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ARRESTS

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MUDDLING THROUGH THE PROBLEM OF CONSTRUCTIVE ENTRY: COMMENTS ON *UNITED STATES V. ALLEN*, 813 F.3D 76 (2D CIR. 2016), AND WARRANTLESS DOORWAY ARRESTS

Steven B. Dow, J.D., Ph.D.*

I. INTRODUCTION

Under the Fourth Amendment concept of constructive entry, which was analyzed for the first time in the scholarly literature in an article published in 2010, police outside of a dwelling are prohibited from engaging in tactics that coerce a suspect to exit that dwelling in order to make a warrantless public arrest.¹ It was not a new concept at that time, having been applied by several courts during the previous two decades, but it had not been discussed directly by legal scholars as a solution to a vexing Fourth Amendment problem that is at least 60 years old.² Since the

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¹ See Steven B. Dow, “*Step Outside, Please*”: *Warrantless Doorway Arrests and the Problem of Constructive Entry*, 45 NEW ENG. L. REV. 7 (2010). Under the rule in *Payton v. New York*, 445 U.S. 573 (1980), a warrantless entry into a dwelling for the purpose of a routine arrest is a violation of the Fourth Amendment. At the same time, under *United States v. Watson*, 423 U.S. 411 (1976), police are permitted to make a public arrest without a warrant. Under the constructive entry rule, police outside of a dwelling are not permitted to engage in actions that coerce suspect to exit the dwelling in order to make a warrantless public arrest because such actions have the same effect as an actual, physical entry. See generally Dow, *supra*, at 7–23; *infra* notes 2–61 and accompanying text.

² The “60-year-old problem” refers to *United States v. Johnson*, 333 U.S. 10 (1948), and the Supreme Court’s concern over the use of police authority to coerce entry without a warrant (and therefore without judicial oversight). See Dow, *supra* note 1, at 25. See also, e.g., Bryan M. Abramoske, *It Doesn’t Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in “Knock and Talk” Investigations*, 41 SUFFOLK U. L. REV. 561, 561–62 (2008); Edward H. Arens, *Armed Standoffs and the Warrant Requirement*, 59 HASTINGS L.J. 1517, 1535 n.191 (2008); Craig M. Bradley,

publication of that article, the courts, particularly intermediate federal appellate courts, have continued to struggle with the same problem, with some courts utilizing constructive entry, some courts rejecting it, and some ignoring it. The recent United States Court of Appeals for the Second Circuit decision in *United States v. Allen*³ presents a good opportunity to reassess the constructive entry concept, analyze the criticism directed at the doctrine, and urge the U.S. Supreme Court to step in and resolve the long-standing conflict and disarray among the federal and state appellate courts. In undertaking these tasks this article will: (1) review the fundamental Fourth Amendment problem that arises out of warrantless doorway arrests; (2) review the key Supreme Court decisions that guide the search for a solution to this problem; (3) review the constructive entry concept as an approach to the problem in a way that is consistent with Supreme Court precedent and fundamental Fourth Amendment principles; (4) analyze and evaluate the Second Circuit's critique of constructive entry; and, (5) articulate the precise issues that need to be addressed by the Supreme Court in order to resolve this fundamental problem.

II. OVERVIEW OF THE *PAYTON* RULE AND CONSTRUCTIVE ENTRY

It is well established that the reasonableness concept in Fourth Amendment jurisprudence calls for a balancing of interests with respect to the protection of privacy in a variety of contexts. That balancing is between the privacy interests of citizens and the public's interest in effective law enforcement, especially with respect to the need to arrest those suspected of committing a crime. It is likewise well established that the level of the Fourth Amendment's privacy protections afforded to occupants of a dwelling is much higher than those afforded to individuals in public spaces.⁴ The right to be secure in one's own home rests "at the very core" of the

"Knock and Talk" and the Fourth Amendment, 84 IND. L.J. 1099, 1118 (2009); Jack E. Call, *The Constitutionality of Warrantless Doorway Arrests*, 19 MISS. C. L. REV. 333, 337 (1999); Evan B. Citron, *Say Hello and Wave Goodbye: The Legitimacy of Plain View Seizures at the Threshold of the Home*, 74 FORDHAM L. REV. 2761, 2779–82 (1996); Caroline Hunt, *Reaching Across the Threshold of the Fourth Amendment—Why Payton v. New York Should be Interpreted Broadly*, 70 SMU L. REV. 189 (2017); Jennifer Marino, *Does Payton Apply?: Absent Consent or Exigent Circumstances, Are Warrantless, In-Home Police Searches and Arrests of Persons Seen Through an Open Door of the Home Legal?*, 2005 U. CHI. LEGAL F. 569, 572; H. Morley Swingle & Kevin M. Zoellner, *"Knock and Talk" Consent Searches: If Called by a Panther, Don't Anther*, 55 J. MO. B. 25 (1999).

³ 813 F.3d 76 (2d Cir. 2016).

⁴ See, e.g., *Florida v. Jardines*, 559 U.S. 1, 6 (2013) ("But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable government intrusion.'") (quoting *Silverman v. United*

Fourth Amendment.⁵ “Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”⁶ In order to deter such entries, the Supreme Court ruled in *Coolidge v. New Hampshire* that a warrantless entry into a dwelling is per se unreasonable and, therefore, a violation of the Fourth Amendment.⁷

The difference in the level of privacy protection in the home compared with that in a public space is especially evident with respect to the rules regarding felony arrest. In a public setting, the rules favor the police. In the leading case of *United States v. Watson*, the Supreme Court held that in a public space the police may arrest someone without a warrant so long as there is probable cause to believe that person committed a crime.⁸ The police officer’s initial determination of probable cause is sufficient to permit the arrest;⁹ although in this situation a judge must make an independent review the officer’s conclusion within 48 hours.¹⁰ Here, the public’s interest in effective law enforcement easily outweighs an individual’s privacy interests.

States, 365 U.S. 505, 511 (1961)); *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *United States v. Dunn*, 480 U.S. 294, 304–05 (1987); *Oliver v. United States*, 466 U.S. 170, 184 (1984); *Payton v. New York*, 445 U.S. 573, 576 (1980); *Morse v. Cloutier*, No. 15-2043, 2017 U.S. App. LEXIS 16287, at *10 (1st Cir. Aug. 25, 2017); *Citron*, *supra* note 2, at 2779–82, 2798; Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1197–98 (1995); *Marino*, *supra* note 2, at 572; Adina Schwartz, *Homes as Folding Umbrellas; Two Recent Supreme Court Decisions on “Knock and Announce,”* 25 AM. J. CRIM. L. 545, 571–78 (1998).

⁵ *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

⁶ *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972). The Seventh Circuit noted, “there is no place where a person’s expectation of privacy is greater than in his own house.” *United States v. Berkowitz*, 927 F.2d 1376, 1387 (7th Cir. 1991). *See also Morse*, 2017 U.S. App. LEXIS 16287, at *21; *Corrigan v. District of Columbia*, 841 F.3d 1022, 1029 (D.C. Cir. 2016) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984)).

⁷ *Coolidge v. New Hampshire*, 403 U.S. 443, 474–75 (1971). For recent cases on this point see *Penree v. City of Utica*, No. 16-828-cv, 2017 U.S. App. LEXIS 9328, at *3 (2d Cir. May 30, 2017); *United States v. Council*, 860 F.3d 604, 608 (8th Cir. 2017); *United States v. Delgado-Pérez*, No. 15-2247, 2017 U.S. App. LEXIS 15402, at *11–12 (1st Cir. Aug. 16, 2017); *United States v. Washington*, No. 16-10000, 2017 U.S. App. LEXIS 11544, at *2 (9th Cir. June 28, 2017); *Bratt v. Genovese*, 660 Fed. App’x 837, 841 (11th Cir. 2016); *Corrigan v. District of Columbia*, 841 F.3d 1022, 1029 (D.C. Cir. 2016).

⁸ *United States v. Watson*, 423 U.S. 411, 423–24 (1976). *See Dow*, *supra* note 1, at 9 n.5, 12 nn.20–22, 17 n.71 and accompanying text. *See also United States v. Council*, 860 F.3d 604, 608 (8th Cir. 2017).

⁹ *County of Riverside v. McLaughlin*, 500 U.S. 44, 47–48 (1991).

¹⁰ *Id.* at 56–57. During this period between the arrest and the independent determination of probable cause, the arrestee might be incarcerated. *See id.* at 58.

In the context of a dwelling, on the other hand, the balance heavily favors the occupants, whose privacy rights are afforded an extremely high level of protection. In addition to the requirement of probable cause, the rule in *Payton v. New York* requires that, absent exigent circumstances, police must obtain an arrest warrant from a judicial official *before* entering a dwelling to make a routine felony arrest.¹¹ The significance of this is that a judge or magistrate—not a police officer—must determine that the evidence against the suspect is sufficient to constitute probable cause before the police are permitted to enter a dwelling to arrest that suspect.¹²

A. *Payton v. New York*

In light of the central role of the *Payton* decision in protecting the privacy of a home, a close examination of that case is useful. The *Payton* decision addressed two separate appeals involving nonconsensual warrantless entries into homes: *People v. Payton*¹³ and *People v. Riddick*.¹⁴ In the *Payton* case, detectives had probable cause to believe that Payton was the perpetrator of a murder.¹⁵ They went to Payton's apartment to arrest him without first obtaining a warrant.¹⁶ When no one answered their knock on the door, the detectives forced their way in with crowbars.¹⁷ Although they did not find anyone inside the apartment, they did find in plain view evidence

¹¹ *Payton v. New York*, 445 U.S. 573, 590 (1980). In this context, “routine” excludes cases in which exigent circumstances exist. *See id.*

¹² *Johnson v. United States*, 333 U.S. 10, 13–14 (1948); *Bratt v. Genovese*, 660 Fed. App'x 837, 841 (11th Cir. 2016) (quoting *Johnson*, 333 U.S. at 17); Call, *supra* note 2, at 340 (discussing the purpose of the warrant requirement and arguing for a rule that enhances the incentives for the police to obtain a warrant); Marino, *supra* note 2, at 571; Nathan Vaughan, *Overgeneralization of the Hot Pursuit Doctrine Provides Another Blow to the Fourth Amendment in Middletown v. Flinchum*, 37 AKRON L. REV. 509, 516 (2004). In addition to obtaining a warrant based on probable cause, the police must have a reasonable belief that the suspect is at home before entering that home to carry out the arrest. *United States v. Taylor*, 497 F.3d 673, 678 (D.C. Cir. 2007); *People v. Aarness*, 150 P.3d 1271, 1274 (Colo. 2006); Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 302–03 (2002).

¹³ 445 U.S. 573 (1980).

¹⁴ 392 N.Y.S.2d 848 (App. Div. 1977), *aff'd*, 380 N.E.2d 224 (N.Y. 1978), *rev'd sub nom.* *Payton v. New York*, 445 U.S. 573 (1980).

¹⁵ 445 U.S. at 576.

