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Does Payton Apply?: Absent Consent or Exigent Circumstance, Are Warrantless, In-Home Police Seizures and Arrests of Persons Seen Through an Open Door of the Home Legal?

Jennifer Marino

The police do not need a warrant to arrest someone who is in a public place if the police have probable cause for the arrest.\(^1\) With few exceptions,\(^2\) however, the police need a warrant to arrest a person inside of his home.\(^3\) These exceptions are called exigent circumstances and include instances where the police are in hot pursuit of a suspect\(^4\) or where the police have probable cause\(^5\) to think that the suspect will destroy evidence.\(^6\) Additionally, it is possible for a person to be in his home but also sufficiently in a public place to allow the police to arrest him, such as when a suspect is straddling the open threshold of his home.\(^7\)

What remains in question is whether the police may arrest someone without a warrant when he is inside of his home but

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\(^1\) B.A. 1991, Lehigh University; M.A. 1993, University of Delaware; J.D. Candidate 2006, University of Chicago.


\(^3\) United States v United States District Court, 407 US 297, 318 (1972) (noting that the exceptions to the warrant requirement are “few in number and carefully delineated”).

\(^4\) Payton v New York, 445 US 573, 583–90 (1980) (establishing that the police need a warrant to arrest someone in his home, absent exigent circumstances). See also Steagald v United States, 451 US 204, 205–06 (1981) (holding that, absent exigent circumstances or consent, the police need a search warrant to arrest someone in the home of a third party).

\(^5\) Warden v Hayden, 387 US 294, 298–99 (1967) (holding that the police do not have to delay an investigation and pursuit of a suspect where the delay could put the police or third parties in danger). See also United States v Santana, 427 US 38, 42 (1976) (stating that the suspect’s retreat into her home could not “thwart” an otherwise proper arrest).

\(^6\) See Minnesota v Olson, 495 US 91, 100–01 (1990) (suggesting that, absent hot pursuit, probable cause of exigent circumstances is necessary).

\(^7\) See Welsh v Wisconsin, 466 US 740, 749–50 (1984) (discussing situations that are recognized as exigent circumstances, such as when there is a threat that evidence will be destroyed).

\(^7\) Santana, 427 US at 40 (describing the suspect as standing “in the doorway” of her home).
visible to the police and the public because of an open door. Supreme Court precedents do not resolve this issue definitively and the circuits differ in their answers to the question.\(^8\)

Section I of this Comment reviews relevant Fourth Amendment doctrines—including the expectation of privacy and the plain view doctrines—and the Supreme Court decisions that preclude warrantless arrests in the home absent exigent circumstances. Section II explores the circuit split by analyzing cases from four different circuits: the Ninth, Second, Sixth, and Seventh Circuits. Finally, in Section III, this Comment discusses possible solutions to the issue of whether the Fourth Amendment precludes the police from making warrantless arrests of individuals who are inside their homes, but visible through an open door.\(^9\) This Comment suggests that warrantless in-home arrests are presumptively unconstitutional, even if the police do not physically enter the home, but that the existence of exigent circumstances or consent can overcome that presumption.

I. ARREST WARRANTS

This Section briefly reviews several Fourth Amendment doctrines that are relevant to plain view doorway arrests. This Section then discusses three Supreme Court cases that form the framework of the circuit split: *United States v Watson,\(^10\) United States v Santana,\(^11\) and United States v Payton.\(^12\) These cases

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8 Compare *United States v Morgan*, 743 F2d 1158 (6th Cir 1984) (holding that absent exigent circumstances, police may not enter the home to make an arrest without a warrant) with *United States v Vaneaton*, 49 F3d 1423 (9th Cir 1995) (holding that when a defendant voluntarily exposes himself to the public view, the presumption against the unreasonableness of a warrantless seizure in the home is overcome); *United States v Gori*, 230 F3d 44 (2d Cir 2000) (stating that the Fourth Amendment warrant requirement was not implicated when the apartment door was voluntarily opened in response to a knock). Recently, the Seventh Circuit held that such an arrest violated the Fourth Amendment. *Hadley v Williams*, 368 F3d 747 (7th Cir 2004).

9 This Comment does not analyze "doorway" arrests. A "doorway" arrest occurs when the police seize and arrest a suspect at the threshold of his home, though they do not possess a warrant. See *Santana*, 427 US at 42 (reasoning that a person standing in the open threshold of her home was in a public place); *United States v Carrion*, 809 F2d 1120, 1128 (5th Cir 1987) (holding that the defendant did not have a reasonable expectation of privacy at the open door of a hotel room). See also Jack E. Call, *The Constitutionality of Warrantless Doorway Arreasts*, 19 Miss Coll L Rev 333, 344 (1999) (listing a table of cases involving warrantless doorway arrests); Bryan Murray, *After United States v Vaneaton, Does Payton v New York Prevent Police from Making Routine Arrests Inside the Home?*, Golden St U L Rev 135 (1996). This Comment takes that scenario a step further. If the suspect is not in the open doorway, but is inside his home and is in the plain view of the police, can the police seize and arrest him?


leave open the question this Comment seeks to answer: whether the Fourth Amendment requires a warrant when a police officer arrests someone in his home, absent exigent circumstances or consent, when the officer sees him through an open door.

A. Fourth Amendment Doctrines

The Fourth Amendment establishes that warrants must be based on probable cause.\(^{13}\) The Fourth Amendment does not, however, explicitly state when warrants are required, though the Supreme Court has "expressed a strong preference for warrants."\(^{14}\) The warrant requirement protects individuals from unreasonable arrests and searches that may result from overzealous police officers.\(^{15}\) A warrant indicates that a magistrate—a neutral third party\(^{16}\)—has confirmed that there is probable cause for the arrest of a suspect.\(^{17}\)

Nevertheless, the Supreme Court has recognized exceptions to the warrant requirement. For example, a warrant is not required for a public felony arrest based on probable cause, as discussed below.\(^{18}\) One search warrant exception is the plain view doctrine.\(^{19}\) The plain view doctrine can extend the scope of a warrant; it expands what an officer may seize when he is lawfully searching for evidence or contraband.\(^{20}\) Under this doctrine, an officer may seize a tangible item that is in plain sight, though the item is not explicitly listed in a warrant, because the item is

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\(^{13}\) US Const Amend IV ("[N]o 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.").


\(^{15}\) United States v Chadwick, 433 US 1, 9 (1997) (stating that a warrant based on probable cause is a "more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime'") (citation omitted).

\(^{16}\) Compare Shadwick v City of Tampa, 407 US 345, 349–52 (1972) (upholding a law allowing a municipal clerk to issue arrest warrants because the clerk was a neutral party) with Lo-Ji Sales, Inc v New York, 442 US 319, 326–27 (1979) (holding that a town justice did not "manifest the neutrality and detachment demanded of a judicial officer" when he helped to execute a warrant).

\(^{17}\) Probable cause means that there is a factual basis to believe that the person being arrested committed the crime. Consider Illinois v Gates, 462 US 213, 233–35 (1983) (discussing ways to evaluate and establish probable cause).


