See *Steagald*, 451 U.S., at 220, 101 S.Ct. 1642. But the law on the books offered a different model: "To enter a man's house" without a proper warrant, Lord Chief Justice Pratt proclaimed in 1763, is to attack "the liberty of the subject" and "destroy the liberty of the kingdom." *Huckle* v. *Money*, 2 Wils. K. B. 206, 207, 95 Eng. Rep. 768, 769 (K. B. 1763). That was the idea behind the Fourth Amendment.

There was an oft-discussed exception: An officer, according to the day's treatises, could enter a house to pursue a felon. The felony category then was a good deal narrower than now. Many modern felonies were "classified as misdemeanors" at common law, with the felony label mostly reserved for crimes "punishable by death." *Garner*, 471 U.S., at 13–14, 105 S.Ct. 1694; see 4 W. Blackstone, Commentaries on the Laws of England 98 (1791) (Blackstone). In addressing those serious crimes, the law "allow[ed of] extremities" to meet "necessity." R. Burn, The Justice of the Peace, and Parish Officer 86 (6th ed. 1758). So if a person suspected "upon probable grounds" of a felony "fly and take house," Sir Matthew Hale opined, then "the constable may break open the door, tho he have no warrant." 2 Pleas of the Crown 91–92 (1736) (Hale). Sergeant William Hawkins set out a more restrictive rule in his widely read treatise. He wrote that a constable, "with or without a warrant," could "break open doors" if "pursu[ing]" a person "known to have committed" a felony—but not if the person was only "under a probable suspicion." 2 Pleas of the Crown 138–139 (1787) (Hawkins). On the other hand, Sir William Blackstone went broader than Hale. A constable, he thought, could "break open doors"—no less than "upon a justice's warrant"—if he had "probable suspicion [to] arrest [a] felon," even absent flight or pursuit. Blackstone 292. The commentators thus differed on the scope of the felony exception to the warrant requirement. But they agreed on one thing: It was indeed a *felony* exception. All their rules applied to felonies as a class, and to no other whole class of crimes.

In the misdemeanor context, officers had more limited authority to intrude on a fleeing suspect's home.[5] Once again, some of the specifics are uncertain, and commentators did not always agree with each other. But none suggested any kind of all-misdemeanor-flight rule. Instead, their approval of entry turned on the circumstances. One set of cases involved what might be called pre-felonies. Blackstone explained that "break[ing] open doors" was allowable not only "in case of [a] felony" but also in case of "a dangerous wounding whereby [a] felony is likely to ensue." *Ibid.* In other words, the felony rule extended to crimes that would become felonies if the victims died. See Hale 94.[6] ***2024** Another set of cases involved crimes, mostly violent themselves, liable to provoke felonious acts. Often called "affrays" or "breaches of the peace," a typical example was "the fighting of two or more persons" to "the terror of his majesty's subjects." Blackstone 145, 150.[7] Because that conduct created a "danger of felony"—because when it occurred, "there is likely to be manslaughter or bloodshed committed"—"the constable may break open the doors to keep the peace." Hale 90, 95 (emphasis deleted); see Hawkins 139 (blessing a warrantless entry "where those who have made an affray in [the constable's] presence fly to a house and are immediately pursued"). Hale also approved a warrantless entry to stop a more mundane form of harm: He (though not other commentators) thought a constable could act to "suppress the disorder" associated with "drinking or noise in a house at an unseasonable time of night." Hale 95. But differences aside, all the commentators focused on the facts of cases: When a suspected misdemeanant, fleeing or otherwise, threatened no harm, the constable had to get a warrant.

**9 The common law thus does not support a categorical rule allowing warrantless home entry when a misdemeanant flees. It had a rule of that kind for felonies. But much as in *Welsh* centuries later, the common law made distinctions based on "the gravity of the underlying offense." 466 U.S., at 753, 104 S.Ct. 2091. When it came to misdemeanors, flight alone was not enough. Whether a constable could make a warrantless entry depended as well on other circumstances suggesting a potential for harm and a need to act promptly.[8] In that way, the common-law rules (even if sometimes hard to discern with precision) mostly mirror our modern caselaw. The former too demanded—and often found—a law enforcement exigency before an officer could "break open" a fleeing misdemeanant's doors. Blackstone 292.

III

The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled.

Because the California Court of Appeal applied the categorical rule we reject today, *2025 we vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KAVANAUGH, concurring.

The Court holds that an officer may make a warrantless entry into a home when pursuing a fleeing misdemeanant if an exigent circumstance is also present—for example, when there is a risk of escape, destruction of evidence, or harm to others. I join the Court's opinion. I also join Part II of Justice THOMAS's concurrence regarding how the exclusionary rule should apply to hot pursuit cases.

I add this brief concurrence simply to underscore that, in my view, there is almost no daylight in practice between the Court's opinion and THE CHIEF JUSTICE's opinion concurring in the judgment.

In his thoughtful opinion, THE CHIEF JUSTICE concludes that pursuit of a fleeing misdemeanant should *itself* constitute an exigent circumstance. The Court disagrees. As I see it, however, the difference between THE CHIEF JUSTICE's approach and the Court's approach will be academic in most cases. That is because cases of fleeing misdemeanants will almost always *also* involve a recognized exigent circumstance —such as a risk of escape, destruction of evidence, or harm to others—that will still justify warrantless entry into a home. See *ante,* at 2016, 2017 - 2018, 2024 - 2025; see also, *e.g.*, *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 612, 135 S.Ct. 1765, 191 L.Ed.2d 856 (2015); *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). As Lange's able counsel forthrightly acknowledged at oral argument, the approach adopted by the Court today will still allow the police to make a warrantless entry into a home "nine times out of 10 or more" in cases involving pursuit of a fleeing misdemeanant. Tr. of Oral Arg. 34.

Importantly, moreover, the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing *felon* is itself an exigent circumstance justifying warrantless entry into a home. See *United States v. Santana*, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); cf. *Stanton v. Sims*, 571 U.S. 3, 8, 9, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*). In other words, the police may make a warrantless entry into the home of a fleeing felon regardless of whether other exigent circumstances are present.

**10 With those observations, I join the Court's opinion.

Justice THOMAS, with whom Justice KAVANAUGH joins as to Part II, concurring in part and concurring in the judgment.

I join the majority opinion, except for Part II–A, which correctly rejects the argument that suspicion that a person committed *any* crime justifies warrantless entry into a home in hot pursuit of that person. I write separately to note two things: the general case-by-case rule that the Court announces today is subject to historical, categorical exceptions; and under our precedent, the federal exclusionary rule does not apply to evidence discovered in the course of pursuing a fleeing suspect.

I

The majority sets out a general rule requiring a case-by-case inquiry when an officer enters a home without a warrant in pursuit of a person suspected of committing a misdemeanor. But history suggests ***2026** several categorical exceptions to this rule. First, warrantless entry is categorically allowed when a person is arrested and escapes. *E.g.,* J. Parker, Conductor Generalis 28–29 (1788) (constables may break into houses without a warrant "[w]herever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house"); *ante,* at 2023, n. 5. This exception is potentially very broad. See *Torres* v. *Madrid*, 592 U. S. ——, ——, 141 S.Ct. 989, 993, 209 L.Ed.2d 190 (2021) (holding that an arrest occurs whenever an officer applies physical force to the body with intent to restrain); *Genner* v. *Sparks*, 6 Mod. 173, 174, 87 Eng. Rep. 928, 929 (Q. B. 1704). Second, authorities at common law categorically allowed warrantless entry when in hot pursuit of a person who committed an affray. *Ante,* at 2024. Third, those authorities allowed the same for what the majority calls certain "pre-felonies." *Ante,* at 2023. Finally, some authorities appear to have allowed warrantless entry when in pursuit of a person who had breached the peace. See, *e.g.,* 2 M. Hale, Pleas of the Crown 95 (1736) (Hale); (Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 802–803 (1924)). What crimes amounted to "breach of peace" for purposes of warrantless entry is not immediately clear. The term sometimes was used to refer to violence, but the majority recognizes historical support for a broader definition. *Ante,* at 2024 (citing Hale 95). And cases decided before and after the Fourteenth Amendment was ratified similarly used the term "breach of peace" in a broad sense. *E.g., State v. Lafferty*, 5 Del. 491 (1854) ("blow[ing] a trumpet at night through the streets"); *Hawkins v. Lutton*, 95 Wis. 492, 494, 70 N.W. 483 (1897) ("loud, profane, and indecent" language).

I join the relevant parts of the majority on the understanding that its general case-by-case rule does not foreclose historical, categorical exceptions. Although the majority unnecessarily leads with doctrine before history, it does not disturb our regular rule that history—not court-created standards of reasonableness—dictates the outcome whenever it provides an answer. See, *e.g., Wilson v. Arkansas*, 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *Virginia v. Moore*, 553 U.S. 164, 171, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008).

****11** I also join on the understanding that the majority has not sought to settle the contours of any of these historical exceptions.

II

I also write to point out that even if the state courts on remand conclude that the officer's entry here was unlawful, the federal exclusionary rule does not require suppressing any evidence.

"[O]fficers who violated the Fourth Amendment were traditionally considered trespassers." *Utah* v. *Strieff*, 579 U. S. 232, 237, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016). For that reason, "individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help." *Ibid.* But beginning in the 20th century, this Court created a new remedy: exclusion of evidence in criminal trials. *Ibid.*

Establishing a violation of the Fourth Amendment, though, does not automatically entitle a criminal defendant to exclusion of evidence. Far from it. "[T]he exclusionary rule is not an individual right." *Herring v. United States*, 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). It is a " 'prudential' doctrine created by this Court," *Davis v. United States*, 564 U.S. 229, 236, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (citation omitted), and there is always a "high obstacle for those urging application of the rule," ***2027** *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 364–365, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). Relevant here, the rule "does not apply when the costs of exclusion outweigh its deterrent benefits." *Strieff*, 579 U. S., at 235, 136 S.Ct. 2056.

On the benefits side, "we have said time and again that the *sole*" factor courts can consider is "deter[ring] misconduct by law enforcement." *Davis*, 564 U.S., at 246, 131 S.Ct. 2419. And not just any misconduct. The exclusionary rule developed to deter "*intentional* conduct that was *patently* unconstitutional." *Herring*, 555 U.S., at 143, 129 S.Ct. 695 (emphasis added). For the past several decades, we have thus declined to exclude evidence where exclusion would not substantially deter "intentional" and "flagrant" behavior. *Id.,* at 144, 129 S.Ct. 695. For example, the exclusionary rule does not apply where "some intervening circumstance" arises between unconstitutional conduct and discovery of evidence, *Strieff*, 579 U. S., at 238, 136 S.Ct. 2056; where evidence would inevitably have been discovered, *ibid.*; or

where officers have acted in good faith, *United States v. Leon*, 468 U.S. 897, 908, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

On the other side of the ledger, we consider all "costs." *E.g., Davis*, 564 U.S., at 237, 131 S.Ct. 2419. One cost is especially salient: excluding evidence under the Fourth Amendment always obstructs the " 'truth-finding functions of judge and jury.' " *Leon*, 468 U.S., at 907, 104 S.Ct. 3405; accord, *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (recognizing "the public interest in having juries receive all probative evidence"). This interference with the purpose of the judicial system also creates a downstream risk that "some guilty defendants may go free or receive reduced sentences." *Leon*, 468 U.S., at 907, 104 S.Ct. 3405.

By itself, this high cost makes exclusion under our precedent rarely appropriate. "Suppression of evidence ... has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). When additional costs are present, the balance tips decisively against exclusion.

****12** Cases of fleeing suspects involve more than enough added costs to render the exclusionary rule inapplicable. First, our precedents make clear that the exclusionary rule does not apply when it would encourage bad conduct by criminal defendants. For example, evidence obtained during an unlawful search is still admissible to impeach a witness because exclusion would create " 'a license to use perjury.' " *United States v. Havens*, 446 U.S. 620, 626, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980). Here, exclusion is inappropriate because it would encourage suspects to flee. Second, our precedents similarly make clear that criminal defendants cannot use the exclusionary rule as "a shield against" their own bad conduct. *Walder v. United States*, 347 U.S. 62, 65, 74 S.Ct. 354, 98 L.Ed. 503 (1954). In most—if not all—States, fleeing from police after a lawful order to stop is a crime. All the evidence that petitioner seeks to exclude is evidence that inevitably would have been discovered had he complied with the officer's order to stop. A criminal defendant should "not ... be put in a better position than [he] would have been in if no illegality had transpired." *Nix*, 467 U.S., at 443–444, 104 S.Ct. 2501.

Aware of the substantial costs created by the exclusionary rule, courts have sometimes narrowed the protections historically afforded by the Fourth Amendment to avoid having to exclude evidence. See *Collins* v. *Virginia*, 584 U. S. ——, ——, 138 S.Ct. 1663, 1668, 201 L.Ed.2d 9 (2018) (THOMAS, J., concurring); A. Amar, The Constitution and Criminal Procedure: ***2028** First Principles 30 (1997) ("Judges do not like excluding bloody knives, so they distort doctrine"). But it should be the judicially created remedy, not the Fourth Amendment, that contracts in the face of that pressure. Courts should follow the plain dictates of our precedent: Officers cannot chase a fleeing person into a home simply because that person is suspected of having committed any misdemeanor, but if the officer nonetheless does so, exclusion under the Fourth Amendment is improper. Criminal defendants must rely on other remedies.

CHIEF JUSTICE ROBERTS, with whom Justice ALITO joins, concurring in the judgment.

Suppose a police officer on patrol responds to a report of a man assaulting a teenager. Arriving at the scene, the officer sees the teenager vainly trying to ward off the assailant. The officer attempts to place the assailant under arrest, but he takes off on foot. He leads the officer on a chase over several blocks as the officer yells for him to stop. With the officer closing in, the suspect leaps over a fence and then stands on a home's front yard. He claims it's his home and tells the officer to stay away. What is the officer to do?

The Fourth Amendment and our precedent—not to mention common sense—provide a clear answer: The officer can enter the property to complete the arrest he lawfully initiated outside it. But the Court today has a different take. Holding that flight, on its own, can never justify a warrantless entry into a home (including its curtilage), the Court requires that the officer: (1) stop and consider whether the suspect —if apprehended—would be charged with a misdemeanor or a felony, and (2) tally up other "exigencies" that *might* be present or arise, *ante*, at 2025 - 2026, 2027, before (3) deciding whether he can complete the arrest or must instead seek a warrant—one that, in all likelihood, will not arrive for hours. Meanwhile, the suspect may stroll into the home and then dash out the back door. Or, for all the officer knows, get a gun and take aim from inside.

The Constitution does not demand this absurd and dangerous result. We should not impose it. As our precedent makes clear, hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge. It is itself an exigent circumstance. And we have never held that whether an officer may enter a home to complete an arrest turns on what the fleeing individual was suspected of doing before he took off, let alone whether that offense would later be charged as a misdemeanor or felony. It is the flight, not the

underlying offense, that has always been understood to justify the general rule: "Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect." *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). The Court errs by departing from that well-established rule.

I

A

**13 The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." While the Amendment does not specify when a warrant must be obtained, we have typically required that officers secure one before entering a home to execute a search or seizure. *King*, 563 U.S., at 459, 131 S.Ct. 1849. We have also, however, recognized exceptions to that requirement "because the ultimate touchstone of the Fourth *2029 Amendment is 'reasonableness.' " *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006).

In some instances the Court has determined that this question of reasonableness can be decided by application of a rule for a particular type of case. *Mitchell* v. *Wisconsin*, 588 U. S. ——, ——, n. 2, 139 S.Ct. 2525, 2534, n. 2, 204 L.Ed.2d 1040 (2019) (plurality opinion); see *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) ("[T]his Court has interpreted the Amendment as establishing rules and presumptions."). This approach reflects our recognition of the need "to provide clear guidance to law enforcement." *Riley v. California*, 573 U.S. 373, 398, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). We strive to "draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. Lago Vista*, 532 U.S. 318, 347, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

We have, for example, established general rules giving effect to the "well-recognized exception [that] applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *King*, 563 U.S., at 460, 131 S.Ct. 1849 (some alterations in original; internal quotation marks omitted). In fact, "our exigency case law is full of general rules" that provide "guidance on how police should handle [such] cases." *Mitchell*, 588 U. S., at ——, n. 3, 139 S.Ct., at 2535, n. 3) (internal quotation marks omitted). These rules allow warrantless entry into the home when necessary to "protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." *Carpenter* v. *United States*, 585 U. S. ——, —— – ——, 138 S.Ct. 2206, 2223, 201 L.Ed.2d 507 (2018). Or—relevant here—"to pursue a fleeing suspect." *Id.*, at ——, 138 S.Ct. 2206 (slip op., at 21).

We take a case-by-case approach in deciding whether a search or seizure was conducted in reaction to an exigent circumstance, such as whether an officer had an objective basis to "fear the imminent destruction of evidence." *Birchfield* v. *North Dakota*, 579 U. S. 438, ——, 136 S.Ct. 2160, 2173, 195 L.Ed.2d 560 (2016). But once faced with an exigency, our rule is clear: officers are "not bound to learn anything more or wait any longer before going in." *United States v. Banks*, 540 U.S. 31, 40, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003).

Today, the Court holds that hot pursuit merely sets the table for other exigencies that may emerge to justify warrantless entry, such as imminent harm. This comes as a surprise. For decades we have consistently recognized pursuit of a fleeing suspect as an exigency, one that on its own justifies warrantless entry into a home.

Almost a half century ago in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), we considered whether hot pursuit supports warrantless home entry. We held that such entry was justified when Santana "retreat[ed] into her house" after a drug transaction upon hearing law enforcement "shout[ ] 'police' " and seeing them "display[ ] their identification." *Id.*, at 40, 42, 96 S.Ct. 2406. As we explained, "a suspect may not defeat an arrest which has been set in motion in a public place ... by the expedient of escaping to a private place." *Id.*, at 43, 96 S.Ct. 2406. Our interpretation of the Fourth Amendment did not hinge on whether the offense that precipitated her withdrawal was a felony or a misdemeanor. See *Stanton v. Sims*, 571 U.S. 3, 9, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*).

**14 We have repeatedly and consistently reaffirmed that hot pursuit is itself an exigent *2030 circumstance. See, *e.g.*, *Carpenter*, 585 U. S., at —— (slip op., at 21) ("[E]xigencies include the need to pursue a fleeing suspect."); *Collins* v. *Virginia*, 584 U. S. ——, ——, 138 S.Ct. 1663, 1674, 201 L.Ed.2d 9 (2018) (distinguishing prior case approving

warrantless entry onto the curtilage as best sounding in "hot pursuit"); *Birchfield*, 579 U. S., at ——, 136 S.Ct., at 2173 (exception for exigent circumstances authorizes "the warrantless entry of private property ... when police are in hot pursuit of a fleeing suspect"); *King*, 563 U.S., at 460, 131 S.Ct. 1849 ("Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect."); *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943 ("We have held, for example, that law enforcement officers may make a warrantless entry onto private property ... to engage in 'hot pursuit' of a fleeing suspect." (citations omitted)); *Steagald v. United States*, 451 U.S. 204, 221, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) ("[W]arrantless entry of a home would be justified if the police were in 'hot pursuit' of a fugitive."); see also *Mitchell*, 588 U. S., at ——, 139 S.Ct., at 2547 (SOTOMAYOR, J., dissenting) (" 'hot pursuit' of a fleeing suspect" qualifies as an exigency); *Missouri v. McNeely*, 569 U.S. 141, 176–177, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) (THOMAS, J., dissenting) (same).

These cases, it bears repeating, have not viewed hot pursuit as merely the background against which *other* exigencies justifying warrantless entry might arise. See, *e.g.*, *Carpenter*, 585 U. S., at —— – —— (slip op., at 21–22) (identifying destruction of evidence, emergency aid, *and* hot pursuit as separate exigencies); *Birchfield*, 579 U. S., at ——, 136 S.Ct., at 2173-2174 (same); *McNeely*, 569 U.S., at 148–149, 133 S.Ct. 1552 (opinion of the Court) (same); *King*, 563 U.S., at 460, 131 S.Ct. 1849 (same); *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943 (same); see also *Mitchell*, 588 U. S., at ——, 139 S.Ct., at 2536 (SOTOMAYOR, J., dissenting) (same). And our decisions do not dismiss the existence of an exigency —including hot pursuit—based on the underlying offense that precipitated law enforcement action, even if known. To the contrary, until today, we have explicitly rejected invitations to do so. See *Brigham City*, 547 U.S., at 405, 126 S.Ct. 1943 (dismissing defendants' contention that offenses at issue were "not serious enough" to justify reliance on the emergency aid doctrine); *Michigan v. Fisher*, 558 U.S. 45, 47, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (*per curiam*); see also *Atwater*, 532 U.S., at 354, 121 S.Ct. 1536 (rejecting exception for "very minor criminal offense[s]" to rule allowing warrantless arrests).

The Court displays little patience for this precedent. With regard to *Santana*, the Court concedes that "we framed our holding in broad[ ] terms." *Ante*, at 2019. Yet it narrows those terms based on rationales that played no role in the decision. The Court then brushes off our slew of cases reaffirming *Santana*'s broad holding as nothing more than "dicta." *Ante*, at 2019. I would not override decades of guidance to law enforcement in favor of a new rule that provides no guidance at all.

B

A proper consideration of the interests at stake confirms the position our precedent amply supports. Pursuit implicates substantial government interests, regardless of the offense precipitating the flight. It is the flight, not the underlying offense, that justifies the entry.

At the start, every hot pursuit implicates the government interest in ensuring compliance with law enforcement. *California v. Hodari D.*, 499 U.S. 621, 627, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Flight is a ***2031** direct attempt to evade arrest and thereby frustrate our "society's interest in having its laws obeyed." *Terry v. Ohio*, 392 U.S. 1, 26, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Disregarding an order to yield to law enforcement authority cannot be dismissed with a shrug of the shoulders simply because the underlying offense is regarded as "innocuous," *ante*, at 2021. As the many state courts to approve of warrantless entry in hot pursuit have reminded us, "[l]aw enforcement is not a child's game of prisoners base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot." *Commonwealth v. Jewett*, 471 Mass. 624, 634, 31 N.E.3d 1079, 1089 (2015) (quoting *State v. Ricci*, 144 N.H. 241, 245, 739 A.2d 404, 408 (1999)).

****15** Flight also always involves the "paramount" government interest in public safety. *Scott v. Harris*, 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); see *Hodari D.*, 499 U.S., at 627, 111 S.Ct. 1547 ("Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."). A fleeing suspect "intentionally place[s] himself and the public in danger." *Scott*, 550 U.S., at 384, 127 S.Ct. 1769. Vehicular pursuits, in particular, are often catastrophic. See Dept. of Justice, Bureau of Justice Statistics, B. Reaves, Police Vehicle Pursuits, 2012–2013, p. 6 (May 2017) (average of about one death per day in the United States from vehicle pursuits from 1996 to 2015). Affording suspects the opportunity to evade arrest by winning the race rewards flight and encourages dangerous behavior.

And the problems do not end there because hot pursuit often gives rise to multiple other exigencies, such as destruction of evidence, violence, and escape. The Court acknowledges this reality, but then posits that not "*every* case of misdemeanor flight poses such dangers." *Ante*, at 2021 (emphasis added). Of course not. But we have never required such a level of certainty before crafting a general rule that law enforcement can follow. For example, in *Washington v. Chrisman*, 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982), we held that an officer may accompany an arrestee into his residence without any showing of exigency and regardless of the "nature of the offense for which the arrest was made," because there "is no way for an officer to predict reliably how a particular subject will react to arrest" and "the possibility that an arrested person will attempt to escape if not properly supervised is obvious." *Id*., at 6–7, 102 S.Ct. 812. In *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), we concluded that, although "no special danger to the police" was suggested by the evidence in the record, the execution of a search warrant merited a categorical rule allowing detention of present individuals because it was the "kind of transaction" that could give rise to other exigencies. *Id*., at 702, 101 S.Ct. 2587. And in *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), we held that the search incident to arrest exception applies to all arrests regardless "what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found," because arrests require "quick *ad hoc* judgment[s]." *Id*., at 235, 94 S.Ct. 467.

Such concerns are magnified here. The act of pursuing a fleeing suspect makes simultaneously assessing which other exigencies might arise especially difficult to ascertain "on the spur (and in the heat) of the moment." *Atwater*, 532 U.S., at 347, 121 S.Ct. 1536. The Court disputes this proposition, *ante,* at 2021 - 2022, n. 3, but the difficulty of discerning hidden weapons or drugs on a suspect running or driving away seems clear to us.

***2032** The risks to officer safety posed by the Court's suggestion that an officer simply abandon pursuit and await a warrant are severe. We are warned in this case that "attempting warrant service for an unknown suspect in an unknown home at night is flat dangerous." Brief for Sonoma County District Attorney's Office et al. as *Amici Curiae* 33. Whether at night or during the day, the officer is obviously vulnerable to those inside the home while awaiting a warrant, including danger from a suspect who has already demonstrated himself to be undeterred by police orders. See, *e.g.*, *Thompson v. Florence*, 2019 WL 3220051, *4 (ND Ala., July 17, 2019) (at fleeing suspect's urging, resident grabbed a handgun); *State v. Davis*, 2000-278, p. 5 (La. App. 5 Cir. 8/29/00), 768 So.2d 201, 206 (fleeing suspect "reached for a handgun" inside home).

Even if the area outside the home remains tranquil, the suspect inside is free to destroy evidence or continue his escape. Flight is obviously suggestive of these recognized exigencies, which could materialize promptly once the officer is compelled to abandon pursuit. The destruction of evidence can take as little as "15 or 20 seconds," *Banks*, 540 U.S., at 40, 124 S.Ct. 521; and a suspect can dash out the back door just as quickly, while the officer must wait outside. Forcing the officer to wait and predict whether such exigencies *will* occur before entry is in practice no different from forcing the officer to wait for these exigencies *to* occur.

****16** Indeed, from the perspective of the officer, many instances of flight leading to further wrongdoing are the sort of "flight alone" cases the Court deems harmless, *ante*, at 2021 - 2022, n. 3. Despite the Court's suggestion to the contrary, examples of "flight alone" generating exigencies difficult to identify in advance are not hard to find. See, *e.g. State v. Lam*, 2013-Ohio-505, 989 N.E.2d 100, 101–102 (App. 2013) (warrantless entry in hot pursuit of someone who committed turn signal violation revealed heroin on suspect and suggested attempt to flush drugs down the toilet); *State v. Mitchem*, 2014-Ohio-2366, 2014 WL 2565680, *1 (App., June 4, 2014) (suspect who committed trespass, fled from the police into private driveway, and stated to officers "[Y]ou can't touch me, I'm at my house," turned out to have a gun). (And, as we will see, it is apparently hard to decide which cases qualify as "flight alone" cases, see *infra*, at 2036 - 2037.)

If the suspect continues to flee through the house, while the officer must wait, even the quickest warrant will be far too late. Only in the best circumstances can one be obtained in under an hour, see Brief for Respondent 33, and it usually takes much longer than that, see Brief for Los Angeles County Police Chiefs' Association as *Amicus Curiae* 24–25. Even electronic warrants may involve "time-consuming formalities." *McNeely*, 569 U.S., at 155, 133 S.Ct. 1552. And some States typically require that a warrant application be in writing, see, *e.g.*, Colo. Rev. Stat. § 16–3–303 (2020), or that the applicant appear in person before a judge, see, *e.g.*, Mass. Gen. Laws, ch. 276, § 2B (2019), or permit oral applications only for certain cases, see, *e.g.*, Iowa Code § 321J.10.3 (2019). All of these factors make it very possible

that the officer will *never* be able to identify the suspect if he cannot continue the pursuit. See *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004) (recognizing identification as an "important government interest[ ]"). The Court today creates "perverse incentives" by imposing an "invitation to impunity-earned-by-recklessness." *Scott*, 550 U.S., at 385–386, 127 S.Ct. 1769.

***2033** Against these government interests we balance the suspect's privacy interest in a home to which he has voluntarily led a pursuing officer. If the residence is not his the suspect has no privacy interest to protect. *Rakas v. Illinois*, 439 U.S. 128, 141, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); see also *State v. Walker*, 2006-1045, p. 7 (La. 4/11/07), 953 So.2d 786, 790–791 (suspect fled into third person's residence where he was unwelcome); *Ulysse v. State*, 899 So.2d 1233, 1234 (Fla. 3rd DCA 2005) (suspect ran inside the home of "a complete stranger"). The police may well have no reason to know whether the suspect entered his own or someone else's home or yard. If the suspect does escape into his own home, his privacy interest is diminished because he was the one who chose to move his encounter with the police there. See *State v. Legg*, 633 N.W.2d 763, 773 (Iowa 2001) (nature of intrusion is "slight" in hot pursuit because the officer's entry "was no surprise to [the suspect]; he was following closely on her heels"); 4 W. LaFave, Search and Seizure § 9.2(d), p. 419 (6th ed. 2020) ("the suspect has only himself to blame for the fact that the encounter has been moved from a public to a private area"). In cases of hot pursuit, "[t]he offender is then not being bothered by the police unexpectedly while in domestic tranquility. He has gone to his home while fleeing solely to escape arrest." *R.* v. *Macooh*, [1993] 2 S. C. R. 802, 815. Put differently, just as arrestees have "reduced privacy interests," *Riley*, 573 U.S., at 391, 134 S.Ct. 2473, so too do those who evade arrest by leading the police on car chases into their garages.