¹⁶ *Id.*

¹⁷ *Id.*

of the crime, which they seized.¹⁸ Payton was arrested at a later point in time.¹⁹ The trial court found that the forcible entry was authorized by a statute that permitted warrantless entries into a dwelling for the purpose of arrest under the same circumstances as an arrest pursuant to an arrest warrant; the court concluded that seizure of the evidence was proper under the plain view rule.²⁰ In *Riddick v. New York*, police officers acting without a warrant went to Riddick's house to arrest him.²¹ When his young son answered the door, the officers looked into the house through the open door and seeing Riddick sitting on a bed, entered the house and arrested him.²² While inside, the officers searched a chest of drawers and found illegal drugs and drug paraphernalia.²³ The trial court ruled that the evidence was admissible on the grounds that the entry was permitted by state statute, and the search was permitted as a search incident to a lawful arrest.²⁴

The Court of Appeals of New York upheld both convictions under the state statute that permitted warrantless entries for the purpose of an arrest.²⁵ The court concluded that this statute was valid under *United States v. Watson*, reasoning that an in-home arrest and a public arrest were sufficiently similar to justify treating them the same.²⁶ The court supported its conclusion by references to common law practice, contemporary practice in sister states, and similar statutes in other states.²⁷

In a six-to-three decision, the Supreme Court reversed the state court's decision.²⁸ In doing so, the Supreme Court disagreed with the state court's

¹⁸ 445 U.S. at 576–77. For a discussion of the “plain view” rule, see *Arizona v. Hicks*, 480 U.S. 321, 325–29 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443, 464–73 (1971).

¹⁹ 445 U.S. at 578.

²⁰ *Id.* at 577–78.

²¹ *Id.* at 578.

²² *Id.*

²³ 445 U.S. at 578.

²⁴ 445 U.S. at 578–79 (citing *Chimel v. California*, 395 U.S. 752 (1969)).

²⁵ 45 N.Y.2d 300, 380 N.E.2d 224 (1978); *Payton*, 445 U.S. at 579.

²⁶ *People v. Payton*, 380 N.E.2d 224, 230 n.3 (N.Y. 1978); *Payton*, 445 U.S. at 578 n.9; N.Y. CRIM. PROC. LAW §§ 120.80, 140.15(4) (McKinney 1971).

²⁷ *Payton*, 380 N.E.2d at 310–13.

²⁸ See *Payton v. New York*, 445 U.S. 573 (1980).

conclusion and every point of its rationale.²⁹ Instead, the Supreme Court held that the Fourth Amendment “prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest.”³⁰ Looking for guidance from the well-established rules governing seizures of tangible property, the Court drew a clear distinction between seizures of objects in a public place on the one hand and searches and seizures of objects in a home on the other.³¹ Well-settled rules permit the seizure in a public space of property in plain view because such a seizure “involves no invasion of privacy and is presumptively reasonable”³² However, the rules regarding searches and seizures of property inside a home are the polar opposite in the sense that such actions are presumptively unreasonable without a warrant.³³

The Court found that this clear distinction between seizures of property in public and searches and seizures inside a home “has equal force when the seizure of a person is involved.”³⁴ This is because an entry into a home to arrest implicates the *same privacy interests* as an entry into a home to search for and seize property. Both involve “an invasion of the sanctity of the home.”³⁵ Both involve “the breach of the entrance to an individual’s home,”³⁶ which is the paradigmatic violation of the privacy right embodied in the Fourth Amendment. The Court repeated an oft-quoted line from *Silverman v. United States*: “At the very 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.”³⁷ Absent exigent circumstances, this right is

²⁹ *See id.*

³⁰ *Payton*, 445 U.S. at 576.

³¹ *Id.* at 586–87.

³² *Payton*, 445 U.S. at 587.

³³ *Payton*, 445 U.S. at 586 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477–78 (1971)).

³⁴ *Payton*, 445 U.S. at 587 (citing *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970)).

³⁵ *Payton*, 445 U.S. at 589 (quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978), *cert. denied sub nom.* *Goldsmith v. United States*, 439 U.S. 913 (1978)).

³⁶ *Payton*, 445 U.S. at 589.

³⁷ *Payton*, 445 U.S. at 589–90 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted). *See also* *United States v. Washington*, No. 16-10000, 2017 U.S. App. LEXIS 11544, at *2 (9th Cir. June 28, 2017); *Corrigan v. District of Columbia*, 841 F.3d 1022, 1029 (D.C. Cir. 2016).

violated when that home is entered without a warrant, whether the entry is to search for and seize tangible items or to seize an occupant.

The Court also disagreed with the other reasons cited by the New York Court of Appeals in support of upholding the warrantless entries.³⁸ The Court noted that the clear support of Congress and a majority of states for warrantless public arrests was absent with respect to warrantless entries into a dwelling for purposes of arrest.³⁹ The Court also cited disagreement among common law commentators and a lack of authoritative case law in support of such entries.⁴⁰ The evidence suggests that at the time the Fourth Amendment was adopted “the prevailing practice was not to make such arrests except in hot pursuit or when authorized by a warrant.”⁴¹ With respect to the contemporary positions on this issue in other states, the Court noted that while a majority of states permit a warrantless entry for routine arrests, this number was declining and fell far short of the level of support for warrantless public arrests upheld in *Watson*.⁴²

Following the *Payton* decision, it is clear that under the Fourth Amendment there are two fundamentally different rules governing arrests. *Watson* permits warrantless public arrests based on probable cause.⁴³ Under the *Payton* rule, in the absence of exigent circumstances police may not enter a dwelling without a warrant to make a felony arrest.⁴⁴ This distinction shows why the police have an incentive to get a suspect (inside a dwelling) to exit the dwelling. Arresting them outside, in public, obviates the need to obtain a warrant. The potential in this situation for the police to use coercive tactics from outside the dwelling to compel the suspect to exit creates a problem that the constructive entry doctrine is intended to address.

B. *The Payton Rule and Constructive Entry*

The appellate reports show that some police are evading *Payton*'s warrant requirement by engaging in tactics that are intended to coerce a suspect to exit the

³⁸ *Id.* at 588–90.

³⁹ *Payton*, 445 U.S. at 598–601.

⁴⁰ *Id.* at 593–97.

⁴¹ *Id.* at 598.

⁴² *Id.*

⁴³ *See* *United States v. Watson*, 423 U.S. 411 (1976).

⁴⁴ *Id.* at 590.

dwelling in order to carry out a warrantless public arrest.⁴⁵ The courts are deeply divided over whether this violates the Fourth Amendment. Some courts take a narrow view of *Payton* that permits such tactics *if* the police do not physically cross the threshold and enter the dwelling.⁴⁶ These courts emphasize the firm line at the entrance to the home and find that so long as the police do not cross that line, there is no *Payton* rule violation.

The justification for this narrow view of the *Payton* rule has been undermined completely over the last half century. Prior to that point the Court's "Fourth Amendment jurisprudence was tied to common-law trespass,"⁴⁷ but, at least since the 1961 decision in *Silverman v. United States*,⁴⁸ the Court has made it clear that "[i]nherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."⁴⁹ While it is true that the Court's opinion in *Payton* gave some emphasis to the "line" that marks a home's boundary and how the officers' crossing that line brought their actions within the scope of Fourth Amendment violations, the Court in no way suggested that this line marks the *limit* of Fourth Amendment protections.⁵⁰ More recently, the Court has expressly "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."⁵¹ The Court's 2001 decision in *Kyllo v. United States*

⁴⁵ See *infra* notes 60–61, 65–70, 98–131 and accompanying text.

⁴⁶ *United States v. Gori*, 230 F.3d 44, 51–52 (2d Cir. 2000) (finding no *Payton* violation without physical entry). See also *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002); *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991); *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987); *Hunt*, *supra* note 2, at 191. Some state courts have taken the same position. See *People v. Gillam*, 734 N.W.2d 585, 589–90 (Mich. 2007). In the *Payton* decision, the Court emphasized the relevance of the "unambiguous physical dimensions of an individual's home," and the "firm line at the entrance to the house" in distinguishing public arrests on one hand from in-home arrests and searches for goods on the other. As the discussion in this article will show, the existence of this boundary contributes to the problematic aspects of implementing the *Payton* rule. See, e.g., *Knight v. Jacobson*, 300 F.3d 1272 (11th Cir. 2002) (involving a suit against a police officer brought under 42 U.S.C. § 1983 (1996)).

⁴⁷ *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

⁴⁸ *Silverman v. United States*, 365 U.S. 508 (1961).

⁴⁹ *Id.* at 511.

⁵⁰ 445 U.S. at 589–90.

⁵¹ *Kyllo*, 533 U.S. at 32 (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). It should be added that although the *Kyllo* case involved the use of a "high-tech" device to invade the privacy of a home's occupants, the Court gave no indication that the decoupling was limited to cases involving the use of such devices. See *State v. Felix*, 811 N.W.2d 775 (2012) (arguing that Fourth Amendment doctrine decouples

makes it clear that an occupant's privacy rights do not stop at the home's physical boundary.⁵² In that case the Court expressed the need to protect a home's privacy from being eroded by the use of police technology, which in that case was employed while the police were outside the home.⁵³ Whether the means of coercing an occupant to exit the dwelling are "high-tech"⁵⁴ or the more common "low-tech,"⁵⁵ such tactics should not be considered free from Fourth Amendment scrutiny merely because the officers using them stay outside of the dwelling's "physical dimensions."

Other courts hold a much broader view in finding that tactics that coerce or attempt to coerce an occupant to exit the dwelling and move into public space (in order to arrest him without a warrant) violate the *Payton* rule because they are as intrusive as an actual physical entry.⁵⁶ For these courts, the *Payton* rule can be violated in this situation even though the police do not physically cross the threshold.⁵⁷ This is because such coercive tactics "accomplish the same thing"⁵⁸ and have the same effect as an actual entry.⁵⁹ Most of the courts that embrace this view

from a trespass framework *only* in cases where the police use high-tech devices to invade the privacy of a dwelling).

⁵² *Kyllo*, 533 U.S. at 40–41; Citron, *supra* note 2, at 2785.

⁵³ 533 U.S. at 33–34.

⁵⁴ See Dow, *supra* note 1, at 20 (discussing high-tech devices such as L.R.A.D.).

⁵⁵ See Dow, *supra* note 1, at 20 (discussing low tech devices such as flashlights, weapons, and voice amplification systems).

⁵⁶ See, e.g., Fisher v. City of San Jose, 475 F.3d 1049, 1065–66 (9th Cir. 2007); United States v. Saari, 272 F.3d 804, 808 (6th Cir. 2001); United States v. Maez, 872 F.2d 1444, 1451 (10th Cir. 1989). A few state courts take the same position. See, e.g., State v. Maland, 103 P.3d 340, 434–35 (Idaho 2004). See also Hunt, *supra* note 2, at 191.

⁵⁷ For these courts, the "lack of physical entry is not dispositive" regarding whether or not a *Payton* violation has occurred. United States v. Maez, 872 F.2d 1444, 1451 (10th Cir. 1989).

⁵⁸ United States v. Morgan, 743 F.2d 1158, 1166 (6th Cir. 1984).

⁵⁹ For these courts, it is the fact that the seized person is located inside the house and not the location of the officers that results in the seizure occurring inside the dwelling. United States v. Reeves, 524 F.3d 1161, 1167 (10th Cir. 2008); Maez, 872 F.2d at 1451; United States v. Al-Azzawy, 784 F.2d 890, 892 (9th Cir. 1985); United States v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982). Not all of these cases involve a situation in which the occupant exited the dwelling. In some cases, the occupant never exited the dwelling or even opened the exterior door so there was no warrantless public arrest, but there was nevertheless an issue whether or not the occupant was seized while inside the dwelling. See, e.g., Ewolski v. City of Brunswick, 287 F.3d 492, 499 (6th Cir. 2002).

use the doctrine of *constructive entry* to determine whether or not *Payton* was violated.⁶⁰ That doctrine is the focus of this article.