\(^{19}\) Coolidge v New Hampshire, 403 US 443, 465 (1971) (reviewing the plain view doctrine where the police have a warrant to search and "in the course of the search come across some other article of incriminating character").

\(^{20}\) Id.
within an officer’s view and it is immediately apparent that the item is evidence of a crime or is contraband.\footnote{21}{See *Horton v California*, 496 US 128, 136–37 (1990) (holding that any evidence in plain view can be seized where it is immediately apparent to the officer that the item is connected to a crime).} It is notable that the Court has not yet applied this doctrine to arrests—that is, the seizure of people. Additionally, there is a distinction between a warrantless, plain view seizure in a public place and a seizure on private property.\footnote{22}{Payton, 445 US at 583.} Plain view seizures on private property are more constricted than those made in a public place.

Another exception to the warrant requirement occurs when the situation involves exigent circumstances.\footnote{23}{See *Payton*, 445 US at 587, citing *G.M. Leasing Corp v United States*, 429 US 338, 354 (1977) ("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... situated on private premises to which access is not otherwise available for the seizing officer.").} The Supreme Court has explicitly recognized the hot pursuit of a fleeing felon,\footnote{24}{Santana, 427 US at 42–43.} the threat of evidence destruction,\footnote{25}{Welsh v Wisconsin, 466 US 740, 749–50 (1984).} and the threat of violence to the public or the police as situations constituting exigent circumstances.\footnote{26}{Warden v Hayden, 387 US 294, 298–99 (1967) (holding that the police do not have to delay an investigation and pursuit of a suspect where the delay could put the police or third parties in danger).} The Court has not provided a definitive list of factors that render a situation as one constituting exigent circumstances. Still, although the state must show that exigent circumstances existed (that the police had probable cause to believe that exigent circumstances existed),\footnote{27}{Vale v Louisiana, 399 US 30, 34 (1971) (stating that "[t]he burden rests on the state to show the existence of such an exceptional situation"). See, for example, *United States v Halley*, 841 F Supp 137, 139 (M D Pa 1993) (declaring that the state must "establish by a preponderance of the evidence that its entry into [a] defendant's apartment was justified by such circumstances"); *United States v Samet*, 794 F Supp 178, 180 (E D Va 1992) (noting that "[w]arrants are not required in cases in which the prosecution can prove by a preponderance of the evidence... exigent circumstances justified the warrantless entry").} the doctrine recognizes that police officers need latitude in responding to "swiftly developing situation[s]."\footnote{28}{United States v Sharpe, 470 US 675, 686 (1985).}

The Fourth Amendment explicitly states that people have a right “to be secure in their persons, houses, and effects” from unreasonable searches and seizures.\footnote{29}{US Const Amend IV.} Per *Katz v United States*,\footnote{30}{389 US 347 (1967).} the test to ascertain whether someone has a privacy expectation...
that the Fourth Amendment protects is whether the individual has an expectation of privacy that society recognizes as reasonable.\textsuperscript{31} The Supreme Court has held that people have a heightened expectation of privacy in their homes.\textsuperscript{32}

Finally, the Supreme Court has established remedies to ensure that citizens' Fourth Amendment rights are not violated. The exclusionary rule is the primary remedy used to protect citizens' Fourth Amendment rights.\textsuperscript{33} It establishes that, if a search or arrest is unconstitutional, a defendant may be able to exclude evidence seized as a result of an illegal search or the search made as the result of the illegal arrest.\textsuperscript{34} The exclusionary rule protects an individual's Fourth Amendment rights because the evidence suppressed is often key to the arrest and conviction of a suspect, and it is thought that police will endeavor not to violate a suspect's Fourth Amendment rights to ensure that the evidence is allowed at trial.\textsuperscript{35} An illegal arrest does not, however, void a subsequent lawful conviction.\textsuperscript{36} Rather than voiding a conviction, the law provides an avenue for civil remedy. A defendant may sue the arresting police officer(s) for violating his Fourth Amendment rights in a civil action under 42 USC § 1983.\textsuperscript{37}

\textsuperscript{31} Id at 361 (Harlan concurring). See also \textit{Kyllo v United States}, 533 US 27, 33 (2001) (stating that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable"). But see \textit{Minnesota v Carter}, 525 US 83, 92–93 (1998) (Scalia concurring) (arguing that the \textit{Katz} test is unhelpful but recognizing through historical and common law tradition that the Fourth Amendment protects individual's homes from unreasonable searches).

\textsuperscript{32} \textit{Katz}, 389 US at 361 (Harlan concurring) (stating that "a man's home is, for most purposes, a place where he expects privacy"). See \textit{Kyllo}, 533 US at 34, 40 (prohibiting the use of sense enhancing technology, where not in widespread public use, to search the interior of the home because it provides information that would not be available other than through a physical intrusion into the home and reaffirming that the "Fourth Amendment draws a firm line at the entrance of the house" and that that line "must not only be firm but also bright") (citations omitted).

\textsuperscript{33} \textit{Weeks v United States}, 232 US 383, 391–93 (1914); \textit{Mapp v Ohio}, 367 US 643, 655 (1961) (establishing the exclusion of evidence as a deterrent to the police to prevent the violation of the Fourth Amendment).

\textsuperscript{34} See, for example, \textit{Payton}, 445 US at 591–92; \textit{United States v Morgan}, 743 F2d 1158, 1168 (6th Cir 1984) (excluding evidence found pursuant to an unlawful arrest in a home). But see \textit{New York v Harris}, 495 US 14, 17–21 (1990) (declining to extend the exclusionary rule to statements made at the stationhouse following an improper arrest that was based on probable cause).


\textsuperscript{36} \textit{Frisbie v Collins}, 342 US 519, 522 (1952).

B. A Warrantless Arrest in Public

The remainder of this Section explores the interplay of these doctrines and the warrant requirement in specific circumstances: an arrest in a public place, an arrest in the suspect's home, and an arrest where the suspect is neither inside nor outside of her home.

The absence of a warrant does not necessarily make an arrest unconstitutional. In Watson, the Supreme Court established that the police do not need a warrant to arrest a person in a public place if the police have probable cause for the arrest.\(^{38}\)

In Watson, a postal inspector arrested the defendant in a public place and obtained his consent to search his car.\(^{39}\) Inside the car, the inspector found stolen credit cards.\(^{40}\) The defendant argued that both his arrest and the search were unlawful and asked the court to exclude the stolen credit cards.\(^{41}\) The Court of Appeals agreed with the defendant because, although the postal inspector had time to secure a warrant, he did not.\(^{42}\) The Supreme Court reversed and held that a warrantless, public arrest for a felony based on probable cause is lawful.\(^{43}\)

The Court reasoned that its past precedents support the validity of warrantless public arrests for felonies.\(^{44}\) The Court also based its decision on the fact that there is a consistent common law tradition of warrantless, public felony arrests and that there

\(^{38}\) Watson, 423 US at 418–24. Where a warrant is not needed, the Supreme Court requires a neutral third-party to make a post-arrest determination that there is probable cause before the police may detain the suspect for further proceedings. Gerstein v Pugh, 420 US 103, 126 (1975). See also County of Riverside v McLaughlin, 500 US 44, 56 (1991) (establishing that the probable cause determination should be made within forty-eight hours of arrest).