C

"In determining what is reasonable under the Fourth Amendment, we have given great weight to the essential interest in readily administrable rules." *Virginia v. Moore*, 553 U.S. 164, 175, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (internal quotation marks omitted). This is particularly true with respect to the rules governing exceptions to the warrant requirement because of exigent circumstances. See *Mitchell*, 588 U. S., at ——, n. 3, 139 S.Ct., at 2535, n. 3. And contrary to the Court's suggestion, the home is not immune from the application of such rules consistent with the Fourth Amendment. See, *e.g.*, *Summers*, 452 U.S., at 705, 101 S.Ct. 2587; *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

****17** Like most rules, this one is not without exceptions or qualifications. The police cannot manufacture an unnecessary pursuit to enable a search of a home rather than to execute an arrest. Cf. *Fernandez v. California*, 571 U.S. 292, 302, 134 S.Ct. 1126, 188 L.Ed.2d 25 (2014) ("evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding possible objection" would be probative of the objective unreasonableness of a warrantless entry based on the consent of another occupant). Additionally, if a reasonable officer would not believe that the suspect fled into the home to "thwart an otherwise proper arrest," *Santana*, 427 U.S., at 42, 96 S.Ct. 2406, warrantless entry would not be reasonable.

Additional safeguards limit the potential for abuse. The officer must in all events effect a reasonable entry. *United States v. Ramirez*, 523 U.S. 65, 71, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998). As the lower courts have recognized, hot pursuit gives the officer authority to enter a home, but "it does not have any bearing on the constitutionality of the manner in which he enters the home." *Trent v. Wade*, 776 F.3d 368, 382 (C.A.5 2015). And his authority to search is circumscribed, limited to "those spaces where a person may be found" for "no longer than it takes to complete the arrest and depart the premises." ***2034** *Maryland v. Buie*, 494 U.S. 325, 335–336, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). Finally, arrests conducted "in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests" are subject to even more stringent review. *Whren v. United States*, 517 U.S. 806, 818, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

Courts must also ascertain whether a given set of circumstances actually qualifies as hot pursuit. While the flight need not be reminiscent of the opening scene of a James Bond film, there must be "some sort of a chase." *Santana*, 427 U.S., at 43, 96 S.Ct. 2406. The pursuit must be "immediate or continuous." *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). And the suspect should have known the officer intended for him to stop. Cf. *Michigan v. Chesternut*, 486 U.S. 567, 573–574, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). Where a suspect, for example, chooses to end a voluntary conversation with law enforcement and go inside her home, that does not constitute flight. *Florida v.*

Royer, 460 U.S. 491, 497–498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion).

Because the California Court of Appeals assumed that hot pursuit categorically permits warrantless entry, I would vacate the decision below to allow consideration of whether the circumstances at issue in this case fall within an exception to the general rule of the sort outlined above. Lange would be free to argue that his is the "unusual case," *Mitchell*, 588 U. S., at ——, 139 S.Ct., at 2539 (plurality opinion), in which the general rule that hot pursuit justifies warrantless entry does not apply.

II

Now consider the regime the Court imposes. In rejecting the *amicus*' proposed categorical rule favoring warrantless home entry, the Court creates a categorical rule of its own: Flight alone can never justify warrantless entry into a home or its curtilage. Instead, flight is but one factor of unclear weight to "consider," *ante,* at 2024 - 2025, and it must be supplemented with at least one additional exigency. This is necessary, the Court explains, because people "flee for innocuous reasons," *ante*, at 2021, although the Court offers just two actual examples of "innocuous" flight, the harmlessness of which would not have been apparent to the police, see *ibid*. (citing *Carroll v. Ellington*, 800 F.3d 154, 162 (C.A.5 2015); *Mascorro v. Billings*, 656 F.3d 1198, 1202 (C.A.10 2011)).

In order to create a hot pursuit rule ostensibly specific to misdemeanors, the Court must turn to a case concerning neither misdemeanors nor hot pursuit. In *Welsh* v. *Wisconsin*, we held that the warrantless entry of a drunk driver's home to arrest him for a nonjailable offense violated the Fourth Amendment. 466 U.S., at 754, 104 S.Ct. 2091. The Court relies on *Welsh* for the proposition that "when a minor offense alone is involved ... officers can probably take the time to get a warrant" to execute an arrest. *Ante*, at 2020 – 2021. The Court's determination that *Welsh* applies to all cases involving "minor" offenses—although we never learn what qualifies as a minor offense—ignores that we have already declined to apply *Welsh* to cases involving misdemeanors because of the "significant" distinction between nonjailable offenses and misdemeanors. *McArthur*, 531 U.S., at 336, 121 S.Ct. 946. And in any event, we explicitly differentiated the circumstances at issue in *Welsh* from "immediate or continuous pursuit of [a person] from the scene of a crime." 466 U.S., at 753, 104 S.Ct. 2091; see *Brigham City*, 547 U.S., at 405, 126 S.Ct. 1943 (rejecting *Welsh*'s application to a situation involving exigent circumstance of emergency aid). Accordingly, as we have already held, "nothing in [*Welsh*] establishes ***2035** that the seriousness of the crime is equally important *in cases of hot pursuit.*" *Stanton*, 571 U.S., at 9, 134 S.Ct. 3 (emphasis in original). The Court's citation to Justice Jackson's concurrence in *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), *ante,* at 2021 - 2022, n. 3, is similarly inapt. That case involved entry for mere "follow[ ] up," not anything resembling hot pursuit. *McDonald*, 335 U.S., at 459, 69 S.Ct. 191.

****18** The Court next limits its consideration of the interests at stake to a balancing of what it perceives to be the government's interest in capturing innocuous misdemeanants against a person's privacy interest in his home. The question, however, is not whether "litter[ing]" presents risks to public safety or the potential for escape, *ante*, at 2019 - 2020, but whether *flight* does so. And flight from the police is never innocuous.

The Court ultimately decides that, when it comes to misdemeanors, States do not have as much of an interest in seeing such laws enforced. But, as the Court concedes, we have already rejected as "untenable" the "assumption that a 'felon' is more dangerous than a misdemeanant." *Tennessee v. Garner*, 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). This is so because "numerous misdemeanors involve conduct more dangerous than many felonies." *Ibid.* At any rate, the fact that a suspect flees when suspected of a minor offense could well be indicative of a larger danger, given that he has voluntarily exposed himself to much higher criminal penalties in exchange for the prospect of escaping or delaying arrest. Cf. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

The Court's rule is also famously difficult to apply. The difference between the two categories of offenses is esoteric, to say the least. See *Atwater*, 532 U.S., at 350, 121 S.Ct. 1536; *Berkemer v. McCarty*, 468 U.S. 420, 431, n. 13, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ("[O]fficers in the field frequently have neither the time nor the competence to determine the severity of the offense for which they are considering arresting a person." (internal quotation marks omitted)). For example, driving while under the influence is a misdemeanor in many States, but becomes a felony if the suspect is a serial drunk driver. See, *e.g.*, Alaska Stat. § 28.35.030(n) (2020). Drug possession may be a misdemeanor

or a felony depending on the weight of the drugs. See, *e.g.*, Ohio Rev. Code Ann. § 2925.11(C) (Lexis 2019) (outlining 50 potential iterations of unlawful drug possession, some misdemeanors others felonies). Layer on top of this that for certain offenses the exact same conduct may be charged as a misdemeanor or felony depending on the discretionary decisions of the prosecutor and the judge (what California refers to as a "wobbler"), and we have a recipe for paralysis in the face of flight. See Cal. Penal Code Ann. §§ 486–490.1 (West Cum. Supp. 2021) (classifying theft as an infraction, misdemeanor, wobbler, or felony depending on the value of the stolen item).

The Court permits constitutional protections to vary based on how each State has chosen to classify a given offense. For example, "human trafficking" can be a misdemeanor in Maryland, Md. Crim. Law Code Ann. § 3–1102(c)(1) (2019), contra, Tex. Penal Code Ann. § 20A.02 (West 2021), and in Pennsylvania so can involuntary manslaughter, 18 Pa. Cons. Stat. § 2504(b) (2015); contra, Ohio Rev. Code Ann. § 2903.04(C). The vehicular flight at issue in this very case is classified as a felony in several States. See, *e.g.,* Fla. Stat. § 316.1935 (2014); Del. Code Ann., Tit. 21, § 4103 (2013). Law enforcement entities and state governments across the Nation ***2036** tell us that they have accordingly developed standards for warrantless entry in hot pursuit tailored to their respective legal regimes. See Brief for Los Angeles County Police Chiefs' Association as *Amicus Curiae* 14–20; Brief for State of Ohio et al. as *Amici Curiae* 25. Given the distinct nature of each State's legal code, such an approach is more appropriate than the Court's blunt constitutional reform.

****19** For all these reasons, we have not crafted constitutional rules based on the distinction between modern day misdemeanors and felonies. In *Tennessee* v. *Garner*, for example, we held that deadly force could not categorically be used to seize a fleeing felon, even though the common law supplied such a rule, because at common law the "gulf between the felonies and the minor offences was broad and deep," but today it is "minor and often arbitrary." 471 U.S., at 14, 105 S.Ct. 1694 (internal quotation marks omitted).

Similarly, in *Atwater*, we held that the general probable-cause rule for warrantless arrests applied to "even a very minor criminal offense," "without the need to balance the interests and circumstances involved in particular situations." 532 U.S., at 354, 121 S.Ct. 1536 (internal quotation marks omitted). We explained that we could not expect every police officer to automatically recall "the details of frequently complex penalty schemes," and concluded that distinguishing between "permissible and impermissible arrests for minor crimes" was a "very unsatisfactory line to require police officers to draw on a moment's notice." *Id*., at 348, 350, 121 S.Ct. 1536 (internal quotation marks and alteration omitted).

The Court's approach is hopelessly indeterminate in other respects as well. The Court admonishes law enforcement to distinguish between "dangerous offender[s]" and "scared teenager[s]," *ante,* at 2021 - 2022, as if an officer can easily tell one from the other, and as if the two categories are mutually exclusive. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Offending by Juveniles (Mar. 31, 2020) (about 16% of serious violent crimes in the United States from 2007 to 2017 were committed by juveniles). And police are instructed to wait for a warrant if there is sufficient "time," *ante*, at 2021 - 2022, but they are not told time before *what*, how many hours the Court would have them wait, and what to do if other "pressing needs" arise. See *Mitchell*, 588 U. S., at ——, 139 S.Ct., at 2535 (plurality opinion) ("[A]n officer's duty to attend to more pressing needs may leave no time to seek a warrant.").

The Court tut-tuts that we are making far too much of all this, and that our "alarmism [is] misplaced." *Ante*, at 2021 - 2022, n. 3. In fact, the Court says, its "approach will in many, if not most, cases allow a warrantless home entry." *Ante*, at 2021 - 2022. In support of that assurance, the Court lists several "exigencies above and beyond the flight itself " that would permit home entry, notably when "the fleeing misdemeanant" will "escape from the home." *Ante,* at 2021 - 2022, n. 3. If an officer "reasonably believes" such an exigency exists," the Court says, "he does not need a categorical misdemeanor-pursuit rule to justify a warrantless home entry." *Ibid*.

When a suspect flees into a dwelling there typically will be another way out, such as a back door or fire escape. See Cal. Code Regs., tit. 24, §§ 1113.2, 1114.8 (2019) (apartments, floors of high-rise buildings, and many other homes must have access to at least two means of egress). If the officer reasonably believes there are multiple exits, then surely the officer can conclude that the suspect might well "escape from the home," *ante*, at 2021 - 2022, n. 3, by running out the back, ***2037** rather than "slowing down and wiping his brow" while the officer attempts to get a warrant. *Scott*, 550 U.S., at 385, 127 S.Ct. 1769. Under the Court's rule warrantless entry into a home in hot pursuit of a fleeing misdemeanant would presumably be permissible, as long as the officer reasonably

believed the home had another exit. Question: Is that correct? Police in the field deserve to know.

**20 But the Court will not answer the question, leaving it to the officer to figure out in the midst of hot pursuit. The answer apparently depends on whether the police "believe anything harmful will happen in the time it takes to get a warrant," *ante*, at 2021 - 2022, n. 3, but again, what the police reasonably believe will happen is of course that the suspect will continue his flight and escape out the back. If that reasonable belief is an exigency, then it is present in almost every case of hot pursuit into the home. Perhaps that is why Lange's counsel admitted that "nine times out of ten or more" warrantless entry in hot pursuit of misdemeanants would be reasonable. Tr. of Oral Arg. 34.

III

Although the Fourth Amendment is not "frozen" in time, we have used the common law as a reference point for assessing the reasonableness of police activity. *Garner*, 471 U.S., at 13, 105 S.Ct. 1694. The Court errs, however, in concluding with the suggestion that history supports its novel incentive to flee.

The history is not nearly as clear as the Court suggests. The Court is forced to rely on an argument by negative implication: if common law authorities supported a categorical rule favoring warrantless entry in pursuit of felons, warrantless entry in pursuit of misdemeanants must have been prohibited. That is wrong. Countless sources support the proposition that officers could and did pursue into homes those who had committed all sorts of offenses that the Court seems to deem "minor." *Ante*, at 2019 - 2020.

For example, common law authorities describe with approval warrantless home entry in pursuit of those who had committed an affray (public fighting), 1 W. Hawkins, Pleas of the Crown 137 (1716), and "disorderly drinking," W. Simpson, The Practical Justice of the Peace and the Parish Officer 26 (1761). And the doctrine of "hue and cry" permitted townspeople to pursue those suspected of "misdemeanor[s]" if the perpetrator "escape[d] into [his] house." R. Bevill, Law of Homicide 162–163 (1799). In colonial America, the hue and cry extended to a "great diversity of crimes," including stealing livestock and revealing oneself to be a Quaker. W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 244–246 (2009).

Finally, at common law an officer could "break open Doors, in order to apprehend Offenders" whenever a person was arrested for "*any Cause*," and thereafter escaped. 2 Hawkins, Pleas of the Crown, at 86–87 (1787) (emphasis added). The Court's attempt to dispose of this awkward reality in a footnote, *ante,* at 2023, n. 5, is unconvincing. Flight and escape both present attempts to "thwart an otherwise proper arrest," *Santana*, 427 U.S., at 42, 96 S.Ct. 2406, and as noted, the common law did not differentiate among escapees based on the perceived magnitude of their underlying offense, R. Burn, The Justice of the Peace 101–103 (14th ed. 1780).

Clearly the list of offenses that historically justified warrantless home entry in hot pursuit of a fleeing suspect were as broad and varied as those found in a contemporary compilation of misdemeanors. See also *Macooh*, [1993] 2 S. C. R., at 817 (concluding after review that at common law "the right to enter in hot pursuit" was *2038 not "limited to arrest for felonies"); *Lyons* v. *R.*, [1984] 2 S. C. R. 633, 657 (recognizing "right of pursuit" as a longstanding exception to common law protection of the sanctity of the home).

In the face of this evidence, the Court fails to cite a single circumstance in which warrantless entry in hot pursuit was found to be unlawful at common law. It then acknowledges that "some of the specifics are uncertain, and commentators did not always agree with each other." *Ante,* at 2023. In *Atwater,* we declined to forbid warrantless arrests for minor offenses when we found "disagreement, not unanimity, among both the common-law jurists and the text writers who sought to pull the cases together." 532 U.S., at 332, 121 S.Ct. 1536. The historical ambiguity is at least as pervasive here.

**21 Even if the common law practice surrounding hot pursuit were unassailably clear, its treatment of the topic before us would still be incomplete. That is because the common law did not recognize the remedy Lange seeks: exclusion of evidence in a criminal case. *Collins*, 584 U. S., at ——, 138 S.Ct., at 1668-1669 (THOMAS, J., concurring). It is often difficult to conceive of how common law rights were influenced by the absence of modern remedies. And in this case we have no guidance from history as to how our doctrines surrounding the exclusionary rule, such as inevitable discovery, would map onto situations in which a person attempts to thwart a public arrest by retreating to a private place. See *Nix v. Williams*, 467 U.S. 431, 443–444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

* * *

Recall the assault we started with. The officer was closing in on the suspect when he hopped the fence and stopped in a yard. The officer starts to climb over the fence to arrest him, but wait—was the assault a misdemeanor or a felony? In Lange's State of California, it could have been either depending on the identity of the victim, the amount of force used, and whether there was a weapon involved. See Cal. Penal Code Ann. § 245 (West 2014). How much force was the man using against the teenager? Is this really the assailant's home in the first place? Pretty suspicious that he jumped the fence just as the officer was about to grab him. If it is his home, are there people inside and, if so, how many? And why would the man run from a mere fight—does he have something more serious to hide?

By this time, of course, the assailant has probably gone out the back door or down the fire escape and is blocks away, with the officer unable to give a useful description—except for how he looks from behind.

All Citations

141 S.Ct. 2011, 2021 WL 2557068, 210 L.Ed.2d 486, 21 Cal. Daily Op. Serv. 6095, 28 Fla. L. Weekly Fed. S 969

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Compare, *e.g.*, 2019 WL 5654385, *7–*8 (case below) (applying a categorical rule); *Bismarck v. Brekhus*, 2018 ND 84, ¶ 27, 908 N.W.2d 715, 719–720 (same); *Commonwealth v. Jewett*, 471 Mass. 624, 634–635, 31 N.E.3d 1079, 1089 (2015) (same); *People v. Wear*, 229 Ill.2d 545, 568, 571, 323 Ill.Dec. 359, 893 N.E.2d 631, 644–646 (2008) (same); *Middletown v. Flinchum*, 95 Ohio St.3d 43, 44–45, 765 N.E.2d 330, 332 (2002) (same); *State v. Ricci*, 144 N.H. 241, 244–245, 739 A.2d 404, 407–408 (1999) (same), with, *e.g.*, *State v. Markus*, 211 So.3d 894, 906–907 (Fla. 2017) (requiring a case-specific showing); *Mascorro v. Billings*, 656 F.3d 1198, 1207 (C.A.10 2011) (same); *Butler v. State*, 309 Ark. 211, 216–217, 829 S.W.2d 412, 415 (1992) (same); *State v. Bolte*, 115 N.J. 579, 597–598, 560 A.2d 644, 654–655 (1989) (same); see also *Stanton v. Sims*, 571 U.S. 3, 6–7, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*) (noting the split).

2 The concurrence is wrong to say that *Welsh* applies only to nonjailable offenses, and not to minor crimes that are labeled misdemeanors. See *post*, at 2034 – 2035 (ROBERTS, C. J., concurring in judgment). No less than four times, *Welsh* framed its holding as applying to "minor offenses" generally. 466 U.S., at 750, 752–753, 104 S.Ct. 2091. (By contrast, the word "nonjailable" does not appear in its legal analysis.) The decision cited lower court cases prohibiting warrantless home entries when the defendant had committed a misdemeanor. See *id.*, at 752, 104 S.Ct. 2091. And its essential rationale applies to all minor crimes, however labeled. As the Court stated (quoting an earlier Justice Jackson opinion): It would "display[ ] a shocking lack of all sense of proportion" to say that "private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it." *Id.*, at 751, 104 S.Ct. 2091 (quoting *McDonald v. United States*, 335 U.S. 451, 459, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (concurring opinion)).

3 Given that our rule allows warrantless home entry when emergencies like these exist, we think the concurrence's alarmism misplaced. See, *e.g.*, *post*, at 2028 - 2029 (opinion of ROBERTS, C. J.) (bewailing "danger[ ]" and "absurd[ity]"). The concurrence spends most of its time worrying about cases in which there are exigencies above and beyond the flight itself: when, for example, the fleeing misdemeanant will "get a gun and take aim from inside" or "flush drugs down the toilet." *Post*, at 2028 - 2029, 2032. But again: When an officer reasonably believes those exigencies exist, he does not need a categorical misdemeanor-pursuit rule to justify a warrantless home entry. (And contrary to the concurrence's under-explained suggestion, see *post*, at 2031 – 2032, assessing exigencies is no harder in this context than in any other.) The only cases in which we and the concurrence reach a different result are cases involving flight alone, without exigencies like the destruction of evidence, violence to others, or escape from the home. It is telling that—although they are our sole disagreement—the concurrence hardly talks about those "flight alone" cases. Apparently, it taxes even the concurrence to justify as an "exigency" a warrantless entry based only on a misdemeanant's prior retreat into his home—when the police officers do not reasonably believe anything harmful will happen in the time it takes to get a warrant.

4 In a 1763 Parliamentary debate, about searches made to enforce a tax, William Pitt the Elder orated as follows: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!" *Miller v. United States*, 357 U.S. 301, 307, and n. 7, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) (citing The Oxford Dictionary of Quotations 379 (2d ed. 1953); 15 T. Hansard, Parliamentary History of England, col. 1307 (1813)).

5 Note, though, that if a person had already been arrested and then escaped from custody, an officer could always search for him at home. See 2 W. Hawkins, Pleas of the Crown 87 (1721).

6 Both felonies and pre-felonies justified the common law's "hue and cry": when a constable or other person "raise[d] the power of the towne"—"with horn and with voice"—to pursue an offender. 3 E. Coke, Institutes of the Laws of England 116 (1644); Blackstone 293. Most of the common-law authorities approved warrantless home entries upon a hue and cry. But because that process was generally available only to apprehend felons and those who had "dangerously wounded any person," it did not enlarge the range of qualifying offenses. Hale 98; see Brief for Constitutional Accountability Center as *Amicus Curiae* 17–18.

7 The term "breach of the peace" can today encompass many kinds of behavior, and even in common-law times it "meant very different things in different" contexts. *Atwater v. Lago Vista*, 532 U.S. 318, 327, n. 2, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). But "[m]ore often than not, when used in reference to common-law arrest power, the term seemed to connote an element of violence." *Id.*, at 327–328, 121 S.Ct. 1536, n. 2.

8 The concurrence professes to disagree with this conclusion, see *post*, at 2037 – 2038 (opinion of ROBERTS, C. J.), but its account of the common law ends up in much the same place as ours. The concurrence recognizes a categorical rule permitting warrantless home entry in pursuit of fleeing felons. See *post*, at 2037. But for misdemeanants, the concurrence presents only discrete circumstances—mostly the same as ours—allowing home entry without a warrant. *Post*, at 2037 – 2038. Those particular instances of permissible entry do not create a categorical rule.

End of Document

100 S.Ct. 1371
Supreme Court of the United States

Theodore PAYTON, Applicant,

v.

NEW YORK.

Obie RIDDICK, Applicant,

v.

NEW YORK.

Nos. 78–5420, 78–5421.
|
Argued March 26, 1979.
|
Reargued Oct. 9, 1979.
|
Decided April 15, 1980.

Synopsis

Two defendants were convicted in the Courts of New York, and the convictions were affirmed by the Supreme Court, Appellate Division, First Department, 55 A.D.2d 859, 390 N.Y.S.2d 769, and by the Supreme Court, Appellate Division, Second Department, 56 A.D.2d 937, 392 N.Y.S.2d 848. The convictions were again affirmed by the Court of Appeals of New York, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395. After noting probable jurisdiction of the appeals to address a constitutional question, the Supreme Court, Mr. Justice Stevens, held that: (1) distinction between warrantless seizure in open area and such a seizure on private premises is of equal force when seizure of person is involved; (2) zone of privacy is nowhere more clearly defined than when bounded by unambiguous physical dimensions of individual's home, and at very core of Fourth Amendment stands right of man to retreat into his own home and there be free from unreasonable government intrusion, and this is true as against seizures of property and seizures of person; and (3) Fourth Amendment prohibits police from making warrantless and nonconsensual entry into suspect's home in order to make routine felony-arrest, and New York statutes which in terms authorized police officers to enter private residence without warrant and with force if necessary to make routine felony arrest were unconstitutional as inconsistent with Fourth Amendment.

Judgments reversed and cases remanded.

Mr. Justice Blackmun filed a concurring opinion.

Mr. Justice White dissented and filed opinion in which Mr. Chief Justice Burger and Mr. Justice Rehnquist joined.

Mr. Justice Rehnquist also filed a separate dissenting opinion.

****1373** *Syllabus*[*]

***573** These appeals challenge the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In each of the appeals, police officers, acting with probable cause but without warrants, had gone to the appellant's residence to arrest the appellant on a felony charge and had entered the premises without the consent of any occupant. In each case, the New York trial judge held that the warrantless entry was authorized by New York statutes and refused to suppress evidence that was seized upon the entry. Treating both cases as involving routine arrests in which there was ample time to obtain a warrant, the New York Court of Appeals, in a single opinion, ultimately affirmed the convictions of both appellants.

Held : The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. Pp. 1378–1388.

(a) The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. 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. Pp. 1378–1388.

(b) The reasons for upholding warrantless arrests in a public place, cf. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, do not apply to warrantless invasions of the privacy of the home. The common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places; the weight of authority as it appeared to the Framers of the ***574** Fourth Amendment was to the effect that a warrant

was required for a home arrest, or at the minimum that there were substantial risks in proceeding without one. Although a majority of the States that have taken a position on the question permit warrantless home arrests even in the absence of exigent circumstances, there is an obvious declining trend, and there is by no means the kind of virtual unanimity on this question that was present in *United States v. Watson, supra*, with regard to warrantless public arrests. And, unlike the situation in *Watson* no federal statutes have been cited to indicate any congressional determination that warrantless entries into the home are "reasonable." Pp. 1382–1388.

(c) 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. P. 1388.

****1374** 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224, reversed and remanded.

Attorneys and Law Firms

William E. Hellerstein, New York City, for appellant in both cases.

Peter L. Zimroth, New York City, for appellee in both cases.

Opinion

Mr. Justice STEVENS delivered the opinion of the Court.

These appeals challenge the constitutionality of New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest.

The important constitutional question presented by this challenge has been expressly left open in a number of our prior opinions. In *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, we upheld a warrantless "midday public arrest," expressly noting that the case did not pose "the still unsettled question ***575** . . . 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.' " *Id.*, at 418, n. 6, 96 S.Ct., at 825, n. 6.[1] The question has been answered in different ways by other appellate courts. The Supreme Court of Florida rejected the constitutional attack,[2] as did the New York Court of Appeals, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 in this case. The courts of last resort in 10 other States, however, have held that unless special circumstances are present, warrantless arrests in the home are unconstitutional.[3] Of the seven United States Courts of Appeals that have considered the question, five have expressed the opinion that such arrests are unconstitutional.[4]

***576** Last Term we noted probable jurisdiction of these appeals in order to address that question. 439 U.S. 1044, 99 S.Ct. 718, 58 L.Ed.2d 703. After hearing oral argument, we set the case for reargument this Term. 441 U.S. 930, 99 S.Ct. 2049, 60 L.Ed.2d 658. We now reverse the New York Court of Appeals and hold that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, ****1375** *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

We first state the facts of both cases in some detail and put to one side certain related questions that are not presented by these records. We then explain why the New York statutes are not consistent with the Fourth Amendment and why the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home.

I

On January 14, 1970, after two days of intensive investigation, New York detectives had assembled evidence sufficient to establish probable cause to believe that Theodore Payton had murdered the manager of a gas station two days earlier. At about 7:30 a. m. on January 15, six officers went to Payton's apartment in the Bronx, intending to arrest him. They had not obtained a warrant. Although light and music emanated from the apartment, there was no response to their knock on the metal door. They summoned emergency assistance and, about 30 minutes later, used crowbars to break open the door and enter the apartment. No one was there. In plain view, however, was a .30-caliber shell casing that was ***577** seized and later admitted into evidence at Payton's murder trial.[5]

In due course Payton surrendered to the police, was indicted for murder, and moved to suppress the evidence taken from his apartment. The trial judge held that the warrantless and forcible entry was authorized by the New York Code of

Criminal Procedure,[6] and that the evidence in plain view was properly seized. He found that exigent circumstances justified the officers' failure to announce their purpose before entering the apartment as required by the statute.[7] He had no ***578** occasion, however, to decide whether those circumstances also ****1376** would have justified the failure to obtain a warrant, because he concluded that the warrantless entry was adequately supported by the statute without regard to the circumstances. The Appellate Division, First Department, summarily affirmed.[8]

On March 14, 1974, Obie Riddick was arrested for the commission of two armed robberies that had occurred in 1971. He had been identified by the victims in June 1973, and in January 1974 the police had learned his address. They did not obtain a warrant for his arrest. At about noon on March 14, a detective, accompanied by three other officers, knocked on the door of the Queens house where Riddick was living. When his young son opened the door, they could see Riddick sitting in bed covered by a sheet. They entered the house and placed him under arrest. Before permitting him to dress, they opened a chest of drawers two feet from the bed in search of weapons and found narcotics and related paraphernalia. Riddick was subsequently indicted on narcotics charges. At a suppression hearing, the trial judge held that the warrantless entry into his home was authorized by the revised New York statute,[9] and that the search of the immediate ***579** area was reasonable under *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685.[10] The Appellate Division, Second Department, affirmed the denial of the suppression motion.[11]

The New York Court of Appeals, in a single opinion, affirmed the convictions of both Payton and Riddick. 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978). The court recognized that the question whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest had not been settled either by that court or by this Court.[12] In answering that question, the majority of four judges relied primarily on its perception that there is a

> ". . . substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of ***580** making an arrest, and [a] significant difference in the governmental interest in achieving the objective of the intrusion in the two instances." *Id.*, at 310, 408 N.Y.S.2d, at 399, 380 N.E.2d, at 228–229.[13]

***581** ****1377** The majority supported its holding by noting the "apparent historical acceptance" of warrantless entries to make felony arrests, both in the English common law and in the practice of many American States.[14]

Three members of the New York Court of Appeals dissented on this issue because they believed that the Constitution requires the police to obtain a "warrant to enter a home in order to arrest or seize a person, unless there are exigent circumstances."[15] Starting from the premise that, except in carefully circumscribed instances, "the Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant,"[16] the dissenters reasoned that an arrest of the person involves an even greater invasion of privacy and should therefore be attended with at least as ***582** great a measure of constitutional protection.[17] The dissenters noted "the existence ****1378** of statutes and the American Law Institute imprimatur codifying the common-law rule authorizing warrantless arrests in private homes" and acknowledged that "the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years," but concluded that "neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented" and "can never be a substitute for reasoned analysis."[18]

Before addressing the narrow question presented by these appeals,[19] we put to one side other related problems that are ***583** *not* presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated both *Payton's* and *Riddick's* cases as involving routine arrests in which there was ample time to obtain a warrant,[20] and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

Nor do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect. The police broke into Payton's apartment intending to arrest Payton, and they arrested Riddick in his own dwelling. We also note that in neither case is it argued that the police lacked probable cause to believe that the suspect was at home when they entered. Finally, in both cases we are dealing with entries into homes

made without the consent of any occupant. In *Payton*, the police used crowbars to break down the door and in *Riddick*, although his 3-year-old son answered the door, the police entered before Riddick had an opportunity either to object or to consent.