In a typical case that gives rise to a constructive entry, the police, acting without a warrant, approach a dwelling in which they believe a suspect is located, with the intent of coaxing him to exit the dwelling to make a public, warrantless arrest. In

⁶⁰ At the federal appellate level, the doctrine is expressly recognized by the Sixth, Ninth, and Tenth circuit courts. *See, e.g.*, *Fisher v. City of San Jose*, 475 F.3d 1049, 1065–66 (9th Cir. 2007); *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001); *United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989). It should be noted that while some courts have not recognized the constructive entry doctrine expressly, they employ essentially the same analysis using a different rubric. *See, e.g.*, *United States v. Council*, 860 F.3d 604, 611–12 (8th Cir. 2017) (court concluded that the defendant’s movement from inside his dwelling (a camper) to the threshold (which was held to be public space) was not the result of coercion or deceit); *United States v. Beaudoin*, 362 F.3d 60, 67 (1st Cir. 2004) (analyzing a doorway confrontation under *Terry v. Ohio*, 392 U.S. 1 (1968)); *United States v. Jerez*, 108 F.3d 684, 689 (7th Cir. 1997); *Sharrar v. Felsing*, 128 F.3d 810, 820 (3d Cir. 1997); *State v. Hilliard*, No. E2015-00970-CCA-R3-CD, 2017 Tenn. Crim. App. LEXIS 774, 23–26 (2017) (court found that what began as a lawful “knock and talk” evolved into a Fourth Amendment violation when the police “deployed overbearing tactics that . . . essentially forced . . . [the defendant] to open the door and exit the dwelling”). Another term used to describe the same doctrine is “constructive intrusion.” *Marino, supra* note 2, at 585. In his treatise on the Fourth Amendment, Professor LaFave does not use the “constructive entry” terminology, but he argues that a warrantless doorway arrest is illegal if the defendant’s presence at the door or outside the dwelling was “brought about by coercive tactics.” 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 6.1(e) (5th ed. 2012)). *See also* *Dow, supra* note 1, at 21 nn.102, 105; *infra* notes 98–131 and accompanying text; *Hunt, supra* note 2, at 191–92.

For recent cases in which the court recognized the constructive entry rule or applied the analysis under different terminology *see, e.g.*, *United States v. Bailey*, No. 2014-54, 2015 U.S. Dist. LEXIS 7851 (V.I. 2015) (court found that the suspect was constructively arrested inside his home); *United States v. Frost*, No. 10-20219-JPM-cgc, 2011 U.S. Dist. LEXIS 42476 (W.D. Tenn. 2011) (court recognized constructive entry, but found that warrantless entry was justified by exigent circumstances); *Wilson v. Jara*, 866 F. Supp. 2d 1270 (D. N.M. 2011) (recognizes constructive entry and finds that the plaintiff was seized while inside her home); *State v. Iannazzo*, No. 27-CR-07-100109, 2010 Minn. App. Unpub. LEXIS 420, 7–15 (2010) (recognized constructive entry, but decided case on another issue); *United States v. Rice*, No. 5:09 CV 007, 2010 U.S. Dist. LEXIS 94511 (E.D. Ohio 2010) (recognized constructive entry but found no violation of *Payton* rule because exigent circumstances justified the entry); *Voss v. Feine*, No. 08-cv-6484 (PJS/LIB), 2010 U.S. Dist. LEXIS 121738, 12–14 (D. Minn. 2010) (recognizes constructive entry); *Commonwealth v. LeBlanc*, 85 Mass. App. Ct. 1128 (2014) (recognized constructive entry but found that none occurred in the case); *City of Sheboygan v. Cesar*, 796 N.W.2d 429 (Wis. Ct. App. 2010) (recognized constructive entry, but concluded that there was no seizure inside the dwelling because there was no coercion by the police); *Woods v. State*, 25 So. 3d 669 (Fla. Dist. Ct. App. 2010) (recognizes constructive entry but finds that none occurred in the case).

The Fifth, Seventh, and Eleventh Circuits declined to adopt the constructive entry doctrine. *See Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002); *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991); *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987). *See also Gori*, 230 F.3d at 52 (finding no *Payton* violation without physical entry). Some state courts have taken the same position. *See People v. Gillam*, 734 N.W.2d 585, 589–90 (Mich. 2007).

order to accomplish this goal, the officers engage in a variety of coercive tactics from outside the dwelling. Courts that accept the constructive entry doctrine see that the *Payton* rule may be violated in such a situation, although they hold divergent views on the circumstances under which the doctrine applies.⁶¹

The constructive entry doctrine is grounded in two concepts that lie at the heart of Fourth Amendment jurisprudence: privacy and seizure. Both should be briefly reviewed in order to understand constructive entry.

C. *Constructive Entry, Privacy, and Seizure*

Privacy rights in one's home are afforded the highest level of protection under the Fourth Amendment. The right to be secure at home has been described by the Supreme Court as resting "[a]t the very core" of the Fourth Amendment.⁶² The ideas of privacy and security are best captured by the concept of *refuge*,⁶³ the right to be left alone. It is the right to be "free from unreasonable governmental intrusion."⁶⁴ This refuge is obviously disturbed by a physical entry into one's home, which is the "chief evil" that the Fourth Amendment is designed to guard against.⁶⁵ Although a constructive entry does not entail an actual entry, it does disturb the privacy of the home's occupants. In a typical constructive entry case, the police remain outside the dwelling and engage in a variety of tactics designed to coerce a suspect into exiting the dwelling. A review of the cases on the subject shows an array of such tactics, including knocking or pounding on the entry door,⁶⁶ shining flood lights⁶⁷ or flashlights into the dwelling,⁶⁸ communicating instructions to an occupant by

⁶¹ See *infra* notes 98–131 and accompanying text.

⁶² *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *Payton*, 445 U.S. at 589–90 (quoting *Silverman*, 365 U.S. at 511).

⁶³ In *Payton*, the Court remarked that an "overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Payton*, 445 U.S. at 601. Although sanctity has obvious religious connotations, it is also the root word of "sanctuary," the meaning of which includes the secular idea of "a place of refuge or asylum." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1128 (4th ed. 2002).

⁶⁴ *Payton*, 445 U.S. at 589–90 (quoting *Silverman v. United States*, 365 U.S. at 511). See also *Kyllo*, 533 U.S. at 31; *Bratt v. Genovese*, 660 Fed. App'x 837, 841 (11th Cir. 2016).

⁶⁵ *Payton*, 445 U.S. at 585; *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972).

⁶⁶ See, e.g., *United States v. Jerez*, 108 F.3d 684, 687 (7th Cir. 1997).

⁶⁷ See, e.g., *United States v. Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984).

⁶⁸ See, e.g., *Jerez*, 108 F.3d at 687.

shouting or with amplified sound systems,⁶⁹ and positioning themselves outside the dwelling, sometimes with weapons drawn.⁷⁰ By their very nature, these actions disturb an occupant's refuge in essentially the same way that it is disturbed by an actual physical entry into the dwelling. Even if the occupant remains within the private space of the dwelling and does not exit, these police tactics, occurring entirely outside the dwelling, disturb an occupant's refuge and thereby violate his or her privacy rights. The violation is exacerbated when the occupant is coerced into giving up that refuge (and privacy within the home) entirely and moving into public space only to face a warrantless arrest. Thus, even without an actual entry, police actions outside a dwelling may disturb the refuge and violate an occupant's privacy rights, accomplishing the same harm as an unauthorized physical entry, which is precisely what *Payton* was intended to prevent.

In many constructive entry cases, the police have probable cause to arrest a suspect, but instead of first obtaining a warrant, they proceed to the suspect's home with the intention of getting him to exit the home in order to make a warrantless public arrest. Disturbing the refuge associated with the home is a serious constitutional matter and for nearly seventy years the Supreme Court has made it clear that a judge or magistrate, not a police officer, is to make the determination of whether probable cause exists before that refuge is disturbed.⁷¹ While exigent circumstances in exceptional cases may result in the occupant's right to privacy being outweighed by the public's interest in effective law enforcement, the Court made it clear that such circumstances do not include the inconvenience or "slight delay" that obtaining a warrant would entail.⁷²

Courts that consider a constructive entry to be a violation of the *Payton* rule use the Fourth Amendment concept of *seizure* to ascertain whether or not such a violation has occurred. A useful starting point in the consideration of key Supreme Court cases on the law of seizures is *United States v. Mendenhall*.⁷³ In this case the defendant was approached in an airport concourse by two federal drug enforcement agents who asked to see her identification and airline ticket. After a brief encounter, she accompanied them to an interview room for further questioning. While being

⁶⁹ See, e.g., *United States v. Maez*, 872 F.2d 1444, 1455 (10th Cir. 1989).

⁷⁰ See, e.g., *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985); *Citron*, *supra* note 2, at 2792.

⁷¹ *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

⁷² See *Johnson*, 333 U.S. at 14–15.

⁷³ *United States v. Mendenhall*, 446 U.S. 544 (1980). See also LAFAVE, *supra* note 60, § 5.1(a).

questioned there, she consented to a search of her person, during which narcotics were found. On the key issue of whether she was seized during the encounter in the concourse area,⁷⁴ a majority of the justices reaffirmed the “view that a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.”⁷⁵ Restraint in this context was based on whether the person “remains free to disregard the questions and walk away.”⁷⁶ The Court concluded that “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”⁷⁷ The majority opinion offered some examples of factors that “might indicate a seizure.”⁷⁸ These include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”⁷⁹ After reviewing the facts in the case, the Court found that “nothing in the record suggest[ed] that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse [area] and proceed on her way, and for that reason we conclude that the agents’ initial approach to her was not a seizure.”⁸⁰

Focusing on whether the person believed they were free to terminate the encounter and leave works relatively well in an airport concourse, sidewalk, or other open public spaces where walking away from an encounter is a realistic option, but in a situation where walking away from the encounter is not a realistic option, the

⁷⁴ This issue was critical because at that point there was no legally sufficient justification to seize her. If she was seized during the concourse encounter, it would be in violation of the rule in *Terry v. Ohio*, 392 U.S. 1 (1968). *Mendenhall*, 446 U.S. at 551–52.

⁷⁵ *Mendenhall*, 446 U.S. at 553.

⁷⁶ *Id.* at 554.

⁷⁷ *Id.* This objective test focuses not on what the suspect believed but on what a reasonable person in these same circumstances would have believed.

⁷⁸ *Id.*

⁷⁹ *Id.* The Court gave no indication that this multiple list of factors was exclusive. Indeed, subsequent to the *Mendenhall* decision lower courts from time to time have added additional factors to the list. *See infra* notes 99–106 and accompanying text. This multi-factor approach to determining whether or not there was a seizure is at the heart of the constructive entry concept. It is also the reason the Court of Appeals for the Second Circuit characterizes the constructive entry concept as “muddled,” even though in that case the court used the same multi-factor analysis to determine whether or not the suspect had been arrested while inside his home. *See infra* notes 229–31, 234–37, 243, 272–78 and accompanying text.

⁸⁰ *Mendenhall*, 446 U.S. at 555.

objective test articulated in *Mendall* becomes problematic. The Court faced this situation a decade later in *Florida v. Bostick*.⁸¹

The *Bostick* case involved an encounter between two uniformed sheriff's deputies and Terrance Bostick, a passenger on an intercity bus.⁸² The officers boarded the bus during a stop in Fort Lauderdale.⁸³ Acting without reasonable suspicion they approached Bostick, who was seated on the bus, and asked to see his identification and bus ticket.⁸⁴ He complied, and after the officers returned the documents, they asked, again without reasonable suspicion, for consent to search his luggage for illegal drugs.⁸⁵ He consented to the search, which gave rise to the question of whether or not he had already been seized before he consented.⁸⁶ The Florida Supreme Court held that "Bostick had been seized because a reasonable passenger in his situation would not have felt free to leave the bus to avoid questioning by the police."⁸⁷

The United States Supreme Court rejected this "free to leave" approach and, instead, focused on the underlying "principle that those words were intended to capture."⁸⁸ The "free to leave" formulation is suitable on a sidewalk, airport concourse, or other public place because asking whether in the face of police actions a reasonable person would have felt free to walk away is a way to ascertain the

⁸¹ *Florida v. Bostick*, 501 U.S. 429 (1991).