\(^{39}\) Federal statute authorizes postal inspectors to make warrantless felony arrests based on probable cause. 18 USC § 3061(a)(3) (2000). In Watson, the inspector had probable cause to believe that Watson had stolen credit cards because he received a tip from a reliable informant that he had used before. Watson, 423 US at 412–13.

\(^{40}\) Id at 412–13.

\(^{41}\) Id at 418–24.

\(^{42}\) United States v Watson, 504 F2d 849, 852 (9th Cir 1974), revd 423 US 411 (1976).

\(^{43}\) Watson, 423 US at 424.

\(^{44}\) Id at 417–23, quoting Carroll v United States, 267 US 132, 156 (1925) (“The usual rule is that a police officer may arrest without a warrant one believed by the officer upon probable cause to have been guilty of a felony.”) Consider Atwater v City of Lago Vista, 532 US 318, 340 (2001) (upholding a warrantless public arrest for a misdemeanor because, although there was some disagreement about a “breach of the peace” element in the common law history, there were “two centuries of uninterrupted (and largely unchallenged) state and federal practice of permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace”).
is widespread acceptance of warrantless public arrests. The Court reserved its opinion about whether the police could make a warrantless arrest in "a private home or other place where the person has a reasonable expectation of privacy."46

C. Is the Open Threshold of a Home a Public Place?

 Shortly after deciding Watson, the Court answered the narrow question of whether the open threshold of a home is a public place in Santana. The Court held that a suspect standing in the open threshold of her home was in a public place for purposes of Fourth Amendment analysis under Watson.47

 In Santana, the police saw the suspect standing in the open threshold of her home and attempted to arrest her.48 When the suspect realized what was happening she retreated into her home.49 The police followed and arrested her inside of her home.50

 The Court upheld the arrest because the police had attempted to arrest Santana while she was in a public place—the open threshold of her home—and when the defendant retreated into her home it was lawful for the police to follow to make the arrest because the police were in "hot pursuit."51 The hot pursuit of suspect was an exigent circumstance that justified the police officers' warrantless entry of the home and the arrest of the suspect therein.52

 According to the Court, because Santana was standing half outside of her home, "[s]he was not in an area where she had any expectation of privacy."53 In fact, Santana "was not merely visible to the public, she was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house."54 The Court seemed to establish a public-private distinction at the threshold of the home. This distinction was based on the notion of where a person had a reasonable expectation of privacy. The home is a place usually accorded a heightened privacy

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46Id at 432–33 (Powell concurring).
47Santana, 427 US at 42.
48Id.
49Id.
50Id.
51Santana, 427 US at 42–43.
52Id at 43.
53Id at 42.
54Id.
expectation; a public place is not. Moreover, the Justices seemed to rely not only on the fact that Santana was in the open doorway of her home, but also that she voluntarily exposed herself to the public prior to the police arriving at her home. The Court noted that "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."

In addition to establishing that a person standing in the open threshold of a home is sufficiently in a public place for purposes of Watson analysis, the Court acknowledged that, in some instances, the police may enter a suspect's home and arrest the suspect inside her home without a warrant. The Court clearly stated that the police could enter the home in hot pursuit of a fleeing suspect.

D. A Warrantless Arrest in the Home

After Santana, it was unclear whether the police could make a warrantless arrest in the home absent exigent circumstances. The Court answered this question in Payton; the Court established the general proposition that the police cannot make a warrantless entry into the home to make a felony arrest. It reaffirmed the Watson principle that the police could make a warrantless arrest in the public but that the line for a public arrest was the threshold of the home.

Payton was based on the consolidation of two cases. In the first case, the police went to a suspect's (Payton's) apartment to arrest him. Although the police did not have either an arrest or a search warrant, they forcibly entered the home and seized evidence that they found after searching the apartment. In the

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56 Id (Harlan concurring).
57 Santana, 427 US at 42, quoting Katz, 389 US at 351. But see Payton, 445 US at 589 ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.").
58 Santana, 427 US at 42-43.
59 Id at 590.
60 Id at 585, citing United States v United States District Court, 407 US 297, 313 (1972) (recognizing that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"). See also id at 585-90 (discussing the importance of the home in Fourth Amendment jurisprudence).
62 Payton, 445 US at 583.
63 Id at 576-77.
second case, the police knocked on the door of Obie Riddick's apartment and entered without a warrant after his young son opened the door. The police saw Obie Riddick sitting in bed inside of the home and they arrested him. Before allowing Riddick to open a dresser drawer to get clothes, the police searched the dresser and seized drugs. Both defendants argued that the warrantless entries of their homes were unconstitutional and requested the suppression of evidence found therein. The Supreme Court agreed.

In reaching this decision, the Court applied the same analytic framework that it used in Watson. First, the Court determined that "the common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places." Second, the Court surveyed the status of the law: of the seven circuit courts to decide the issue, five opined that such arrests were unconstitutional; three other circuit courts assumed but did not decide that such arrests were unconstitutional; and, one circuit court upheld an arrest but did not discuss the issue. The Court noted that, although many states allowed the warrantless entry of a home, the trend was to limit such practices, and the state courts that had decided the issue all found the practice unlawful, except for Florida and New York.

Additionally, the Court's decision was based, in part, on the concept that the home affords a person heightened privacy protection. The Court noted that no exigent circumstances existed in Payton. Also, the cases were distinguished from Santana because neither Riddick nor Payton had voluntarily put himself in a public space. Consent was not an issue either; although Riddick's door was opened to the police, the Court could not infer that Riddick consented to the police entry because his three year old son had opened the door.

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64 Id at 578.
65 Id.
66 Payton, 445 US at 578.
67 Id at 574-75.
68 Id at 596.
69 Id at 575 n 4.
70 Payton, 445 US at 599-60.
71 Id at 586-87.
72 Id at 583 ("[W]e 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.").
73 Id.
In a concurring opinion, Justice Blackmun suggested a different frame of analysis that may shed light on the circuit split at issue in this Comment. Instead of relying on historical analysis of the common law, Blackmun sought to balance the government's interests with individuals' interests, with the sanctity of the home tipping the balance in favor of requiring a warrant absent exigent circumstances. This balancing approach did not establish a bright-line rule, as the majority's decision seemed to create. Rather, it suggested that the heightened privacy protection of the home barred warrantless arrests in the home. The opinion recognized that there may be some instances where the heightened privacy protection of the home yields to heightened state interests, such as when there are exigent circumstances.

In his dissent, Justice White also rejected a bright-line rule that prohibited warrantless felony arrests in the home. Justice White suggested that the analysis should focus on the extent of the intrusiveness of the police activity. Accordingly, that analysis would show that the warrantless entries at issue in Payton were not a violation of the Fourth Amendment.

What the concurring and dissenting opinions reveal is that even if Payton established a bright-line rule protecting the home, in certain cases, this rule must cede to other interests. These opinions question whether the holding in Payton should be construed narrowly and should only prohibit certain physical intrusions into the home without a warrant.