II

It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment.[21] Indeed, as originally ***584** proposed ****1379** in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures.[22] As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.[23] The Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches ***585** 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."

It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment. Almost a century ago the Court stated in resounding terms that the principles reflected in the Amendment "reached farther than the concrete form" of the specific cases that gave it birth, and "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed.2d 746. Without pausing to consider whether that broad language may require some qualification, it is sufficient to note that the warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142. Cf. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660. Indeed, as Mr. Justice POWELL noted in his concurrence in *United States v. Watson*, the arrest of a person is "quintessentially a seizure." 423 U.S., at 428, 96 S.Ct., at 830.

The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items. As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ****1380** ***586** *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.[24]

It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable.[25] Yet it is also well settled that ***587** objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open area and such a seizure on private premises was plainly stated in *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 354, 97 S.Ct. 619, 629, 50 L.Ed.2d 530:

> "It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer."

As the late Judge Leventhal recognized, this distinction has equal force when the seizure of a person is involved. Writing on the constitutional issue now before us for the United States Court of Appeals for the District of Columbia Circuit sitting en banc, *Dorman v. United States*, 140 U.S.App.D.C. 313, 435 F.2d 385 (1970), Judge Leventhal first noted the settled rule that warrantless arrests in public places are valid. He immediately recognized, however, 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." *Id.*, at 317, 435 F.2d, at 389. (Footnote omitted.)

**1381 His analysis of this question then focused on the long-settled premise that, absent exigent circumstances, a warrantless *588 entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.[26] He 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 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.[27] Judge Leventhal concluded that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.

This reasoning has been followed in other Circuits.[28] Thus, the Second Circuit recently summarized its position:

"To be arrested in the home involves not only the invasion *589 attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present." *United States v. Reed*, 572 F.2d 412, 423 (1978), cert. denied, *sub nom. Goldsmith v. United States*, 439 U.S. 913, 99 S.Ct. 283, 58 L.Ed.2d 259.

We find this reasoning to be persuasive and in accord with this Court's Fourth Amendment decisions.

The majority of the New York Court of Appeals, however, suggested that there is a substantial difference in the relative intrusiveness of an entry to search for property and an entry to search for a person. See n. 13, *supra*. It is true that the area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant in the home. See *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. This difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest.[29]

But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's **1382 home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very *590 core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734. 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.

III

Without contending that *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, decided the question presented by these appeals, New York argues that the reasons that support the *Watson* holding require a similar result here. In *Watson* the Court relied on (a) the well-settled common-law rule that a warrantless arrest in a public place is valid if the arresting officer had probable cause to believe the suspect is a felon;[30] (b) the clear consensus among the States adhering to that well-settled common-law rule;[31] and (c) the expression of the judgment of Congress that such an arrest is "reasonable."[32] We consider *591 each of these reasons as it applies to a warrantless entry into a home for the purpose of making a routine felony arrest.

A

An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive,[33] consideration **1383 of what the Framers of the Amendment might have thought to be reasonable. Initially, it should be noted that the common-law rules of arrest developed in legal contexts that substantially differ from the cases now before us. In these cases, which involve application of the exclusionary rule, the issue is whether certain *592 evidence is admissible at

trial.[34] See *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable's authority to make the arrest was a defense. See, *e. g., Leach v. Money*, 19 How.St.Tr. 1001, 97 Eng.Rep. 1075 (K.B.1765). Additionally, if an officer was killed while attempting to effect an arrest, the question whether the person resisting the arrest was guilty of murder or manslaughter turned on whether the officer was acting within the bounds of his authority. See M. Foster, Crown Law 308, 312 (1762). See also *West v. Cabell*, 153 U.S. 78, 85, 14 S.Ct. 752, 753, 38 L.Ed. 643.

A study of the common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony—as distinguished from an officer's right to arrest for a crime committed in his presence—reveals a surprising lack of judicial decisions and a deep divergence among scholars.

The most cited evidence of the common-law rule consists of an equivocal dictum in a case actually involving the sheriff's authority to enter a home to effect service of civil process. In *Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195–196 (K.B.1603), the Court stated:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; and that appears well by the stat. of Westm. 1. c. 17. (which it but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruction ***593** or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 E. 2. Execut. 252. where it is said, that the K.'s officer who comes to do execution, &c. may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them, 7 E. 3.16." (Footnotes omitted.)

This passage has been read by some as describing an entry without a warrant. The context strongly implies, however, that the court was describing the extent of authority in executing the King's writ. This reading is confirmed by the phrase "either to arrest him, or to do *other* execution of the K.'s process" and by the further point that notice was necessary because the owner may "not know of the *process*." In any event, the passage surely cannot be said unambiguously to endorse warrantless entries.

The common-law commentators disagreed sharply on the subject.[35] Three distinct views were expressed. Lord Coke, ***594** widely ****1384** recognized by the American colonists "as the greatest authority of his time on the laws of England,"[36] clearly viewed a warrantless entry for the purpose of arrest to be illegal.[37] ***595** Burn, Foster, and Hawkins agreed,[38] as did East and Russell, though the latter two qualified their opinions by stating that if an entry to arrest was made without a warrant, the officer was perhaps immune from liability for the trespass if the suspect was actually guilty.[39] Blackstone, Chitty, and Stephen took the opposite view, that entry to arrest without a warrant was legal,[40] though Stephen relied on ****1385** Blackstone who, along with Chitty, in turn relied exclusively on Hale. But Hale's view was not quite so unequivocally expressed.[41] ***596** Further, Hale appears to rely solely on a statement in an early Yearbook, quoted in *Burdett v. Abbot*, 14 East 1, 155, 104 Eng.Rep. 501, 560 (K.B.1811):[42]

> " 'that for felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the commonweal to take them.' "
>
> Considering the diversity of views just described, however, it is clear that the statement was never deemed authoritative. Indeed, in *Burdett*, the statement was described as an "extrajudicial opinion." *Ibid*.[43]

It is obvious that the common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places. Indeed, particularly considering the prominence of Lord Coke, the weight of authority as it appeared to the Framers was to the effect that a warrant was required, or at the minimum that there were substantial risks in proceeding without one. The common-law sources display a sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repetition of the adage that a "man's house is his castle," made it abundantly clear that both in England[44] ***597** and in the Colonies "the freedom of one's house" was one of the most vital elements of English liberty.[45]

**1386 Thus, our study of the relevant common law does not provide the same guidance that was present in *Watson*. Whereas *598 the rule concerning the validity of an arrest in a public place was supported by cases directly in point and by the unanimous views of the commentators, we have found no direct authority supporting forcible entries into a home to make a routine arrest and the weight of the scholarly opinion is somewhat to the contrary. Indeed, the absence of any 17th- or 18th-century English cases directly in point, together with the unequivocal endorsement of the tenet that "a man's house is his castle," strongly suggests that the prevailing practice was not to make such arrests except in hot pursuit or when authorized by a warrant. Cf. *Agnello v. United States*, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145. In all events, the issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted.

B

A majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries;[46] 15 States clearly *599 prohibit them, though 3 States do so on federal constitutional grounds alone;[47] and 11 States have apparently taken no position on the question.[48]

**1387 But these current figures reflect a significant decline during the last decade in the number of States permitting warrantless entries for arrest. Recent dicta in this Court raising questions about the practice, see n. 1, *supra*, and Federal Courts of Appeals' decisions on point, see n. 4, *supra*, have led state courts to focus on the issue. Virtually all of the state courts that have had to confront the constitutional issue directly have held warrantless entries into the home to arrest to be invalid in the absence of exigent circumstances. See nn. 2, 3, *supra*. Three state courts have relied on Fourth Amendment *600 grounds alone, while seven have squarely placed their decisions on both federal and state constitutional grounds.[49] A number of other state courts, though not having had to confront the issue directly, have recognized the serious nature of the constitutional question.[50] Apparently, only the Supreme Court of Florida and the New York Court of Appeals in this case have expressly upheld warrantless entries to arrest in the face of a constitutional challenge.[51]

A longstanding, widespread practice is not immune from constitutional scrutiny. But neither is it to be lightly brushed aside. This is particularly so when the constitutional standard is as amorphous as the word "reasonable," and when custom and contemporary norms necessarily play such a large role in the constitutional analysis. In this case, although the weight of state-law authority is clear, there is by no means the kind of virtual unanimity on this question that was present in *United States v. Watson*, with regard to warrantless arrests in public places. See 423 U.S., at 422–423, 96 S.Ct., at 827–828. Only 24 of the 50 States currently sanction warrantless entries into the home to arrest, see nn. 46–48, *supra*, and there is an obvious declining trend. Further, the strength of the trend is greater than the numbers alone indicate. Seven state courts have recently held that warrantless home arrests violate their respective *State* Constitutions. See n. 3, *supra*. That is significant because by invoking a state constitutional provision, a state court immunizes its decision from review by this Court.[52] This heightened degree of immutability underscores the depth of the principle underlying the result.

*601 C

No congressional determination that warrantless entries into the home are "reasonable" has been called to our attention. None of the federal statutes cited in the *Watson* opinion reflects any such legislative judgment.[53] Thus, that support for the *Watson* holding finds no counterpart in this case.

Mr. Justice POWELL, concurring in *United States v. Watson, supra*, at 429, 96 S.Ct., at 830, stated:

> "But logic sometimes must defer to history and experience. The Court's opinion emphasizes the historical sanction accorded warrantless felony arrests [in public places]."

In this case, however, neither history nor this Nation's experience requires us to disregard **1388 the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.[54]

*602 IV

The parties have argued at some length about the practical consequences of a warrant requirement as a precondition to a felony arrest in the home.[55] In the absence of any evidence that effective law enforcement has suffered in those States

that already have such a requirement, see nn. 3, 47, *supra*, we are inclined to view such arguments with skepticism. More fundamentally, however, such arguments of policy must give way to a constitutional command that we consider to be unequivocal.

Finally, we note the State's suggestion that only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake, and since such a warrant requirement is manifestly impractical, there need be no warrant of any kind. We find this ingenious argument unpersuasive. It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable ***603** to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Because no arrest warrant was obtained in either of these cases, the judgments must be reversed and the cases remanded to the New York Court of Appeals for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice BLACKMUN, concurring.

I joined the Court's opinion in *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), upholding, on probable cause, the warrantless arrest in a public place. I, of course, am still of the view that the decision in *Watson* is correct. The Court's balancing of the competing governmental and individual interests properly occasioned that result. Where, however, the warrantless arrest is in the suspect's home, that same balancing requires that, absent exigent circumstances, the result be the other way. The suspect's interest in the sanctity of his home then outweighs the governmental interests.

I therefore join the Court's opinion, firm in the conviction that the result in *Watson* and the result here, although opposite, are fully justified by history and by the Fourth Amendment.

****1389** Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, dissenting.

The Court today holds that absent exigent circumstances officers may never enter a home during the daytime to arrest for a dangerous felony unless they have first obtained a warrant. This hard-and-fast rule, founded on erroneous assumptions concerning the intrusiveness of home arrest entries, ***604** finds little or no support in the common law or in the text and history of the Fourth Amendment. I respectfully dissent.

I

As the Court notes, *ante*, at 1382–1383, the common law of searches and seizures, as evolved in England, as transported to the Colonies, and as developed among the States, is highly relevant to the present scope of the Fourth Amendment. *United States v. Watson*, 423 U.S. 411, 418–422, 96 S.Ct. 820, 825–827, 46 L.Ed.2d 598 (1976); *id.*, at 425, 429, 96 S.Ct., at 828–830 (POWELL, J., concurring); *Gerstein v. Pugh*, 420 U.S. 103, 111, 114, 95 S.Ct. 854, 861–863, 43 L.Ed.2d 54 (1975); *Carroll v. United States*, 267 U.S. 132, 149–153, 45 S.Ct. 280, 283–285, 69 L.Ed. 543 (1925); *Bad Elk v. United States*, 177 U.S. 529, 534–535, 20 S.Ct. 729, 731, 44 L.Ed. 874 (1900); *Boyd v. United States*, 116 U.S. 616, 622–630, 6 S.Ct. 524, 527–532, 29 L.Ed. 746 (1886); *Kurtz v. Moffitt*, 115 U.S. 487, 498–499, 6 S.Ct. 148, 151–152, 29 L.Ed. 459 (1885). Today's decision virtually ignores these centuries of common-law development, and distorts the historical meaning of the Fourth Amendment, by proclaiming for the first time a rigid warrant requirement for all nonexigent home arrest entries.

A

As early as the 15th century the common law had limited the Crown's power to invade a private dwelling in order to arrest. A Year Book case of 1455 held that in civil cases the sheriff could not break doors to arrest for debt or trespass, for the arrest was then only in the private interests of a party. Y.B. 13 Edw. IV, 9a. To the same effect is *Semayne's Case*, 5 Co.Rep. 91a, 77 Eng.Rep. 194 (K.B.1603). The holdings of these cases were condensed in the maxim that "every man's house is his castle." H. Broom, Legal Maxims * 321–329.

However, this limitation on the Crown's power applied only to private civil actions. In cases directly involving the Crown, the rule was that "[t]he king's keys unlock all doors." Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 798, 800 (1924). The Year Book case cited above stated a different rule for criminal cases: for a felony, or suspicion of felony, one may break into the dwelling house to take the felon, for ***605** it is the common weal and to the interest of the King to take him. Likewise, *Semayne's Case* stated in dictum:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter." 5 Co.Rep., at 91b, 77 Eng.Rep., at 195.

Although these cases established the Crown's power to enter a dwelling in criminal cases, they did not directly address the question of whether a constable could break doors to arrest without authorization by a warrant. At common law, the constable's office was two fold. As conservator of the peace, he possessed, *virtute officii*, a "great original and inherent authority with regard to arrests," 4 W. Blackstone, Commentaries * 292 (hereinafter Blackstone), and could "without any other warrant but from [himself] arrest felons, and those that [were] probably suspected of felonies," 2 M. Hale, Pleas of the Crown 85 (1736) (hereinafter Hale); see *United States v. Watson, supra,* 423 U.S. at 418–419, 96 S.Ct. 825. Second, as a subordinate public official, the constable performed ministerial tasks under the authorization and direction of superior officers. See 1 R. Burn, The Justice of the Peace and Parish Officer 295 (6th ed. 1758) (hereinafter Burn); 2 W. Hawkins, Pleas of ****1390** the Crown 130–132 (6th ed. 1787) (hereinafter Hawkins). It was in this capacity that the constable executed warrants issued by justices of the peace. The warrant authorized the constable to take actions beyond his inherent powers.[1] It also ensured that he actually carried out his instructions, by giving him clear notice of his duty, for the breach of which he could be punished, 4 Blackstone * 291; 1 Burn 295; 2 Hale 88, and by relieving him from civil liability even if probable cause to ***606** arrest were lacking, 4 Blackstone * 291; 1 Burn 295–296; M. Dalton, The Country Justice 579 (1727 ed.) (hereinafter Dalton); 2 Hawkins 132–133. For this reason, warrants were sometimes issued even when the act commanded was within the constable's inherent authority. Dalton 576.

As the Court notes, commentators have differed as to the scope of the constable's inherent authority, when not acting under a warrant, to break doors in order to arrest. Probably the majority of commentators would permit arrest entries on probable suspicion even if the person arrested were not in fact guilty. 4 Blackstone * 292; 1 Burn 87–88;[2] 1 J. Chitty, Criminal Law 23 (1816) (hereinafter Chitty); Dalton 426; 1 Hale 583; 2 *id.,* at 90–94. These authors, in short, would have permitted the type of home arrest entries that occurred in the present cases. The inclusion of Blackstone in this list is particularly significant in light of his profound impact on the minds of the colonists at the time of the framing of the Constitution and the ratification of the Bill of Rights.

A second school of thought, on which the Court relies, held that the constable could not break doors on mere "bare suspicion." M. Foster, Crown Law 321 (1762); 2 Hawkins 139; 1 E. East, Pleas of the Crown 321–322 (1806); 1 W. Russell, Treatise on Crimes and Misdemeanors 745 (1819) (hereinafter Russell). Cf. 4 E. Coke, Institutes * 177. Although this doctrine ***607** imposed somewhat greater limitations on the constable's inherent power, it does not support the Court's hard-and-fast rule against warrantless nonexigent home entries upon probable cause. East and Russell state explicitly what Foster and Hawkins imply: although mere "bare suspicion" will not justify breaking doors, the constable's action would be justifiable if the person arrested were *in fact* guilty of a felony. These authorities can be read as imposing a somewhat more stringent requirement of probable cause for arrests in the home than for arrests elsewhere. But they would not bar nonexigent, warrantless home arrests in all circumstances, as the Court does today. And Coke is flatly contrary to the Court's rule requiring a warrant, since he believed that even a warrant would not justify an arrest entry until the suspect had been indicted.

Finally, it bears noting that the doctrine against home entries on bare suspicion developed in a period in which the validity of *any* arrest on bare suspicion—even one occurring outside the home—was open to question. Not until Lord Mansfield's decision in *Samuel v. Payne*, 1 Doug. 359, 99 Eng.Rep. 230 (K.B.1780), was it definitively established that the constable could arrest on suspicion even if it turned out that no ****1391** felony had been committed. To the extent that the commentators relied on by the Court reasoned from any general rule against warrantless arrests based on bare suspicion, the rationale for their position did not survive *Samuel v. Payne.*

B

The history of the Fourth Amendment does not support the rule announced today. At the time that Amendment was adopted the constable possessed broad inherent powers to arrest. The limitations on those powers derived, not from a warrant "requirement," but from the generally ministerial nature of the constable's office at common law. Far from restricting the constable's arrest power, the institution of the ***608** warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.

In fact, it was the abusive use of the warrant power, rather than any excessive zeal in the discharge of peace officers' inherent authority, that precipitated the Fourth Amendment. That Amendment grew out of colonial opposition to the infamous general warrants known as writs of assistance, which empowered customs officers to search at will, and to break open receptacles or packages, wherever they suspected uncustomed goods to be. *United States v. Chadwick*, 433 U.S. 1, 7–8, 97 S.Ct. 2476, 2481–2482, 53 L.Ed.2d 538 (1977); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51–78 (1937) (hereinafter Lasson). The writs did not specify where searches could occur and they remained effective throughout the sovereign's lifetime. *Id.*, at 54. In effect, the writs placed complete discretion in the hands of executing officials. Customs searches of this type were beyond the inherent power of common-law officials and were the subject of court suits when performed by colonial customs agents not acting pursuant to a writ. *Id.* at 55.

The common law was the colonists' ally in their struggle against writs of assistance. Hale and Blackstone had condemned general warrants, 1 Hale 580; 4 Blackstone * 291, and fresh in the colonists' minds were decisions granting recovery to parties arrested or searched under general warrants on suspicion of seditious libel. *Entick v. Carrington*, 19 How.St.Tr. 1029, 95 Eng.Rep. 807 (K.B.1765); *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (K.B.1763); *Wilkes v. Wood*, 19 How.St.Tr. 1153, 98 Eng.Rep. 489 (K.B.1763). When James Otis, Jr., delivered his courtroom oration against writs of assistance in 1761, he looked to the common law in asserting that the writs, if not construed specially, were void as a ***609** form of general warrant. 2 Legal Papers of John Adams 139–144 (L. Wroth & H. Zobel eds. 1965).[3]

Given the colonists' high regard for the common law, it is indeed unlikely that the Framers of the Fourth Amendment intended to derogate from the constable's inherent common-law authority. Such an argument was rejected in the important early case of *Rohan v. Sawin*, 59 Mass. 281, 284–285 (1851):

> "It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make ****1392** searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers . . . to arrest without warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law."[4]

***610** That the Framers were concerned about warrants, and not about the constable's inherent power to arrest, is also evident from the text and legislative history of the Fourth Amendment. That provision first reaffirms the basic principle of common law, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The Amendment does not here purport to limit or restrict the peace officer's inherent power to arrest or search, but rather assumes an existing right against actions in excess of that inherent power and ensures that it remain inviolable. As I have noted, it was not generally considered "unreasonable" at common law for officers to break doors in making warrantless felony arrests. The Amendment's second clause is directed at the actions of officers taken in their ministerial capacity pursuant to writs of assistance and other warrants. In contrast to the first Clause, the second Clause does purport to alter colonial practice: "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."
That the Fourth Amendment was directed towards safeguarding the rights at common law, and restricting the

warrant practice which gave officers vast new powers beyond their inherent authority, is evident from the legislative history of that provision. As originally drafted by James Madison, it was directed *only* at warrants; so deeply ingrained was the basic common-law premise that it was not even expressed:

> "The rights of the people to be secured in their persons[,] their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 452 (1789).

***611** The Committee of Eleven reported the provision as follows:

> "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized." *Id.*, at 783.

The present language was adopted virtually at the last moment by the Committee of Three, which had been appointed only to arrange the Amendments rather than to make substantive changes in them. Lasson 101. The Amendment passed the House; but "the House seems never to have consciously agreed to the Amendment in its present form." *Ibid*. In any event, because the sanctity of the common-law protections was assumed from the start, it is evident that the change made by the Committee of Three was a cautionary measure without substantive content.

In sum, the background, text, and legislative history of the Fourth Amendment demonstrate that the purpose was to restrict ****1393** the abuses that had developed with respect to warrants; the Amendment preserved common-law rules of arrest. Because it was not considered generally unreasonable at common law for officers to break doors to effect a warrantless felony arrest, I do not believe that the Fourth Amendment was intended to outlaw the types of police conduct at issue in the present cases.

C

Probably because warrantless arrest entries were so firmly accepted at common law, there is apparently no recorded constitutional challenge to such entries in the 19th-century cases. Common-law authorities on both sides of the Atlantic, however, continued to endorse the validity of such arrests. *E. g.*, 1 J. Bishop, Commentaries on the Law of Criminal Procedure §§ 195–199 (2d ed. 1872); 1 Chitty 23; 1 J. Colby, A Practical Treatise upon the Criminal Law and Practice of the State ***612** of New York 73–74 (1868); F. Heard, A Practical Treatise on the Authority and Duties of Trial Justices, District, Police, and Municipal Courts, in Criminal Cases 135, 148 (1879); 1 Russell 745. Like their predecessors, these authorities conflicted as to whether the officer would be liable in damages if it were shown that the person arrested was not guilty of a felony. But all agreed that warrantless home entries would be permissible in at least some circumstances. None endorsed the rule of today's decision that a warrant is always required, absent exigent circumstances, to effect a home arrest.

Apparently the first official pronouncement on the validity of warrantless home arrests came with the adoption of state codes of criminal procedure in the latter 19th and early 20th centuries. The great majority of these codes accepted and endorsed the inherent authority of peace officers to enter dwellings in order to arrest felons. By 1931, 24 of 29 state codes authorized such warrantless arrest entries.[5] By 1975, 31 of 37 state codes authorized warrantless home felony arrests.[6] The American Law Institute included such authority in its model legislation in 1931 and again in 1975.[7]

The first direct judicial holding on the subject of warrantless home arrests seems to have been *Commonwealth v. Phelps*, 209 Mass. 396, 95 N.E. 868 (1911). The holding in this case that such entries were constitutional became the settled rule in the States for much of the rest of the century. See Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 798, 803 (1924). Opinions of this Court also assumed that such arrests were constitutional.[8]

***613** This Court apparently first questioned the reasonableness of warrantless nonexigent entries to arrest in *Jones v. United States*, 357 U.S. 493, 499–500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958), noting in dictum that such entries would pose a "grave constitutional question" if carried out at night.[9] In *Coolidge v. New Hampshire*, 403 U.S. 443, 480, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564 (1971), the Court stated, again in dictum:

> "[I]f [it] is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless

entry of a man's house for purposes of **1394 arrest, it might be wise to re-examine the assumption. Such a re-examination 'would confront us with a grave constitutional question, namely, whether the forcible nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he has committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.' *Jones v. United States*, 357 U.S., at 499–500, 78 S.Ct., at 1257."

Although *Coolidge* and *Jones* both referred to the special problem of warrantless entries during the nighttime,[10] it is not surprising that state and federal courts have tended to read those dicta as suggesting a broader infirmity applying to daytime entries also, and that the majority of recent decisions have been against the constitutionality of all types of warrantless, nonexigent home arrest entries. As the Court concedes,however, *614 even despite *Coolidge* and *Jones* it remains the case that

"[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries; 15 States clearly prohibited them, though 3 States do so on federal constitutional grounds alone; and 11 States have apparently taken no position on the question." *Ante*, at 1386 (footnotes omitted).

This consensus, in the face of seemingly contrary dicta from this Court, is entitled to more deference than the Court today provides. Cf. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

D

In the present cases, as in *Watson*, the applicable federal statutes are relevant to the reasonableness of the type of arrest in question. Under 18 U.S.C. § 3052, specified federal agents may "make arrests without warrants for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States, if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." On its face this provision authorizes federal agents to make warrantless arrests anywhere, including the home. Particularly in light of the accepted rule at common law and among the States permitting warrantless home arrests, the absence of any explicit exception for the home from § 3052 is persuasive evidence that Congress intended to authorize warrantless arrests there as well as elsewhere.

Further, Congress has not been unaware of the special problems involved in police entries into the home. In 18 U.S.C. § 3109, it provided that

"[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything *615 therein, to execute a search warrant, if, after notice of its authority and purpose, he is refused admittance . . . ."

See *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). In explicitly providing authority to enter when executing a search warrant, Congress surely did not intend to derogate from the officers' power to effect an arrest entry either with or without a warrant. Rather, Congress apparently assumed that this power was so firmly established either at common law or by statute that no explicit grant of arrest authority was required in § 3109. In short, although the Court purports to find no guidance in the relevant federal statutes, I believe that fairly read they authorize the type of police conduct at issue in these cases.

II

A

Today's decision rests, in large measure, on the premise that warrantless arrest entries constitute a particularly severe invasion of personal privacy. I do not dispute **1395 that the home is generally a very private area or that the common law displayed a special "reverence . . . for the individual's right of privacy in his house." *Miller v. United States, supra*, at 313, 78 S.Ct., at 1198. However, the Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere. Cf. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967); *Boyd v. United States*, 116 U.S., at 630, 6 S.Ct., at 532. It is necessary in each case to assess realistically the actual extent of invasion of constitutionally protected privacy. Further, as Mr. Justice POWELL observed in *United States v. Watson, supra*, at 428, 96 S.Ct., at 830 (concurring opinion), all arrests involve serious intrusions into an individual's privacy and dignity. Yet we settled in *Watson* that the intrusiveness of a public arrest is not enough to mandate the obtaining of a warrant. The inquiry in the

present case, therefore, is whether the incremental ***616** intrusiveness that results from an arrest's being made *in the dwelling* is enough to support an inflexible constitutional rule requiring warrants for such arrests whenever exigent circumstances are not present.