⁸² *Id.* at 431–32.

⁸³ *Id.* at 431.

⁸⁴ *Id.* at 431–32.

⁸⁵ *Id.*

⁸⁶ There was conflicting evidence about whether Bostick had been advised of his right to refuse to consent to the search and whether he had ever consented. *Id.* at 432. Both of these issues were resolved in favor of the state by the Florida courts. *Id.* Subsequent to the *Bostick* decision, the Supreme Court decided that police do not have to advise citizens of their right to refuse to consent to a search. *See United States v. Drayton*, 536 U.S. 194 (2002); *Ohio v. Robinette*, 519 U.S. 33 (1996).

⁸⁷ *Bostick*, 501 U.S. at 433. This court went on to fashion a per se rule that a seizure occurs whenever the police board a bus, question passengers without reasonable suspicion, and obtain consent to search their luggage. *Id.* This was based on Bostick's argument that using the "free to leave" formulation, within the confines of an intercity bus, a reasonable person would not feel free to leave "because there is nowhere to go on a bus" and that if a passenger were to exit the bus "he would have risked being stranded and losing whatever luggage he had locked away in the luggage compartment." *Id.* at 435.

⁸⁸ *Id.* at 435.

“coercive effect” of those actions.⁸⁹ If the encounter is on a bus or similar situation, where the person is seated and “has no desire to leave,” it is not an accurate measure of that effect because the restraint on the person’s freedom of movement is not the result of the coercive police conduct.⁹⁰ It is the result of the decision to travel by bus, a “factor independent of police conduct.”⁹¹ The Court stated that in this situation “[t]he appropriate inquiry is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”⁹² This is a manifestation of the “crucial” test that applies in *any* setting, namely “whether . . . the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about this business.’”⁹³ In other words, on a sidewalk or other public space, walking away or leaving is a manifestation of the citizen’s refusal to participate in an encounter with the police and, at the same time, an exercise of one’s freedom of movement. On a bus, where leaving is not a reasonable option, that refusal will be manifested in a different way. To be sure, beyond not replying to the officer’s questions and, instead, staring at the back of the seat in front, staring out the window, or opening a book or newspaper and reading (or pretending to read) it, the bus passenger has limited options to manifest his or her refusal. In this situation there are very limited ways to “go about one’s business.” Although the majority of the Court expressed some doubts that *Bostick* had been seized, it remanded the case to the state courts to determine, under the test it articulated, whether or not *Bostick* was seized prior to his consent to the search.⁹⁴

In the case of a possible constructive entry, we have a situation that is similar, but not identical, to a passenger on a bus who is approached by the police. As we saw in the *Bostick* case, the “free to leave” formulation will not be useful in determining whether a seizure has occurred. It makes little sense to inquire whether a reasonable person inside a dwelling felt free to leave the dwelling, because exiting the dwelling by “walking away” or “leaving” and moving into public space to face arrest would not manifest an occupant’s desire to “terminate the encounter.”⁹⁵ The

⁸⁹ *Id.* at 435–36.

⁹⁰ *Id.*

⁹¹ *Id.* at 436. See generally *Investigations and Police Practices*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 3, 9 n.19 (2008).

⁹² *Bostick*, 501 U.S. at 436.

⁹³ *Id.* at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

⁹⁴ *Bostick*, 501 U.S. at 437.

⁹⁵ *Id.* at 433–34.

ironic and problematic aspect of this is that the suspect “walking away” (essentially exiting the dwelling) is exactly what the police are trying to accomplish. Therefore, when the suspect is inside a dwelling, an intention to terminate the encounter should be manifested in a different way. With respect to an occupant of a dwelling, going about one’s business is accomplished by ignoring the police outside, staying inside the dwelling, and enjoying the privacy—and the sense of refuge—that comes with it. Thus, the appropriate inquiry to determine whether the occupant of a dwelling was seized, which would constitute a constructive entry, is whether a reasonable person would have felt free to ignore the police actions and go about his business *within the dwelling*. Although some courts continue to thoughtlessly apply the “free to leave” language from *Mendenhall* in such cases,⁹⁶ many courts appear to realize that the desire to enjoy the privacy of the home is manifested by staying inside, rather than leaving that home.⁹⁷ This critical distinction can be summarized as follows: a seizure in a public setting is an unreasonable interference with one’s freedom to leave, while a seizure in a home is interference with one’s freedom to stay.

Putting these concepts into practice is challenging because of the possibility that exiting the dwelling may be consensual. Exiting a dwelling might be the product of coercive police actions, actions that convey to a reasonable person that compliance with the police “requests” to exit is required. In such a case, a constructive entry has occurred. On the other hand, exiting the dwelling might be the product of the occupant’s free will and a willingness to cooperate with the police requests, rather than the result of coercive actions. If exiting the dwelling is consensual, there is no seizure, no violation of the occupant’s privacy rights, and no violation of the Fourth Amendment. This matter will be considered below in the context of applying the constructive entry concept.

Among the courts that have accepted the doctrine of constructive entry (or at least provisionally accepted it), there is disagreement on where to draw the line between police actions that constitute a seizure and actions that do not constitute a seizure. Put another way, there is a conflict among the courts regarding when an occupant’s choice to open the door or exit the dwelling is a consensual act or the result of coercive police actions. The Supreme Court has never considered the issue of constructive entry, so it is necessary to look to the lower courts for guidance on this matter. Following the Supreme Court’s lead in *United States v. Mendenhall*, the

⁹⁶ See, e.g., *United States v. Morgan*, 743 F.2d 1158, 1164 (6th Cir. 1984); *Woods v. State*, 25 So. 3d 669, 672 (Fla. Dist. Ct. App. 2010).

⁹⁷ See, e.g., *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008).

lower courts specified factors that might indicate that a seizure has occurred. In addition to those factors,⁹⁸ certain lower courts have added some of their own: use of a voice amplification system;⁹⁹ forceful knocking on the door;¹⁰⁰ continuous knocking;¹⁰¹ repeated requests or demands to exit the dwelling;¹⁰² shining spotlights at the dwelling;¹⁰³ the time of day or night the encounter takes place;¹⁰⁴ the number and location of police cars in relation to the dwelling;¹⁰⁵ and driving an armored vehicle onto the front lawn of a dwelling.¹⁰⁶

Among those courts that recognize the constructive entry doctrine, there is a uniform willingness to find a constructive entry in cases where the police show of force or threat of force is overwhelming. For example, in *United States v. Morgan*,¹⁰⁷ nine armed police officers surrounded the defendant's home, used a vehicle to block the driveway, aimed spotlights at the house, and used a bullhorn to "summon" the defendant to exit the house.¹⁰⁸ The court held that the officers' "show of authority"

⁹⁸ See *supra* notes 73–80 and accompanying text.

⁹⁹ *United States v. Maez*, 872 F.2d 1444, 1446 (10th Cir. 1989); *United States v. Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984).

¹⁰⁰ *Reeves*, 524 F.3d at 1163 (avoiding the use of constructive entry terminology in the majority opinion, the court held that the defendant was seized inside his dwelling); *United States v. Saari*, 272 F.3d 804, 807 (6th Cir. 2001).

¹⁰¹ *Reeves*, 524 F.3d at 1163 (avoiding the use of constructive entry terminology in the majority opinion, the court held that the defendant was seized inside his dwelling); *United States v. Saari*, 272 F.3d 804, 807 (6th Cir. 2001).

¹⁰² *People v. Gillam*, 734 N.W.2d 585, 598 (Mich. 2007) (Kelly, J., dissenting).

¹⁰³ *Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984).

¹⁰⁴ *Reeves*, 524 F.3d at 1164, 1165 (avoiding the use of constructive entry terminology in the majority opinion, the court describes the police officers' attempts to coerce the defendant to exit his dwelling between 2:30 and 3:00 A.M. when the defendant was seized inside his dwelling); *Jerez*, 108 F.3d at 687 (discussing a situation in which officers knocked on the entry door after 11:00 P.M.).

¹⁰⁵ *Morgan*, 743 F.2d at 1161.

¹⁰⁶ *Ewolski v. City of Brunswick*, 287 F.3d 492, 499 (6th Cir. 2002).

¹⁰⁷ 743 F.2d 1158 (6th Cir. 1984).

¹⁰⁸ *Morgan*, 743 F.2d at 1161. The way in which courts characterize the language and tone of voice used by the police is a critical issue in constructive entry analysis, and it makes the analysis of appellate decisions very problematic. For example, in *United States v. Maez*, 872 F.2d 1444, 1447 (10th Cir. 1989), the court stated that the police "asked" the occupants over loud speakers to exit their trailer. Using the term "asked" rather than "commanded," "demanded," "requested," "ordered," or "summoned" without specifying the exact words the police used, makes it difficult to assess the correctness of the court's characterization. *Id.* at 1446. This, in turn, makes it difficult to determine the level of coerciveness in a

was such that a “reasonable person would have believed [that] he was not free to leave.”¹⁰⁹ Rather than knowingly waiving his constitutional rights and “voluntarily expos[ing] himself to a warrantless arrest by appearing at the door,”¹¹⁰ the defendant appeared at the door because of the “coercive police behavior taking place outside of the house.”¹¹¹

When we move away from the cases in which there is an overwhelming show of force or threat of force, determining whether a seizure occurred becomes very difficult, even among courts that recognize the constructive entry doctrine. None of the factors cited by the Supreme Court or added by the lower courts has been found to be determinative. The courts that recognize constructive entry generally agree on how to formulate the relevant test, but the application of the test is problematic.

The number of officers approaching the dwelling and confronting the occupant is not determinative. For example, in *United States v. Thomas*, the United States Court of Appeals for the Sixth Circuit stated that a constructive entry occurs “when the police, while not entering the house, deploy overbearing tactics that essentially force the individual out of the home.”¹¹² The tactics are considered coercive when there is “such a show of authority that [the] [d]efendant reasonably believed he had no choice but to comply.”¹¹³ In this case, five officers in four police vehicles went to the house in which the defendant was living; two officers approached and knocked on the door.¹¹⁴ When the defendant opened the door, the officers asked him to step

specific case. This is one of the reasons that the analysis of *United States v. Allen* is problematic. In that case the court never specified the precise words used by the police. See *infra* notes 171–79 and accompanying text.

¹⁰⁹ *Morgan*, 743 F.2d at 1164. For a discussion of whether not feeling “free to leave” a dwelling constitutes a restraint on a person who does not wish to leave, see *supra* notes 80–97 and accompanying text.

¹¹⁰ *Morgan*, 743 F.2d at 1166 (quoting *Johnson v. United States*, 333 U.S. 10, 13 (1948)).

¹¹¹ *Id.* at 1167. For other cases involving overwhelming force or threats of force by the police, see *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989) (discussing a situation in which ten police officers and a SWAT team surrounded the trailer occupied by the defendant and his family and, with rifles pointing at the trailer, “asked” the occupants over loudspeakers to exit the trailer) and *Sharrar v. Felsing*, 128 F.3d 810, 815–16 (3d Cir. 1997) (discussing a situation involving a SWAT team, snipers, and machine guns pointed at the suspect’s house). See also Call, *supra* note 2, at 337–38; Marino, *supra* note 2, at 584–85, 591.

¹¹² *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005). See also *United States v. Grayer*, 232 F. App’x 446, 450 (6th Cir. 2007) (quoting *Thomas*, 430 F.3d at 277).

¹¹³ *Thomas*, 430 F.3d at 277 (internal quotation marks omitted).

