"THE FEDERAL CORNER"

An "Across the Threshold" Arrest Without a Warrant

F. R. (Buck) Files, Jr.

On January 29, 2016, a panel of the United States Court of Appeals for the Second Circuit held that, as matter of first impression, where officers have summoned a defendant to the door of his house, they may not effect a warrantless "across the threshold" arrest in the absence of exigent circumstances; and, that, a warrantless "across the threshold" arrest of a defendant, who was summoned to door of his home for such purpose, violated the Fourth Amendment. *United States v. Allen*, ___ F.3d ___, 2016 WL 362570 (2016). [Panel: Circuit Judges Sack, Lynch and Lohier (opinion by Lohier)].

[A Brief Synopsis of the Facts]

On July 25 or 26, 2012, officers of the Springfield, Vermont Police Department received a complaint that an individual – later determined to be Dennis B. Allen, Jr. – had assaulted John Johnston. On July 27, 2012, four Springfield police officers went to Allen's apartment to arrest him. The officers did not have an arrest warrant even though they had probable cause to arrest him and nearly two days to obtain a warrant. There were no exigent circumstances known to the officers.

When the officers arrived at Allen's apartment and knocked on the door, Allen opened it and spoke with the officers for some five to six minutes. During this time, he remained "*inside the threshold*" and the officers stood on the sidewalk while they talked to him. Allen admitted to the officers that he knew Johnston, but denied assaulting him. The officers eventually told Allen that he would need to come with them to the police station in order that he could be processed for the assault. Allen asked if he could put on his shoes and tell his twelve year old daughter that he would be leaving with the officers. *The officers agreed that he could do so, but only if they accompanied him.*

After they had entered his apartment, one of the officers asked Allen if he had anything in his pockets. Allen produces seven bags of marijuana. The officers also observed drug paraphernalia in plain view. They took him into custody, handcuffed him, placed him in the police car and drove him to the police station.

The officers obtained a search warrant for the apartment and discovered a handgun and other drug paraphernalia. Federal officers arrested Allen and charged him with being a felon in possession of a firearm in violation 18 U.S.C. §922 (g)(1). Allen admitted to the federal officers that he possessed the firearm.

[In the District Court]

Allen's lawyer filed a motion to suppress the firearm and his client's admission that he possessed the firearm. He argued to the Court that these were fruits of a warrantless arrest in violation of the Fourth Amendment. United States District Judge Christina Reiss, Chief Judge of the District in Vermont, denied the motion to suppress.

Allen entered a conditional guilty plea, reserving his right to appeal the denial of his motion to suppress. Chief Judge Reiss sentenced him to twenty-three months in prison and two years supervised release. Allen gave timely notice of appeal.

Judge Lohier's opinion reads, in part, as follows:

[The Fourth Amendment and the Home]

> The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The Amendment, therefore, "indicates with some precision the places and things encompassed by its protections: persons, houses, papers, and effects."*Jardines*, 133 S.Ct. at 1414 (internal quotation marks omitted). *But the home is "first among equals," because at the Amendment's "very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Id. (internal quotation marks omitted). Accordingly, "seizures inside a home without a warrant are presumptively unreasonable." Payton*, 445 U.S. at 586. [Emphasis added]

[*Payton* and *Reed*]

> In *Payton*, the Supreme Court held that the police violated the Fourth Amendment by physically entering a home without a warrant to effect an arrest. The Court noted that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." 445 U.S. at 585 (internal quotation marks omitted). Quoting with approval this Court's decision in *United States v. Reed*, 572 F.2d 412, 423 (2d Cir.1978), the Court went on to explain the general rationale for prohibiting warrantless arrests inside the home in the absence of an exigency:
>
> > 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. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when ... probable cause is clearly present.

Id. at 588–89. It is therefore settled law that, at a minimum, law enforcement officers violate Payton when, in the absence of exigent circumstances or consent, they physically enter protected premises to effect a warrantless search or arrest.

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[The Other Circuits' Cases]

Some of our sister circuits have read *Payton* narrowly, and appear to conclude that there is no *Payton* violation unless police physically cross the threshold and enter the home.

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Other circuits have eschewed that narrow reading, concluding that law enforcement officers may violate *Payton* without physically entering the home.