After Payton, it seemed clear that the police could only enter a suspect's home to arrest him if they had a warrant or if the police had probable cause and there were exigent circumstances that justified entry of the home. Yet, the scope and definition of exigent circumstances is unclear. Additionally, the idea that a suspect could consent to the police activity remains unaddressed by the Court. Finally, it is unclear whether someone inside of his

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74 Payton, 445 US at 603 (Blackmun concurring). In his analysis, Blackmun noted that Watson was likewise justified on a balancing of the interests approach. Id. The balancing of the interests approach is similar to the analytical approach that the Court adopted in Terry v Ohio, 392 US 1, 21 (1968) (affirming petitioner's conviction for carrying a concealed weapon when the police found the weapon through a warrantless "stop and frisk" by balancing the need to search a suspect against the invasion that the search entailed).

75 Id at 603 (Blackmun concurring) (stating that "[t]he suspect's interest in the sanctity of his home then outweighs the governmental interests").

76 Id at 603–04 (White dissenting).

77 Id at 615–17 (White dissenting).

78 Payton, 445 US at 615–16 (White dissenting).
home can still expose himself to the public such that he is subject to a warrantless arrest in accordance with Santana. Since 1980, the Court has not clarified whether Payton should be considered a bright-line rule. 79 It has only restated its general principle in dicta. 80 In the meantime, courts have struggled with the parameters of Payton.

II. THE CIRCUIT SPLIT

The circuit courts have interpreted the requirements of Payton differently. Some circuit courts have held that the police, with probable cause, may arrest a suspect who is inside his home if he is exposed to the public through an open door. This Section explores a case from the Ninth Circuit, United States v Vaneaton, 82 and a case from the Second Circuit, United States v Gori. 83

Other circuit courts have rejected this approach. These courts have reasoned that someone inside of his home does not necessarily voluntarily expose himself to arrest by having the door to his home opened to the police or to the public. This Section analyzes two such cases, one from the Sixth Circuit, United States v Morgan, 84 and one from the Seventh Circuit, Hadley v United States. 85

A. A Plain View or Voluntary Exposure Exception to Payton

As noted above, some courts have held that when a suspect or someone in the home voluntarily opens the door to the police or to the public, the police may arrest the suspect inside of the home without a warrant. This may be considered a consent exception to Payton. 86 If a suspect voluntarily interacts with the

79 Consider Groh v Ramirez, 540 US 551, 565, 559 (2004) ("No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.") (emphasis added).
80 Krk v Louisiana, 536 US 635, 638 (2002) (per curiam) ("[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.").
82 49 F3d 1423 (9th Cir 1995).
83 230 F3d 44 (2d Cir 2000).
84 743 F2d 1158 (6th Cir 1984).
85 368 F3d 747 (7th Cir 2004).
86 The Court has not resolved the consent exception to the prohibition against warrantless arrests. See Payton, 445 US at 583 (stating the consent was not an issue in the case because Obie Riddick's young son opened the door to the police). Nevertheless, some
police, the home does not afford that suspect additional protection. This approach may also be considered an extension of *Santana,*\(^7\) where a suspect places himself in the 'public' arena because, though he remains inside of the home, the suspect is viewable by the public and the police. On the other hand, these may be considered cases where *Payton* does not apply simply because the police never physically enter the home.

In *Vaneaton,*\(^8\) the Ninth Circuit Court upheld the warrantless arrest of a suspect inside his hotel room, and denied the suppression of evidence found in connection with the arrest.\(^9\) In this case, the police discovered that a suspect wanted for several robberies was staying in a hotel that the police had visited as part of an investigation.\(^9\) The police went to the suspect’s room, and with their guns holstered, knocked on the door.\(^9\) The suspect, Vaneaton, saw the police through a window and opened the door to them, at which point the police arrested him inside his hotel room.\(^9\) Vaneaton then consented to a search of his hotel room during which the police found a weapon.\(^9\)

The Ninth Circuit held that this arrest did not violate *Payton* and that the evidence found pursuant to the search, based on the suspect’s consent, was valid.\(^4\) The court reasoned that because Vaneaton “so expose[d] himself, the presumption of *Payton* was overcome,”\(^9\) the presumption being that the home, or hotel room, provides heightened privacy protection. According to courts have found that consent is an exception to the warrant requirement. See, for example, *United States v Samet,* 794 F Supp 178, 181–82 (E D Va 1992) (upholding a warrantless arrest, based on “consent once removed,” where the defendant had invited an undercover police officer into his home and other officers entered the home upon receiving a signal from the undercover officer); *United States v Diaz,* 814 F2d 454, 459 (7th Cir 1987), cert denied 484 US 657 (1987) (same).\(^8\)

\(^7\) 427 US at 42.
\(^8\) 49 F3d 1423 (9th Cir 1995).
\(^9\) *Vaneaton,* 49 F3d at 1425 (holding that the “police, acting with probable cause but without a warrant while standing outside [a] motel room, could lawfully arrest [a person] while he was standing immediately inside the open doorway”). The *Payton* prohibition against warrantless arrests absent exigent circumstances is applicable to hotel rooms or guest quarters at commercial establishments. See *United States v Baldacchino,* 762 F2d 170, 175–76 (1st Cir 1985) (stating that the guest of an inn has the same right of privacy in his hotel room as a person has in his home); *United States v Newbern,* 731 F2d 744, 748 (11th Cir 1984) (same); *United States v Jones,* 696 F2d 479, 486–87 (7th Cir 1982) cert denied 462 US 1106 (1983) (same).

\(^9\) *Vaneaton,* 49 F3d at 1425.
\(^10\) Id.
\(^11\) Id at 1427.
\(^12\) Id at 1425.
\(^13\) *Vaneaton,* 49 F3d at 1427.
\(^14\) Id at 1426.
the court, the Vaneaton "episode did not materially resemble the kinds of 'invasions' or 'intrusions' against which Payton [sought] to guard."96 Therefore, the court determined that the appropriate test was "not whether [the defendant] was standing inside or outside of the threshold . . . but whether he voluntarily exposed himself to warrantless arrest by freely opening the door of his hotel room."97

In other words, the court framed the issue not as whether Vaneaton was sufficiently in a public place when he stood in the open threshold of his hotel room to justify a warrantless arrest, like in Santana.98 Rather, the court framed the question as whether he voluntarily exposed himself to the police when he opened the door. According to the court, the police did not coerce or use force to get Vaneaton to open the door to them.99

One judge disagreed with this reasoning and dissented. Judge Tashima highlighted the potentially problematic policy implications of the voluntary exposure rationale. He noted that the majority approach could discourage people from opening the doors to the police, which would have an adverse effect on police officers' jobs.100 His dissent illustrates that the voluntary exposure or plain view analysis creates a line drawing problem. A "voluntary exposure" exception would introduce confusion over "whether appearing at a closed screen door, or a glass door, or even an open window is sufficient to trigger the voluntary exposure exception."101 The courts would have to "decide how far inside the home and away from the doorway a citizen must be to escape the voluntary exposure exception."102

In one case that illustrates these problems, the Second Circuit upheld the warrantless arrest of a suspect who was inside of an apartment when the police seized him.103 In Gori, the police entered an apartment building and set up surveillance of an apartment that was supposed to be a drug trafficking locale.104 The police sat in surveillance for twenty to thirty minutes when a food delivery person arrived and knocked on the apartment

96 Id at 1427.
97 Id at 1426 (internal quotes omitted).
99 Vaneaton, 49 F3d at 1427.
100 Id at 1430 (Tashima dissenting).
101 Id at 1430 n 9 (Tashima dissenting).
102 Id (Tashima dissenting).
103 United States v Gori, 230 F3d 44, 57 (2d Cir 2000).
104 Id at 47.
When the occupants of the apartment opened the door to the food delivery person, the officers—with their weapons drawn but pointed at the ground—asked everyone to leave the apartment and enter the public hallway. At that point the officers arrested the occupants; the owner of the apartment then gave consent to search the apartment. The occupants of the apartment argued that their arrests were unlawful and the evidence seized thereafter should be suppressed.