¹¹⁴ *Thomas*, 430 F.3d at 276, 280.

outside, and when he did so, he was arrested.¹¹⁵ The court did not consider this police conduct to constitute a constructive entry.¹¹⁶ The defendant's actions were consensual.¹¹⁷ In *United States v. Saari*, decided by the same court, four officers approached the defendant's apartment with weapons drawn.¹¹⁸ One of the officers knocked forcefully on the door and identified himself as a police officer.¹¹⁹ When the defendant opened the door, the officers pointed their weapons at him and ordered him to step outside with his hands in the air.¹²⁰ Rejecting the government's claim that the defendant's actions were voluntary, the court found instead that the defendant responded to "coercive authority" when he opened the door and exited the dwelling.¹²¹ In *United States v. Grayer*, the same court ruled that when four officers and a police dog approached the defendant's house, knocked on the door, and asked the defendant to step outside and speak with them, there was no constructive entry.¹²² The court reiterated that if an occupant "willingly and voluntarily" acquiesced "to non-coercive police requests to leave the protection of the house," there was no constructive entry.¹²³

The presence of a brandished firearm is not determinative. Although courts find a constructive entry in nearly every case in which the officers point a firearm at an occupant, there are several cases in which the officers are armed but do not point a firearm at the occupant, and the court makes the same finding.¹²⁴ For example, in *United States v. Quaempts*,¹²⁵ decided by the Court of Appeals for the Ninth Circuit in 2005, at least four officers went to the defendant's trailer.¹²⁶ After one of them

¹¹⁵ *Id.* at 276.

¹¹⁶ *See id.*

¹¹⁷ *Id.* at 278–79.

¹¹⁸ *United States v. Saari*, 272 F.3d 804, 806–07 (6th Cir. 2001).

¹¹⁹ *Id.* at 807.

¹²⁰ *Id.*

¹²¹ *Id.* at 808.

¹²² *United States v. Grayer*, 232 F. App'x 446, 447 (6th Cir. 2007).

¹²³ *Id.* at 450.

¹²⁴ *Compare Saari*, 272 F.3d at 807 (involving a situation in which police pointed their weapons at the occupant), *with* *People v. Aarness*, 150 P.3d 1271, 1274 (Colo. 2006) (finding no constructive entry when officers approached the defendant's dwelling with guns drawn).

¹²⁵ *United States v. Quaempts*, 411 F.3d 1046 (9th Cir. 2005).

¹²⁶ *Id.* at 1047.

knocked on the door and said, “Darrell Quaempts, police officer. I need to talk to you,” the defendant opened the door.¹²⁷ The court found the actions to be a constructive entry.¹²⁸

A review of the cases suggests that not only is there no one determinative factor, but there is no consensus among the courts on how much weight to place on the various existing factors, both the ones specified by the Supreme Court in *Mendenhall* and those subsequently added by the lower courts. At the opposite end of the spectrum from the cases that involved an overwhelming show of force and threats of force,¹²⁹ we find cases in which there are as few as two officers, no threats of force, and no weapons drawn, yet the court finds a seizure taking place inside the dwelling¹³⁰ or holds that a jury could find that opening the door was not a voluntary act.¹³¹

The disarray that is observed among the courts relating to the constructive entry doctrine is caused, in part, by the discrepancy in the way that courts determine whether a seizure has occurred. In *Mendenhall*, the Supreme Court stated that a seizure of a person is triggered when, “by means of physical force or a show of authority . . . , [one’s] freedom of movement is restrained.”¹³² Many lower courts, on the other hand, state that a seizure is triggered by a show of authority *or* coercion. This difference in terminology is significant. Presumably these courts equate coercion with physical force or threats of force. Certainly, these things are typically coercive. The problem is that this formulation suggests that a show of authority is *distinct* from coercion—that is, a show of authority alone is not coercive. In fact, a show of authority by a police officer may be just as coercive as physical force or the

¹²⁷ *Id.* at 1048 (internal quotation marks omitted).

¹²⁸ *Id.* at 1048–49.

¹²⁹ See, e.g., *Sharrar v. Felsing*, 128 F.3d 810 (3d Cir. 1997); *Maetz*, 872 F.2d 1444 (10th Cir. 1989); *Morgan*, 743 F.2d 1158 (6th Cir. 1984).

¹³⁰ See *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997) (applying a *Terry* analysis and concluding that as a result of the officers’ actions outside the motel room, the defendants were seized inside their room for purposes of the Fourth Amendment). See also *Terry v. Ohio*, 392 U.S. 1, 5–6 (1968).

¹³¹ *Duncan v. Storie*, 869 F.2d 1100 (8th Cir. 1989). In this case, the court does not use constructive entry terminology, but undertakes the same Fourth Amendment seizure analysis that one finds in constructive entry cases. See *id.* at 1102–03.

¹³² *United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

threat of such force.¹³³ The assertion of authority by a uniformed officer may be highly coercive in the sense that he overcomes the occupant's free will to stay inside the dwelling with the door closed.¹³⁴ If more courts recognized a show of police authority as inherently coercive, it would make this area of law more coherent and, at the same time, slow the erosion of the *Payton* rule. Moreover, social science research over the last half-century strongly suggests that a police officer in uniform, with a weapon and a badge, is inherently a show of authority¹³⁵ and can be highly coercive even in routine encounters between police and citizens, particularly with respect to some minority groups.¹³⁶ This research suggests that wearing a police uniform and displaying a badge should be added to the list of factors to be considered in determining whether or not the police have seized an occupant inside of a dwelling. With this overview of the *Payton* rule and the constructive entry doctrine in mind, the next section will present a critique of the recent Second Circuit decision in *United States v. Allen*.¹³⁷

III. CRITIQUE OF *UNITED STATES V. ALLEN*

The Second Circuit's decision in *United States v. Allen* highlights the problematic aspects of the *Payton* rule and, despite the criticism from the majority in *Allen*, the usefulness of the constructive entry concept in resolving those problems.¹³⁸

¹³³ Citron, *supra* note 2, at 2791–92; Tracey Maclin, *The Good News and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27 (2008); Swingle & Zoellner, *supra* note 2, at 27. *See also* *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008).

¹³⁴ In *Johnson v. United States*, 333 U.S. 10 (1948), one of the earliest cases that dealt with doorway confrontations, the Supreme Court made it clear that coercion can be found in a show of authority as well as the use or threatened use of force. Some courts fail to see the coercive nature of police authority. *See, e.g.*, *Knight v. Jacobson*, 300 F.3d 1272 (11th Cir. 2002) (police officer knocked on the plaintiff's apartment door at 2:00 A.M. and told him to step outside found not to be coercive).

¹³⁵ *See, e.g.*, Daniel J. Bell, *Police Uniforms, Attitudes, and Citizens*, 10 J. CRIM. JUST. 45 (1982) (showing that both the police officer's uniform and their manner toward a citizen shape the citizen's reaction); Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47 (1974); Steve Herbert, *Tangled up in Blue: Conflicting Paths to Police Legitimacy*, 10 THEORETICAL CRIM. 481 (2006); Nathan Joseph & Nickolas Alex, *The Uniform: A Sociological Perspective*, 77 AM. J. SOC. 719 (1972); Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507 (2001).

¹³⁶ *See, e.g.*, Maclin, *supra* note 133.

¹³⁷ *United States v. Allen*, 813 F.3d 76 (2d Cir. 2016).

¹³⁸ *Id.*

A. *The Facts of United States v. Allen*

For the most part, the facts of the *Allen* case are simple and uncontested. The case involved the investigation by local police of an assault allegedly committed by Allen.¹³⁹ During the investigation, the police determined that Allen was the perpetrator.¹⁴⁰ Although they had “ample” probable cause to believe that Allen committed the assault, they chose not to seek an arrest warrant.¹⁴¹ Instead, four officers traveled to Allen’s apartment with the “pre-formed plan . . . to arrest him” and take him to the police station for processing.¹⁴²

The entry door to Allen’s apartment was on the street level.¹⁴³ It opened to a hallway and staircase up to the living areas, which were located on the second and third floors of the building.¹⁴⁴ When the officers arrived at Allen’s home, they knocked on the entry door.¹⁴⁵ Hearing the knock on the door, Allen stepped into a second-floor porch and looked down at the officers, one of whom Allen recognized from previous interactions.¹⁴⁶ That officer waved to Allen, and in response to something that officer said, Allen traveled down the stairs to the entry door and opened it.¹⁴⁷

Remaining “inside the threshold,” Allen spoke with the officers, all of whom remained on the sidewalk, for “five or six minutes” about the alleged assault.¹⁴⁸

¹³⁹ *Id.* at 78–79.

¹⁴⁰ *Id.* at 78.

¹⁴¹ *Id.*

¹⁴² *Id.* (quoting *United States v. Allen*, No. 5:12-cr-130-1, 2013 U.S. Dist. LEXIS 57010, at *2 (D. Vt. Apr. 22, 2013)).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ According to the district court opinion, the officers rang the doorbell, which, according to the defendant, was not operating, “and may also have knocked on the door.” *United States v. Allen*, No. 5:12-cr-130-1, 2013 U.S. Dist. LEXIS 57010, at *4 (D. Vt. Apr. 22, 2013). The court did not address this discrepancy, simply stating that the officers “knocked on the door.” *Allen*, 813 F.3d at 79.

¹⁴⁶ *United States v. Allen*, 2013 U.S. Dist. LEXIS 57010, *4 (D. Vt. 2013) (This fact is omitted in the Second Circuit opinion.).

¹⁴⁷ *Allen*, 813 F.3d at 79. The Second Circuit assures that “[t]he facts are not in dispute.” *Id.* at 78. However, there is significant uncertainty over exactly what the officer(s) said that resulted in Allen going down the stairs and opening the entry door. *See infra* notes 165–68, 171–79 and accompanying text.

¹⁴⁸ *Allen*, 813 F.3d at 79; 2013 U.S. Dist. LEXIS 57010, at *4.

During this time “no weapons were drawn and the officers did not physically touch Defendant.”¹⁴⁹

According to the Second Circuit opinion, an officer, while remaining outside the threshold, then “told Allen that he would need to come down to the police station to be processed for the assault.”¹⁵⁰ The court characterizes the officer’s statement as telling Allen that “he was under arrest.”¹⁵¹ Allen then asked the officers if he could go back up the stairs to “retrieve his shoes and inform his 12-year-old daughter that he would be leaving with the officers.”¹⁵² The officers informed Allen that he could do so only if they accompanied him.¹⁵³ Allen acquiesced.¹⁵⁴ The officers entered the dwelling and accompanied him back up the stairs and into the living area.¹⁵⁵ When the officers and Allen entered the living area of the apartment, “one of the officers asked Allen whether he had anything in his pockets.”¹⁵⁶ In response, Allen removed several items, “including seven bags of marijuana.”¹⁵⁷ While in the apartment with Allen the officers also saw in plain view drug paraphernalia.¹⁵⁸ Allen was then taken out of the apartment, handcuffed, and taken to the police station.¹⁵⁹ The officers then applied for and obtained a warrant to search Allen’s apartment based on the observed drug paraphernalia and bags of marijuana.¹⁶⁰ While executing the warrant they recovered, in addition to the drug paraphernalia, a handgun, which resulted in Allen’s

¹⁴⁹ *Allen*, 813 F.3d at 79; 2013 U.S. Dist. LEXIS 57010, at *4.

¹⁵⁰ *Allen*, 813 F.3d at 79; 2013 U.S. Dist. LEXIS 57010, at *5.

¹⁵¹ *Allen*, 813 F.3d at 79 (“In other words, he was under arrest.”).