Today's decision ignores the carefully crafted restrictions on the common-law power of arrest entry and thereby overestimates the dangers inherent in that practice. At common law, absent exigent circumstances, entries to arrest could be made only for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors.[11] Further, it seems generally accepted that entries could be made only during daylight hours.[12] And, in my view, the officer entering to arrest must have reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of the entry.[13]

These four restrictions on home arrests—felony, knock and announce, daytime, and stringent probable cause—constitute powerful and complementary protections for the privacy interests associated with the home. The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most ***617** serious crimes. The knock-and-announce and daytime requirements protect individuals against the fear, humiliation, and embarrassment of being aroused from their beds in states of partial or complete undress. And these requirements allow the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling. The stringent probable-cause requirement would help ensure against the possibility that the police would enter when the suspect was not home, and, in searching for him, frighten members of the family or ransack parts of the house, seizing items in plain view. In short, these requirements, taken together, permit an individual suspected of a serious crime to surrender at the front door of his dwelling and thereby avoid most of the ****1396** humiliation and indignity that the Court seems to believe necessarily accompany a house arrest entry. Such a front-door arrest, in my view, is no more intrusive on personal privacy than the public warrantless arrests which we found to pass constitutional muster in *Watson*.[14]

All of these limitations on warrantless arrest entries are satisfied on the facts of the present cases. The arrests here were for serious felonies—murder and armed robbery—and both occurred during daylight hours. The authorizing statutes required that the police announce their business and demand entry; neither Payton nor Riddick makes any contention that these statutory requirements were not fulfilled. And it is not argued that the police had no probable cause to believe that both Payton and Riddick were in their dwellings at the time of the entries. Today's decision, therefore, sweeps away any possibility that warrantless home entries might be permitted in some limited situations other than those in which ***618** exigent circumstances are present. The Court substitutes, in one sweeping decision, a rigid constitutional rule in place of the common-law approach, evolved over hundreds of years, which achieved a flexible accommodation between the demands of personal privacy and the legitimate needs of law enforcement.

A rule permitting warrantless arrest entries would not pose a danger that officers would use their entry power as a pretext to justify an otherwise invalid warrantless search. A search pursuant to a warrantless arrest entry will rarely, if ever, be as complete as one under authority of a search warrant. If the suspect surrenders at the door, the officers may not enter other rooms. Of course, the suspect may flee or hide, or may not be at home, but the officers cannot anticipate the first two of these possibilities and the last is unlikely given the requirement of probable cause to believe that the suspect is at home. Even when officers are justified in searching other rooms, they may seize only items within the arrestee's position or immediate control or items in plain view discovered during the course of a search reasonably directed at discovering a hiding suspect. Hence a warrantless home entry is likely to uncover far less evidence than a search conducted under authority of a search warrant. Furthermore, an arrest entry will inevitably tip off the suspects and likely result in destruction or removal of evidence not uncovered during the arrest. I therefore cannot believe that the police would take the risk of losing valuable evidence through a pretextual arrest entry rather than applying to a magistrate for a search warrant.

B

While exaggerating the invasion of personal privacy involved in home arrests, the Court fails to account for the danger that its rule will "severely hamper effective law enforcement," *United States v. Watson*, 423 U.S., at 431, 96 S.Ct., at 831 (POWELL, J., concurring); *Gerstein v. Pugh*, 420 U.S., at 113, 95 S.Ct., at 862. The policeman ***619** on his beat must

now make subtle discriminations that perplex even judges in their chambers. As Mr. Justice POWELL noted, concurring in *United States v. Watson, supra*, police will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.

Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. ****1397** This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

The uncertainty inherent in the exigent-circumstances determination burdens the judicial system as well. In the case of searches, exigent circumstances are sufficiently unusual that this Court has determined that the benefits of a warrant outweigh the burdens imposed, including the burdens on the judicial system. In contrast, arrests recurringly involve exigent circumstances, and this Court has heretofore held that a warrant can be dispensed with without undue sacrifice in Fourth Amendment values. The situation should be no dif ferent ***620** with respect to arrests in the home. Under today's decision, whenever the police have made a warrantless home arrest there will be the possibility of "endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like," *United States v. Watson, supra*, at 423–424, 96 S.Ct., at 828.

Our cases establish that the ultimate test under the Fourth Amendment is one of "reasonableness." *Marshall v. Barlow's, Inc*., 436 U.S. 307, 315–316, 98 S.Ct. 1816, 1822, 56 L.Ed.2d 305 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 539, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967). I cannot join the Court in declaring unreasonable a practice which has been thought entirely reasonable by so many for so long. It would be far preferable to adopt a clear and simple rule: after knocking and announcing their presence, police may enter the home to make a daytime arrest without a warrant when there is probable cause to believe that the person to be arrested committed a felony and is present in the house. This rule would best comport with the common-law background, with the traditional practice in the States, and with the history and policies of the Fourth Amendment. Accordingly, I respectfully dissent.

Mr. Justice REHNQUIST, dissenting.

The Court today refers to both *Payton* and *Riddick* as involving "routine felony arrests." I have no reason to dispute the Court's characterization of these arrests, but cannot refrain from commenting on the social implications of the result reached by the Court. Payton was arrested for the murder of the manager of a gas station; Riddick was arrested for two armed robberies. If these are indeed "routine felony arrests," which culminated in convictions after trial upheld by the state courts on appeal, surely something is amiss in the process of the administration of criminal justice whereby these convictions are now set aside by this Court under the exclusionary rule which we have imposed upon the States under ***621** the Fourth and Fourteenth Amendments to the United States Constitution.

I fully concur in and join the dissenting opinion of Mr. Justice WHITE. There is significant historical evidence that we have over the years misread the history of the Fourth Amendment in connection with searches, elevating the warrant requirement over the necessity for probable cause in a way which the Framers of that Amendment did not intend. See T. Taylor, Two Studies in Constitutional Interpretation 38–50 (1969). But one may accept all of that as *stare decisis*, and still feel deeply troubled by the transposition of these same errors into the area of actual arrests of felons within their houses with respect to ****1398** whom there is probable cause to suspect guilt of the offense in question.

All Citations

445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 See also *United States v. Watson*, 423 U.S., at 433, 96 S.Ct., at 832 (STEWART, J., concurring); *id.*, at 432–433, 96 S.Ct., at 832 (POWELL, J., concurring); *Gerstein v. Pugh*, 420 U.S. 103, 113, n. 13, 95 S.Ct. 854, 863 n. 13, 43 L.Ed.2d 54; *Coolidge v. New Hampshire*, 403 U.S. 443, 474–481, 91 S.Ct. 2022, 2042–2045, 29 L.Ed.2d 564; *Jones v. United States*, 357 U.S. 493, 499–500, 78 S.Ct. 1253, 1257–1258, 2 L.Ed.2d 1514. Cf. *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300.

2 See *State v. Perez*, 277 So.2d 778 (1973), cert. denied, 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 468.

3 See *State v. Cook*, 115 Ariz. 188, 564 P.2d 877 (1977) (resting on both state and federal constitutional provisions); *People v. Ramey*, 16 Cal.3d 263, 545 P.2d 1333 (1976), cert. denied, 429 U.S. 929, 97 S.Ct. 335, 50 L.Ed.2d 299 (state and federal); *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971) (federal only); *State v. Jones*, 274 N.W.2d 273 (Iowa 1979) (state and federal); *State v. Platten*, 225 Kan. 764, 594 P.2d 201 (1979) (state and federal); *Commonwealth v. Forde*, 367 Mass. 798, 329 N.E.2d 717 (1975) (federal only); *State v. Olson*, 287 Or. 157, 598 P.2d 670 (1979) (state and federal); *Commonwealth v. Williams*, 483 Pa. 293, 396 A.2d 1177 (1978) (federal only); *State v. McNeal*, 251 S.E.2d 484 (W.Va.1978) (state and federal); *Laasch v. State*, 84 Wis.2d 587, 267 N.W.2d 278 (1978) (state and federal).

4 Compare *United States v. Reed*, 572 F.2d 412 (CA2 1978), cert. denied, *sub nom. Goldsmith v. United States*, 439 U.S. 913, 99 S.Ct. 283, 58 L.Ed.2d 259; *United States v. Killebrew*, 560 F.2d 729 (CA6 1977); *United States v. Shye*, 492 F.2d 886 (CA6 1974); *United States v. Houle*, 603 F.2d 1297 (CA8 1979); *United States v. Prescott*, 581 F.2d 1343 (CA9 1978); *Dorman v. United States*, 140 U.S.App.D.C. 313, 435 F.2d 385 (1970), with *United States v. Williams*, 573 F.2d 348 (CA5 1978); *United States ex rel. Wright v. Woods*, 432 F.2d 1143 (CA7 1970), cert. denied, 401 U.S. 966, 91 S.Ct. 983, 28 L.Ed.2d 248. Three other Circuits have assumed without deciding that warrantless home arrests are unconstitutional. *United States v. Bradley*, 455 F.2d 1181 (CA1 1972); *United States v. Davis*, 461 F.2d 1026 (CA3 1972); *Vance v. North Carolina*, 432 F.2d 984 (CA4 1970). And one Circuit has upheld such an arrest without discussing the constitutional issue. *Michael v. United States*, 393 F.2d 22 (CA10 1968).

5 A thorough search of the apartment resulted in the seizure of additional evidence tending to prove Payton's guilt, but the prosecutor stipulated that the officers' warrantless search of the apartment was illegal and that all the seized evidence except the shell casing should be suppressed.

> "MR. JACOBS: There's no question that the evidence that was found in bureau drawers and in the closet was illegally obtained. I'm perfectly willing to concede that, and I do so in my memorandum of law. There's no question about that." App. 4.

6 "At the time in question, January 15, 1970, the law applicable to the police conduct related above was governed by the Code of Criminal Procedure. Section 177 of the Code of Criminal Procedure as applicable to this case recited: 'A peace officer may, without a warrant, arrest a person, . . . 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.' Section 178 of the Code of Criminal Procedure provided: 'To make an arrest, as provided in the last section [177], the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.' " 84 Misc.2d 973, 974–975, 376 N.Y.S.2d 779, 780 (Sup.Ct., Trial Term, N.Y. County, 1974).

7 "Although Detective Malfer knocked on the defendant's door, it is not established that at this time he announced that his purpose was to arrest the defendant. Such a declaration of purpose is unnecessary when exigent circumstances are present (*People v. Wojciechowski*, 31 A.D.2d 658, 296 N.Y.S.2d 524; *People v. McIlwain*, 28 A.D.2d 711, 281 N.Y.S.2d 218).

> " 'Case law has made exceptions from the statute or common-law rules for exigent circumstances which may allow dispensation with the notice . . . It has also been held or suggested that notice is not required if there is reason to believe

that it will allow an escape or increase unreasonably the physical risk to the police or to innocent persons.' (*People v. Floyd*, 26 N.Y.2d 558, 562, 312 N.Y.S.2d 193, 260 N.E.2d 815.)

"The facts of this matter indicate that a grave offense had been committed; that the suspect was reasonably believed to be armed and could be a danger to the community; that a clear showing of probable cause existed and that there was strong reason to believe that the suspect was in the premises being entered and that he would escape if not swiftly apprehended. From this fact the court finds that exigent circumstances existed to justify noncompliance with section 178. The court holds, therefore, that the entry into defendant's apartment was valid." *Id.*, at 975, 376 N.Y.S.2d, at 780–781.

8 55 A.D.2d 859, 390 N.Y.S.2d 769 (1976).

9 New York Crim.Proc.Law § 140.15(4) (McKinney 1971) provides, with respect to arrest without a warrant:

"In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

Section 120.80, governing execution of arrest warrants, provides in relevant part:

"4. In order to effect the arrest, the police officer may, under 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, unless there is reasonable cause to believe that the giving of such notice will:

"(a) Result in the defendant escaping or attempting to escape; or

"(b) Endanger the life or safety of the officer or another person; or

"(c) Result in the destruction, damaging or secretion of material evidence.

"5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary."

10 App. 63–66.

11 56 A.D.2d 937, 392 N.Y.S.2d 848 (1977). One justice dissented on the ground that the officers' failure to announce their authority and purpose before entering the house made the arrest illegal as a matter of state law.

12 45 N.Y.2d, at 309–310, 408 N.Y.S.2d, at 399, 380 N.E.2d, at 228.

13 The majority continued:

"In the case of the search, unless appropriately limited by the terms of a warrant, the incursion on the householder's domain normally will be both more extensive and more intensive and the resulting invasion of his privacy of greater magnitude than what might be expected to occur on an entry made for the purpose of effecting his arrest. A search by its nature contemplates a possibly thorough rummaging through possessions, with concurrent upheaval of the owner's chosen or random placement of goods and articles and disclosure to the searchers of a myriad of personal items and details which he would expect to be free from scrutiny by uninvited eyes. The householder by the entry and search of his residence is stripped bare, in greater or lesser degree, of the privacy which normally surrounds him in his daily living, and, if he should be absent, to an extent of which he will be unaware.

"Entry for the purpose of arrest may be expected to be quite different. While the taking into custody of the person of the householder is unquestionably of grave import, there is no accompanying prying into the area of expected privacy attending his possessions and affairs. That personal seizure alone does not require a warrant was established by *United States v. Watson* (423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, *supra*), which upheld a warrantless arrest made in a public place. In view of the minimal intrusion on the elements of privacy of the home which results from entry on

the premises for making an arrest (as compared with the gross intrusion which attends the arrest itself), we perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence. To the extent that an arrest will always be distasteful or offensive, there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable.

"At least as important, and perhaps even more so, in concluding that entries to make arrests are not 'unreasonable'—the substantive test under the constitutional proscriptions—is the objective for which they are made, viz., the arrest of one reasonably believed to have committed a felony, with resultant protection to the community. The 'reasonableness' of any governmental intrusion is to be judged from two perspectives—that of the defendant, considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action. The community's interest in the apprehension of criminal suspects is of a higher order than is its concern for the recovery of contraband or evidence; normally the hazards created by the failure to apprehend far exceed the risks which may follow nonrecovery." *Id.*, at 310–311, 408 N.Y.S.2d, at 399, 380 N.E.2d, at 229.

14 "The apparent historical acceptance in the English common law of warrantless entries to make felony arrests (2 Hale, Historia Placitorum Coronae, History of Pleas of Crown [1st Amer. ed., 1847], p. 92; Chitty, Criminal Law [3d Amer., from 2d London ed., 1836] 22–23), and the existence of statutory authority for such entries in this State since the enactment of the Code of Criminal Procedure in 1881 argue against a holding of unconstitutionality and substantiate the reasonableness of such procedure. . . .

"Nor do we ignore the fact that a number of jurisdictions other than our own have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest. The American Law Institute's Model Code of Pre-Arraignment Procedure makes similar provision in section 120.6, with suggested special restrictions only as to nighttime entries." *Id.*, at 311–312, 408 N.Y.S.2d, at 400, 380 N.E.2d, at 229–230 (footnotes omitted).

15 *Id.*, at 315, 408 N.Y.S.2d, at 403, 380 N.E.2d, at 232 (Wachtler, J., dissenting).

16 *Id.*, at 319–320, 408 N.Y.S.2d, at 406, 380 N.E.2d, at 235 (Cooke, J., dissenting).

17 "Although the point has not been squarely adjudicated since *Coolidge* [*v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564,] (see *United States v. Watson*, 423 U.S. 411, 418, n. 6, 96 S.Ct. 820 [825 n. 6], 46 L.Ed.2d 598), its proper resolution, it is submitted, is manifest. At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed (see, *e. g., Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524 [532,] 29 L.Ed. 746; *Camara v. Municipal Ct.*, 387 U.S. 523, 528, 87 S.Ct. 1727 [, 1730,] 18 L.Ed.2d 930). To achieve that end, the framers of the amendment interposed the warrant requirement between the public and the police, reflecting their conviction that the decision to enter a dwelling should not rest with the officer in the field, but rather with a detached and disinterested Magistrate (*McDonald v. United States*, 335 U.S. 451, 455–456, 69 S.Ct. 191, [193,] 93 L.Ed. 153; *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, [368–369,] 92 L.Ed. 436). Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control any contemplated entry, regardless of the purpose for which that entry is sought. By definition, arrest entries must be included within the scope of the amendment, for while such entries are for persons, not things, they are, nonetheless, violations of privacy, the chief evil that the Fourth Amendment was designed to deter (*Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, [682,] 5 L.Ed.2d 734)." *Id.*, at 320–321, 408 N.Y.S.2d, at 406, 380 N.E.2d, at 235–236 (Cooke, J., dissenting).

18 *Id.*, at 324, 408 N.Y.S.2d, at 409, 380 N.E.2d, at 238 (Cooke, J., dissenting).

19 Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court. See *Raley v. Ohio*, 360 U.S. 423, 436, 79 S.Ct. 1257, 1265, 3 L.Ed.2d 1344.

20 45 N.Y.2d, at 308, 408 N.Y.S.2d, at 398, 380 N.E.2d, at 228. Judge Wachtler in dissent, however, would have upheld the warrantless entry in *Payton's* case on exigency grounds, and therefore agreed with the majority's refusal to suppress the shell casing. See *id.*, at 315, 408 N.Y.S.2d, at 403, 380 N.E.2d, at 232.

21 "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." ' *Boyd v. United States*, 116 U.S. 616, 625, 6 S.Ct. 524, 529, 29 L.Ed. 746." *Stanford v. Texas*, 379 U.S. 476, 481–482, 85 S.Ct. 506, 510, 13 L.Ed.2d 431.

See also J. Landynski, Search and Seizure and the Supreme Court 19–48 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13–78 (1937); T. Taylor, Two Studies in Constitutional Interpretation 19–44 (1969).

22 " 'The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.' Annals of Cong., 1st Cong., 1st sess., p. 452." Lasson, *supra*, at 100, n. 77.

23 "The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." Lasson, *supra*, at 103. (Footnote omitted.)

24 As Mr. Justice Jackson so cogently observed in *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 369, 92 L.Ed. 436:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (Footnotes omitted.)

25 As the Court stated in *Coolidge v. New Hampshire* :

"Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'

—

"It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.' " 403 U.S., at 474–475, 477–478, 91 S.Ct., at 2042, 2044.

Although Mr. Justice Harlan joined this portion of the Court's opinion, he expressly disclaimed any position on the issue now before us. *Id.*, at 492, 91 S.Ct., at 2051 (concurring opinion).

26 As Mr. Justice Harlan wrote for the Court:

"It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. *Agnello v. United States*, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145; *Taylor v. United States*, 286 U.S. 1, 6, 52 S.Ct. 466, 467, 76 L.Ed. 951. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, *e. g., Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436; *McDonald v. United States*, 335 U.S. 451, 455, 69 S.Ct. 191, 193, 93 L.Ed. 153; cf. *Giordenello v. United States*, [357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503]. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant. Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Jones v. United States*, 357 U.S., at 497–498, 78 S.Ct., at 1256 (footnote omitted).

27 See generally Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St.L.J. 56 (1974).

28 See n. 4, *supra*.

29 See, *e. g.*, the facts in *Payton's* case, n. 5, *supra*.

30 "The cases construing the Fourth Amendment thus reflect the ancient common-law rule 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. 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 * 72–74; Wilgus, Arrests 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)." 423 U.S., at 418–419, 96 S.Ct., at 825.

31 "The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It appears in almost all of the States in the form of express statutory authorization." *Id.*, at 421–422, 96 S.Ct., at 826.

32 "This is the rule Congress has long directed its principal law enforcement officers to follow. Congress has plainly decided against conditioning warrantless arrest power on proof of exigent circumstances." *Id.*, at 423, 96 S.Ct., at 827.

The Court added in a footnote:

"Until 1951, 18 U.S.C. § 3052 conditioned the warrantless arrest powers of the agents of the Federal Bureau of Investigation on there being reasonable grounds to believe that the person would escape before a warrant could be obtained. The Act of Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239, eliminated this condition." *Id.*, at 423, n. 13, 96 S.Ct., at 827.

33 There are important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions. For example, whereas the kinds of property subject to seizure under warrants had been limited to contraband and the fruits or instrumentalities of crime, see *Gouled v. United States*, 255 U.S. 298, 309, 41 S.Ct. 261, 265, 65 L.Ed. 647, the category of property that may be seized, consistent with the Fourth Amendment, has been expanded to include mere evidence.

Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782. Also, the prohibitions of the Amendment have been extended to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, even though the earlier law had focused on the physical invasion of the individual's person or property interests in the course of a seizure of tangible objects. See *Olmstead v. United States*, 277 U.S. 438, 466, 48 S.Ct. 564, 72 L.Ed.2d 944. Thus, this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.

34 The issue is not whether a defendant must stand trial, because he must do so even if the arrest is illegal. See *United States v. Crews*, 445 U.S. 463, at 474, 100 S.Ct. 1244, at 1251, 63 L.Ed.2d 537.

35 Those modern commentators who have carefully studied the early works agree with that assessment. See ALI, A Model Prop. Off. Draft Code of Pre-Arraignment Procedure 308 (1975) (hereinafter ALI Code); Blakey, The Rule of Announcement and Unlawful Entry: *Miller v. United States* and *Ker v. California*, 112 U.Pa.L.Rev. 499, 502 (1964); Comment, Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle, 82 Dick.L.Rev. 167, 168, n. 5 (1977); Note, The Constitutionality of Warrantless Home Arrests, 78 Colum.L.Rev. 1550, 1553 (1978) ("the major common-law commentators appear to be equally divided on the requirement of a warrant for a home arrest") (hereinafter Columbia Note); Recent Development, Warrantless Arrests by Police Survive a Constitutional Challenge—*United States v. Watson*, 14 Am.Crim.L.Rev. 193, 210–211 (1976). Accord, *Miller v. United States*, 357 U.S. 301, 307–308, 78 S.Ct. 1190, 1194–1195, 2 L.Ed.2d 1332; *Accarino v. United States*, 85 U.S.App.D.C. 394, 402, 179 F.2d 456, 464 (1949).

36 "Foremost among the titles to be found in private libraries of the time were the works of Coke, the great expounder of Magna Carta, and similar books on English liberties. The inventory of the library of Arthur Spicer, who died in Richmond County, Virginia, in 1699, included Coke's *Institutes*, another work on Magna Carta, and a 'Table to Cooks Reports.' The library of Colonel Daniel McCarty, a wealthy planter and member of the Virginia House of Burgesses who died in Westmoreland County in 1724, included Coke's *Reports*, an abridgment of Coke's *Reports, Coke on Littleton*, and 'Rights of the Comons of England.' Captain Charles Colston, who died in Richmond County, Virginia, in 1724, and Captain Christopher Cocke, who died in Princess Anne County, Virginia, in 1716, each had copies of Coke's *Institutes*. That these libraries were typical is suggested by a study of the contents of approximately one hundred private libraries in colonial Virginia, which revealed that the most common law title found in these libraries was Coke's *Reports*. They were typical of other colonies, too. Another study, of the inventories of forty-seven libraries throughout the colonies between 1652 and 1791, found that of all the books on either law or politics in these libraries the most common was Coke's *Institutes* (found in 27 of the 47 libraries). The second most common title was a poor second; it was Grotius' *War and Peace*, found in 16 of the libraries (even Locke's *Two Treatises on Government* appeared in only 13 of the libraries).

> "The popularity of Coke in the colonies is of no small significance. Coke himself had been at the eye of the storm in the clashes between King and Parliament in the early seventeenth century which did so much to shape the English Constitution. He rose to high office at the instance of the Crown—he was Speaker of the House of Commons and Attorney General under Queen Elizabeth, and James I made Coke first his Chief Justice of Common Pleas and then his Chief Justice of King's Bench. During this time Coke gained an unchallenged position as the greatest authority of his time on the laws of England, frequently burying an opponent with learned citations from early Year Books. Having been a champion of the Crown's interests, Coke (in a change of role that recalls the metamorphosis of Thomas à Becket) became instead the defender of the common law." A. Howard, The Road From Runnymede 118–119 (1968). (Footnotes omitted.)

37 "[N]either the Constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony. . . . " 4 E. Coke, Institutes * 177. Coke also was of the opinion that only a King's indictment could justify the breaking of doors to effect an arrest founded on suspicion, and that not even a warrant issued by a justice of the peace was sufficient authority. *Ibid.* He was apparently alone in that view, however.

38 1 R. Burn, The Justice of the Peace and Parish Officer 87 (6th ed. 1758) ("where one lies under probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr. *Hawkins* says) that no one can justify the breaking open doors in order to apprehend him . . . "); M. Foster, Crown Law 321 (1762); 2 W. Hawkins, Pleas of the Crown 139 (6th ed. 1787): "But where one lies under a probable suspicion only, and is not indicted, it seems the better (*d*) opinion at

this day, That no one can justify the breaking open doors in order to apprehend him." The contrary opinion of Hale, see n. 41, *infra*, is acknowledged among the authorities cited in the footnote (*d*).

39 1 E. East, Pleas of the Crown 322 (1806) ("[Y]et a bare suspicion of guilt against the party will not warrant a proceeding to this extremity [the breaking of doors], unless the officer be armed with a magistrate's warrant grounded on such suspicion. It will at least be at the peril of proving that the party so taken on suspicion was guilty."); 1 W. Russell, A Treatise on Crimes and Misdemeanors 745 (1819) (similar rule).

40 4 W. Blackstone, Commentaries * 292; 1 J. Chitty, A Practical Treatise on the Criminal Law 23 (1816); 4 H. Stephen, New Commentaries on the Laws of England 359 (1845).

41 1 M. Hale, Pleas of the Crown 583 (1736); 2 *id.*, at 90–95. At page 92 of the latter volume, Hale writes that in the case where the constable suspects a person of a felony, "if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break the door, tho he have no warrant. 13 *E.* 4. 9. *a*." Although it would appear that Hale might have meant to limit warrantless home arrests to cases of hot pursuit, the quoted passage has not typically been read that way.

42 Apparently, the Yearbook in which the statement appears has never been fully translated into English.

43 That assessment is consistent with the description by this Court of the holding of that Yearbook case in *Miller v. United States*, 357 U.S., at 307, 78 S.Ct., at 1194:

> "As early as the 13th Yearbook of Edward IV (1461–1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party."

44 Thus, in *Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (K.B.1603), the court stated: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortun*', without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3. Coron. 303, & 305. & 26 Ass. pl. 23. So it is held in 21 H. 7. 39. every one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium*." (Footnotes omitted.)

> In the report of that case it is noted that although the sheriff may break open the door of a barn without warning to effect service of a writ, a demand and refusal must precede entry into a dwelling house. *Id.*, at 91b, n. (c), 77 Eng.Rep., at 196, n. (c): "And this privilege is confined to a man's dwelling-house, or out-house adjoining thereto, for the sheriff on a *fieri facias* may break open the door of a barn standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close. *Penton v. Brown*, 2 Keb. 698, S.C. 1 Sid. 186."

45 "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege." 2 Legal Papers of John Adams 142 (L. Wroth & H. Zobel eds. 1965).

> We have long recognized the relevance of the common law's special regard for the home to the development of Fourth Amendment jurisprudence. See, *e. g., Weeks v. United States*, 232 U.S. 383, 390, 34 S.Ct. 341, 343, 58 L.Ed. 652:
>
> "Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution, said: 'The maxim that "every man's house is his castle," is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.' 'Accordingly,' says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, 'no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases

of felony, and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon."

Although the quote from Lieber concerning warrantless arrests in the home is on point for today's cases, it was dictum in *Weeks*. For that case involved a warrantless arrest in a public place, and a warrantless search of Week's home in his absence.

46 Twenty-three States authorize such entries by statute. See Ala.Code § 15–10–4 (1975); Alaska Stat.Ann. § 12.25.100 (1972); Ark.Stat.Ann. § 43–414 (1977); Fla.Stat. § 901.19 (1979); Haw.Rev.Stat. § 803–11 (1977); Idaho Code § 19–611 (1979); Ill.Rev.Stat., ch. 38, § 107—5(d) (1971); La.Code Crim.Proc.Ann., Art. 224 (West 1967); Mich.Comp.Laws § 764.21 (1970); Minn.Stat. § 629.34 (1978); Miss.Code Ann. § 99–3–11 (1973); Mo.Rev.Stat. § 544.200 (1978); Neb.Rev.Stat. § 29–411 (1975); Nev.Rev.Stat. § 171.138 (1977); N.Y.Crim.Proc.Law §§ 140.15(4), 120.80(4), (5) (McKinney 1971); N.C.Gen.Stat. § 15A–401(e) (1978); N.D.Cent.Code § 29–06–14 (1974); Ohio Rev.Code Ann. § 2935.12 (1975); Okla.Stat., Tit. 22, § 197 (1971); S.D.Comp.Laws Ann. § 23A–3–5 (1979); Tenn.Code Ann. § 40–807 (1975); Utah Code Ann. § 77–13–12 (Repl.1978); Wash.Rev.Code § 10.31.040 (1976). One State has authorized warrantless arrest entries by judicial decision. See *Shanks v. Commonwealth*, 463 S.W.2d 312, 315 (Ky.App.1971).

A number of courts in these States, though not directly deciding the issue, have recognized that the constitutionality of such entries is open to question. See *People v. Wolgemuth*, 69 Ill.2d 154, 13 Ill.Dec. 40, 370 N.E.2d 1067 (1977), cert. denied, 436 U.S. 908, 98 S.Ct. 2243, 56 L.Ed.2d 408; *State v. Ranker*, 343 So.2d 189 (La.1977) (citing both State and Federal Constitutions); *State v. Lasley*, 306 Minn. 224, 236 N.W.2d 604 (1975), cert. denied, 429 U.S. 1077, 97 S.Ct. 820, 50 L.Ed.2d 796; *State v. Novak*, 428 S.W.2d 585 (Mo.1968); *State v. Page*, 277 N.W.2d 112 (N.D.1979); *State v. Max*, 263 N.W.2d 685 (S.D.1978).