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[The Issue in *Allen*]

While entitled to due regard, those cases of course do not bind us. Nor do any of this Court's cases decisively answer the question presented by this appeal, namely, *whether Payton permits warrantless "across the threshold" arrests where law enforcement officers have summoned the suspect to the front door of his home.* While *Payton* recognizes that "physical entry of the home is the *chief* evil against which the wording of the Fourth Amendment is directed," 445 U.S. at 585 (emphasis added) (internal quotation marks omitted), the Supreme Court has "refused to lock the Fourth Amendment into instances of actual physical trespass."*United States v. United States District Court for E. Dist. Of Mich.,* 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). [Emphasis added]

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[*U.S. v. Reed*]

This Court's seminal case analyzing warrantless arrests in the home, *Reed,* predates *Payton.* There, we addressed the "important and [as of that time] oft-reserved question whether and under what circumstances federal law enforcement officers may enter the home of a suspect in order to effect a felony arrest for which they have statutory authority and probable cause but no warrant." 572 F.2d at 414. Three armed federal agents knocked on the door of Reed's apartment, and Reed opened the door. *Id.* at 415. The

testimony about what transpired next differed. Reed testified "that the agents 'rushed in' immediately after she pulled the door open and then arrested her."*Id.* at 422. One of the arresting agents, however, "testified that he placed Reed under arrest in the living room-dining room part of the apartment *after advising her at the door* that his purpose was to place her under arrest."*Id.* (emphasis added). The district court, we noted, "believed that Reed was arrested when she opened the door."*Id.* We did not find that factual finding to be clearly erroneous, and instead reasoned that

> *[n]o matter which of these versions is most accurate,* Reed's arrest was effected not in a "public" place but in a place protected by the Fourth Amendment. She was not arrested in the hallway of the apartment building. Nor was she standing on the threshold of her apartment in such a way that she would have been inside the apartment by taking a step backward and "outside" by taking a step forward.... Rather, she was arrested inside of her home.

Id. at 422–23 (emphasis added). Regardless of the officer's position with respect to the threshold at the time of the arrest, we concluded, Reed retained the protections of her home. Indeed, we further noted that we did not believe that

> the fact that Reed opened the door to her apartment in response to the knock of three armed federal agents operated in such a way as to eradicate her Fourth Amendment privacy interest. To hold otherwise would be to present occupants with an unfair dilemma, to say the least[-]either open the door and thereby forfeit cherished privacy interests or refuse to open the door and thereby run the risk of creating the appearance of an "exigency" sufficient to justify a forcible entry. This would hardly seem fair in situations that present no exigent circumstances in the first place.

Id. at 423 n. 9 (citation omitted).

Reed, a decision expressly approved by the Supreme Court in Payton, thus provides strong support for Allen's position. Under one of the factual scenarios that we accepted as true for purposes of that case, Reed was arrested while she stood inside her threshold and officers remained outside of it. We held that if that is what occurred, such an "across the threshold" arrest was unconstitutional.

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[*Reed* Established a Precedent]

We believe that a careful reading of *Reed* establishes a precedent, binding on this panel, that when officers approach the door of a residence, announce their presence, and place the occupant under arrest when he or she, remaining inside the premises, opens the door in response to the police request, the arrest occurs inside the home, and therefore requires a warrant. We follow that precedent because we must. But we are also content to do so because we believe that the decision was correct.

[The Fourth Amendment and the Home]

In recent years, the Supreme Court has repeatedly made clear that the Fourth Amendment applies with its greatest force in the home. *See, e.g., Jardines,* 133 S.Ct. at 1414 *("[W]hen it comes to the Fourth Amendment, the home is first among equals.")*. [Emphasis added]

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[Knock and Talk]

Although law enforcement officers, like any other citizens, have an implied license to approach a home, knock on the door, and try to speak with the occupants, *King*, 563 U.S. at 469; *see also Titemore*, 437 F.3d at 259–60, "[t]he scope of [that] license—express or implied—is limited not only to a particular area but also to a specific purpose." *Jardines, 133* S.Ct. at 1416. Such a purpose generally does not include conducting a warrantless search, *id.*, or likewise, a warrantless arrest.