¹⁵² *Id.*

¹⁵³ *Id.* In note 4, the court noted that once Allen was under arrest, the officers were permitted to “remain literally at [his] elbow at all times.” *Id.* at 79 n.4 (quoting *Washington v. Chrisman*, 455 U.S. 1, 6 (1982)). The court seems to use this action by the police as evidence that Allen was arrested. In other words, if the police say to someone, “We need to go with you,” that suggests that the person is arrested. This action would also indicate that Allen was seized, even if not arrested.

¹⁵⁴ *Id.* at 79.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

arrest and indictment on a federal charge of being a felon in possession of a firearm.¹⁶¹

In the U.S. District Court, Allen moved to suppress the firearm as the fruit of an illegal search.¹⁶² After a one-day hearing the court rejected Allen's motion on the grounds that although he had been arrested while inside of his home, "an across the threshold arrest,"¹⁶³ there was no *Payton* violation. Taking a narrow view of the *Payton* rule, the court held that because the officers never physically crossed the threshold "in order to effectuate the arrest,"¹⁶⁴ there was no violation. In other words, arresting Allen from outside the dwelling while he was inside does not violate the *Payton* rule.

Before discussing the Second Circuit decision in this case, some brief attention should be directed at the two highly ambiguous factual aspects of the case. These help to illustrate the substantial difficulty that one encounters in researching the Fourth Amendment issues that arise out of doorway confrontations and, at the same time, point to two of the seemingly intractable doctrinal issues in this area of law. The first problem is that neither the trial court nor the appellate court specified exactly *what* the officers said to Allen when he was on the upstairs porch that resulted in him going down the stairs and opening the entry door. At one point in its opinion the Second Circuit stated that one of the officers "requested" that Allen come down the stairs to the entry door "to speak with him."¹⁶⁵ Elsewhere in the opinion, the court characterized the initial encounter as one in which the "officers have summoned the suspect to the front door of his home."¹⁶⁶ Further in the opinion the court refers to this situation as one in which officers "call him or her to the door."¹⁶⁷ "Requesting," "summoning," and "calling" an occupant to answer the door all have different shades of meaning and connote vastly different degrees of authority being asserted by the

¹⁶¹ *Id.* (Allen was charged with the federal offense under 18 U.S.C. § 922(g)(1) (2012)).

¹⁶² *Allen*, 813 F.3d at 78; 2013 U.S. Dist. LEXIS 57010, at *1.

¹⁶³ The District Court cited *California v. Hodari D.*, 499 U.S. 621 (1991), as the controlling precedent on the question of whether and when Allen was arrested. *Id.* at 9. This will be discussed *infra* notes 181–86, 224–42 and accompanying text.

¹⁶⁴ *Allen*, 813 F.3d at 80; 2013 U.S. Dist. LEXIS 57010, at *1.

¹⁶⁵ *Allen*, 813 F.3d at 79.

¹⁶⁶ *Id.* at 81 ("[W]hen law enforcement officers have summoned the suspect to the front door of his home. . . ."); *id.* at 82 ("[W]here law enforcement officers have summoned a suspect to the door of this home. . . ."). The court also used "summoned" when discussing the district court opinion. *Id.* at 80.

¹⁶⁷ *Id.* at 84.

officers. As we saw in the overview of constructive entry presented above, the key issue at this point in the doorway confrontation is whether Allen was seized during the process of stopping whatever he was doing, going into the porch in response to the officers' knocking, descending the stairs in response to whatever the officers said to him, and opening the door. Was Allen's free will overcome? At one point in the opinion, the Second Circuit states that Allen "complied," came down the stairs, and opened the entry door.¹⁶⁸ Is "compliance" at odds with the exercise of free will? The key question at this point is whether a reasonable person would have felt free to ignore the officers and return to whatever he had been doing inside his dwelling. Neither the District of Vermont nor the Second Circuit considered this question. This issue is critical because Allen may have been seized well before the across the threshold arrest took place. If that were the case, there was a constructive entry by the officers in violation of the *Payton* rule and that violation occurred prior to the across the threshold arrest. Without knowing precisely what was said that resulted in Allen opening the door, we cannot be certain about whether a seizure took place at that point.¹⁶⁹

Moreover, if Allen had opened the door, exited the dwelling, and been arrested outside his home, being legally seized at the time he opened the door would raise some doubts about whether he exited the home voluntarily, which, in turn, would undermine the validity of the warrantless public arrest. This issue would be critical for those courts, like the Second Circuit, that believe a warrantless arrest outside the home would not violate the *Payton* rule.¹⁷⁰

The second problematic aspect of the facts is uncertainty over precisely *what* the police officers said to Allen that constituted his arrest. In its opinion, the Second Circuit states variously that while Allen was inside the doorway, the officers "advised him" that he was under arrest,¹⁷¹ "told [him] in effect" that he was under

¹⁶⁸ *Id.* at 79 ("Allen complied.").

¹⁶⁹ It may be that the court did not view opening the door as a seizure. In the opinion, all of the references to opening the door are in conjunction with the subsequent arrest. For example, the court, in its holding, says that the police may not "cause a suspect to open the door of the home to effect a warrantless arrest. . . ." *Id.* at 85. On pp. 84–85, in discussing the precedent established by *Reed*, the court refers to placing the occupant under arrest when he or she "opens the door in response to the police request . . ." *Id.* at 84–85. This issue is critical because if the police, instead of arresting Allen while he was standing inside his dwelling, had asked him to *step outside into public space and then arrested him*, the question of a *Payton* violation would depend on whether answering the door constituted a seizure.

¹⁷⁰ *Id.* at 78, 87, 89 (concurring opinion). *See also* Dow, *supra* note 1, at 18–23.

¹⁷¹ *Allen*, 813 F.3d at 86 (explaining that the police officers "advis[ed] Allen that he was under arrest").

arrest,¹⁷² and “made a face-to-face announcement . . . that a suspect is under arrest[.]”¹⁷³ The officers gave a “command that . . . [Allen] would have to come to the police station with them . . . ,”¹⁷⁴ and “[t]he officers then told Allen that he would need to come down to the police station to be processed for the assault. In other words, he was under arrest.”¹⁷⁵ But it is not at all clear whether these words were spoken by the officers or are the court’s paraphrasing of the officers’ words. Did the officers state to Allen that he was “under arrest,” or is the court paraphrasing the officers’ statements? Does stating to someone, “[you] need to come down to the police station [with us]”¹⁷⁶ without using the word “arrest” constitute an arrest? Allen testified that when he asked the officers if he was under arrest, he was told that he was not.¹⁷⁷ The Second Circuit discredits this testimony in light of the officers’ “pre-formed” plan to arrest Allen.¹⁷⁸ By stating that the officers told Allen that he was “in effect” under arrest, the court creates serious doubt that the officers actually used the words “under arrest.” Had the officers used those words, it is likely that the court would have simply stated that the officers told Allen that he was under arrest. Why did the court add the phrase “in effect”? It is most likely because the officers did not say to Allen that he was under arrest. As the Court points out, determining “whether an arrest occurred in, at, or by the threshold . . . presents close fact-finding issues for the district courts.”¹⁷⁹ The failure of courts, such as the district court and the Second Circuit in the *Allen* case, to clarify the language the police use in this situation compounds the problem and makes it exceedingly difficult to resolve these critical legal issues.

B. *The District Court Decision*

After Allen was indicted for a federal felon-in-possession charge, he moved to suppress the firearm (found in the apartment during the search authorized by the

¹⁷² *Id.* (“after being told in effect that he was under arrest”).

¹⁷³ *Id.* at 88 n.11.

¹⁷⁴ *Id.* at 86.

¹⁷⁵ *Id.* at 78. In a later portion of the opinion the Second Circuit again uses the phrase “the officers told Allen that he would need to come down to the police station to be processed for the assault.” *Id.* at 86.

¹⁷⁶ *Id.* at 86.

¹⁷⁷ *United States v. Allen*, 2013 U.S. Dist. LEXIS 57010, *5 (D. Vt. 2013).

¹⁷⁸ 813 F.3d at 78.

¹⁷⁹ *Id.* at 88 (quoting LAFAVE, *supra* note 60, § 6.1(e)).

warrant) and statements made as fruits of a warrantless in-home arrest.¹⁸⁰ The district court agreed with Allen that he was arrested while inside his home.¹⁸¹ In doing so, that court applied the rule on arrest articulated in the Supreme Court decision in *California v. Hodari D.*¹⁸² In that case the Court held that an “arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.”¹⁸³ The district court reasoned that by asking the officers for permission to return to the apartment living area, “say goodbye to his daughter, and retrieve his shoes,” Allen had submitted to the officers’ authority at that point and was, therefore, arrested.¹⁸⁴ However, the district court denied Allen’s motion because it adheres to the narrow view of the *Payton* rule, which specifies that unless the police officer physically crosses the threshold, there is no violation.¹⁸⁵ Focusing on whether the officers had crossed the threshold of the dwelling in the course of effecting the arrest, the court concluded that there was no violation of the *Payton* rule.¹⁸⁶

C. *The Second Circuit Decision*

The Second Circuit decision in *United States v. Allen* begins by articulating an expansive view of privacy rights in the home.¹⁸⁷ Quoting the Supreme Court opinion in *Florida v. Jardines*,¹⁸⁸ the decision begins by stating that “the home is first among equals” with respect to the Fourth Amendment.¹⁸⁹ It goes on to emphasize that “[a]t the Amendment’s very core stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.”¹⁹⁰ Quoting the Supreme Court decision in *Georgia v. Randolph*,¹⁹¹ the court adds that “it is beyond dispute that

¹⁸⁰ *Allen*, 813 F.3d at 79 (2016); *United States v. Allen*, 2013 U.S. Dist. LEXIS 57010, at 1 (D. Vt. 2013).

¹⁸¹ *Allen*, 813 F.3d at 79; 2013 U.S. Dist. LEXIS 57010, at 13–14.

¹⁸² *California v. Hodari D.*, 499 U.S. 621 (1991).

¹⁸³ *Allen*, 813 F.3d at 79–80; 2013 U.S. Dist. LEXIS 57010, at *9 (quoting *Hodari*, 499 U.S. at 626).

¹⁸⁴ *Allen*, 813 F.3d at 80; 2013 U.S. Dist. LEXIS 57010, at *11.

¹⁸⁵ *Allen*, 813 F.3d at 80; 2013 U.S. Dist. LEXIS 57010, at *12–26.

¹⁸⁶ *Allen*, 813 F.3d at 80; 2013 U.S. Dist. LEXIS 57010, at *26.

¹⁸⁷ 813 F.3d at 77–78.

¹⁸⁸ *Florida v. Jardines*, 569 U.S. 1 (2013).

¹⁸⁹ *Allen*, 813 F.3d at 77 (quoting *Jardines*, 569 U.S. 1, 6 (2013)). See *supra* notes 4–6 and accompanying text.

¹⁹⁰ *Allen*, 813 F.3d at 77 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

¹⁹¹ *Georgia v. Randolph*, 547 U.S. 103, 115 (2006).

the home is entitled to special protection as the center of the private lives of our people.”¹⁹²

The Second Circuit agreed with the lower court that Allen was arrested while he was inside his home,¹⁹³ adding that neither party disputed this conclusion.¹⁹⁴ However, the court rejects the District of Vermont’s narrow view of the *Payton* rule¹⁹⁵ and, instead, adopts the broad view, which holds that the rule can be violated even if the police do not physically cross the threshold and enter the dwelling.¹⁹⁶ The court notes that the Supreme Court “refused to lock the Fourth Amendment into instances of actual physical trespass,”¹⁹⁷ and that some other federal circuit courts hold a similar view in finding that “officers need not physically enter the home for *Payton* to apply”¹⁹⁸ The court goes on to hold “that irrespective of the location . . . of the arresting officers, law enforcement may not cause a suspect to open the door of the home to affect a warrantless arrest of a suspect in his home in the absence of exigent circumstances.”¹⁹⁹

¹⁹² *Allen*, 813 F.3d at 85 (quoting *Randolph*, 547 U.S. at 115).