47 Four States prohibit warrantless arrests in the home by statute, see Ga.Code §§ 27–205, 27–207 (1978) (also prohibits warrantless arrests outside the home absent exigency); Ind.Code §§ 35–1–19–4, 35–1–19–6 (1976); Mont.Code Ann. § 46–6–401 (1979) (same as Georgia); S.C.Code § 23–15–60 (1976); 1 by state common law, see *United States v. Hall*, 468 F.Supp. 123, 131, n. 16 (E.D.Tex.1979); *Moore v. State*, 149 Tex.Crim. 229, 235–236, 193 S.W.2d 204, 207 (1946); and 10 on constitutional grounds, see n. 3, *supra*.

48 Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Virginia and Wyoming. The courts of three of the above-listed States have recognized that the constitutionality of warrantless home arrest is subject to question. See *State v. Anonymous*, 34 Conn.Supp. 531, 375 A.2d 417 (Sup.Ct., App.Sess.1977); *Nilson v. State*, 272 Md. 179, 321 A.2d 301 (1974); *Palmigiano v. Mullen*, 119 R.I. 363, 377 A.2d 242 (1977).

49 See cases cited in n. 3, *supra*.

50 See cases cited in nn. 46, 48, *supra*.

51 See n. 2, *supra*.

52 See, *e. g., Herb v. Pitcairn*, 324 U.S. 117, 125–126, 65 S.Ct. 459, 462–463, 89 L.Ed. 789. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977).

53 The statute referred to in n. 32, *supra*, provides:

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U.S.C. § 3052.

It says nothing either way about executing warrantless arrests in the home. See also ALI Code at 308; Columbia Note 1554–1555, n. 26.

54 There can be no doubt that Pitt's address in the House of Commons in March 1763 echoed and re-echoed throughout the Colonies:

> " 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement! ' " *Miller v. United States*, 357 U.S., at 307, 78 S.Ct., at 1195.

55 The State of New York argues that the warrant requirement will pressure police to seek warrants and make arrests too hurriedly, thus increasing the likelihood of arresting innocent people; that it will divert scarce resources thereby interfering with the police's ability to do thorough investigations; that it will penalize the police for deliberate planning; and that it will lead to more injuries. Appellants counter that careful planning is possible and that the police need not rush to get a warrant, because if an exigency arises necessitating immediate arrest in the course of an orderly investigation, arrest without a warrant is permissible; that the warrant procedure will decrease the likelihood that an innocent person will be arrested; that the inconvenience of obtaining a warrant and the potential for diversion of resources is exaggerated by the State; and that there is no basis for the assertion that the time required to obtain a warrant would create peril.

1 For example, a constable could arrest for breaches of the peace committed outside his presence only under authority of a warrant. *Bad Elk v. United States*, 177 U.S. 529, 534–535, 20 S.Ct. 729, 731, 44 L.Ed. 874 (1900); 1 Burn 294; 2 Hale 90; 2 Hawkins 130.

2 The Court cites Burn for the proposition that home arrests on mere suspicion are invalid. *Ante*, at 1384, n. 38. In fact, Burn appears to be of the opposite view. Burn contrasts the case of arrests by private citizens, which cannot be justified unless the person arrested was actually guilty of felony, with that of arrests by constables:

> "But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable, he is punishable if he omit it upon complaint." 1 Burn 87–88 (emphasis in original).

Burn apparently refers to a constable's duty to act without a warrant on complaint of a citizen.

3 The Court cites Pitt's March 1763 oration in the House of Commons as indicating an "overriding respect for the sanctity of the home." *Ante*, at 1388, and n. 54. But this speech was in opposition to a proposed excise tax on cider. 15 Parliamentary History of England 1307 (1813). Nothing in it remotely suggests that Pitt objected to the constable's traditional power of warrantless entry into dwellings to arrest for felony.

4 See also *North v. People*, 139 Ill. 81, 105, 28 N.E. 966, 972 (1891) (Warrant Clause "does not abridge the right to arrest without warrant, in cases where such arrest could be lawfully made at common law before the adoption of the present constitution"); *Wakely v. Hart*, 6 Binn. 316, 319 (Pa.1814) (rules permitting arrest without a warrant are "principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed was nothing more than an affirmance of the common law . . . ").

5 American Law Institute, Code of Criminal Procedure 254–255 (Off.Draft 1931) (hereinafter Code).

6 American Law Institute, A Model Code of Pre-Arraignment Procedure App. XI (Prop.Off.Draft 1975) (hereinafter Model Code).

7 Code §§ 21, 28; Model Code § 120.6(1).

8 See *Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948) (stating in dictum that officers could have entered hotel room without a warrant in order to make an arrest "for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty") (footnote omitted); *Ker v. California*, 374 U.S. 23, 38, 83 S.Ct. 1623, 1632, 10 L.Ed.2d 726 (1963) (plurality opinion); *Sabbath v. United States*, 391 U.S. 585, 588, 88 S.Ct. 1755, 1757, 20 L.Ed.2d 828 (1968).

9 One Court of Appeals had previously held such entries unconstitutional. *Accarino v. United States*, 85 U.S.App.D.C. 394, 179 F.2d 456 (1949).

10 As I discuss *infra*, there may well be greater constitutional problems with nighttime entries.

11 *Miller v. United States*, 357 U.S. 301, 308, 78 S.Ct. 1190, 1195, 2 L.Ed.2d 1332 (1958); *Semayne's Case*, 5 Co.Rep. 91a, 77 Eng.Rep. 194 (K.B.1603); Dalton 427; 2 Hale 90; 2 Hawkins 138.

12 Model Code § 120.6(3). Cf. *Jones v. United States*, 357 U.S. 493, 499–500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958); *Coolidge v. New Hampshire*, 403 U.S. 443, 480, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564 (1971).

13 I do not necessarily disagree with the Court's discussion of the quantum of probable cause necessary to make a valid home arrest. The Court indicates that only an arrest warrant, and not a search warrant, is required. *Ante*, at 1388. To obtain the warrant, therefore, the officers need only show probable cause that a crime has been committed and that the suspect committed it. However, under today's decision, the officers apparently need an extra increment of probable cause when executing the arrest warrant, namely, grounds to believe that the suspect is within the dwelling. *Ibid*.

14 If the suspect flees or hides, of course, the intrusiveness of the entry will be somewhat greater; but the policeman's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel.

End of Document

63 Cal.2d 690, 408 P.2d 365, 47 Cal.Rptr. 909
Supreme Court of California

THE PEOPLE, Plaintiff and Respondent,

v.

JESSE JAMES GILBERT and ROBIN CHARLES KING, JR., Defendants and Appellants.

Crim. No. 8690.
Dec. 15, 1965.

HEADNOTES

(1)
Criminal Law § 448--Evidence--Admissions to Prosecuting Officers.
Defendant's incriminating statements are inadmissible when obtained in an investigation that was no longer a general inquiry into an unsolved crime but one focused on a particular suspect in custody by authorities who carried out a process of interrogation that lent itself to eliciting incriminating statements without first effectively informing defendant of his rights to counsel and to remain silent, and no evidence establishes defendant's waiver of those rights.

See **Cal.Jur.2d,** Evidence, § 397; **Am.Jur.,** Evidence (1st ed §§ 600-602). ***691**

(2)
Criminal Law § 448--Evidence--Admissions to Prosecuting Officers.
Defendant's statements to investigating officers were admitted in violation of his rights to counsel and to remain silent where, at the time they were made, defendant was under arrest, had been in custody for four days, had been interrogated three times concerning a robbery, was formally charged with murder, robbery and kidnaping, and was taken into an interrogation room for the purpose of eliciting incriminating statements without being advised of his rights to counsel or to remain silent.

(3)
Criminal Law § 1382(27)--Appeal--Reversible Error--Evidence-- Admissions.
Defendant's incriminating statements, obtained by authorities in violation of his rights to counsel and to remain silent and erroneously and prejudicially admitted into evidence were not merely cumulative of equally damaging admissible statements volunteered to the booking officer before defendant was formally interrogated where there was evidence that defendant admitted guilty knowledge of his accomplices' plans to commit robbery only after prolonged interrogation and the booking officer did not testify to the details of the volunteered statements but merely to the conclusions he drew from them.

(4)
Criminal Law § 1382(27)--Appeal--Reversible Error--Evidence-- Admissions.
Defendant's trial testimony could not be segregated from his erroneously admitted and prejudicial statements, obtained by authorities in violation of his rights to counsel and to remain silent, to sustain a judgment of conviction where the detailed statements, including admissions of guilty knowledge, left him no choice but to attempt to exculpate himself by testifying that he did not know his codefendant and another intended robbery.

(5)
Criminal Law § 1382(27)--Appeal--Harmless Error--Evidence--Admissions.
Inadmissible statements obtained from codefendant in violation of his rights to counsel and to remain silent and his testimony impelled by their use were not prejudicial to defendant, though the statements and testimony were to the effect that defendant planned a bank robbery culminating in murder, where eight witnesses present at the robbery unequivocally identified defendant as one of the robbers and incriminating evidence was found in his apartment, including a drawing of the robbery area with writing on it identified as defendant's.

(6)
Criminal Law § 1382(27)--Appeal--Harmless Error--Evidence--Admissions.
The erroneous admission into evidence of codefendant's statements, obtained in violation of his rights to counsel and to remain silent, and of his trial testimony identifying defendant as the perpetrator of a robbery culminating in murder was not prejudicial on the issue of defendant's death penalty for the murder of a police officer during the robbery where codefendant's statements and testimony were

not reintroduced at the penalty trial, the prosecutor did not comment on them, and in aggravation ***692** of the penalty, the prosecutor showed defendant's extensive criminal record involving a series of armed bank robberies, as well as the circumstances of the officer's death.

(7)
Criminal Law § 571--Evidence--Accomplices and Corroboration.
Although, in a joint trial of defendant and an accomplice, the prosecution may not call the accomplice as a witness, an accomplice choosing to take the stand need not limit his testimony to himself; accomplices are competent to testify for or against each other, whether they are tried jointly or severally. (Pen. Code, §§ 1321, 1323.5; Code Civ. Proc., § 1879.)

(8)
Homicide § 267--Appeal--Reversible Error--Instructions.
An instruction that defendants could be convicted of murder for the killing of their accomplice during a robbery without proof of malice and solely on the ground that they committed the robbery which was the proximate cause of their accomplice's death withdrew from the jury the crucial issue of whether the shooting of the accomplice was in response to the shooting of an officer or solely to prevent the robbery, and denial of defendants' constitutional right to have the jury determine every material issue presented by the evidence was a miscarriage of justice within the meaning of Const., art. VI, § 4 1/2.

(9)
Criminal Law § 1440(3)--Appeal--Harmless Error--Procedure for Determining Penalty.
Regardless of what conclusion a properly instructed jury might reach on defendant's liability for the death of his accomplice in a bank robbery, where that death was a circumstance of the murder of an officer at the robbery scene, the jury could properly consider in aggravation of the penalty for the officer's murder the accomplice's death (Pen. Code, § 190.1), and error in instructing that defendant could be convicted of murder for the killing of his accomplice without proof of malice, solely on the ground that the robbery was the proximate cause of the accomplice's death was not prejudicial to defendant on the issue of the penalty for the officer's murder.

(10)
Homicide § 4--Participation in Offense Resulting in Homicide.
To convict defendant of first degree murder for a killing committed by another, the following principle may be invoked: Murder is the unlawful killing of a human being with malice aforethought (Pen. Code, § 187), and such malice is implied under § 188 when defendant or his accomplice for a base, anti-social motive and with wanton disregard for human life, does an act involving a high degree of probability that it will result in death. Initiating a gun battle is such an act.

See **Cal.Jur.2d,** Homicide, §§ 15-21; **Am.Jur.,** Homicide (1st ed § 56).

(11)
Homicide § 4--Participation in Offense Resulting in Homicide.
For defendant to be convicted of first degree murder for a killing ***693** committed by another, the killing must be attributable to the act of defendant or his accomplice.

(12)
Homicide § 4--Participation in Offense Resulting in Homicide.
When defendant or his accomplice, with a conscious disregard for life, intentionally commits an act likely to cause death, and his victim or a police officer kills in reasonable response to the act, defendant is guilty of murder, and the killing is attributable, not merely to the commission of a felony, but to the intentional act of defendant or his accomplice committed with conscious disregard of life.

(13)
Homicide § 4--Participation in Offense Resulting in Homicide.
A police officer's killing of another in the performance of his duty cannot be considered an independent intervening cause for which defendant is not liable where the killing is a reasonable response to the dilemma thrust on the policeman by the intentional act of defendant or his accomplice.

(14)
Conspiracy § 8(3)--Criminal--Liability of Coconspirators--Acts in Furtherance of Common Design.

Under the rules defining principals in criminal conspiracies, defendant may be guilty of murder for a killing attributable to his accomplice's act; but to be so guilty, the accomplice must cause the death of another human being by an act committed in furtherance of the common design.

See **Cal.Jur.2d,** Conspiracy, §§ 8-10; **Am.Jur.2d,** Conspiracy, § 14.

(15)
Homicide § 15(6)--First Degree Murder--Killing in Perpetration of Felony.
When murder is established under Pen. Code, §§ 187 and 188, § 189 may properly be invoked to determine the degree of that murder. Thus, though malice aforethought may not be implied under § 189 to make a killing murder unless defendant or his accomplice commits the killing in perpetration of an inherently dangerous felony, when murder is otherwise established, § 189 may be invoked to determine its degree.

(16)
Searches and Seizures § 29--Incidental to Arrest--Search of Premises.
In a prosecution of codefendants for a bank robbery and the murder of an accomplice and a police officer, though officers who were pursuing defendant entered his apartment without a warrant, the trial court properly admitted in evidence articles found therein that connected defendant with the robbery where the complicity of defendant and his address were learned from the dying accomplice and officers found the apartment unoccupied on their arrival.

(17)
Searches and Seizures § 29--Incidental to Arrest--Search of Premises.
A search without a warrant is reasonable when officers enter in fresh pursuit of escaping felons to make an arrest.

(18)
Arrest § 15--Making Arrest--Making Known Official Character--Fresh Pursuit.
Where officers entered defendant's apartment, ***694** after a bank robbery and killing of a policeman, not to make a general exploratory search to find evidence of guilt, but in fresh pursuit to search for a suspect reasonably believed to be in the apartment and to arrest him, the officers were not required to demand entrance and announce their purpose (Pen. Code, § 844) and thus increase their peril by possibly alerting the suspect.

(19)
Searches and Seizures § 29--Incident to Arrest--Search of Premises.
While officers looked through defendant's apartment for a suspected robber and murderer reasonably believed to be there, they could properly examine suspicious objects in plain sight and could properly look for anything that could be used to identify defendant or his accomplices or to expedite their pursuit of defendant; thus, evidence obtained through the search was properly admitted.

(20)
Criminal Law § 545--Evidence--Demonstrative Evidence--Writings for Comparison.
Defendant waived any rights he might have had as to use of his handwriting exemplars where they were made voluntarily after he was advised that he was not required to say anything without advice of counsel and that any statements he made might be used against him.

(21)
Witnesses § 23--Duty to Testify--Self-incrimination--Identification of Accused.
The privilege against self-incrimination does not exempt an accused from appearing for identification and no substantial right is infringed by a police show-up.

(22)
Criminal Law § 107--Rights of Accused--Aid of Counsel.
Though requiring defendant to appear at a police show-up after his indictment cannot be considered a mere investigation, defendant is not prejudiced by the absence of counsel so long as the show-up is not designed to elicit information from defendant or impair his privilege against self-incrimination.

(23)
Criminal Law § 104.5--Rights of Accused--Rights of Discovery.
Defense counsel can effectively obtain information as to whether police show-up proceedings were fairly conducted by pretrial discovery of prosecution witnesses and by cross-

examination on the issue of procedure employed at the show-up.

(24)
Robbery § 23--Evidence--Demonstrative Evidence.
In a prosecution for armed robbery, a weapon found in defendant's possession when arrested but not identified as the one used in the robbery could properly be admitted only on the issue of the minimum penalty. (Pen. Code, §§ 3024, 969c, 1158a.)

(25)
Criminal Law § 536(1)--Evidence--Demonstrative Evidence--Weapons.
Though when defendant is charged under Pen. Code, § 969c, with having been armed at arrest and pleads not guilty, the jury must determine whether he was armed (Pen. Code, § 1158a), when he stipulates to having been armed at arrest for the purpose of the penalty, no purpose is served by admitting evidence that he was armed (Pen. Code, § 1025). ***695**

(26)
Criminal Law § 1382(23)--Appeal--Harmless Error--Evidence-- Demonstrative Evidence.
Evidence that a weapon was found in defendant's possession at the time of his arrest tends to show, not that he committed armed robbery, but only that he is the sort of person who carries deadly weapons, and where, in a prosecution for armed robbery, defendant stipulated to being armed at arrest with a weapon not used in the robbery, the error in admitting testimony that he was armed at arrest was not prejudicial. (Const., art. VI, § 4 1/2.)

(27)
Criminal Law § 1382(10)--Appeal--Harmless Error--Evidence--Facts Otherwise Shown.
Defendant was not prejudiced by evidence that he was arrested in Philadelphia (as being too remote to indicate flight) where there was more cogent evidence of his flight.

(28)
Criminal Law § 52--Defenses--Alibi.
An alibi consists of evidence that defendant was not at the scene of the alleged crime when it was committed and that he did not otherwise participate in its commission.

(29)
Criminal Law § 782--Instructions--Alibi.
In the prosecution for robbery of a bank, though there was evidence that the bank was about 45 minutes driving time from defendant's apartment, the apartment manager's admission, on cross-examination, that her testimony of defendant's asking her for a key more than an hour after the robbery varied somewhat from her pretrial statement that defendant might have asked for a key 15 minutes after the robbery merely cast doubt on the accuracy of her testimony and absent evidence of defendant's being at a place other than the robbery scene at the time of the robbery, the trial court properly refused an alibi instruction.

(30)
Kidnaping § 7, 8--EvidenceInstructions.
In a prosecution for kidnaping for the purpose of robbery, testimony of the victim that defendant's grip on her arm was so firm she felt the impression for some time, that she was pushed toward the door, and that she fell on the sidewalk but was not sure whether she was pushed down, was not sufficient to show bodily harm within the meaning of Pen. Code, § 209, and the trial court did not err in refusing defendant's requested instruction on bodily harm.

(31)
Criminal Law § 1011.1--Procedure for Determining Penalty.
In providing under Pen. Code, § 190.1, for a separate penalty trial for offenses punished by death or life imprisonment, the Legislature expressed a preference for one jury qualified to act throughout the entire case, and this preference does not deprive defendant of due process or the right of an impartial jury, since evidence properly introduced at the trial on the guilt issue is relevant to determining the penalty.

(32)
Jury § 103(7)--Challenges--For Cause--Questions as to Death Penalty.
To exclude jurors opposed to the death penalty does not ***696** favor the prosecution over defendant; defendant has the right to challenge for cause jurors biased in favor of the death penalty, even though they state they are able to render an impartial verdict.

SUMMARY

APPEALS (one automatically taken under Pen. Code, § 1239, subd. (b)) from judgments of the Superior Court of Los Angeles County. H. Burton Noble, Judge. Judgments as to one

defendant reversed; judgments as to other defendant reversed in part and affirmed in part.

Prosecution for murders of defendants' accomplice and of a police officer, for robbery and for kidnaping for the purpose of robbery. Judgments of conviction of one defendant reversed; judgments of conviction of other defendant reversed as to first degree murder of accomplice and affirmed in all other respects.

COUNSEL

Hugh R. Manes, under appointment by the Supreme Court, and Erling J. Hovden, Public Defender (Los Angeles), J. Stanley Brill and James L. McCormick, Deputy Public Defenders, for Defendants and Appellants.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Norman H. Sokolow, Deputy Attorney General, for Plaintiff and Respondent.

TRAYNOR, C. J.

Defendants were convicted on two counts of first degree murder (Pen. Code, §§ 187, 189), one count of first degree robbery (Pen. Code, §§ 211, 211a), and four counts of kidnaping for the purpose of robbery (Pen. Code, § 209). On each count of first degree murder, defendant King's penalty was fixed at life imprisonment and defendant Gilbert's penalty was fixed at death. (Pen. Code, §§ 190, 190.1.) The trial court sentenced King to prison for the term prescribed by law on all counts and sentenced Gilbert to death on the two murder counts and to prison on the remaining counts for the term prescribed by law. King appeals from the judgment of conviction. Gilbert's appeal is automatic. (Pen. Code, § 1239, subd. (b).)

Shortly after 10:30 a.m., January 3, 1964, defendant Gilbert and Edgar Ball Weaver entered an Alhambra savings and loan association office, hereafter referred to as a bank, wearing hats and sunglasses. Gilbert, armed with an automatic pistol, shouted, "Everybody freeze; this is a holdup." ***697** He threw a paper shopping bag with the name Alpha Beta on it at one of the tellers and told her to fill it with money. Weaver, armed with a revolver, stood by the door and kept the bank covered while Gilbert forced an accountant to open the vault and directed the senior teller and the controller to open compartments inside. After obtaining only a box of rolled coins from the vault, Gilbert retrieved the shopping bag and began to fill it with money from the tellers' drawers.

Alhambra Police Officer George Davis, who had been alerted to the robbery, entered the bank with a shotgun and disarmed Weaver. Gilbert then grabbed a woman teller and pushed her toward the door, pointing his pistol at her head and warning Davis: "Drop that gun and back off or I'll shoot the woman." Davis backed toward the front door, saying, "No you won't; you will never shoot." Officer Billy Edward Nixon then arrived at the bank in a police car and saw Officer Davis backing out of the front door with a shotgun. As Gilbert followed Davis out of the bank, he pushed the woman toward Davis and fired, mortally wounding Davis. Weaver picked up his revolver and followed Gilbert out of the bank. As they fled, Officer Nixon shot and wounded Weaver.

Gilbert and Weaver escaped in a white automobile. A witness gave the license number to Officer Nixon, and several bystanders directed him as he pursued the automobile. Several blocks from the bank a man ran up to Officer Nixon and told him that two men who seemed to be trying to get away from something left a white automobile and entered another white automobile and continued north on Granada. Officer Nixon found an unoccupied white automobile with the license number that had been given to him parked facing north on Granada. Farther north on the same street he saw a green automobile that had run over the curb and crashed into a tree. Weaver was inside, semiconscious and bleeding, with a revolver on the seat beside him. Weaver died in the hospital later that evening from a bullet that had entered his back.

Law enforcement officers questioned defendant King about the robbery twice on January 5, two days after the robbery, and again on January 10, when he came to the Alhambra police station pursuant to a request. On each occasion he denied knowledge of the robbery. The San Gabriel police arrested him on February 7, and on February 11 took him to the Alhambra police station. Upon being told that he was ***698** being booked on charges of murder, robbery, and kidnaping, King became very talkative and began to disclose his participation in the robbery. A police officer told him to wait until booking had been concluded before making any statements. He was taken into an interrogation room and during a seven-hour session gave detailed statements about his participation in the robbery.

King told the officers that he met Weaver at a parole meeting. Although he refused to help Weaver rob a "bookie joint," he later accepted Weaver's offer of $100 to steal an automobile. On the morning of January 3, 1964, King stole a white automobile and drove it to Los Feliz and San Fernando Road.

A friend followed in King's own white automobile. Gilbert and Weaver arrived in a green automobile at 10 a.m., and King and his friend followed them to Alhambra. Gilbert and Weaver parked the green automobile and took the stolen automobile. For $1,000 King agreed to wait for them and to drive Gilbert back to Glendale.

After leaving his friend at a bowling alley, King waited for Gilbert and Weaver. When they returned, Weaver, who was bleeding badly, got into the green automobile, and Gilbert got into King's automobile with a shopping bag. Gilbert put a .45 automatic pistol against King's stomach and threatened to kill him unless he did what he was told.

King drove to Gilbert's apartment in Glendale. On the way, Gilbert told King that he and Weaver had robbed a bank. He said that when a policeman entered the bank he used a woman as a hostage and forced the policeman to back out the door. He shot the policeman and fired two shots at another officer who was sitting in a police car. Gilbert said, "I have killed one cop today, and I will kill a lot more before I am through." He also said that he thought that Weaver got in his line of fire and that he had accidentally shot Weaver.

When they arrived at Gilbert's apartment, King waited with the shopping bag while Gilbert obtained a key from the manager. After Gilbert changed clothing, he offered King $1,000 to drive him to Salt Lake City. When King refused, Gilbert came toward him holding a pillow. King heard a click and realized that a pistol under the pillow had misfired. He begged for his life, and, after a few moments, Gilbert said that he was not going to kill him. Gilbert gave King $1,300, and they left the apartment. King waited while Gilbert returned the key to the manager. They drove to an alley where ***699** Gilbert threw his .45 automatic pistol into a garbage can. They went to a bar, and, shortly after Gilbert met a woman friend, he allowed King to leave.

King's statements were admitted into evidence at the trial on the issue of guilt. He contends that they were erroneously admitted over his objection.

(1) Incriminating statements are inadmissible if they were obtained when "(1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his right to remain silent, and no evidence establishes that he waived those rights." (*People v. Dorado,* 62 Cal.2d 338, 353-354 [42 Cal.Rptr. 169, 398 P.2d 361]; *Escobedo v. Illinois,* 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977].)

(2) King's statements were admitted in violation of this rule. When King made them he was in custody and the investigation was no longer a general inquiry into an unsolved crime but had focused upon him. When the police took him into the interrogation room shortly after 3 p.m. on February 11, their purpose was to elicit incriminating statements. A short time after the interview began a tape recorder was started without King's knowledge. At 10 p.m. King was asked to make a formal tape recording for use in court. When he refused to do so he was asked to dictate a statement to be used in court. King said that he would make a statement, but that he would not sign it until he had advice from an attorney. At no time was he advised of his right to counsel or of his right to remain silent.[1] Accordingly, the statements should have been excluded. ***700**

The Attorney General contends, however, that King's statements were not obtained by a process of interrogations that lent itself to eliciting incriminating statements since King began voluntarily to disclose his participation in the robbery before he was asked any questions and before he was taken into the interrogation room. We do not agree with this contention. The statements that were introduced at the trial were not spontaneous, unsolicited declarations but detailed statements obtained through a period of prolonged interrogation.

In *People v. Stewart,* 62 Cal.2d 571, 578 [43 Cal.Rptr. 201, 400 P.2d 97], we pointed out that in most cases an interrogation following an arrest will lend itself to eliciting incriminating statements. (See also *People v. Bilderbach,* 62 Cal.2d 757, 761-762 [44 Cal.Rptr. 313, 401 P.2d 921].) When King made his statements he was not only under arrest but had been in custody for four days. He had been interrogated three times previously concerning the robbery. When the police formally charged him with murder, robbery and kidnaping, the accusatory stage had been reached. When they took him into the interrogation room, their purpose was to elicit incriminating statements, and they had a duty to advise him of his constitutional rights.

In *People v. Cotter, ante,* pp. 386, 393, 398 [46 Cal.Rptr. 622, 405 P.2d 862], and *People v. Jacobson, ante,* pp. 319, 329, 331 [46 Cal.Rptr. 515, 405 P.2d 555], we held that the

fact that a defendant is willing to confess and has already volunteered incriminating statements and confessions does not absolve the police of the duty to advise him of his constitutional rights before eliciting further confessions at stationhouse interrogations. We further held, however, that error in admitting confessions so elicited in the absence of such warning is not prejudicial when there are also in evidence equally damaging admissible confessions that were made before the police improperly elicited the inadmissible confessions.

(3) In the present case, however, the booking officer did not testify to the details of what King volunteered before he was formally interrogated. The officer stated only the conclusions he drew therefrom. There is nothing in the record to indicate that King's volunteered statements during booking were not wholly consistent with his testimony at the trial that he had no knowledge of the planned robbery until after it occurred. There is evidence, however, that King admitted ***701** guilty knowledge of the plans of Weaver and Gilbert only after prolonged interrogation. Thus, King's inadmissible statements were not merely cumulative of equally damaging admissible statements.

(4) There is also no merit in the contention that the erroneous admission of King's statements was not prejudicial to him because he took the stand and testified to committing the same acts that he had admitted in his statements. When King testified, the only evidence other than his statements that had been introduced to connect him with the crime was a fingerprint identified as his on a shopping bag similar to the one that had been used in the robbery. Since the details of his volunteered statements during booking are not in evidence, it is impossible to determine whether detailed evidence of those statements alone would have impelled his testimony. The detailed inadmissible statements, including admissions of guilty knowledge, clearly left King no choice but to take the stand and attempt to exculpate himself by testifying that he did not know that Gilbert and Weaver intended to commit a robbery. Thus, King's testimony cannot be segregated from his erroneously admitted statements to sustain the judgment. (*Fahy v. Connecticut,* 375 U.S. 85, 91 [84 S.Ct. 229, 11 L.Ed.2d 171]; *People v. Davis,* 62 Cal.2d 791, 796 [44 Cal.Rptr. 454, 402 P.2d 142]; *People v. Ibarra,* 60 Cal.2d 460, 463 [34 Cal.Rptr. 863, 386 P.2d 487]; *People v. Dixon,* 46 Cal.2d 456, 458 [296 P.2d 557].) Accordingly, the judgment convicting King must be reversed.