The court held that the arrest was lawful and denied the suppression of evidence. The court reasoned that Payton was not implicated in the case. Because the police did not physically enter the home—the "evil" that the Fourth Amendment and the Payton decision guard against—"the warrant requirement and the heightened protections established for the home in Payton [were] not implicated." The court stated that people who "voluntarily expose themselves to public view . . . [have] no reasonable expectation of privacy" and could be subject to a warrantless arrest at their home "in absence of unreasonable police conduct."

In sum, the Second Circuit based its decision on three factors. First, the court understood Payton to be a prohibition against the police physically entering a home without a warrant. Second, the occupants exposed themselves to the public, and thereby to a public warrantless arrest, when one of the occupants of the apartment opened the door to the food delivery person. Persons so exposed to the public, even while within the home, did not enjoy a heightened or reasonable expectation of privacy. Third, the court did not consider consent an issue; it did not require the occupants to consent to the door being opened to the public or a showing that it was the owner of the home that voluntarily opened the door to the food delivery person.

The dissent in the case suggested that the court was misconstruing the doctrinal issues. According to the dissent, the Supreme Court had "made clear that individuals do not forfeit all
privacy rights simply by placing themselves in public view.\textsuperscript{113} Further, regardless of how minimal the search of or the seizure in a home may be, such acts invade the "sanctity of the home" and must be based on probable cause, not mere reasonableness.\textsuperscript{114} Finally, the dissent asserted that there was no policy reason to abandon the warrant requirement, because the police could use what they heard or saw through an open doorway to "form the probable cause basis for a warrant or lead them to determine that there were exigent circumstances excusing a warrant."\textsuperscript{115}

Both \textit{Vaneaton} and \textit{Gori} illustrate the struggle to interpret \textit{Payton}. The majority opinions start with the assumption that \textit{Payton} was about preventing the warrantless physical entry of the home. Both decisions are based on voluntary exposure to the public or voluntary exposure to the police reasoning, and both use reasonableness analysis to determine that the police actions at issue were legal. The dissents in both cases raise similar policy concerns, which need to be addressed when formulating a solution to the circuit split. It is notable that both dissents resemble Judge Posner's majority opinion in \textit{Hadley} as discussed below.

B. Rejecting the Plain View, Voluntary Exposure Exception

This Section of the Comment analyzes two cases that reject a voluntary exposure exception to \textit{Payton}. These decisions are notable for their understanding of \textit{Payton} as embracing a more expansive prohibition against arrests in the home, without a warrant and in the absence of exigent circumstances; the decisions do not reject the \textit{Payton} framework insofar as they involve instances where the police did not physically enter the suspects' homes. Additionally, the decisions illustrate the line drawing problem of a voluntary exposure exception to \textit{Payton}. They reason that \textit{Payton} does not unnecessarily limit police activity because the police can use any knowledge they gain from what they see in plain sight to get a warrant or to determine that there are

\textsuperscript{113} Id at 58 (Sotomayor dissenting).
\textsuperscript{114} Id at 64–65, citing Justice Scalia's decision in \textit{Arizona v Hicks}, 480 US 321, 328 (1987) (Sotomayor dissenting) ("[A] dwelling-place search, no less than a dwelling-place seizure, requires probable cause, and there is no reason in theory or practicality why application of the 'plain view doctrine' would supplant that requirement.").
\textsuperscript{115} \textit{Gori}, 230 F3d at 59 (Sotomayor dissenting).
exigent circumstances which allow a warrantless arrest in the home.

In Morgan, the Sixth Circuit Court rejected a voluntary exposure exception to Payton. The court held that absent a warrant or exigent circumstances—which it listed as hot pursuit, an emergency situation, an immediate threat to officers or the public, or the threat of the destruction of evidence, or the threat of escape—the police cannot use coercive tactics to compel a suspect to leave his home.\textsuperscript{117}

In Morgan, the police saw the defendant put weapons into his car after responding to complaints about someone discharging weapons in a public park.\textsuperscript{118} Several hours later, the police surrounded the defendant’s home without a warrant.\textsuperscript{119} The police focused floodlights on the home and used a bullhorn to command Morgan to exit.\textsuperscript{120} The defendant appeared at the front door with a pistol in his hand, which he subsequently put down inside the doorway before exiting the house.\textsuperscript{121} The police searched the entire home and found additional guns, but only the gun that was left inside of the front door was held unlawful.\textsuperscript{122} Morgan argued that the arrest was unconstitutional and that the evidence found subsequent to the arrest should be suppressed.\textsuperscript{123}

The court agreed. It rejected the state’s justification that the arrest was lawful because the police could see him in plain view when he was at the open door of the home and the court rejected the plain view justification for the seizure of evidence incident to arrest.\textsuperscript{124}

The court rejected the state’s use of a balancing of the interests analysis to justify the seizure of Morgan.\textsuperscript{125} Instead, the court stated that the proper frame of analysis was Payton.\textsuperscript{126} Accordingly, the presumption was that police could not make a

\textsuperscript{116} Id at 1166–67, citing United States v McCool, 526 F Supp 1206, 1209 (M D Tenn 1981) (“To uphold a warrantless arrest at a person’s home whenever law enforcement officers successfully obtain his presence at a door too readily allows subversion of the Payton principle.”).
\textsuperscript{117} Morgan, 743 F2d at 1163.
\textsuperscript{118} Id at 1160.
\textsuperscript{119} Id at 1160–61.
\textsuperscript{120} Id at 1161.
\textsuperscript{121} Morgan, 743 F2d at 1161.
\textsuperscript{122} The gun violated a statutory firearms provision. Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id at 1167–68.
\textsuperscript{125} Morgan, 743 F2d at 1166–68.
\textsuperscript{126} Id.
warrantless arrest inside of the suspect’s home, absent exigent circumstances. The court recognized that police activity may be so coercive that it becomes a constructive intrusion into the home which violates Payton.\textsuperscript{127} From this perspective, the police do not have to physically enter or invade the home to achieve the same results as an unlawful entry.\textsuperscript{128} Morgan had not voluntarily appeared at his front door or voluntarily exited his home. Instead, he was compelled to do so by the police activity. Additionally, the court reasoned that the police did not have a lawful right to be in the home and, therefore, did not have a lawful basis to see the evidence in question.\textsuperscript{129} Because the police were not lawfully searching the home, the evidence they saw and seized, even though in plain sight, was excluded.