¹⁹³ *Allen*, 813 F.3d at 79–80, 80 n.6.

¹⁹⁴ *Id.* at 80.

¹⁹⁵ *See supra* notes 188–89 and accompanying text.

¹⁹⁶ *Allen*, 813 F.3d at 82, 85–86 (“[I]rrespective of the location . . . of the arresting officers, law enforcement may not cause a suspect to open the door of the home to affect a warrantless arrest of a suspect in his home in the absence of exigent circumstances.”); *see generally supra* notes 56–61 and accompanying text.

¹⁹⁷ *Allen*, 813 F.3d at 82 (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

¹⁹⁸ *Allen*, 813 F.3d at 81 (quoting *United States v. Reeves*, 524 F.3d 1161, 1165 (11th Cir. 2008)). In addition to the *Reeves* case, the court cites *Fisher v. City of San Jose*, 558 F.3d 1069, 1074–75 (9th Cir. 2009) (en banc), and *United States v. Saari*, 272 F.3d 804, 807–08 (6th Cir. 2001). *See generally* Dow, *supra* note 1, at 18–20. With respect to the narrow view the court cites *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir. 2002); *United States v. Berkowitz*, 927 F.2d 1376, 1386–88 (7th Cir. 1991), and *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987). *See generally* Dow, *supra* note 1, at 18–20.

¹⁹⁹ *Allen*, 813 F.3d at 85. To emphasize that the suspect’s location, not the officers’ location, is key, the court adds that “[w]here law enforcement officers have summoned a suspect to the door of his home, and he remains inside the home’s confines, they may not effect a warrantless ‘across the threshold’ arrest in the absence of exigent circumstances.” *Id.* at 82. The opinion adds that “we reject the government’s contention that this fact requires that *Payton*’s warrant requirements be limited to cases in which the arresting officers themselves cross the threshold of the home before effecting an arrest.” *Id.* at 85. *See also id.* (“[T]he [*Payton*] rule must turn on the location of the defendant, not the officers, at the time of the arrest.”).

In adopting the broad view of the *Payton* rule, the court observes that the sister circuit courts which have adopted the same view “tend to rely on the legal fiction of constructive or coercive entry . . .”; however, the court rejects this doctrine and, instead, adopts an approach that focuses on whether a threshold *arrest* occurred while the suspect was inside his dwelling.²⁰⁰ An analysis and critique of this rejection of the constructive entry rule is presented in this article; however, before that is undertaken it is necessary to discuss the approach that the court utilizes as an alternative to the constructive entry rule. That alternative approach, which focuses on whether there was an across the threshold arrest, will be referred to as the *arrest rule*.²⁰¹

D. The Arrest Rule

In discussing the arrest rule as a preferred alternative to the constructive entry rule, the court begins with a discussion of *United States v. Reed*,²⁰² its own “seminal case analyzing warrantless arrests in the home”²⁰³ This case predates the *Payton* decision and was, in fact, cited with approval by the U.S. Supreme Court in the *Payton* opinion.²⁰⁴ In *Reed*, three armed federal law enforcement officers, acting with probable cause but without a warrant, knocked on Reed’s apartment door.²⁰⁵ Although there was conflicting testimony over what happened after Reed opened the door,²⁰⁶ the federal district court hearing the case concluded that Reed was arrested “when she opened the apartment door.”²⁰⁷ In other words, she was *already arrested before* the agents spoke to her and before they entered the apartment and took her into custody. The Second Circuit did not elaborate on whether Reed was arrested at

²⁰⁰ In his concurring opinion, Judge Lohier states that he does “not understand the majority’s holding to have rejected what the majority describes as the ‘legal fiction,’ and what I regard as the legal reality, of coercive entry.” *Allen*, 813 F.3d at 89. However, he does not discuss the issue.

²⁰¹ The term “arrest” is used here to emphasize that the court overlooks the possibility of a seizure that does not constitute an arrest but nevertheless triggers a violation of the *Payton* rule. The constructive entry rule encompasses seizures, including those that are short of an arrest, if the occupant was seized while inside of his dwelling.

²⁰² *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978).

²⁰³ *Allen*, 813 F.3d at 82.

²⁰⁴ *Payton v. New York*, 445 U.S. 573, 589 (1980). See *Allen*, 813 F.3d at 82 n.8.

²⁰⁵ *Reed*, 572 F.2d at 415.

²⁰⁶ *Id.* at 422.

²⁰⁷ *Id.* at 423.

the moment she opened the door.²⁰⁸ Instead, the *Allen* court found that “Reed was arrested while she stood inside her threshold and officers remained outside of it”²⁰⁹ and held that “such an ‘across the threshold’ arrest was unconstitutional.”²¹⁰ For the Second Circuit, the binding precedent established by the *Reed* decision is “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.”²¹¹

In *United States v. Allen*, the Second Circuit has no doubt and sees no reason to dispute the fact that Allen was arrested.²¹² With respect to the issue of exactly when and where he was arrested, the court focuses on the control that the police exercised over him. The court emphasizes that Allen was not free to ignore the police or their command to accompany them to the station.²¹³ In addition, the court alludes to an objective test for determining whether an arrest has occurred and suggests that in this situation a reasonable person would not have felt free to ignore the police.²¹⁴ The court finds that from the point at which he was told that he needed to come down to the police station, Allen’s actions were controlled by the police. (Initially this was without physical contact.) His actions in following the commands of the police were not consensual on his part.²¹⁵ The court finds that he reasonably believed he needed permission from the officers to go back upstairs into the living area to retrieve his

²⁰⁸ The failure of the Second Circuit to discuss the district court’s finding that Reed was arrested when she opened the door may help to explain why the Second Circuit ignored this same issue in the *Allen* case. It is unfortunate that the court did not carefully look at whether Allen was arrested or, more broadly, seized when he opened the door to this apartment, before the dialogue with the officers across the threshold that, according to the court, constituted an arrest. Under a constructive entry analysis, the actions of going down the stairs and opening the front door may have constituted a seizure and, therefore, a violation of the *Payton* rule. See *supra* notes 60–61, 73–97 and accompanying text. See also generally *Dow*, *supra* note 1.

²⁰⁹ *Allen*, 813 F.3d at 83.

²¹⁰ *Id.*

²¹¹ *Id.* at 85.

²¹² *Id.* at 86. See also *id.* at 80 n.6 (“[N]either party disputes that Allen was arrested while he was still inside his home.”).

²¹³ *Id.* at 86.

²¹⁴ *Id.*

²¹⁵ *Id.*

shoes, say goodbye to his daughter, and then to go with the police to the station, and could do so only if accompanied by an officer.²¹⁶

The court believes that the across the threshold arrest violates the *Payton* rule because the “result was exactly the same as if the officers had entered the apartment and arrested Allen inside.”²¹⁷ The control over Allen’s actions, which is the focus of the court’s arrest analysis, was accomplished while Allen was inside his dwelling.²¹⁸ The court offers a second reason why the across the threshold arrest violates the *Payton* rule. In *Washington v. Chrisman*,²¹⁹ the Supreme Court held that the moment a person is arrested, police have a “right to remain literally at . . . [the arrestee’s] elbow at all times.”²²⁰ This allows the police extensive control over the arrestee’s movements. If an across the threshold arrest were permitted, the court believes that asserting this level of control would “often lead to the very intrusion into the home that *Payton* warns is the ‘chief evil’ against which the warrant requirement protects.”²²¹ This is because “a physical intrusion into the home will very frequently follow the arrest.”²²²

With respect to the analytical framework for determining whether and when an arrest took place, the Second Circuit finds that the District of Vermont’s use of the Supreme Court’s test in *California v. Hodari D.*²²³ was inappropriate in the context of “in-home encounters.”²²⁴ In *Hodari*, as police officers approached a small group of youths, the suspects ran away.²²⁵ One of the officers pursued a suspect on foot,

²¹⁶ *Id.*

²¹⁷ *Id.* Ironically, this is the key justification for the constructive entry rule, which the court rejects. In other words, the across the threshold arrest constitutes a constructive entry. *See supra* notes 56–60 and accompanying text.

²¹⁸ *Allen*, 813 F.3d at 86 (“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*.”) (emphasis in original).

²¹⁹ *Washington v. Chrisman*, 455 U.S. 1 (1982).

²²⁰ *Id.* at 6.

²²¹ *Allen*, 813 F.3d at 86 (citing *Payton v. New York*, 445 U.S. 573, 585 (1980)).

²²² *Id.*

²²³ *California v. Hodari D.*, 499 U.S. 621 (1991).

²²⁴ *Allen*, 813 F.3d at 80 n.6, 86–87. “Doorway encounters” is more descriptive than “in-home encounters,” the term the court uses, because in cases such as *Allen* the suspect is inside the home, but the police are outside the home, at least initially.

²²⁵ 499 U.S. at 622–23.

who continued to flee until the officer tackled him and subdued him.²²⁶ On the question of exactly when the suspect had been seized within the meaning of the Fourth Amendment, the Supreme Court held that a suspect is not arrested until he submits “to the assertion of authority” by the police or, in the case of a suspect who is unwilling to submit, is physically restrained by the police.²²⁷ Under the facts of the case, because Hodari did not submit to police authority, he was not arrested until the officer tackled and physically restrained him.²²⁸ In the *Allen* case, the Second Circuit rejected the *Hodari* rule²²⁹ and, instead, applied the rule articulated in *United States v. Mendenhall*,²³⁰ which it describes as “the traditional totality-of-the-circumstances analysis.”²³¹ Quoting from *Mendenhall*, the court states that a “person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”²³² Under this analysis, the court concludes that “Allen was arrested while standing inside the threshold of his home”²³³

The court’s rejection of *Hodari* is problematic for several reasons. First, the court noted that the *Hodari* rule was created in the context of a street encounter and that neither of the parties nor the lower court cited any appellate authority for applying it to a doorway encounter.²³⁴ Second, the concept of seizure in *Mendenhall*, i.e. force or show of authority that makes compliance compelled, is the same basic concept as arrest in *Hodari*, which holds that an arrest has occurred when the suspect submits to authority or is subdued by physical force. The court rejects *Hodari*’s concept of arrest by claiming that it applies in public but not in a doorway

²²⁶ *Id.*

²²⁷ *Id.* at 626 (“An arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority.”).

²²⁸ *Id.* at 629.

²²⁹ *Allen*, 813 F.3d at 80 n.6, 87.

²³⁰ *United States v. Mendenhall*, 446 U.S. 544 (1980). See *supra* notes 73–80 and accompanying text.

²³¹ *Allen*, 813 F.3d at 80 n.6, 86–87.

²³² *Id.* at 80 n.6 (quoting *Mendenhall*, 446 U.S. at 554). On the concept of seizure articulated in *Mendenhall*, see *supra* notes 73–80. On the concept of seizure used in constructive entry, see *infra* notes 243–50, 277–86 and accompanying text.

²³³ *Allen*, 813 F.3d at 80 n.6.