Defendant Gilbert contends that since King's statements and testimony implicated him, the error was also prejudicial as to him, thereby compelling reversal. In *People v. Aranda, ante,* pp. 518, 526 [47 Cal.Rptr. 353, 407 P.2d 265], we held that instructions that an erroneously admitted confession of one defendant implicating his codefendant should be considered against the former only did not cure the error as to the latter. We pointed out that "The giving of such instructions, however, and the fact that the confession is only an accusation against the nondeclarant and thus lacks the shattering impact of a self-incriminatory statement by him (see *People v. Parham,* 60 Cal.2d 378, 385 [33 Cal.Rptr. 497, 384 P.2d 1001]) preclude holding that the error of admitting the confession is always prejudicial to the nondeclarant." This rule also applies to King's testimony that was impelled by the erroneous admission of his statements. ***702**

(5) The effect of King's statements as an accusation against Gilbert was somewhat vitiated by the trial court's instruction that the jury should not consider them as evidence against Gilbert. King's testimony was less damaging to Gilbert than his statements, and the trial court instructed the jury that such testimony must be corroborated and should be viewed with distrust. Regardless of the efficacy of these instructions, King's statements and testimony cannot be considered prejudicial in face of the overwhelming evidence of Gilbert's guilt. Eight witnesses who were present in the bank unequivocally identified Gilbert as one of the robbers, and incriminating evidence was found in his apartment, including a drawing of the Alhambra bank area with writing on it identified as Gilbert's. Under these circumstances, there is no reasonable possibility that the error in admitting King's statements and testimony might have contributed to Gilbert's conviction. (Cal. Const., art. VI, § 4 1/2; *Fahy v. Connecticut,* 375 U.S. 85, 86-87 [84 S.Ct. 229, 11 L.Ed.2d 171]; *People v. Watson,* 46 Cal.2d 818, 836 [299 P.2d 243].)

(6) Nor was the admission of King's statements and testimony at the trial on the issue of guilt prejudicial on the issue of Gilbert's penalty. At the trial on the issue of penalty King's statements were not reintroduced, King did not testify, and the district attorney did not comment upon his statements or testimony in arguing to the jury. Most of the prosecution's evidence at the penalty trial was introduced to show facts in aggravation of Gilbert's penalty. Gilbert was convicted in 1947 of second degree murder upon a plea of guilty for killing a fellow prisoner while serving a term in San Quentin. He was released on parole in 1959, and convicted of burglary in 1960. He escaped from prison in July 1963, and committed

a series of armed bank robberies on October 28, December 6, December 20, December 23, and December 31, 1963.[2] In the face of such facts in aggravation of the penalty and of the circumstances of the killing of Officer Davis, the erroneous admission of King's statements at the trial on the issue of guilt was not prejudicial on the question of Gilbert's penalty. (Cal. Const., art. VI, § 4 1/2; ***703** *Fahy v. Connecticut,* 375 U.S. 85, 86-87 [84 S.Ct. 229, 11 L.Ed.2d 171]; *People v. Watson,* 46 Cal.2d 818, 836 [299 P.2d 243].)

Gilbert also contends that the trial court erroneously refused to instruct the jury to disregard King's testimony as evidence against him, on the ground that such testimony was not part of the People's evidence and was introduced after he rested his case. The contention is frivolous that the corroborated testimony of an accomplice cannot be considered as evidence against a defendant who is tried separately. (Pen. Code, § 1111.) Likewise a defendant has no ground to object to his accomplice's testimony because he is tried jointly. (7) It is true that when the accomplice is also on trial, the prosecution may not call him as a witness. (Pen. Code, § 1323.5.) It does not follow, however, that if he chooses to take the stand his testimony is limited to himself, for accomplices are competent to testify for or against each other, whether they are tried jointly or severally. (Pen. Code, §§ 1321, 1323.5; Code Civ. Proc., § 1879.)[3]

Both defendants contend that since their accomplice was killed by a police officer, the felony-murder doctrine cannot be invoked to convict them of first degree murder for that killing. (Count II.) In *People v. Washington,* 62 Cal.2d 777, 781-782 [44 Cal.Rptr. 442, 402 P.2d 130], we held that since the purpose of the common-law felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit, malice aforethought cannot be imputed under that rule unless a felon commits the killing. We recognized, however, that entirely apart from the felony-murder rule, malice may be established when a defendant initiates a gun battle, and that under such circumstances he may be convicted of murder for a killing committed by another. (8) Although the evidence in the present case would support a conviction of first degree murder on the ground that Weaver was killed in response to a shooting initiated by Gilbert, the court did not instruct the jury on that ground, but gave an erroneous instruction that defendants could be convicted of murder for that killing ***704** without proof of malice and solely on the ground that they committed a robbery that was the proximate cause of their accomplice's death. This instruction withdrew from the jury the crucial issue of whether the shooting of Weaver was in response to the shooting of Davis or solely to prevent the robbery. Since defendants have a constitutional right to have the jury determine every material issue presented by the evidence, the denial of that right was a miscarriage of justice within the meaning of article VI, section 4 1/2 of the California Constitution. (*People v. Modesto,* 59 Cal.2d 722, 730 [31 Cal.Rptr. 225, 382 P.2d 33], and cases cited.)

(9) Regardless of the conclusion that the jury, properly instructed, might have reached on Gilbert's liability for the death of his accomplice, that death was a circumstance of the murder of Officer Davis that the jury could properly consider in aggravation of the penalty for that murder. (Pen. Code, § 190.1.) Thus, the error was not prejudicial to Gilbert on the issue of the penalty for Davis' murder. Accordingly, he is not entitled to a new penalty trial as to that count.

Since the application of the principles of criminal liability for a killing committed by another may arise upon King's retrial, it is appropriate here to define that liability. (10) The following principles may be invoked to convict a defendant of first degree murder for a killing committed by another:

(1) *Proof of malice aforethought.* "Murder is the unlawful killing of a human being, with malice aforethought." (Pen. Code, § 187.) Such malice is implied under Penal Code section 188 when the defendant or his accomplice " 'for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.' " (*People v. Washington,* 62 Cal.2d 777, 782 [44 Cal.Rptr. 442, 402 P.2d 130], quoting *People v. Thomas,* 41 Cal.2d 470, 480 [261 P.2d 1] [concurring opinion].) Initiating a gun battle is such an act.

(11) (2) *The killing must be attributable to the act of the defendant or his accomplice.* (12) When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life. ***705** (13) Thus, the victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act

of the defendant or his accomplice. (See Hart and Honore, Causation in the Law, pp. 296-299; Hall, General Principles of Criminal Law (2d ed.) pp. 270-281.)

(14) (3) *Vicarious criminal liability.* Under the rules defining principals and criminal conspiracies, the defendant may be guilty of murder for a killing attributable to the act of his accomplice. To be so guilty, however, the accomplice must cause the death of another human being by an act committed in furtherance of the common design. (*People v. Schader,* 62 Cal.2d 716, 731 [44 Cal.Rptr. 193, 401 P.2d 665]; *People v. Boss,* 210 Cal. 245, 249 [290 P. 881]; *People v. Ferlin,* 203 Cal. 587, 597 [265 P. 230].)

(4) *The application of Penal Code section 189.* (15) When murder is established under Penal Code sections 187 and 188 pursuant to the principles defined above, section 189 may properly be invoked to determine the degree of that murder. Thus, even though malice aforethought may not be implied under section 189 to make a killing murder unless the defendant or his accomplice commits the killing in the perpetration of an inherently dangerous felony (*People v. Washington,* 62 Cal.2d 777, 780-783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Ford,* 60 Cal.2d 772, 795 [36 Cal.Rptr. 620, 388 P.2d 892]), when a murder is otherwise established, section 189 may be invoked to determine its degree.

(16) Defendants contend that the trial court erred in admitting evidence illegally obtained by a search of Gilbert's apartment. At a hearing outside the presence of the jury the prosecution introduced evidence of the following facts:

Weaver was taken to the hospital shortly after Officer Nixon found him in the crashed automobile. At the hospital he told an F.B.I. agent[4] that he committed the robbery with a man named Gilbert who lived in apartment 28 of a certain apartment house on Los Feliz Boulevard in Glendale. Pursuant to a broadcast of this information, agent Kiel located the apartment house at 1 p.m. When he arrived he saw a man talking to the manager. After the man left, Kiel talked to the ***706** manager, who told him that Mr. Flood, one of the two men who rented apartment 28 the previous day, had left just as he arrived. Kiel relayed this information to agent Schlatter and several other officers when they arrived 10 minutes later. Schlatter obtained a key from the manager and the officers entered the apartment. They found it unoccupied. On the coffee table Schlatter noticed a notebook with a drawing of the area of the Alhambra bank. Inside an Alpha Beta shopping bag he found some rolls of coins bearing the name of the bank. He found an ammunition clip from a .45 caliber automatic pistol, and another agent found on top of a bedroom dresser an envelope from a photography studio with a photograph of Gilbert inside. The photograph was shown to bank employees for identification.

Even though the officers entered Gilbert's apartment without a warrant,[5] the trial court properly admitted into evidence the articles found in the apartment and testimony by fingerprint experts who found fingerprints of Gilbert and Weaver in the apartment and King's fingerprint on the shopping bag. A search without a warrant is reasonable when it is incident to a lawful arrest (*Ker v. California,* 374 U.S. 23 [83 S.Ct. 1623, 10 L.Ed.2d 726]; *Harris v. United States,* 331 U.S. 145 [67 S.Ct. 1098, 91 L.Ed. 1399]; *People v. Boyles,* 45 Cal.2d 652 [290 P.2d 535]),[6] or is justified by a pressing emergency (*People v. Roberts,* 47 Cal.2d 374, 377-378 [303 P.2d 721]; see *McDonald v. United States,* 335 U.S. 451, 454 [69 S.Ct. 191, 93 L.Ed. 153]). (17) It is also reasonable when the officers enter in fresh pursuit of escaping felons to make an arrest.

(18) The officers identified Gilbert and found out where he lived less than two hours after the robbery. En route to Gilbert's apartment, agent Schlatter heard over the radio that three men were suspected of committing the robbery and ***707** that two of them had escaped in the same automobile. When Schlatter arrived at the apartment, agent Kiel told him that one of the occupants had just left. Schlatter testified that "we knew ... there were three robbers. One was wounded and accounted for, one had just left a few minutes before, and there was a third unaccounted for. Presumably he was in the apartment." Since the officers were in fresh pursuit of two robbers who escaped in the same automobile, agent Schlatter's assumption was not unreasonable. The officers entered, not to make a general exploratory search to find evidence of guilt, but in fresh pursuit to search for a suspect and make an arrest. A police officer had been shot, one suspect was escaping, and another suspect was likely to escape. Under these circumstances the officers were not required to demand entrance and announce their purpose (Pen. Code, § 844), for to do so might have alerted the suspect and increased the officers' peril. (See *Ker v. California,* 374 U.S. 23, 37-41 [83 S.Ct. 1623, 10 L.Ed.2d 726]; *People v. Maddox,* 46 Cal.2d 301, 305-306 [294 P.2d 6].)

The search in the present case is thus different from the search condemned in *Stoner v. California,* 376 U.S. 483 [84 S.Ct. 889, 11 L.Ed.2d 56]. In that case, two days after the robbery

of a food market, police officers identified the defendant as one of the two robbers. Without a warrant, the officers went to the defendant's hotel where a clerk let them into his room. They had no reason to believe that the defendant was in his room, for his key was in his mailbox at the hotel desk. The officers were not in fresh pursuit of escaping robbers, and they therefore had no reason to believe that the accomplice was in defendant's room. Moreover, they had time to obtain a warrant. Accordingly, there were no exigent circumstances such as existed in the present case to justify the search.

(19) The search in the present case was also properly limited to and incident to the purpose of the officers' entry. While the officers were looking through the apartment for their suspect they could properly examine suspicious objects in plain sight. (*People v. Roberts,* 47 Cal.2d 374, 378-380 [303 P.2d 721].) Moreover, they could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit. Accordingly, the evidence obtained through the search was properly admitted.

Defendant Gilbert makes several other contentions that affect him only. ***708**

(20) He contends that handwriting exemplars were obtained from him by deceit and in the absence of counsel in violation of the principles of *Escobedo v. Illinois,* 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], and that the exemplars were erroneously admitted at the trial along with testimony based upon them by an expert who identified Gilbert's handwriting on the bank area drawing found in his apartment. Since we agree with the Attorney General's contention that Gilbert waived any rights that he might have had before he made the exemplars, we need not decide whether handwriting exemplars are properly within the rule of *Escobedo v. Illinois, supra.* We also agree that there is no evidence of improper deception by the authorities.

F.B.I. Agent Dean arrested Gilbert in Philadelphia on February 26, 1964. When Dean attempted to interrogate Gilbert about the Alhambra bank robbery, Gilbert refused to talk until he obtained the advice of counsel. Later that day, agent Shanahan interviewed Gilbert. Shanahan told him that he was not required to say anything without advice from an attorney and that any statement he made might be used against him. Gilbert agreed to talk about anything except the California robbery. Shanahan interrogated Gilbert about robberies in Philadelphia in which a demand note had been used and he asked Gilbert for a sample of his handprinting. Gilbert voluntarily wrote some exemplars. Shanahan testified that he obtained those exemplars for the purpose of investigating the Philadelphia robberies and that they were thereafter filed by the F.B.I. in the same manner as fingerprints. He did not tell Gilbert that the exemplars would not be used in any other investigation. Thus, even if Gilbert believed that his exemplars would not be used in California, it does not appear that the authorities improperly induced such belief.

Gilbert further contends that *Escobedo* requires the exclusion of testimony of witnesses who identified him as one of the robbers after they attended a police "show-up" in which he appeared without counsel after indictment.[7]

We rejected a similar contention in ***709** *People v. Lopez,* 60 Cal.2d 223, 241-244 [32 Cal.Rptr. 424, 384 P.2d 16], on the ground that the purpose of the right to counsel in pretrial stages is primarily to insure early representation and adequate preparation for trial, and should not be construed to hinder legitimate police investigation when no substantial right of the accused is at stake. (21) Since the privilege against self-incrimination does not exempt the accused from appearing for the purpose of identification, no substantial right is infringed by the show-up. The principle of the *Lopez* case has not been impaired by *Escobedo v. Illinois,* 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977]. (22) Although requiring a defendant to appear in a show-up after his indictment cannot be considered a mere investigatory procedure, the defendant is not prejudiced by the absence of counsel so long as the show-up is not designed to elicit information from him or impair his privilege against self-incrimination. The defendant is required to do no more at a show-up than he would have to do at trial, and the prosecution may properly use such a procedure to select witnesses and prepare its case. "[A]bsent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case." (*Jones v. Superior Court,* 58 Cal.2d 56, 59 [22 Cal.Rptr. 879, 372 P.2d 919, 96 A.L.R.2d 1213].)

(23) Gilbert contends that counsel is necessary at the show-up to observe whether the proceedings are fairly conducted. Counsel can effectively obtain such information, however, by pretrial discovery of prosecution witnesses and by cross-examination on the issue of the procedure employed during the show-up.

Gilbert contends that the trial court erroneously admitted into evidence testimony that he was armed with a concealed deadly weapon when he was arrested. We agree.

(24) The weapon found in Gilbert's possession when he was arrested was not identified as the one used in the robbery. (Cf. *People v. Riser,* 47 Cal.2d 566, 577 [305 P.2d 1]; Pen. Code, § 12022.) Such evidence could therefore be properly admitted only upon the issue of the minimum penalty. (Pen. Code, §§ 3024, 969c, 1158a.) Penal Code section 3024 provides for increased minimum penalties when the defendant has in his possession a concealed deadly weapon upon arrest. (25) When the defendant is so charged under ***710** section 969c and pleads not guilty, the jury must determine whether he was armed as charged. (Pen. Code, § 1158a.) When the defendant is willing to stipulate to being armed at arrest for the purpose of the penalty, however, as in the present case, no purpose is served by admitting evidence that the defendant was so armed. (Cf. Pen. Code, § 1025.) Moreover, even if the defendant denies being armed upon arrest, the jury should be instructed that evidence that the defendant was armed when arrested should not be considered as tending to prove his guilt. (26) Evidence that a weapon was found in the defendant's possession "tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser,* 47 Cal.2d 566, 577 [305 P.2d 1].) The error in admitting testimony that Gilbert was armed at arrest, however, was not prejudicial. (Cal.Const., art. VI, § 4 1/2.)

(27) Gilbert contends that the trial court erred in admitting evidence that he was arrested in Philadelphia, on the ground that the time and place of his arrest were too remote to prove flight. There was other more cogent evidence of flight, however, and Gilbert was not prejudiced by the evidence that he was arrested in Philadelphia.

Gilbert contends that the trial court improperly refused to give an alibi instruction. (28) An alibi consists of evidence that the defendant was not at the scene of the crime when it was committed and did not otherwise participate in its commission. (29) No evidence was introduced to show that Gilbert was somewhere else at the time of the robbery.

The robbery occurred about 10:45 a.m. on January 3, 1964. King testified that it took about 45 minutes to drive from Alhambra to Gilbert's apartment. The manager of the apartment house testified that Gilbert asked her for a key between 11 a.m. and 12 noon. Upon cross-examination, the manager said that she thought it was closer to 12 than to 11 when Gilbert asked her for the key. She admitted, however, that she previously told the F.B.I. that Gilbert asked her for a key sometime between 11 a.m. and 11:30 a.m. Such evidence did not warrant an alibi instruction. The manager's admission upon cross-examination that her testimony varied somewhat from the statement she previously gave to the F.B.I. did not tend to establish that Gilbert was somewhere else when the robbery occurred. It merely cast some doubt on the accuracy of the manager's testimony. Accordingly, the trial court properly refused an alibi instruction. ***711**

(30) Gilbert contends that the trial court committed prejudicial error in refusing to instruct the jury on the issue of kidnaping with bodily harm. Section 209 of the Penal Code provides that when the person kidnaped suffers bodily harm the penalty shall be either death or life imprisonment without possibility of parole. Thus, if there was evidence of bodily harm and the jury had been instructed thereon, it would not have been limited to choosing between the death penalty and life imprisonment, but would also have been able to fix the penalty at life imprisonment without possibility of parole. (Cf. *People v. Seiterle,* 56 Cal.2d 320 [14 Cal.Rptr. 681, 363 P.2d 913].)

The trial court did not err, however, in refusing to give Gilbert's requested instruction on bodily harm, since there was no evidence to support such an instruction. The victim testified that the grip on her arm was so firm that she "felt the impressions on that arm for sometime," and that she was pushed toward the door. Although she fell down on the sidewalk, she was not sure whether she was pushed down, and there was no evidence that she suffered any injuries in falling. Such trivial injury is not sufficient to constitute bodily harm within the meaning of section 209. In *People v. Jackson,* 44 Cal.2d 511, 516-517 [282 P.2d 898], we held that the victim of a kidnaping suffered no bodily harm as a matter of law, although he was pushed into a sitting position on a couch and his wrists and ankles were chained so as to impair the circulation of blood and make some marks on his wrists.

Gilbert contends, however, that "any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or the projecting of such force against his person" constitutes bodily harm within the meaning of section 209. (See *People v. Tanner,* 3 Cal.2d 279, 297 [44 P.2d 324]; *People v. Britton,* 6 Cal.2d 1, 3 [56 P.2d 494]; *People v. Brown,* 29 Cal.2d 555, 559 [176 P.2d 929]; *People v. Chessman,* 38 Cal.2d 166, 185 [238 P.2d 1001].)

We rejected this definition in the *Jackson* case, however, and pointed out that in the *Tanner* case and the cases following it the kidnaping victim suffered serious bodily injury.

Finally, there is no merit in Gilbert's contention that the trial court improperly excused jurors for cause who stated upon *voir dire* examination that they would have been able fairly to adjudicate guilt even though they were conscientiously opposed to capital punishment. He asserts that such ***712** jurors should have been allowed to serve at the trial on the issue of guilt and a new jury impaneled if necessary for the trial on the issue of penalty.

In *People v. Riser,* 47 Cal.2d 566, 573-576 [305 P.2d 1], we held that it is improper to permit such jurors to serve even though their exclusion is not compelled by a literal reading of Penal Code section 1074, subdivision 8.[8] (31) Moreover, after our decision in the *Riser* case, the Legislature adopted section 190.1, which provides for a separate penalty trial and states that at the trial on the issue of penalty "the trier of fact *shall be the same jury* [as on the issue of guilt] unless, for good cause shown, the court discharges the jury ...." (Italics added.) Thus, in providing for a separate penalty trial, the Legislature expressed a preference for one jury qualified to act throughout the entire case.

Such legislative preference for the same jury at both trials deprives the defendant neither of due process nor of the right to an impartial jury. Since all of the evidence properly introduced at the trial on the issue of guilt is relevant in determining the penalty (Pen. Code, § 190.1), having the same jury avoids repetition of evidence and is thus not an arbitrary requirement. (32) To exclude jurors opposed to the death penalty does not favor the prosecution over the defendant, for the defendant has the right to challenge for cause jurors who have a bias in favor of the death penalty even though they state that they are able to render an impartial verdict of guilt. (See *People v. Riser,* 47 Cal.2d 566, 575 [305 P.2d 1].)

The judgment as to King is reversed. The judgment as to Gilbert on count II is reversed. In all other respects the judgments as to Gilbert are affirmed.

Peters, J., Tobriner, J., Peek, J., and Burke, J., concurred.

MOSK, J.

I concur in affirming the judgments as to Gilbert and I concur in the reversal of count II as to both defendants under compulsion of *People v. Washington* (1965) 62 Cal.2d 777 [44 Cal.Rptr. 442, 402 P.2d 130]. I ***713** dissent, however, from the reversal of the other judgments as to King.

On the ladder of culpability, King was undeniably several rungs below his codefendant Gilbert. This factor was considered by the jury in sparing his life while returning a verdict of death for Gilbert. However, neither a distinction between the extent of involvement of the two defendants nor the facts of this case justify reversing King's conviction.

Viewed in the light most favorable to the People, as it must be (*People v. Sweeney* (1960) 55 Cal.2d 27, 33 [9 Cal.Rptr. 793, 357 P.2d 1049]), the evidence does not support the view of the majority that the incriminating statements of King were obtained when "the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements" (*Escobedo v. Illinois* (1964) 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977]; *People v. Dorado* (1965) 62 Cal.2d 338, 353 [42 Cal.Rptr. 169, 398 P.2d 361]).

The prosecution attempted to introduce into evidence statements made by both defendants. After extensive *voir dire* examination outside the presence of the jury, the trial judge thoughtfully reviewed the facts and the relevant law on confessions. Gilbert's extrajudicial statements were excluded. As to King, however, the court made a specific oral finding: "I think the record is straight. The Court has heard the evidence in this case and is of the opinion that this defendant did not request counsel; that he had no desire to have counsel at the time. That the first time that he knew that he became suspect in this case it was his desire to make a complete confession of his involvement in this offense, on his own volition, and that whatever statement he made, from evidence I heard, was completely voluntary on his part. ... I am not yet prepared to say that a defendant that wants to 'spill his guts,' if I may use that term, and make a complete confession of a crime, that he cannot be permitted to do so unless whoever is questioning him goes out and gets him a lawyer."

Under well-settled rules of law, we are bound by the determination of the trial judge on questions of fact. The trial court found not merely that King did not ask for counsel, but that *he had no desire to have counsel* at the time of his confession. The evidence amply supports that conclusion.

The majority opinion refers to "a period of prolonged interrogation" after arrest and during the accusatory stage ***714** as defined in *Dorado*. That description is superficially accurate, but it overlooks the significant backdrop to this drama.

The tragic crime involved here was committed on January 3, 1964. From January 5 on, King knew that he was a suspect, and indeed he had been interviewed by the police three times. He had more than a month in which to obtain advice of counsel if he had so desired and having suffered two prior convictions of a felony, he could not have been unaware of the need for and the right to legal representation. Instead, however, he brooded about making a clean breast of his involvement, and in fact on one occasion he started for the police station with that in mind but lost his nerve en route. This background makes completely comprehensible his subsequent conduct when, on February 11, he was brought from San Gabriel, where he was in custody on another matter, to the Alhambra police department, where he was placed under arrest on these charges and a process of booking began. During that process King asked Officer Ted Bennett what charges he faced, and the officer responded that he was being booked for two counts of murder, one count of robbery, and one count of kidnaping. Thereupon King became voluble and freely discussed his participation in the events involved herein. Officer Bennett did not undertake a process of interrogation, but on the contrary tried to discourage King from talking and instructed him to wait until later, for his conversation was interrupting the booking procedure. Nevertheless, King persisted and continued to discuss the case. The dialogue related in the footnote summarizes the event.[1] ***715**

The majority emphasizes that the statements introduced in evidence were not those made by King during the booking process but were those elicited during the subsequent period in the interrogation room. I do not consider this to be a significant distinction, for during this entire period King sought to relate his story and, indeed, could not be deterred from doing so. It is understandable that King would choose to volunteer statements regarding his participation in the crimes, since it was his purpose to cast the blame entirely on his codefendant Gilbert.[2] He undoubtedly considered it to his advantage to relate his version of events before his codefendant talked. That he was so inclined is indicated not only by his conduct during the booking procedure but by his earlier start for the police station to confess, frustrated only by his loss of nerve. He stated several times that he could not sleep because he was troubled by his conscience, that he "wanted to see this guy [Gilbert] busted as much as you."

After several hours in the interrogation room, during which King related his version of events, he was asked to prepare a statement and sign it. He recited his story voluntarily and without interruption or interrogation. In fact, one witness described him as being as resolute as if he were dictating a novel.[3]

The first time the evidence suggests any reluctance by King to continue his volunteered narration was his declination to sign the dictated statement. He then added an ***716** appendage reading as follows: "I make this statement freely of my own will, however not being familiar with the laws I do not feel that I should sign this confession or make any tape recordings of the same until I have been advised to do so or not by an attorney. The officers involved did inform me prior to making this statement that it could and possibly would be used in court against me."

At the trial, King asserted he had expressed a desire to phone his girl friend to request her to obtain counsel for him. But on cross-examination he admitted that she would have been unavailable during working hours. Furthermore, King admitted to a witness outside the courtroom during preliminary proceedings that he had not asked for a phone call to contact an attorney, but had read of a recent Supreme Court decision in the newspaper about asking for an attorney, and "you can't blame a guy for trying." In any event, we are bound by the factual determination of the trial court that he neither sought nor desired counsel during this period.

The majority, by reversing King's conviction merely because *Dorado* ritual was not recited, apply a parochial approach to a relatively uncomplicated factual situation. The police officers could not have given legal advice to King *before* he blurted out his incriminating statements at the booking office; it is evident that efforts to deter his narration were unavailing. And it is wholly unrealistic, as well as futile, to require the police to advise a suspect of his right to counsel *after* he, of his own volition and without urging or prompting, takes the initiative to confess. It appears to be of little consequence that in the instant case King's unsolicited confession began during the booking process and continued in an interrogation room. The total circumstances are not as neatly divisible as the majority opinion chooses to make them. *People v. Jacobson* (1965) *ante,* p. 319 [46 Cal.Rptr. 515, 405 P.2d 555], and *People v. Cotter* (1965) *ante,* p.

386 [46 Cal.Rptr. 622, 405 P.2d 862], two cases involving multiple confessions cited by the majority, are inapposite. In both cases the defendants confessed several times during the investigatory stage, later were brought to the police station where they were interrogated and again confessed. The earlier and later events were clearly distinct as to time, location and circumstances. Here, King's incriminatory statement resulted from one continuous process, all of it the product of his contrite frame of mind. The record is utterly devoid of evidence suggesting he was imposed upon, coerced, persuaded or induced ***717** to relate his criminal experience in any manner other than his uninhibited inclination dictated.

The evidence, including King's statement, amply supports his conviction. Therefore, except as to count II, I would affirm the King judgments.

McComb, J., concurred.

The petition of appellant Gilbert for a rehearing was denied February 9, 1966.

Footnotes

1 On *voir dire* examination, King testified that after he was told of the charges against him he asked for an attorney and that he made his statements only after his request was refused. His testimony was controverted, however, by the testimony of an Alhambra police officer who said that King did not ask for an attorney before making his statements. The trial court found that King made his statements without requesting counsel, and, interpreting *Escobedo v. Illinois,* 378 U.S. 478, [84 S.Ct. 1758, 12 L.Ed.2d 977], to require a request for counsel (see *People v. Dorado,* 62 Cal.2d 338, 347-351 [42 Cal.Rptr. 169, 398 P.2d 361]), admitted his statements. On the other hand, the court excluded a statement obtained from Gilbert on the ground that he requested counsel and was denied counsel. Gilbert, who knew of his rights, said during his interrogation, “I want an attorney present during all my answers. I know anything I say is going to be held against me.”

2 The trial court instructed the jury to disregard these crimes unless it believed beyond a reasonable doubt that the evidence established that Gilbert was guilty of committing them. (See *People v. Terry,* 61 Cal.2d 137, 149, fn. 8 [37 Cal.Rptr. 605, 390 P.2d 381].)