Similarly, in Hadley, the Seventh Circuit recently rejected a plain view exception to Payton in a \$ 1983 suit for damages.\textsuperscript{130} When the police knocked at the home where Hadley lived, his sister opened the door.\textsuperscript{131} The police saw Hadley in his bedroom through the open door and they arrested him.\textsuperscript{132} The court held that a grant of summary judgment in the \$ 1983 suit was inconsistent with the principle that “to arrest a person in his home without a warrant is normally a violation of the Fourth Amendment even if there is probable cause to arrest him.”\textsuperscript{133}

The court explained that consent was not a valid basis for the police entry because it was not clear whether the sister allowed the police into the home.\textsuperscript{134} When a person answers a knock on his door, it does not mean that he is welcoming the person who knocked to enter his home.\textsuperscript{135}

The court explicitly rejected the reasoning that the police can arrest someone who is in the plain view of the police even when he remains inside of his home. The court stated that because “few people will refuse to open the door to the police, the effect of the rule in Gori and Vaneaton is to undermine . . . the principle that a warrant is required for entry into the home, in

\begin{itemize}
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id at 1167.
  \item \textsuperscript{129} Morgan, 743 F2d at 1167.
  \item \textsuperscript{130} 368 F3d at 750.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id at 749.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Hadley, 368 F3d at 750.
  \item \textsuperscript{135} Id.
\end{itemize}
absence of consent or compelling circumstances."  

The court reasoned that its holding would not tie police officers' hands because knowledge that they obtained from what was in "plain view" in the open doorway could serve as the basis for a warrant. Further, if the "police reasonably fear that before they can obtain a warrant the contraband or evidence will be destroyed or the criminal flee the nest" then "the case becomes one of 'exigent circumstances' and the police can take steps to secure the evidence or the person." This reasoning closely resembles the dissents in Vaneaton and Gori. And the Seventh Circuit's understanding of Payton—as a prohibition of arrest in the home absent a warrant, not just a prohibition against the physical entry of the home without a warrant—is similar to the Sixth Circuit Court's approach in Morgan. As noted above, Morgan and Hadley represent a fundamentally different understanding of Payton from the decisions in Vaneaton and Gori.

Circuit courts wrestle with cases where the police do not cross the physical threshold of the home to seize and arrest a person while he is inside of his home. It remains unclear whether the Payton rule is about prohibiting the police from physically entering a home without a warrant, consent, or exigent circumstances. The circuit courts disagree over whether a suspect can voluntarily expose himself to the police or to the public such that a warrantless arrest in the home becomes legal. The courts also disagree over what constitutes voluntary exposure. Finally, courts disagree about whether Payton establishes a bright-line rule or if the courts should balance the privacy protection of the home with the degree of the intrusiveness of the police action.

III. SUGGESTED SOLUTIONS

When the Supreme Court decided Payton, it settled certain aspects of the law surrounding warrantless arrests. The police

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136 Id.
137 Id at 749.
138 Hadley, 368 F3d at 749.
140 Payton, 445 US at 573.
may make a warrantless, public arrest.\textsuperscript{141} Additionally, a person who is standing in the open threshold of her home is considered to be in a public place if the police see her there when they approach and attempt to arrest her.\textsuperscript{142} But the police may not physically enter a private home to make an arrest, even when they have probable cause, unless they have a warrant or there are exigent circumstances.\textsuperscript{143}

Nonetheless, the Court left other areas of the law uncertain. It is not clear whether \textit{Payton} applies to situations where the police do not physically enter the home to arrest a suspect. The first issue this Section clarifies is whether \textit{Payton} applies to situations where the police do not physically enter a home to make an arrest. This Section suggests that the application of \textit{Payton} to situations where the police do not physically enter the home is a narrow prohibition.

Another area of uncertainty is whether a suspect consents to a warrantless arrest in his home when he voluntarily exposes himself to public view or to the police while he remains inside of his home. The Supreme Court suggested that there may be situations when a suspect consents to a warrantless in-home arrest,\textsuperscript{144} but the Court has not elaborated on this \textit{Payton} exception.\textsuperscript{145} The second issue this Section addresses is how a suspect can give his consent to a warrantless arrest in his home—the voluntary exposure doctrine. This is a key point of departure in the circuits. This Section discusses the policy implications of the voluntary exposure doctrine and whether it abrogates \textit{Payton}.

Third, this Section analyzes whether \textit{Payton} establishes a bright-line rule. The Comment suggests that it does not; rather, \textit{Payton} creates the presumption that any warrantless arrest in the home is unlawful, except when there is consent or exigent circumstances. The courts should not adopt a interests-balancing approach and only consider if the police activity is reasonable. A

\textsuperscript{141} Watson, 423 US at 411.
\textsuperscript{142} Santana, 427 US at 43.
\textsuperscript{143} Payton, 445 US at 587–88.
\textsuperscript{144} See id at 583; Grob v Ramirez, 540 US at 560 (noting that a search of private property is unreasonable unless there is a search warrant, consent, or exigent circumstances).
\textsuperscript{145} Some courts have applied the consent exception to \textit{Payton} in different situations. See, for example, United States v Samet, 794 F Supp 178, 181–82 (E D Va 1992) (upholding a warrantless arrest, based on "consent once removed," where the defendant had invited an undercover police officer into his home and other officers entered the home upon receiving a signal from the undercover officer); United States v Diaz, 814 F2d 454, 469 (7th Cir 1987) (same).
warrantless arrest in the home, absent consent or exigent circumstances, should be held presumptively unreasonable.

A. The Police Do Not Physically Enter the Home to Make an In-Home, Warrantless Arrest

The Ninth Circuit in *Vaneaton* and the Second Circuit in *Gori* concluded that *Payton* does not apply when the police do not physically enter a suspect's home to make a warrantless arrest. The court in *Vaneaton* tried to avoid a discussion that centered on where the suspect stood in relation to the threshold of the home because it created a line drawing problem. Yet, an approach that focuses only on the location of the police officer may involve the court in a similar line drawing problem.

The *Vaneaton* and *Gori* approach is based on an understanding that the Fourth Amendment and the *Payton* decision were designed to prevent or protect against certain kinds of government intrusions into a private place. But the only support for this approach in *Payton* stems from Justice White's dissent. The Supreme Court recently suggested that *Payton* prohibits the physical intrusion of the home. This suggestion, however, was included only in dicta in another opinion by Justice White.

As illustrated in the circuit court cases involved in the circuit split, this interpretation of *Payton* allows the police to arrest a suspect in his home if the police action was reasonable in securing the suspect in a publicly viewable location within the home. This means that as long as the police do not cross the threshold, the only question for the court to decide is whether the police acted reasonably.