[Allen's "Across the Threshold" Arrest Violated the Fourth Amendment]

Bearing in mind that the government bears a "heavy burden" when attempting to justify warrantless arrests in the home, *see Welsh v. Wisconsin*, 466 U.S. 740, 749–50, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), in light of our precedent and recent Supreme Court case law, we conclude that Allen's "across the threshold" arrest violated the Fourth Amendment. If the rule of *Payton*, and the fundamental Fourth Amendment protection of the home on which it is based, are to retain their vitality, the rule must turn on the location of the defendant, not the officers, at the time of the arrest. *We therefore hold that irrespective of the location or conduct of the arresting officers, law enforcement may not cause a suspect to open the door of the home to effect a warrantless arrest of a suspect in his home in the absence of exigent circumstances.* [Emphasis added]

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[Allen was Arrested Inside His Home]

There is no dispute in this case that Allen was *arrested* while still in his home. The government does not contend that Allen was free to refuse the officers' command that he would have to come to the police station with them, or that a "reasonable person" would have felt free to do so. *See United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). The government does not and could not contend that Allen made a consensual decision to accept a police invitation to discuss matters with them at another location. From the point at which the officers told Allen that he would need to come down to the police station to be processed for the assault, they had asserted control over his person. Allen reasonably believed that he needed the officers' permission to return upstairs to get his shoes and to say goodbye to his daughter, and the officers confirmed that belief, advising him that he could go upstairs *only if* he was accompanied by one or more officers. The result of the "across the threshold" arrest was exactly the same as if the officers had entered the apartment and arrested Allen inside, save that the intrusion into the apartment's interior followed rather than preceded the announcement that Allen was under arrest.

[The Officers Asserted Their Power over Him Inside His Home]

By advising Allen that he was under arrest, and taking control of his further movements, the officers asserted their power over him *inside his home*.That they did so is evident if we consider what would have happened if Allen, after being told in effect that he was under arrest, had simply closed the door and retreated deeper into his home. It is inconceivable that the officers would at that point have shrugged their shoulders and turned away. An arrested person is, and should be, *arrested:* When the police are authorized to take a person into custody, and undertake to do so, they must have the authority to make the arrest effective if the suspect refuses to comply.

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[Allen Did Not Waive or Forfeit His Fourth Amendment Protection]

Allen's behavior cannot be seen as waiving or forfeiting the protections of the Fourth Amendment. While Allen had no obligation to open the door or to speak to police officers in the first place, *see King,* 563 U.S. at 470, the fact that he—as would most reasonable people—chose to do so does not mean that he forfeited the Fourth Amendment's protections of the home. As in *Reed*, "to hold otherwise would present occupants with an unfair dilemma,"572 F.2d at 423 n. 9, and would discourage citizens from

opening the door to speak with law enforcement officers. The government does not contend that Allen consented to the officers' entry into his home. Neither is it argued—nor could it be, on these facts—that any exigency existed that would excuse the need for a warrant.

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[Crossing the Threshold is Not the Key to a *Payton* Analysis]

In short, we embrace the rule, which in any event we are compelled to follow by the binding circuit precedent of *Reed*, that where law enforcement officers summon a suspect to the door of his home and place him under arrest while he remains within his home, in the absence of exigent circumstances, *Payton* is violated regardless of whether the officers physically cross the threshold. That rule applies regardless of whether the police "constructively" or "coercively" entered the apartment through shows of force or authority beyond that conveyed by the simple command to the occupant to submit to arrest. We believe that this rule provides clear guidance to law enforcement, avoids undue complexities and perverse incentives to householders not to open their doors to inquiring police officers, and most importantly, ensures that the Fourth Amendment protections, which are at their zenith in the home, are adequately protected.

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This a liminal case, which presents a close line-drawing problem.[1] If the officers had gone *into* Allen's apartment without a warrant to effect the arrest, the arrest would violate the Constitution; if Allen had come *out of* the apartment into the street and been arrested there, no warrant would be required. We conclude that the protections of *Payton* are primarily triggered by the *arrested person's* location and do not depend on the location or conduct of the arresting officers. Because it is uncontested that Allen remained inside his home, and was in his home when the officers placed him under arrest, his warrantless arrest in the absence of exigent circumstances violated the Fourth Amendment. We therefore vacate the judgment of conviction, reverse the denial of the suppression motion, and remand the case for further proceedings consistent with this opinion.

My Thoughts

- I believe that this is an important Fourth Amendment case. Over the years, I have pondered the fact situation in *Allen*; however, I never had this presented to me in a case and never took the time to research it.
- The United States Court of Appeals for the Fifth Circuit came to a different

conclusion as to an alleged *Payton* violation in *United States v. Carrion*, 809 F.2d 1120 (5th Cir. 1987). Circuit Judge Johnson, writing for the Court, did not do the in depth analysis in *Carrion* that Judge Lohier did in *Allen*. Neither did he address the Second Circuit's *Reed* opinion that was cited in *Payton*.

- Cases such as *Allen* give us comfort that the Fourth Amendment is still alive and well.