3 A defendant who can show prejudice from being tried jointly with others, however, may move for a severance under Penal Code, section 1098. (Cf. *People v. Clark,* 62 Cal.2d 870, 883-885 [44 Cal.Rptr. 784, 402 P.2d 856]; *People v. Aranda, ante,* pp. 518, 529 [47 Cal.Rptr. 353, 407 P.2d 265].) Although each defendant has the benefit of a presumption of innocence and a privilege against self-incrimination, due process of law does not require that the prosecution rely solely upon its own proof in establishing its case.

4 It is a violation of U.S. Code, title 18, section 2113, to rob a savings and loan association whose accounts are insured by the federal government.

5 The officers later obtained warrants to seize the articles found in the apartment.

6 A search cannot be justified as incident to an arrest unless it is substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest. (*Agnello v. United States,* 269 U.S. 20 [46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409]; *People v. Cruz,* 61 Cal.2d 861, 865-866 [40 Cal.Rptr. 841, 395 P.2d 889]; *Castaneda v. Superior Court,* 59 Cal.2d 439, 442 [30 Cal.Rptr. 1, 380 P.2d 641]; *Tompkins v. Superior Court,* 59 Cal.2d 65, 67 [27 Cal.Rptr. 889, 378 P.2d 113]; *People v. Gorg,* 45 Cal.2d 776, 781 [291 P.2d 469].) Therefore, probable cause to arrest Gilbert is not alone sufficient to justify a search of his apartment. (See *Stoner v. California,* 376 U.S. 483, 486-487 [84 S.Ct. 889, 11 L.Ed.2d 856].)

7 Gilbert also contends that he was taken from the jail to the “show-up” at the police building without authorization in violation of Penal Code section 4004. The prosecution was not required to establish such authorization as a foundation for the testimony of witnesses who identified Gilbert, and we must presume that official duty was regularly performed. (Code Civ. Proc., § 1963, subd. 15.) Moreover, we see no compelling reason to adopt an exclusionary rule to enforce compliance with section 4004.

8 Section 1074, subdivision 8, provides that: “A challenge for implied bias may be taken for all or any of the following causes, and for no other. ... 8. If the offense charged be punishable with death, the entertaining of such conscientious opinions *as would preclude his finding the defendant guilty* ....” (Italics added.)

1 On *voir dire* examination at the trial, Officer Bennett made it abundantly clear that King's statements were voluntary and entirely unsolicited. In response to questions from the court, the officer testified as follows:

“The Court: You first took him to the booking officer that has charge of the booking, did you?

“The Witness: Yes, sir.

“The Court: With reference to your taking him there, when did he start to talk about this case?

“The Witness: As he was taken to the booking window, he asked what the charges were. I related the charges, and at that time he started relating his participation in it.

“The Court: Did you make some statement to him at that time about continuing with telling you about it until a later time or what?

“The Witness: I asked him on several occasions, sir, not to relate it at that time, to wait until after he was booked, but he continued on.

“The Court: Now, were you there during the process of the booking?

“The Witness: Yes, sir.

“The Court: And during all the time that he was being—the information was being taken by the booking officer, was he making statements with reference to this case?

“The Witness: Yes, sir, he was.

“The Court: And this started as soon as you told him what he was going to be charged with, is that right?

“The Witness: Yes.

“The Court: All right. Did he continue making this statement during the booking process?

“The Witness: All through the process, sir.”

2 The eagerness of King to talk was deemed significant by his own counsel, who stressed it in closing argument to the jury: “You can also take into consideration the fact that after Mr. King's arrest he did try in all ways that he could to assist the Alhambra police. Now, maybe this assistance came late; maybe Mr. King was interested in self-preservation and wanted to keep from being tied into these particular offenses. But then he did cooperate, and I think that cooperation with the police indicates the possibility of rehabilitation as far as Mr. King is concerned.”

3 The following colloquy was from the testimony of the witness Luciano:

“Q. There were no instructions at all during this dictated statement?

“A. No interruptions whatsoever. He sat down and dictated like he was writing a novel.”

104 Idaho 705
Court of Appeals of Idaho.

STATE of Idaho, Plaintiff-Respondent,

v.

William Douglas CAMPBELL, Defendant-Appellant.

No. 13318.
|
April 26, 1983.

Synopsis
Defendant was convicted before the District Court, First Judicial District, Kootenai County, Roy E. Mosman, J., of robbery, and he appealed. The Court of Appeals, Walters, C.J., held that: (1) delay of approximately 12 months between filing of complaint against defendant and date of trial did not deny defendant's right to speedy trial; (2) police had right to enter defendant's house without warrant, to order suspects to leave house and to arrest them outside; (3) officers were justified by exigencies of circumstances and with probable cause to enter defendant's residence without warrant after defendant's arrest to search for other suspects; (4) evidence was sufficient to support conclusion that two pairs of footwear seized by police from defendant's residence had not been materially altered and should be admitted without chain of custody proof; (5) officer's reference to defendant's traffic record was not fundamental error; (6) prosecutor's references in closing argument to facts not in evidence were not reversible error; and (7) evidence was sufficient to support conviction.

Judgment affirmed.

Attorneys and Law Firms

****1151 *707** Eric T. Nordlof, Coeur d'Alene, for defendant-appellant.

David H. Leroy, Atty. Gen., Lynn E. Thomas, Sol. Gen., Myrna A.I. Stahman, Deputy Atty. Gen., Boise, for plaintiff-respondent.

Opinion

WALTERS, Chief Judge.

William Campbell was convicted of the robbery of a Coeur d'Alene, Idaho, convenience store. He appeals, seeking review of several decisions made by the trial court in the proceedings leading up to, and including, the jury trial where he was found guilty. We affirm the conviction.

The issues raised on appeal are: (1) Was Campbell denied his right to a speedy trial? (2) Should evidence, seized following a warrantless arrest, have been suppressed at trial? (3) Did the trial court err by admitting two pairs of shoes in evidence at trial, in the absence of proof of a complete "chain of custody"? (4) Was the testimony of a police officer, concerning Campbell's traffic record, sufficiently prejudicial to require a new trial? (5) Is Campbell entitled to a new trial because of improper references to facts not in evidence, made by the prosecuting attorney in closing argument? (6) Was ****1152 *708** there sufficient evidence admitted at trial to uphold the conviction? (7) Did the admission of the shoes in evidence, the testimony about traffic violations, and the prosecutor's remarks in summation, *cumulatively* represent reversible error? The facts and procedural context of each issue will be more fully addressed in the respective parts of this opinion.

I. SPEEDY TRIAL

Campbell contends the trial court erred by refusing to dismiss the Information against him, under I.C. § 19–3501. At the time Campbell was tried, I.C. § 19–3501 provided in pertinent part:

> The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed ... [i]f a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the court in which the indictment is triable, after it is found.[1]

The Information, charging Campbell with robbery, was filed on December 9, 1977, and trial was held on November 27, 1978. Campbell filed his motion to dismiss on November 1, 1978, contending that, by local rule of the district court, two terms of court were held each year—one in the spring and one in the fall—and that his right to speedy trial under the statute was violated because his trial did not occur during the spring, 1978, term. The trial judge denied the motion to dismiss, holding—in essence—that "good cause to the contrary" had been shown because Campbell had acquiesced in delay occasioned by pretrial motions filed by a co-defendant.

While this appeal was pending, our Supreme Court issued two opinions which affect the application of I.C. § 19–3501, as it appeared during the time of Campbell's prosecution. In *State v. Carter,* 103 Idaho 917, 655 P.2d 434 (1981), and in *State v. Talmage,* 104 Idaho 249, 658 P.2d 920 (1983), the Court explained that, in 1975, I.C. § 1–706—which had provided for "terms of court"—was repealed by the Legislature in response to the promulgation of I.R.C.P. 77(a). The Court held that, in cases filed after the effective date of the repeal of I.C. § 1–706, the right to speedy trial could not be determined by reference to terms of court. Instead, the court ruled that a four-fold balancing test, enunciated by the United States Supreme Court in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), is to be applied. The factors to be considered under the *Barker* test are: (1) the length of the delay; (2) the reason(s) for delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant occasioned by the delay.

In both *Carter* and *Talmage,* our Supreme Court then proceeded to apply the *Barker* balancing test in determining those appeals. Likewise, we will review Campbell's contention concerning speedy trial under the *Barker* approach, rather than under the "term of court" concept.

A. Length of Delay

The interval between the filing of the complaint against Campbell and the date of trial was approximately twelve months. A delay of this length is sufficient to trigger an inquiry into whether speedy trial has been denied. *State v. Talmage, supra,* 104 Idaho at 252, 658 P.2d at 923. However, when compared to delays which have been alleged to have constituted denial of speedy trial in other actions decided by our Supreme Court, we conclude that the twelve-month period here is not in itself so excessive as to outweigh the other balancing ****1153 *709** factors. *See e.g., State v. Lindsay,* 96 Idaho 474, 531 P.2d 236 (1975) (fourteen month interval between date of filing of complaint and date of trial held not to constitute denial of speedy trial, when balanced against the other factors in the *Barker* test).

B. Reasons for the Delay

Turning to the next balancing factor, the record discloses that both Campbell and a co-defendant named Sadriana were charged with robbery, by separate Informations filed on December 9, 1977. Each defendant was scheduled to appear before District Judge Watt E. Prather for arraignment on December 15, 1977. On that date, the co-defendant Sadriana appeared, entered a plea of not guilty, and his case was scheduled for a two-day trial commencing on February 23, 1978, before District Judge James Towles. At Sadriana's arraignment, the state indicated its desire that the case be consolidated with Campbell's for trial. Campbell did not appear for the scheduled arraignment on December 15, but instead filed a motion to disqualify Judge Prather from presiding over his case. About the same time, Sadriana also filed for disqualification of Judge Towles. Both cases were then assigned to District Judge Dar Cogswell, who rescheduled the trial to commence April 27, even though Campbell had not yet been arraigned.

On January 26, 1978, Campbell appeared before Judge Cogswell for arraignment. A plea of not guilty was entered. There was no objection to consolidation of the two cases; a formal order of consolidation was entered, and the time alloted for trial was increased from two days to four days.

On March 17, co-defendant Sadriana filed a motion to dismiss his Information and noticed the motion for hearing on March 24. On March 20, however, upon discovering that no prosecutor would be available to argue the motion on the scheduled date, counsel for Sadriana prepared an order vacating the March 24 hearing. The order also rescheduled all pretrial motions to April 27, and vacated the April 27 trial date, leaving the trial date "to be rescheduled after the hearing on the motions in the above entitled action." This order was signed by Judge Cogswell on March 20. Believing that he also had a motion pending—a motion to suppress evidence—counsel for Campbell[2] prepared an order identical to the one furnished by Sadriana's attorney and submitted it to Judge Cogswell, who signed that order on March 28.

Counsel for Sadriana then filed on April 20, motions to sever the trials and to suppress evidence, and noticed these motions for hearing on April 27. On April 27, because Judge Cogswell was unavoidably detained in a trial in another county, the hearing was vacated and rescheduled for May 16.

On May 16 counsel appeared before the court. Following argument, Sadriana's motions were taken under advisement pending further briefing and to afford Judge Cogswell time to read the transcript of the preliminary hearing. Also, it was discovered that counsel for Campbell had not, in fact, filed his motion to suppress. That motion was then filed the next day, to be considered by the court at the expiration of the briefing

schedule. Following completion of the briefing schedule, Sadriana's counsel filed notice of request for a speedy trial.

On September 29, Judge Cogswell entered a written order denying all motions under advisement, including Campbell's motion to suppress. By separate order dated the same day, Judge Cogswell rescheduled the cases for trial commencing in late January, 1979. In that order, after reciting that he was mindful of the "defendants' previous request for a speedy trial," the judge specified several reasons why an earlier trial **1154 *710 date was not available, *viz.,* the defendants were not in custody, the matter had been delayed because of the pretrial motions; Judge Cogswell was the only district judge remaining in the First Judicial District, who had not been disqualified and who could preside over the trial; there were other criminal cases of greater or equal priority already scheduled before Judge Cogswell; the January, 1979, date was the first available time for a five-day trial; and that there was "good cause" for the delay in establishing the trial dates.

However, on October 16, 1978, the Supreme Court of Idaho expedited the trial by entering an administrative order appointing District Judge Roy E. Mosman, of the Second Judicial District, to preside at the trial of Campbell and Sadriana. The trial was rescheduled, to commence on November 27, 1978; and it actually was held at that time.

While it appears from this record that some of the delay might be attributable to the state—such as the unavailability of a prosecutor for the motion hearing on March 24 and of Judge Cogswell for the rescheduled hearing on April 27—both of those occasions were precipitated by the filing of a pretrial motion by the co-defendant Sadriana. Otherwise there is no indication in the record that any delays were caused by the state; rather the passage of time resulted from the active pursuit of the pretrial motions by both defendants who were being jointly held for trial. Under the circumstances of this case, the pursuit of these motions was not inconsistent with normal procedures to be expected in the defense of the case. Delays which are appropriate under normal procedure are permissible. *Balla v. State,* 97 Idaho 378, 544 P.2d 1148 (1976), *citing State v. Wilbanks,* 95 Idaho 346, 509 P.2d 331 (1973) *and Olson v. State,* 92 Idaho 873, 452 P.2d 764 (1969).

Campbell argues that his right to a speedy trial should not have been impaired by any delay resulting from consideration of the motions filed by his co-defendant Sadriana. We are not persuaded by this argument.

All of Sadriana's motions were filed before Campbell filed his motion to suppress evidence. Pretrial disposition of Campbell's motion was therefore not delayed or hindered simply because of Sadriana's filings. Campbell voiced no objection or resistance to the simultaneous consideration of his motion with those filed by Sadriana. All motions were decided in the same proceeding. In our view, had that situation not been agreeable to Campbell, he should have taken some affirmative steps to alter the procedure. It is clear that where delays in bringing a defendant to trial are caused or consented to by the defendant, he is considered to have waived the right to be tried within the time fixed by statute or required by constitution. *State v. Talmage, supra,* 104 Idaho at 253, 658 P.2d at 924. Campbell's acquiescence in the procedure followed here, as found by the trial court, reasonably could be interpreted as a consensual waiver of his right to speedy trial.

Under statutes which—like I.C. § 19–3501—protect the right of speedy trial, courts of other states have held that delays caused by a defendant's own motion to suppress, or by motions of a co-defendant where there is no objection to delay interposed by the defendant who subsequently claims a denial of the right to speedy trial, do not violate the statutory right to a speedy trial. *See Garner v. State,* 145 A.2d 68 (Del.1958); *People v. Donalson,* 64 Ill.2d 536, 1 Ill.Dec. 494, 356 N.E.2d 776 (Ill.1976); *People v. Kemp,* 49 Ill.App.3d 270, 7 Ill.Dec. 653, 364 N.E.2d 944 (Ill.Ct.App.1977); and *State v. Fogle,* 25 Wis.2d 257, 130 N.W.2d 871 (Wisc.1964). We conclude that the reasons for the delay in this case weigh more heavily against the defendant Campbell and are more properly attributable to him, than to the state.

C. Assertion of defendant's right to speedy trial

On October 25, 1978, after appointment of Judge Mosman to preside at trial, a **1155 *711 notice was filed setting the trial for November 27. On November 1, Campbell filed his motion to dismiss for lack of speedy trial. Once he disclosed his concern and desire for a speedy trial by that motion, he was tried within approximately a month. He did not make any earlier or insistent demand for trial. *See State v. Lindsay; compare Richerson v. State,* 91 Idaho 555, 428 P.2d 61 (1967); *Jacobson v. Winter,* 91 Idaho 11, 415 P.2d 297 (1966). We hold that this factor also weighs against, rather than in favor of, Campbell's claim of denial of speedy trial.

D. Prejudice

"[P]rejudice is a central factor in analyzing the right to speedy trial." *State v. Holtslander,* 102 Idaho 306, 313, 629 P.2d 702,

709 (1981). Where a defendant fails to make a showing of reasonable possibility of prejudice, this factor should be given very little weight, if any, for the defendant. *Id.* Here, there is no contention that Campbell's ability to present his defense was impeded by the delay. He has not alleged or shown that he was prejudiced by the delay in any way. We can ascribe no weight to the factor of prejudice in this case.

In conclusion, under the applicable balancing test enunciated in *Barker v. Wingo, supra,* we hold that Campbell was not denied his right to speedy trial. While the reasoning of the trial judge, in denying Campbell's motion to dismiss, was directed to the "term of court" issue—rather than to application of the *Barker* balancing test—the result reached by the trial judge was correct and will be upheld on appeal. *See e.g. State v. White,* 102 Idaho 924, 644 P.2d 318 (1982); *Idaho Falls Consol. Hospitals, Inc. v. Bingham County Bd. of County Com'rs,* 102 Idaho 838, 642 P.2d 553 (1982). The order denying the motion to dismiss is affirmed.

II. WARRANTLESS ARREST AND SEIZURE OF EVIDENCE

Campbell next contends that his arrest and the ensuing seizure of evidence in his house were illegal because there were no warrants either for the arrest or for a search. Upon that basis, prior to trial, he moved for suppression of evidence seized at the time of his arrest. The motion was denied by the district court. The court ruled that "[t]he officers had valid reason for entering the house in hot pursuit of suspected felons and in the course of such pursuit were entitled to seize any items of incriminating evidence that were within their plain view." *See State v. Harwood,* 94 Idaho 615, 495 P.2d 160 (1972) (recognizing hot pursuit exception to search warrant requirement); *State v. Ellis,* 99 Idaho 606, 586 P.2d 1050 (1978) (recognizing lawfulness of seizure of evidence in plain view).

Preliminarily, we note that the existence of exigent circumstances, excusing the lack of a warrant, must be determined from the totality of the circumstances. The question of exigency is addressed to the factfinding function of the trial court, and its findings in that regard will not be set aside unless determined to be clearly erroneous. *United States v. Jones,* 635 F.2d 1357, 1360 (8th Cir.1980); *United States v. Flickinger,* 573 F.2d 1349, 1357 (9th Cir.1978), *cert. denied,* 439 U.S. 836, 99 S.Ct. 119, 58 L.Ed.2d 132 (1978); *United States v. Bradshaw,* 515 F.2d 360, 365 (D.C.Cir.1975), *cert. denied,* 424 U.S. 956, 96 S.Ct. 1432, 47 L.Ed.2d 362 (1976); *United States v. Rosselli,* 506 F.2d 627 (7th Cir.1974); *State v. Lloyd,* 61 Haw. 505, 606 P.2d 913 (Hawaii 1980). According to the standard announced by the United States Supreme Court, a finding is not clearly erroneous unless, after reviewing the entire evidence, the court on appeal is left with the definite and firm conviction that a mistake has been committed. *United States v. Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). *See also United States v. Jones, supra.*

We will preface our discussion of the arrest and seizure of evidence by reviewing the evidence as presented at the preliminary hearing in this case. On November 23, ****1156 *712** 1977, at 2:20 a.m., an armed robbery occurred at the Circle K Store located at Twentieth and Sherman Streets in Coeur d'Alene, Idaho. While the store clerk and an off-duty policeman, Donald Brown, were in the store, three persons, armed with a shotgun and with a pistol, entered and demanded the store's money. The intruders wore hats or knit caps on their heads and scarves or handkerchiefs covering portions of their faces. The store clerk gave money to the robbers and they immediately left the store. After waiting a moment, Officer Brown exited the store and observed four persons running up Twentieth Street. Officer Brown initially attempted to follow the suspects by car, but soon determined it would be best if he returned to the store and notified the authorities. Fresh snow had fallen that evening. Officer Brown then undertook to follow the suspects' footprints from the store. Two sets of tracks led to a parked vehicle. The occupants of that vehicle were later apprehended by the police. The other two sets of tracks were followed by Brown for nearly forty minutes and led to a residence located at Seventh and Hastings. These two sets of footprints were distinctive in appearance in that one set of tracks had a "waffle-type" tread and the other had a "ripple-type" tread.

While Brown was following the footprints in the snow, two other officers, Halligan and Merrick, stayed in close proximity to him, in their vehicle. They arrived at the residence at approximately 3:00 a.m., and then proceeded to circle the block for about five minutes. When they returned, Officer Halligan walked to within ten feet of the house on two occasions and looked through a window for approximately two to five minutes. Gazing through an area approximately one foot wide between the curtains on the window, he observed three persons sitting around a table, handling money. Following Officer Halligan's second effort to look into the house, Officer Merrick ordered the occupants

of the house to come out. Campbell and Sadriana walked out of the house and were arrested. Campbell was identified by Officer Brown as a participant in the robbery. Campbell does not now dispute that probable cause existed for his arrest.

After arresting Campbell and Sadriana, the police entered the residence to look for other subjects. The police passed through the living room and kitchen on their way to the basement, where they arrested a Mr. Shepard and a Mr. Williams. At that time, the police confiscated from the basement a 12-gauge shotgun, two pairs of pants which were wet below the knees, and two pairs of wet shoes. One pair of shoes had a waffle tread on the sole; the other pair had a ripple tread. They also confiscated two coats found in the kitchen—one of which contained money in a pocket—and a roll of dimes, a hat similar to one worn during the robbery, and a pair of wet boots that were found in the living room closet. As noted earlier, upon these facts the district court found that the seizure of this evidence was permissible.

A. *Campbell's Arrest*

Campbell contends that his arrest was invalid because it was made without a warrant. He cites *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), decided after his conviction, to support the contention that his arrest was unlawful and that any evidence seized as a result of the arrest should have been suppressed.[3] In *Payton,* the United States Supreme Court held that, absent exigent circumstances, a warrantless and nonconsensual entry by police officers into the arrestee's home to effect a "routine" felony arrest is unreasonable under the Fourth Amendment, and that evidence seized as a result of the entry cannot be used against the arrestee at trial.

In our view, *Payton* is inapposite to Campbell's case. While the police here did ****1157 *713** not have an arrest warrant, neither were they attempting to make a "routine" arrest. As found by the district court below, the police were acting under the exigent circumstances recognized in *Payton,* in arresting Campbell. 445 U.S. at 590, 100 S.Ct. at 1382.

The case of *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), involved circumstances almost identical to the instant matter. There the police, being aware that an armed robbery had just occurred and having probable cause to believe that the robber had entered a house a few minutes before their arrival, entered, searched the house and arrested the suspect. Approving the warrantless entry to arrest the robber and to search for weapons, the United States Supreme Court, speaking through Mr. Justice Brennan, 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 warrant was invalid. Under the circumstances of this case, "the exigencies of the situation made that course imperative." [Citations omitted.] The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

387 U.S. at 298–99, 87 S.Ct. at 1645–46.

The Idaho Supreme Court has enunciated a number of the factors to be considered in determining whether exigent circumstances exist. *See State v. Rauch,* 99 Idaho 586, 590, 586 P.2d 671, 675 (1978). Generally,

> [t]he term "exigent circumstances" refers to a catalogue of exceptional or compelling circumstances which in various situations allow police to enter, search, seize and arrest without complying with the warrant requirements of the United States Constitution.... In the context of warrantless entries and arrests, courts consider six factors to determine if "exigent circumstances" are present: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) a strong reason to believe the suspect is in the premises to be entered; (5) the likelihood that the suspect will escape if not swiftly apprehended; (6) the peaceful circumstances of the entry.

Id. 99 Idaho 590–91, 586 P.2d 675–76.

In this case, the police had reason to believe there were weapons and armed robbery suspects in the house. Prompt action was necessary to effect an arrest while minimizing the chances for violence or escape. In view of the exigent

circumstances, the police had a right to enter the house without a warrant. This right logically would include the less intrusive action of ordering the suspects to leave the house and arresting them outside. We conclude that under both *Warden* and *Payton,* the arrest of Campbell without a warrant was proper.

B. Seizure of Evidence

We next address the activities of the officers when they entered the residence following Campbell's arrest. The police officers were aware that at least three, if not four, people had participated in the robbery. By looking into the house, the police had learned that there were more people inside than just Campbell and Sadriana, who exited the home. When they were arrested, neither Campbell nor Sadriana had any ****1158** ***714** firearms on their persons. The police reasonably could have inferred that firearms remained in the house with at least one other occupant. In our view, under these circumstances, the police had a reasonable basis to believe that the other apparent occupant of the house was connected with the robbery.

The police were faced with two choices. They could have remained outside—knowing that another person, who was possibly armed, remained in the house—while the officers took steps to obtain arrest and search warrants. Or the officers could have entered the house to apprehend the other person or persons in the home and take control of any weapons, as a protective measure. Under these circumstances we cannot say that the district court erred in finding that the officers acted reasonably. *United States v. Jones,* 635 F.2d 1357, 1360 (8th Cir.1980). The officers were justified, by the exigencies of the circumstances and with probable cause, in entering the residence to search for other suspects who likely possessed weapons, instrumentalities, and evidence of the robbery, in order to diminish the potential for danger, escape of a suspect, and destruction of evidence. *Accord: People v. Escudero,* 23 Cal.3d 800, 153 Cal.Rptr. 825, 592 P.2d 312 (Cal.1979); *Faulkner v. State,* 646 P.2d 1304 (Okl.Cr.App.1982); *State v. Hendricks,* 25 Wash.App. 775, 610 P.2d 940 (Wash.App.1980).

All of the items of physical evidence used against Campbell at his trial were found by the police in plain view, once they entered the residence. Our Supreme Court has held that "[w]here incriminating evidence is exposed to the plain view of investigating officers who have not only a right, but also a *duty* to be where they are, and in a position from which it is observed, it is susceptible of lawful seizure." [Emphasis in original.] *State v. Ellis,* 99 Idaho 606, 608, 586 P.2d 1050, 1052 (1978).

Campbell also argues that even if the warrantless entry and "search" of his residence was incident to a valid arrest, the scope of the search went beyond the permissible limits allowed by *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). There it was held that limited warrantless searches incident to arrest,—of the person being arrested and to the area "within his immediate control"—are permissible. Under *Chimel* it is reasonable to remove any weapons that the arrestee may seek to use in order to resist arrest or to effect an escape, and to search for and seize any evidence on the arrestee's person or in the area immediately within his control, to prevent concealment or destruction of the evidence.

Chimel does not apply to the case before us. In the constitutional sense, no "search" incident to an arrest occurred. The arrest of Campbell was made outside the house. The police then entered the house to look for weapons and other persons suspected of participating in a very recent robbery. They entered the home under circumstances approved in *Warden.* The evidence seized from Campbell's house and offered at his trial was in plain view. Under those circumstances, *Chimel* is inapposite. *See State v. Tisdel,* 94 Idaho 329, 487 P.2d 692 (1971). We hold that the district court did not err in denying Campbell's motion to suppress.

III. ADMISSION OF THE SHOES IN EVIDENCE

Two pairs of footwear, seized by the police from Campbell's residence, were offered in evidence at the joint trial of Campbell and Sadriana. These were the shoes with the "waffle" and "ripple" sole treads which were found by the police in the basement of the Campbell house. Foundation for admission of these items was made through the testimony of one of the police officers. The officer identified the shoes as being the same ones found in the residence. Campbell objected to the admission of these exhibits on several grounds. The trial court ****1159** ***715** overruled Campbell's objections and admitted the shoes in evidence. On this appeal we are asked to review only the ground of "chain of custody" in respect to the admission of that evidence.

Campbell argues that the shoes were improperly admitted because no proof was offered by the state that the shoes were "substantially in the same condition," at the time of trial, as

they were in when seized by the arresting officers. Campbell cites *State v. Crook,* 98 Idaho 383, 565 P.2d 576 (1977), to support his contention. In *Crook* our Supreme Court said:

> As a general rule in criminal proceedings, an exhibit must be shown to be in substantially the same condition when offered into evidence as it was when the crime was committed. However, the party offering the exhibit need not exclude all possibility of tampering. Where the court is satisfied that in all reasonable probability the article has not been changed in any material respect, the article is admissible into evidence.... Ordinarily, the party offering an exhibit establishes its chain of custody in order to create a presumption that it was not materially altered. If the chain of custody has been broken, however, the party can still rely upon other evidence to show a lack of material alteration.

98 Idaho at 384, 565 P.2d at 577.

The standard for the admissibility of evidence is whether the trial court can determine that, in all reasonable probability, the proffered exhibit has not been changed in any material respect. *State v. Griffith,* 94 Idaho 76, 481 P.2d 34 (1971). Proof through a chain of custody is a means by which identity of an exhibit may be established and by which the standard of admissibility can be satisfied. However, it is not, of itself, a separate requisite for admissibility.

Here both pairs of shoes were positively identified as being the same ones taken from the Campbell residence. The officer testified in substance that both pairs were in the same condition at trial as they were when they were seized, except they were no longer wet and one of the shoes had a small gap or tear on it that he did not recollect seeing before. The trial court determined that both pairs would be admitted, notwithstanding Campbell's objection on the grounds of lack of chain of custody. Campbell did not assert that the exhibits had been materially altered in any respect. We believe the trial court was justified, under *Crook,* in concluding that the items had not been materially altered, and should be admitted without the chain of custody proof.