The *Gori* court posits that the proper frame of analysis for determining whether police activity is reasonable in these situations is *Terry v Ohio*. This implies that, even if he is inside his home, a suspect can be treated as if he were on a public street, as long as the police can see him from outside of the home. It follows that if the *Payton* prohibition does not bar warrantless arrests in

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147 See id at 1427 (reasoning that *Payton* prohibits police from making a warrantless physical entry of the home to make an arrest); *Gori*, 230 F3d at 51 (same).
148 *Payton*, 445 US at 619. (White dissenting). See also *New York v Harris*, 495 US 14, 16 (1990) (asserting that *Payton* prohibits police from entering the home to make a warrantless arrest).
149 *Vaneaton*, 49 F3d at 1427; *Gori*, 230 F3d at 51.
150 *Gori*, 230 F3d at 54.
the home, even where the police do not enter the home, the police could easily overcome Payton.\footnote{Consider \textit{Hadley}, 368 F3d at 750 (noting that “equat[ing] knowledge (what the officer obtains from the plain view) with a right to enter” would “permit the rule of Payton to be evaded”).}

Still, the \textit{Payton} holding does not necessarily limit the prohibition against warrantless in-home arrests to situations where the police physically enter the home.\footnote{\textit{Payton}, 445 US at 583.} As the decisions in \textit{Morgan} and \textit{Hadley} show, some circuit courts do not understand \textit{Payton} to only prohibit the police from physically entering the home. Instead, these courts look to whether the suspect was arrested without a warrant while inside of his home.

If \textit{Payton} did prohibit the in-home arrest of a suspect—absent a warrant, consent, or exigent circumstances—the results in the cases discussed in this Comment would not necessarily change, as discussed below. These exceptions narrow the \textit{Payton} holding. Importantly, courts recognize that the police are dealing with fluid situations.\footnote{\textit{Sharpe}, 470 US at 686. It may be true that exigent circumstances are likely to arise where the police attempt to arrest someone.\footnote{\textit{Payton}, 445 US at 619 (White dissenting) (claiming that “arrests recurrying involve exigent circumstances, and this Court has heretofore held that a warrant can be dispensed with without undue sacrifice in Fourth Amendment values”).} But, when these exigent circumstances develop the police can arrest a suspect in his home without a warrant.\footnote{\textit{See, for example, Santana}, 427 US at 42–43 (finding that a fleeing suspect created exigent circumstances which justified an in-home warrantless arrest).}

Additionally, the police may use knowledge that they obtain in their investigation, surveillance, or plain view observation of the suspect and his home to determine that exigent circumstances exist or to form the basis of probable cause for a warrant.\footnote{\textit{Hadley}, 368 F3d at 750, citing \textit{Welsh}, 466 US at 749–50, \textit{Santana}, 427 US at 42–43; \textit{Gori}, 230 F3d at 59 (Sotomayor dissenting).} Finally, the police can ask the suspect to consent to their entry of his home; they can also ask the suspect to exit his home. Consent can overcome the prohibition against a warrantless arrest in the home.\footnote{\textit{Vaneaton}, 49 F3d at 1426.} Therefore, applying \textit{Payton} to situations where the police do not physically breach the threshold does not necessarily tie the hands of police officers.

Moreover, even when an arrest is found to be illegal because of a \textit{Payton} violation, the conviction is not necessarily void.\footnote{\textit{Frisbie v Collins}, 342 US 519, 522 (1952). Further, an illegal arrest does not necessarily lead to the sup-
pression of all of the evidence found following that arrest. Evidence secured subsequent to the arrest may not be excluded from trial if the arrest was based on probable cause. In sum, an interpretation of Payton that prohibits in-home arrests—absent a warrant, consent, or exigent circumstances—does not create a broad rule that will prevent the police from doing their jobs or suspects from being convicted of crimes.

B. Consenting to a Warrantless In-Home Arrest: Should there be a Voluntary Exposure Exception to Payton?

There should not be a voluntary exposure exception to Payton. The exception would create a line drawing problem for courts. It would create unclear guidelines for police officers. The voluntary exposure exception also creates bad incentives for the police. This Section explores reasons why the exception is not necessary. It also discusses reasons why the voluntary exposure exception is problematic.

If a suspect invites a police officer into his home, he has limited his personal expectation of privacy. It would be reasonable to conclude that at that point the home does not afford the suspect additional protection from a warrantless arrest. Similarly, if a suspect voluntarily leaves his home he exposes himself to warrantless arrest by entering a public place.

It could be argued that people feel like they have no choice but to allow the police to enter their homes when asked. Likewise, people may not feel free to remain inside of their homes when the police request that they step into a public area. This argument raises the question of whether these situations are coercive.

The courts have dealt with the question of coercion in other contexts. Looking to the consent to search doctrine, a reasonable rule in this context would be whether, given the totality of the circumstances, the suspect consented to either the police

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159 Harris, 495 US at 17–21 (declining to extend the exclusionary rule to statements made at the stationhouse following an improper arrest that was based on probable cause).
160 Id.
161 Santana, 427 US at 42. See also Watson, 423 US at 423–24 (establishing the constitutionality of warrantless public arrests that are based on probable cause).
162 See, for example, Bumper v North Carolina, 391 US 543, 548 (1968) (holding that a search cannot be justified by consent when the suspect consented only after a police officer told the suspect that he had a warrant to search).
163 Consider Schneckloth v Bustamonte, 412 US 218, 227 (1973) (establishing that to determine whether consent to search is given voluntarily the court should consider the totality of the circumstances).
entering his home or to his exiting his home. For example, in \textit{Vaneaton} the court could have concluded that \textit{Payton} did apply but that arrest was legal because the suspect consented to the police action when he opened his hotel door knowing it was the police knocking on the door.\footnote{\textit{Vaneaton}, 49 F3d at 1425.} The police did not act in a coercive manner in the encounter and the suspect consented to the police search of his hotel room.\footnote{Id.}

On the other hand, in \textit{Morgan}, the police clearly acted coercively in securing the suspect’s presence outside of his home.\footnote{\textit{Morgan}, 743 F2d at 1161, 1164.} The suspect reasonably feared that he was under siege because the police had his home surrounded.\footnote{Id at 1161.} A suspect who leaves his home under these circumstances is not consenting to his warrantless arrest or to the police entry of his home. The police tactics created a situation where Morgan was not free to go about his business or remain in his home.\footnote{Id at 1164, citing \textit{Florida v Royer}, 460 US 491, 303 (1983) (plurality opinion) (holding that someone is seized for Fourth Amendment purposes if the suspect is not free to leave).}

As illustrated in \textit{Vaneaton}, in order to consent to police activity the suspect must know that it is the police knocking at his door. A person does not voluntarily consent to a warrantless arrest in his home where he is unaware that the police are knocking at his door.\footnote{Consider \textit{Hadley}, 368 F3d at 750 (“[T]he fact that a person answers a knock at the door doesn’t mean that he agrees to let the person who knocked enter.”).} Though some may argue that knowing that it is the police knocking on the door is not required,\footnote{See \textit{Bustamonte}, 412 US at 241 (“There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a ‘knowing’ and ‘intelligent’ waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.”).} that reasoning undercuts the voluntary consent doctrine in this instance. The suspect must knowingly put himself in a public place or reveal himself to the police.