We note that, after the shoes were admitted in evidence, the jury requested the use of a magnifying glass to inspect the soles of one of the pairs of shoes. The jury indicated to the court and counsel that a question had arisen as to whether Campbell's initials appeared on the soles of one pair of footwear. Before granting the jury's request, the court and counsel examined the shoes with a magnifying glass. All of them concluded that no such markings appeared. While Campbell now suggests that this "episode" underscores his "chain of custody" argument, we disagree. This incident did not, in our view, create a genuine issue that the shoes had been altered. We hold that the trial court did not abuse its discretion in admitting the shoes in evidence, as exhibits.

IV. TESTIMONY CONCERNING TRAFFIC VIOLATIONS

Campbell contends that the trial court should have ordered a mistrial on its own motion because of prejudicial testimony given by Officer Halligan, concerning Campbell's traffic record. Halligan was the officer who, from outside Campbell's residence, observed three people sitting at the kitchen table handling money. As he was testifying about that occurrence, he mentioned that he had recognized two of the individuals from "professional contacts." At that point, the prosecutor asked that the ****1160 *716** jury be excused. After the jury left, the prosecutor disclosed that he next intended to ask Officer Halligan under what circumstances and for how long he had known one of the defendants. The prosecutor expressed his desire not to invite a mistrial. In response, the court said:

> THE COURT: Well, does your question have to disclose anything about the [sic] prior criminal action? Why can't you just ask him if he's seen one of these people before and if he answers yes ask him which one and for how long a period of time or something bland of that nature.
>
> [BY THE PROSECUTOR]: O.K. If that would suffice that would be fine.

The jury was then returned to the courtroom and the following transpired:

> Q. Now, Sergeant Halligan, you indicated that you'd seen one of those individuals before?
>
> A. Yes, sir, I did.
>
> Q. And which individual was that?
>
> A. Mr. Campbell.
>
> Q. O.K. And how long did you have an opportunity to see him before?
>
> A. Prior to this situation, sir?
>
> Q. Prior to this situation.
>
> A. I contacted Mr. Campbell on several times.

Q. And can you recall the time frame as far as you're contacting him, how long you had an opportunity to observe him and talk to him?

A. Yes, sir. It was on a—I would say traffic violations—

[BY CAMPBELL'S ATTORNEY]: Going to object, your Honor. Ask the jury be excused.

THE COURT: All right. If you will step out again, ladies and gentlemen.

(The jury panel was excused from the courtroom.)

THE COURT: Officer Halligan, it's unbelievable to me that you could sit here through the discussion that we had out of the presence of the jury and then volunteer that information.

THE WITNESS: Well, apparently I misunderstood, sir.

THE COURT: Apparently you did. Now, you have been asked how long you had an opportunity to observe this man. I don't think that's a very hard question to understand, it can be answered in terms of seconds and minutes and hours.

THE WITNESS: Yes, sir.

THE COURT: You don't have to say that there was any arrest involved in it or any investigation involved in it or anything of the nature.

Now, I'll tell you again, if that happens you're probably going to be in contempt of court.

THE WITNESS: Yes, sir.

THE COURT: You have anything you want to say on this record at this time, [counsel for defendant Campbell]?

[BY CAMPBELL'S ATTORNEY]: I think the Court's already said it, your Honor, adequately.

THE COURT: All right. Now, Mr. [Prosecutor], if you want to spend some time with your witness and make sure that he understands exactly what's going on I do not want anything to come in at this stage that might be construed as prejudicial and I'm shocked at that conduct by this officer after we—in his presence discussed that very subject. If you have any worry at all about him being able to understand you why you better go through your questions with him so there's no questions about this again.

[BY THE PROSECUTOR]: O.K. Your Honor, may I have just a few minutes with the officer?

THE COURT: Yes, we'll be in recess.

—

THE COURT: All right. The record should show that the jury has returned.

Proceed with your examination, please.

[BY THE PROSECUTOR:] Thank you, your Honor.

****1161** ***717** Q. Sergeant Halligan, you stated that you'd seen Defendant Campbell before. How many times have you seen him before?

A. Three to four occasions, sir.

Q. O.K. And do you recall how long you had contact with him on each of those occasions?

A. Three of the occasions approximately five to ten minutes. Fourth occasion 15, 20 minutes.

[PROSECUTOR]: O.K. I have no further questions, your Honor, at this time.

Campbell cites *State v. Wrenn,* 99 Idaho 506, 584 P.2d 1231 (1978) for the proposition that evidence of other unrelated criminal activity of the accused is generally inadmissible. There the defendant Wrenn was charged with robbery. On appeal, Wrenn contended the trial court erred in denying a motion for mistrial following the testimony of an officer who had stated that Wrenn was traveling in a stolen automobile when the robbery was committed. On review, our Supreme Court held that this testimony was prejudicial, which prejudice could not be remedied by a cautionary instruction to the jury. The court said:

> The prejudicial effect of such testimony is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character. It, therefore, takes the jury away from their primary consideration of their [sic] guilt or innocence of the particular crime on trial.

99 Idaho 510, 584 P.2d at 1235. The Court concluded that, when coupled with an erroneous instruction on "flight" and in light of the lack of strong evidence of participation in the

robbery, the prejudice to Wrenn was sufficient to warrant a new trial.

Here, Campbell did not move for a mistrial, did not move to strike the reference to traffic violations, did not request a cautionary instruction, and did not assert or argue the admission of the testimony as a basis for new trial; nor did he object to the procedure followed by the court when allowing Officer Halligan to testify. We have held that generally, in the absence of a timely objection at trial, the alleged error will not be considered on appeal, unless it is so fundamental or plain as to constitute a deprivation of due process. *State v. Wells,* 103 Idaho 137, 139, 645 P.2d 371, 373 (Ct.App.1982). *See also State v. Garcia,* 100 Idaho 108, 594 P.2d 146 (1979).

It does not appear that introduction of evidence of a prior felony is fundamental error, which will be reviewed in the absence of a timely objection to the admission of that evidence. *See State v. Knee,* 101 Idaho 484, 616 P.2d 263 (1980). This rule would apply with even greater strength to testimony concerning prior "traffic violations" in a prosecution for a non-traffic offense, where the defendant's traffic record has no bearing on the case.

We are unpersuaded that Halligan's reference to Campbell's traffic record would have induced the jury to believe that Campbell was more likely to have committed the robbery. *State v. Wrenn, supra.* We conclude under these circumstances, that "fundamental" error did not occur and that the trial court was not required, *sua sponte,* to order a mistrial.

V. PROSECUTOR'S SUMMATION

Campbell next contends that the prosecuting attorney, in summation to the jury, made two references to facts not in evidence, which should have required a declaration of a mistrial. First, in the course of discussing the identification of Campbell by one of the officers, the prosecutor made reference to a Mr. Williams, stating that Williams was at Campbell's preliminary hearing, and that he, Williams, looked "almost exactly like" Campbell, according to Campbell's testimony. At that point defense counsel objected on the grounds that there was no evidence that Williams was at the preliminary hearing. The objection was sustained. Second, discussing the testimony ****1162 *718** of Officer Halligan, who had observed three people sitting at the kitchen table in Campbell's house, the prosecutor rhetorically speculated as to what those persons were doing. The prosecutor stated: "There's no cards, there's no poker chips—." At that point defense counsel again objected. The objection was sustained on the basis of an absence of testimony concerning poker chips.

Recently in *State v. LaMere,* 103 Idaho 839, 655 P.2d 46 (1982), the Idaho Supreme Court discussed appellate review of comments made by a prosecutor in closing argument. In *LaMere,* unlike the record here, defense counsel failed to object to alleged prejudicial comments. The Court applied the rule announced in *State v. Sharp,* 101 Idaho 498, 503, 616 P.2d 1034, 1039 (1980), that on appeal, even without objection, we will consider an alleged error, 'where the record shows that the prosecuting attorney has been guilty of misconduct calculated to inflame the minds of jurors and arouse prejudice or passion against the accused by statements in his argument of facts not proved by evidence....'

The Court then considered two allegedly prejudicial statements made by the prosecutor. As to the first one, the Court held that "[w]e do not believe that the comment was so inherently prejudicial that an objection, accompanied by an instruction by the [trial] court to disregard the comment, would not have cured the defect." 103 Idaho at 844, 655 P.2d at 51. As to the second allegedly prejudicial comment, the Court applied a standard based on *State v. LaPage,* 102 Idaho 387, 630 P.2d 674 (1981), and held that "[e]ven if the prosecutor's statement had been properly excluded from the trial, we are convinced beyond a reasonable doubt that the jury would still have arrived at the same verdict. Therefore, we hold it amounted to harmless error." 103 Idaho at 845, 655 P.2d at 52.

We believe that the statements made by the prosecutor in this case fall within the *Sharp* rule applied by our Supreme Court to the first prosecutorial remark examined in *LaMere.* Here, the comments of the prosecutor were not so inherently prejudicial that an objection, and accompanying instruction, would not have cured the defect. Although objections were, in fact, made and sustained, no immediate request was made at that time for a specific instruction to the jury to disregard either of the prosecutor's remarks. Moreover, the jury had been generally instructed—before opening arguments and again at the close of the evidence, but before counsels' summations—that statements and remarks of counsel were not evidence and that any such statements or remarks which did not conform to the evidence were to be disregarded. We hold, under these circumstances, that no reversible error occurred.

VI. SUFFICIENCY OF THE EVIDENCE TO SUPPORT CONVICTION

Campbell next contends that the evidence in this case was insufficient to support a conviction. He points to inconsistencies in the testimony; he questions the identification made by Officer Brown; he urges that the police could have made a more thorough investigation by way of taking fingerprints and making footprint comparisons; he argues that other evidence of the robbery could have been, but was not, produced; and he suggests that inferences other than guilt could be drawn from the evidence.

By and large, these contentions concern matters which could be argued to the jury, and which fall within the province of the jury—to be considered along with the evidence submitted—in determining whether the state had proven guilt beyond a reasonable doubt. We are guided by the principle that where a jury verdict is supported by substantial, competent evidence, it will not be disturbed on appeal. *State v. Olin,* 103 Idaho 391, 648 P.2d 203 (1982). We are required to review the record to determine if such evidence exists, and we ****1163 *719** are precluded from substituting our judgment for that of the jury as to the credibility of witnesses, the weight of the testimony, and the reasonable inferences to be drawn from the evidence. *State v. Warden,* 100 Idaho 21, 592 P.2d 836 (1979). Having reviewed the record fully, we hold the evidence does sustain the verdict.

VII. CUMULATIVE ERROR

Finally, Campbell argues that the admission of the shoes in evidence, the testimony concerning his traffic violations, and the allusion by the prosecutor during closing argument to facts not in evidence—when considered together—constitute more than harmless error and require a reversal. We disagree.

Under the "cumulative error" doctrine, an accumulation of irregularities, each of which in itself might be harmless, may in the aggregate show the absence of a fair trial. *State v. Vallejos,* 86 N.M. 39, 519 P.2d 135, 139 (N.M.Ct.App.1974). The Montana Supreme Court in *State v. McKenzie,* 608 P.2d 428, 448, *cert. denied* 449 U.S. 1050, 101 S.Ct. 626, 66 L.Ed.2d 507 (Mont.1980), observed that the concepts of "harmless error" and "cumulative error" are not interrelated.

> "Harmless error" refers to technical errors, which do not require reversal.... "Cumulative error" refers to a number of errors which prejudice defendant's right to a fair trial.

Here we have held that the admission of the shoes in evidence was not error; and that there was no reversible error resulting either from the reference to traffic violations or from the prosecutor's statements during closing argument. With respect to admission of evidence, we have found no errors to "accumulate." We are left with the prosecutor's remarks, and those have been held nonreversible in the preceding section of this opinion.

The judgment of conviction is affirmed.

SWANSTROM and BURNETT, JJ., concur.

All Citations

104 Idaho 705, 662 P.2d 1149

Footnotes

1 It has been held that the provision concerning indictments is equally applicable to prosecutions based upon an information. *See* I.C. § 19–1304; *State v. Hobson,* 99 Idaho 200, 579 P.2d 697 (1978). We note also that I.C. § 19–3501 was amended in 1980 by deleting the reference to "the next term of the court in which the indictment is triable, after it is found" and inserting instead, the words "within six (6) months from the date that the indictment or information is filed with the court." 1980 Idaho Sess.Laws ch. 102, p. 226 § 1.

2 Campbell is represented on this appeal by counsel other than the one who represented him at trial.

3 *Payton* was held applicable retroactively, to cases pending on direct appeal when it was decided, in *United States v. Johnson,* 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).

662 P.2d 1149

End of Document

96 S.Ct. 2406
Supreme Court of the United States

UNITED STATES, Petitioner,

v.

Dominga SANTANA and William Alejandro.

No. 75-19.
|
Argued April 27, 1976.
|
Decided June 24, 1976.

Synopsis

After being indicted for possessing heroin with intent to distribute, defendants moved to suppress heroin and marked money seized by the police at the time of the arrests. The United States Court of Appeals for the Third Circuit affirmed a district court order granting the suppression motion, and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that while standing in doorway of her house, defendant was in a "public place" for purposes of the Fourth Amendment; that when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to make a warrantless arrest in a public place upon probable cause and did not violate the Fourth Amendment; that by retreating into a private place, her house, defendant could not thwart an otherwise proper arrest that had been set in motion in a public place, the threshold of her house; and that since there was a need for the police to act quickly to prevent the destruction of narcotics evidence, there was a true "hot pursuit," and therefore the warrantless entry by the police into the house to make the arrest was justified, as was the ensuing search incident thereto.

Reversed.

Mr. Justice White filed a concurring opinion.

Mr. Justice Stevens filed a concurring opinion in which Mr. Justice Stewart joined.

Mr. Justice Marshall filed a dissenting opinion in which Mr. Justice Brennan joined.

****2407** Syllabus[*]

***38** On the basis of information that respondent Santana had in her possession marked money used to make a heroin "buy" arranged by an undercover agent, police officers went to Santana's house where she was standing in the doorway holding a paper bag, but as the officers approached she retreated into the vestibule of her house where they caught her. When she tried to escape, envelopes containing what was later determined to be heroin fell to the floor from the paper bag, and she was found to have been carrying some of the marked money on her person. Respondent Alejandro, who had been sitting on the front steps, was caught when he tried to make off with the dropped envelopes of heroin. After their indictment for possessing heroin with intent to distribute, respondents moved to suppress the heroin and marked money. The District Court granted the motion on the ground that although the officers had probable cause to make the arrests, Santana's retreat into the vestibule did not justify a warrantless entry into the house on the ground of "hot pursuit." The Court of Appeals affirmed. Held:

****2408** 1. Santana, while standing in the doorway of her house, was in a "public place" for purposes of the Fourth Amendment, since she was not in an area where she had any expectation of privacy and was not merely visible to the public but was 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 make a warrantless arrest in a public place upon probable cause and did not violate the Fourth Amendment. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598. P. 2409.

2. By retreating into a private place, Santana could not defeat an otherwise proper arrest that had been set in motion in a public place. Since there was a need to act quickly to prevent destruction of evidence, there was a true "hot pursuit," which need not be an extended hue and cry "in and about (the) public streets," and thus a warrantless entry to make the arrest was ***39** justified, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782, as was the search incident to that arrest. Pp. 2409-2410.

Reversed.

Attorneys and Law Firms

Frank H. Easterbrook, Washington, D. C., for petitioner, pro hac vice, by special leave of Court.

Dennis H. Eisman, Philadelphia, Pa., for respondent Santana.

Mr. Justice REHNQUIST delivered the opinion of the Court.

I

On August 16, 1974, Michael Gilletti, an undercover officer with the Philadelphia Narcotics Squad arranged a heroin "buy" with one Patricia McCafferty (from whom he had purchased narcotics before). McCafferty told him it would cost $115 "and we will go down to Mom Santana's for the dope."

Gilletti notified his superiors of the impending transaction, recorded the serial numbers of $110 (Sic) in marked bills, and went to meet McCafferty at a prearranged location. She got in his car and directed him to drive to 2311 North Fifth Street, which, as she had ***40** previously informed him, was respondent Santana's residence.

McCafferty took the money and went inside the house, stopping briefly to speak to respondent Alejandro who was sitting on the front steps. She came out shortly afterwards and got into the car. Gilletti asked for the heroin; she thereupon extracted from her bra several glassine envelopes containing a brownish-white powder and gave them to him.

Gilletti then stopped the car, displayed his badge, and placed McCafferty under arrest. He told her that the police were going back to 2311 North Fifth Street and that he wanted to know where the money was. She said, "Mom has the money." At this point Sergeant Pruitt and other officers came up to the car. Gilletti showed them the envelope and said "Mom Santana has the money." Gilletti then took McCafferty to the police station.

Pruitt and the others then drove approximately two blocks back to 2311 North Fifth Street. They saw Santana standing in the doorway of the house[1] with a brown paper bag in her hand. They pulled up to within 15 feet of Santana and got out of their van, shouting "police," and displaying their identification. As the officers approached, Santana retreated into the vestibule of her house.

The officers followed through the open door, catching her in the vestibule. As she tried to pull away, the bag tilted and "two bundles of glazed paper packets with a white powder" fell to the floor. Respondent ****2409** ***41** Alejandro tried to make off with the dropped envelopes but was forcibly restrained. When Santana was told to empty her pockets she produced $135, $70 of which could be identified as Gilletti's marked money. The white powder in the bag was later determined to be heroin.

An indictment was filed in the United States District Court for the Eastern District of Pennsylvania charging McCafferty with distribution of heroin, in violation of 21 U.S.C. s 841, and respondents with possession of heroin with intent to distribute in violation of the same section. McCafferty pleaded guilty. Santana and Alejandro moved to suppress the heroin and money found during and after their arrests.

The District Court granted respondents' motion.[2] In an oral opinion the court found that "(t)here was strong probable cause that Defendant Santana had participated in the transaction with Defendant McCafferty." However, the court continued:
"One of the police officers . . . testified that the mission was to arrest Defendant Santana. Another police officer testified that the mission was to recover the bait money. Either one would require a warrant, one a warrant of arrest under ordinary circumstances and one a search warrant."

The court further held that Santana's "reentry from the doorway into the house" did not support allowing the police to make a warrantless entry into the house on the grounds of "hot pursuit," because it took "hot pursuit" to mean "a chase in and about public streets." The court did find, however, that the police ***42** acted under "extreme emergency" conditions. The Court of Appeals affirmed this decision without opinion.

II

In United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), we held that the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment. Thus the first question we must decide is whether, when the police first sought to arrest Santana, she was in a public place.
While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the

cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). 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. Hester v. United states, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924). 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.

The only remaining question is whether her act of retreating into her house could thwart an otherwise proper arrest. We hold that it could not. In Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), we recognized the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons. This case, involving a true "hot pursuit,"[3] is clearly governed by *Warden* ; ****2410** the need to act quickly here is even greater than in that case while the intrusion is much less. The District Court was correct in concluding that "hot ***43** pursuit" means some sort of a chase, but it need not be an extended hue and cry "in and about (the) public streets." The fact that the pursuit here ended almost as soon as it began did not render it any the less a "hot pursuit" sufficient to justify the warrantless entry into Santana's house. Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence. See Vale v. Louisiana, 399 U.S. 30, 35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970). Once she had been arrested the search, incident to that arrest, which produced the drugs and money was clearly justified. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); Chimel v. California, 395 U.S. 752, 762-763, 89 S.Ct. 2034, 2039, 23 L.Ed.2d 685 (1969).

We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient of escaping to a private place. The judgment of the Court of Appeals is

Reversed.

Mr. Justice WHITE, concurring.

It is not disputed here that the officers had probable cause to arrest Santana and to believe that she was in the house. In these circumstances, a warrant was not required to enter the house to make the arrest, at least ***44** where entry by force was not required. This has been the longstanding statutory or judicial rule in the majority of jurisdictions in the United States, see ALI, A Model Code of Pre-arraignment Procedure 306-314, 696-697 (197, and has been deemed consistent with state constitutions, as well as the Fourth Amendment. It is also the Institute's recommended rule. Id., s 120.6. I agree with the Court that the arrest here did not violate the Fourth Amendment.

My Brother MARSHALL, Post, p. 2410, and United States v. Watson, 423 U.S. 411, 433, 96 S.Ct. 820, 832, 46 L.Ed.2d 598 (1976) (dissenting opinion), would reinterpret the Fourth Amendment to sweep aside this widely held rule and to establish a constitutional standard requiring warrants for arrests except where exigent circumstances clearly exist. The states are, of course, free to limit warrantless arrests, as is Congress; but I would not impose his suggested nationwide edict, founded as it is on a belief in the superior wisdom of the Members of this Court and their power to divine that the country's practice to this date with respect to arrests is unreasonable within the meaning of the Fourth Amendment.

Mr. Justice STEVENS, with whom Mr. Justice STEWART joins, concurring.

When Officer Gilletti placed McCafferty under arrest, the police had sufficient information to obtain a warrant for the arrest of Santana in her home. It is therefore important to note that their failure to obtain a warrant at that juncture was both (a) a justifiable police decision, and (b) even if not justifiable, harmless.

The decision was justified by the significant risk that the marked money would no longer be in Santana's possession if the police waited until a warrant could be obtained. The failure to seek a warrant was harmless ***45** because it would have been proper to keep the Santana residence under surveillance while the warrant was being sought; since she ventured into plain view, a warrantless arrest would have been justified before the warrant could have been procured.

I therefore join the opinion of the Court.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

Earlier this Term, I expressed the view that, in the absence of exigent circumstances, **2411 the police may not arrest a suspect without a warrant. United States v. Watson, 423 U.S. 411, 433, 96 S.Ct. 820, 832, 46 L.Ed.2d 598 (1976) (dissenting opinion). For this reason, I cannot join either the opinion of the Court or that of Mr. Justice WHITE, each of which disregards whether exigency justified the police decision to approach Santana's home without a warrant for the purpose of arresting her. Nor can I accept Mr. Justice STEVENS' approach, for while acknowledging that some notion of exigency must be asserted to justify the police conduct in this case, Mr. Justice STEVENS fails to consider that the exigency present in this case was produced solely by police conduct. I would remand the case to allow the District Court to determine whether that police conduct was justifiable or was solely an attempt to circumvent the warrant requirement.

The Court declines today to settle the oft-reserved question of whether and under what circumstances a police officer may enter the home of a suspect in order to make a warrantless arrest. United States v. Watson, supra, 423 U.S., at 418 n. 6, 96 S.Ct., at 825; Gerstein v. Pugh, 420 U.S. 103, 113 n. 13, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 480-481, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564 (1971); Jones v. United States, 357 U.S. 493, 499-500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958). Seizing upon the fortuity that Santana was standing in her doorway when the police *46 approached her home for the purpose of entering and arresting her, the Court ignores Mr. Justice WHITE's repeated advocacy of the common-law rule on warrantless entries, Ante, p. 2410; Coolidge v. New Hampshire, supra[1], 403 U.S., at 511-512, n. 1, 91 S.Ct. at 2061 (White, J., concurring and dissenting), and treats this case as a simple application of Watson.

It is somewhat more than that, for the Court takes the opportunity to refine the contours of that decision. Thus, if I correctly read the Court's citation to the "open fields" doctrine of Hester v. United States, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924), the Court holds that the police may enter upon private property to make warrantless arrests of persons who are in plain view and outdoors; and the Court applies that doctrine today to persons who are arguably within their homes but who are "as exposed" to the public as if they were outside. But the Court's encroachment upon the reserved question is limited. *47 Thus, the Court's citation of *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967), does not suggest that a plain view of a suspect is alone sufficient to justify warrantless entry and seizure in the home. Indeed, the Court's rejection of sight alone as a basis for warrantless entry and arrest is made patent, in Mr. Justice STEWART's phrase, by negative implication from the Court's need to elaborate a hot pursuit justification for the police following Santana into her home. Cf. Coolidge v. New Hampshire, supra, 403 U.S., at 480-481, 91 S.Ct., at 2045. Presumably, if plain view were the touchstone, Santana would have been just as liable to warrantless **2412 arrest as she retreated several feet inside her open door as she was when standing in the doorway.

The Court's doctrine, then, appears Sui generis, useful only in arresting persons who are "as exposed to public view, speech, hearing, and touch," Ante, at 2409, as though in the unprotected outdoors. Narrow though it may be, however, the Court's approach does not depend on whether exigency justifies an arrest on private property, and thus I cannot join it.

Mr. Justice STEVENS focuses on what I believe to be the right question in this case whether there were exigent circumstances and reaches an affirmative answer because he finds a "significant risk that the marked money would no longer be in Santana's possession if the police waited until a warrant could be obtained." Ante, at 2410. I agree that there were exigent circumstances in this case. McCafferty was arrested a block and a half down the street from Santana's home. Although the arresting officers did not see anyone in Santana's home watching the arrest, App. 16, one officer testified: "We were a block and a half from her home when the arrest was made. I am sure that the word would have been back within a matter of seconds or minutes." Id., at 51. That is undoubtedly a reasonable conclusion to draw *48 from the facts of the arrest; and the danger that the evidence would be destroyed and the suspects gone before a warrant could be obtained would ordinarily justify the police's quick return to Santana's home and the warrantless entry and arrest. If that is the basis of the "significant risk" to which Mr. Justice STEVENS refers, I have no difference with him on that score.[2]

I do not believe, however, that these exigent circumstances automatically validate Santana's arrest. The exigency that justified the entry and arrest was solely a product of police conduct. Had Officer Gilletti driven McCafferty to a more remote location before arresting her, it appears that no exigency would have been created by the arrest; in such an event a warrant would have been necessary, in my view, before Santana could have been arrested. United States v. Watson, 423 U.S., at 433, 96 S.Ct., at 832 (Marshall, J.,

dissenting). It is not apparent on this record why Officer Gilletti arrested McCafferty so close to Santana's home when the arresting officers were clearly aware that such a nearby arrest would necessitate the prompt arrest of Santana. App. 51. While a police decision that the time is right to arrest a suspect should properly be given great deference, cf. Hoffa v. United States, 385 U.S. 293, 310, 87 S.Ct. 408, 417, 17 L.Ed.2d 374 (1966), the power to arrest is an awesome one and is subject to abuse. An arrest may permit a search of premises incident to the arrest, a search that otherwise could be carried out only upon probable cause and pursuant to a search warrant. Likewise, an arrest in circumstances such as those presented here may create exigency that may justify a search ***49** or another arrest. When an arrest is so timed that it is no more than an attempt to circumvent the warrant requirement, I would hold the subsequent arrest or search unlawful. See *Coolidge v. New Hampshire*, 403 U.S., at 469-471, 91 S.Ct., at 2040; *Vale v. Louisiana*, 399 U.S. 30, 35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970); *Chimel v. California*, 395 U.S. 752, 767, 89 S.Ct. 2034, 2042, 23 L.Ed.2d 685 (1969); Abel v. United States, 362 U.S. 217, 226 and 230, 80 S.Ct. 683, 690 and 692, 4 L.Ed.2d 668 (1960); United States v. Rabinowitz, 339 U.S. 56, 82, 70 S.Ct. 430, 442, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting); United States v. Lefkowitz[3] , 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L.Ed. 877 (1932). Accordingly, I would remand this case for consideration of whether the police decision to ****2413** arrest McCafferty a block and a half from Santana's home was for the sole purpose of creating the exigent circumstances that otherwise would justify Santana's subsequent arrest.

All Citations

427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 An Officer Strohm testified that he recognized Santana, whom he had seen before. He also indicated that she was standing directly in the doorway one step forward would have put her outside, one step backward would have put her in the vestibule of her residence.

2 It is not apparent on what grounds respondent Alejandro had standing to protest the seizures. However, the Government did not raise this issue below and consequently we do not reach it.

3 Warden was based upon the "exigencies of the situation," 387 U.S., at 298, 87 S.Ct., at 1645, and did not use the term "hot pursuit" or even involve a "hot pursuit" in the sense that that term would normally be understood. That phrase first appears in Johnson v. United States, 333 U.S. 10, 16 n. 7, 68 S.Ct. 367, 370, 92 L.Ed. 436 (1948), where it was recognized that some element of a chase will usually be involved in a "hot pursuit" case.

1 Mr. Justice WHITE would have us bequeath our duty to interpret the Constitution to the States and Congress. As I said in response to a similar argument in Watson:

"(T)he doctrine of deference that the Court invokes is contrary to the principles of constitutional analysis practiced since Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) . . . . (I)t is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice. '(N)o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.' Walz v. Tax Comm'n, 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970). See also Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Our function in constitutional cases is weightier than the Court today suggests: where reasoned analysis shows a practice to be constitutionally deficient, our obligation is to the Constitution, not the Congress." 423 U.S., at 443, 96 S.Ct., at 837 (dissenting opinion) (footnote omitted).

2 I assume that Mr. Justice STEVENS is not suggesting that exigent circumstances justifying a warrantless search or arrest are always present regardless of whether the suspect is aware the police are on his trail whenever police have probable

cause to believe the suspect is in possession of evidence. Cf. Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

3 Because I cannot agree that police may arrest a suspect in a public place solely upon probable cause, I cannot agree with Mr. Justice STEVENS that any police error in deciding to return to Santana's home for the purpose of entering and arresting her was harmless.

Blue to Gold

LAW ENFORCEMENT TRAINING