In this way, \textit{Gori} presents a consent problem. The police used a coercive tactic to get the occupants of the apartment to expose themselves to the public and the police. They used a third-party as a straw man to get the occupants of the apartment to open their door.\footnote{\textit{Gori}, 230 F3d at 47.} The occupants did not knowingly expose
themselves to the police. They did not give their consent to the police activity. Persons inside of the home—even if in plain sight of the police through an open door—are not necessarily giving their consent to the police. Using a third party in this way does not yield voluntary access to the suspects. Thus, for policy reasons, relying on third parties as a tactic to secure access to the interior of a home and the occupants therein should be discouraged. It creates an exigent situation by placing a third party in danger.

Still, there may be a way to justify the arrest of the occupants of the apartment in Gori. Even though the police used coercive tactics—or tactics that should be discouraged on policy grounds—to gain access to the apartment, the owner of the home gave her consent to the police to search the home. It is reasonable to conclude that the owner’s consent to the search could be the basis for the warrantless arrest of the occupants of the apartment. The occupants did not have an expectation of privacy in the apartment when the owner gave her consent to the search and the police had probable cause for the arrest of the occupants.

Instead of adopting this consent approach the courts in Gori and Vaneaton adopted voluntary exposure reasoning. Because the police could see the suspects, the warrantless arrests were lawful. The Supreme Court has not yet applied its plain view doctrine to people and it is unclear whether the Santana reasoning would apply to people who are inside of their homes but exposed to the public through an open door. The Supreme Court seemed to reject this reasoning in Payton when it did not uphold the arrest of Obie Riddick when an opened door exposed Riddick to the police.

Extending this reasoning to the interior of the home creates a line drawing problem as illustrated in the dissents in Vaneaton

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172 Payton, 445 US at 583.
173 Gori, 230 F3d at 47.
174 Bustamonte, 412 US at 227. See also Illinois v Rodriguez, 497 US 177, 184–86 (1990) (holding that a warrantless search of a home is valid based on third party consent if it is objectively reasonable for the police to believe that the third party could have consented to the search); United States v Matlock, 415 US 164, 170–71 (1974) (establishing that a warrantless search is valid when based on consent of a third party who has common authority over the premises).
175 Steagald v United States, 451 US 204, 205–06 (1981) (holding that, absent exigent circumstances or consent, the police need a search warrant to arrest someone in the home of a third party).
176 Payton, 445 US at 583.
and Gori, and in the Hadley opinion.\textsuperscript{177} This problem does not just involve the courts. The rule would also create confusion for police officers who would have to judge—in often difficult and fluid situations—when a suspect was sufficiently exposed to the public to justify the arrest. It will create confusion about whether the home still affords a heightened privacy protection. This would likely have ramifications for the warrantless search doctrine.

It could be argued that the consent exception and the exigent circumstances exception to Payton also create line drawing problems. However, the police and the courts already have a basis for judging these situations. The police and the courts can draw on the consent to search doctrine. The exigent circumstances exception is specifically designed to give the police the benefit of the doubt—and prevent line drawing problems—where the police believe that they or a third party are in danger, where the suspect may destroy evidence, or where the suspect may try to flee.\textsuperscript{178}

The voluntary exposure doctrine, on the other hand, does not fit with the plain view doctrine—used to expand the things the police may seize when they are lawfully searching\textsuperscript{179}—because in the warrantless arrest situations the police are not necessarily already lawfully searching. The lawfulness of the police activity is at issue.

Finally, the voluntary exposure doctrine creates odd incentives. People may be reluctant to open their doors to the police, or to the public, and this can negatively impact the police who often rely on the public for information relating to specific crimes.\textsuperscript{180} It may also create an atmosphere of paranoia because people will not feel secure in their homes and this in turn may create more dangerous situations for the police.

The voluntary exposure exception can eliminate much of the heightened privacy protection of the home. Such a change in

\textsuperscript{177} Vaneaton, 49 F3d at 1430 (Tashima dissenting); Gori, 230 F3d at 58 (Sotomayor dissenting); Hadley, 368 F3d at 750.
\textsuperscript{178} See Welsh, 466 US at 749–50 (establishing that the threat of evidence destruction is an exigent circumstance); Santana, 427 US at 42 (holding that a fleeing suspect creates an exigent circumstance); Warden v Hayden, 387 US at 298 (finding that danger to the police or third parties is an exigent circumstance).
\textsuperscript{179} See Coolidge, 403 US at 465; Horton, 496 US at 130 (establishing that when the police are searching pursuant to a search warrant they may seize evidence not specifically listed in the warrant if the evidence is in their plain view and if it is apparent that the object is connected to a crime or if it is contraband).
\textsuperscript{180} Vaneaton, 49 F3d at 1430 (Tashima dissenting).
Fourth Amendment doctrine should come from the Supreme Court. There is textual basis for protection of the home,¹⁸¹ there is common law tradition to support the protection of the home,¹⁸² and there is Supreme Court precedent protecting the privacy of the home.¹⁸³ For these reasons, voluntary exposure should not be considered as an exception to Payton.

C. How Courts Should Apply Payton to Warrantless Arrests in the Home Where the Police do not Physically Enter the Home

Until the Supreme Court offers clarification, the circuit courts should apply heightened Payton protection in cases where the police arrest a person in his home without a warrant, even if the police do not physically enter the home. This presumption, that a warrantless in-home arrest is illegal, can be overcome where there are exigent circumstances or where the suspect consents to the police presence in his home or the suspect voluntarily leaves his home.¹⁸⁴

As indicated, Payton does not establish a bright-line rule under this formulation. Rather, it establishes a presumption that can be overcome in specific situations. The state can overcome the presumption by showing that there were exigent circumstances, or that the suspect consented to the police activity, or that the suspect voluntarily left his home.

CONCLUSION

This Comment attempts to reconcile the circuit court split over the application of Payton to warrantless arrests of suspects in the home where the police do not physically enter the home. It resolves the question of whether voluntary exposure is an excep-

¹⁸¹ US Const Amend IV.
¹⁸² Payton, 445 US at 584–86.
¹⁸³ See, for example, Kyllo, 533 US at 40 (reaffirming that the "Fourth Amendment draws a firm line at the entrance of the house" and that that line "must not only be firm but also bright").
¹⁸⁴ The state should have the burden of proof in establishing either of these situations. As courts have established, the burden of proof should be by a preponderance of the evidence. See, for example, United States v Halley, 841 F Supp 137, 139 (M D Pa 1993) (declaring that the state must "establish by a preponderance of the evidence that its entry into [a] defendant's apartment was justified by such circumstances"); United States v Samet, 794 F Supp 178, 180 (E D Va 1992) ("Warrants are not required in cases in which the prosecution can prove by a preponderance of the evidence . . . exigent circumstances justified the warrantless entry.").
tion to the prohibition against warrantless in-home arrests. The Comment argues that *Payton* did not establish a bright-line rule. Rather, it is a narrow presumption that a warrantless arrest in the home is unlawful in the absence of either consent or exigent circumstances.