²³⁴ The court refers to the situation in the *Allen* case as an “in-home encounter,” 813 F.3d at 87, and an encounter “in the home,” *id.* at 80 n.6.

situation,²³⁵ and then adopts the formulation of seizure in *Mendendall*, which uses the same basic formulation to deal with a public seizure.²³⁶ The Second Circuit assumes that the rule in *Hodari* is incompatible with the rule in *Mendenhall*, but it is not at all clear that these two rules are incompatible.²³⁷

Third, the court observes that the *Hodari* rule would be “unworkable in the context of an ‘across the threshold’ arrest” for two reasons.²³⁸ The first reason is that adhering to the *Payton* rule would mean that an officer attempting to make a warrantless arrest of a suspect who is inside the dwelling “would have to stop at the threshold and allow a suspect to defy arrest.”²³⁹ This criticism misses the mark because the same thing can happen under the court’s arrest rule when we apply the objective test from *Mendenhall*. In a situation in which a *reasonable person* would not feel free to ignore the officer and go about his business, the suspect may nevertheless ignore the officer’s commands and refuse to comply. Unless there is an exigent circumstance, which would allow the police to enter the dwelling, the suspect could defy arrest. This outcome seems to be appropriate under the *Payton* rule. It is therefore unclear how the court’s argument supports the *Mendenhall* rule over the *Hodari* rule. The second reason the Second Circuit rejected the *Hodari* rule in an across the threshold arrest situation is that if that rule were to be followed in a doorway encounter in which the suspect refuses to submit to the officer’s authority, police acting with probable cause would be permitted to enter the dwelling in order to subdue the suspect with physical force, an outcome that would undermine the *Payton* rule.²⁴⁰ This conclusion is problematic. Instead of saying that the *Hodari* rule would undermine the *Payton* rule in a situation in which the suspect refuses to submit to the officer’s authority, it would make more sense to argue that the *Payton* rule trumps the *Hodari* rule in a doorway confrontation, so that if the suspect defies the officer’s authority (and assuming no exigent circumstances), the officer would have to obtain a warrant in order to enter and arrest the suspect. This outcome is compatible with the *Payton* rule.

²³⁵ *Id.* at 80 n.6, 86–87.

²³⁶ *Id.* at 80 n.6, 86. *See also supra* notes 73–80 and accompanying text.

²³⁷ A detailed analysis of this matter is beyond the scope of this article.

²³⁸ *Id.* at 87.

²³⁹ *Id.*

²⁴⁰ *Id.* at 86–87.

Not only is the court's rejection of *Hodari* problematic, but its use of the test articulated in *Mendenhall* is problematic as well. The court rejects *Hodari* because it dealt with an arrest in a public space,²⁴¹ but then adopts the test from *Mendendall*, which dealt with a seizure in a public space, specifically an airport concourse.²⁴² The court fails to explain why it rejects one test and adopts a test that is essentially the same. Moreover, *Mendendall* did not deal with an arrest; it dealt with a seizure that fell short of an arrest.²⁴³ The question in that case was whether Mendendall had been seized when she consented to follow the agents to an interrogation room and (there) consented to a search of her person.²⁴⁴ This was critical because reasonable suspicion—required by *Terry v. Ohio*²⁴⁵—was absent at that point. The arrest did not occur until after the drugs had been found on her person, at which point probable cause existed.²⁴⁶ The Second Circuit fails to critically assess whether *Mendenhall* is appropriate to determine whether an *arrest* took place at Allen's doorway. In addition, *Mendendall* relies on a multiple-factor test to determine whether or not there was a seizure.²⁴⁷ This is essentially the same multiple-factor test that is at the heart of the constructive entry rule the Second Circuit rejects.²⁴⁸ Finally, *Mendenhall* uses the *free to leave* formulation, which was shown to be problematic in *Bostick* and is problematic in a doorway confrontation situation.²⁴⁹ The court does not acknowledge this problem, nor does it discuss how the *Mendenhall* formulation has

²⁴¹ *Id.* at 80 n.6, 86–87.

²⁴² *Id.* at 80 n.6, 86. *See also supra* notes 73–80 and accompanying text.

²⁴³ *Mendenhall* deals with seizures generally, whereas the *Allen* case deals with an arrest specifically. An arrest is a type of seizure. A *stop* is also a seizure but shorter in duration. In both situations, the suspect's freedom of movement is curtailed. In both situations he is not free to leave. In *Mendenhall*, the suspect was not arrested until after the drugs in her possession were discovered. The court found that when she was asked by federal agents to accompany them to an interrogation room, she was not seized. *See supra* notes 73–80 and accompanying text. In using *Mendenhall*, the Second Circuit is using a test (for seizures) that was not specifically intended for the issue at the center of the *Allen* case: whether he was arrested while inside of his dwelling. Using the *Mendenhall* test, the court concluded that Allen was seized, and then it factored in, without any discussion, the duration of seizure to conclude that he was arrested.

²⁴⁴ *United States v. Mendenhall*, 446 U.S. 544, 551–52.

²⁴⁵ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

²⁴⁶ *See Mendenhall*, 446 U.S. at 547–49.

²⁴⁷ *Id.* at 554.

²⁴⁸ *See infra* next section, The Critique of Rejecting the Constructive Entry Rule.

²⁴⁹ The rule in *Mendenhall*, without modification, will not be useful in the context of a doorway confrontation. *See supra* notes 81–97 and accompanying text.

to be modified in the *Allen* case, while at the same time adhering to the basic underlying concept of a seizure that the Supreme Court outlined in *Bostick*.²⁵⁰

For several reasons, the Second Circuit expresses confidence that the rule from *Reed* (i.e. the arrest rule) is compatible with related aspects of Fourth Amendment doctrine, such as the rule in *Mendenhall*, and common police practices. The court finds that because probable cause existed two days before the arrest, there “was ample time to obtain a warrant.”²⁵¹ Instead of obtaining a warrant, the police went to Allen’s home for the purpose of arresting him without a warrant.²⁵² Any “problems in affecting the arrest” were the result of this decision²⁵³ and not any inherent flaws in the arrest rule. Moreover, in situations where the police initially lack probable cause, but it develops during the course of an encounter with a suspect at the doorway of his home,²⁵⁴ the arrest rule would be compatible with the exigent circumstances rule, which would permit the police to enter without a warrant if exigent circumstances developed during the encounter. Finally, the court notes that the arrest rule would also be compatible with the police obtaining a telephonic warrant, keeping the house under surveillance until a conventional warrant could be obtained,²⁵⁵ or arresting the suspect in public if he exits the home.²⁵⁶

The Second Circuit uses its arrest rule in an effort to protect the privacy rights that are the focus of *Payton*, specifically the privacy rights of a home’s occupants. However, the *Payton* rule focuses on an entry rather than an arrest. Specifically, it prohibits a warrantless entry into a home to carry out a routine felony arrest. One major flaw of the arrest rule in doorway cases is that the *Payton* rule can be violated even though there was not an arrest. In both consolidated cases in the *Payton* decision, there was a warrantless entry in a home. In one of these cases the entry was without a contemporaneous arrest. The police entered Payton’s home intending to arrest him, but because he was not at home, the arrest did not occur until sometime

²⁵⁰ See *supra* notes 81–94 and accompanying text.

²⁵¹ *United States v. Allen*, 813 F.3d 76, 87 (2d Cir. 2016).

²⁵² *Id.* at 78.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* (citing *United States v. Watson*, 423 U.S. 411, 413, 417–18 (1976)). See *supra* notes 8–10 and accompanying text. The court does not address the problem of coercing the suspect into exiting his home and then arresting him without a warrant.

later.²⁵⁷ The failure to deal with this aspect of *Payton* means that the court's arrest rule will fail to deal with the many situations in which police actions fall short of an arrest, but arguably violate an occupant's privacy rights, the very rights that are protected by the *Payton* rule.

Despite the arrest rule's flaws, the Second Circuit applied it to reach the correct result, namely, finding that the across the threshold arrest of Allen (while he was inside his home) violated the *Payton* rule,²⁵⁸ but then went on to reject the constructive entry rule as inapplicable, "muddled," and lacking guidance.²⁵⁹ This raises the question of whether the arrest rule is a better rule than the constructive entry rule the court rejects. An assessment of the court's reasons for rejecting the constructive entry rule will be presented in the next section.

IV. THE CRITIQUE OF REJECTING THE CONSTRUCTIVE ENTRY RULE

In finding a *Payton* violation, the Second Circuit rejected the narrow view of that rule and, instead, adopted the broad view, under which a violation is not limited to situations that involve a physical entry by the police.²⁶⁰ The court applied the arrest rule to find a *Payton* violation, and in doing so reaches the correct result. However, its rejection of the constructive entry doctrine exhibits a misunderstanding of that doctrine. An analysis and critique of this rejection is presented in this section.

In rejecting the constructive entry rule, the court suggests that the rule is overly narrow because it finds a constructive entry (i.e. a seizure) only in cases in which the police use "forceful and compelling"²⁶¹ commands "to the occupant to submit to arrest."²⁶² It is true that the constructive entry rule will find a *Payton* violation in such cases, but contrary to the court's assertion, it can also find a violation in cases, such as *Allen*, where the officer's command to submit to custody is "authoritative,

²⁵⁷ *Payton v. New York*, 445 U.S. 573, 576–77 (1980).

²⁵⁸ See *supra* notes 199–222 and accompanying text; Hunt, *supra* note 2, at 189–92.

²⁵⁹ *Allen*, 813 F.3d at 87–88.

²⁶⁰ See *supra* notes 45–61 and accompanying text.

²⁶¹ *Allen*, 813 F.3d at 87–88.

²⁶² *Id.*

but polite,”²⁶³ if the case involves a seizure under the objective test.²⁶⁴ As already discussed, that test is whether a reasonable person would not have felt free to ignore the officers’ command and, instead, go about their business.²⁶⁵ Under the facts of the *Allen* case,²⁶⁶ the actions by the police would constitute a constructive entry. The criticism of being overly narrow can, however, be leveled against the court’s arrest rule. The constructive entry rule is, in fact, much broader than the arrest rule, which the police can evade by simply calibrating their behavior to avoid a seizure that qualifies as an arrest. The arrest rule would not prevent the police from coercing the suspect to exit the dwelling, at which point the police could carry out a public, warrantless arrest, so long as the degree of coercion does not reach the level of an arrest while the suspect is inside the dwelling.²⁶⁷ Under the constructive entry rule, coercive police actions that constitute a seizure, but fall short of an arrest, still violate the *Payton* rule. One does not need to search very long to find cases involving a seizure short of an arrest that caused the suspect to open the door and in some cases to exit the dwelling.²⁶⁸ These coercive tactics would be permitted under the arrest rule. They would not be permitted under the constructive entry rule because they constitute a seizure.²⁶⁹

Another reason the Court of Appeals rejects the constructive entry rule is its belief that the rule embodies “metaphysical subtleties,”²⁷⁰ fails “to provide clear

²⁶³ *Id.* at 88 (This is how the Court of Appeals describes the actions by the police in the *Allen* case.).

²⁶⁴ See, e.g., *United States v. Quampts*, 411 F.3d 1046 (9th Cir. 2005) (finding a constructive entry); *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997) (applying a *Terry v. Ohio*, 392 U.S. 1 (1968) analysis and concluding that defendants were seized while inside their room).

²⁶⁵ This objective test is based, in part, on the language found in *Mendenhall*, but following *Bostick*, is modified to fit the particular circumstances of a doorway confrontation. In this situation, the only reasonable way for the occupants to manifest their unwillingness to engage in a conversation with the police or comply with the request to exit the dwelling is to remain inside, ignore the police, and go about their own business. If they have already opened the door, they would shut the door and then go about their own business inside. See *Dow*, *supra* note 1, at 27–30; *supra* notes 73–97 and accompanying text.

²⁶⁶ See *supra* notes 138–79 and accompanying text.

²⁶⁷ *Allen*, 813 F.3d at 87–88.

²⁶⁸ See *Dow*, *supra* note 1, at 33–34. See also *supra* notes 112–23. In these cases, a reasonable person would not have felt free to ignore the police and go about his or her own business.

²⁶⁹ The constructive entry rule is triggered by a seizure, even if the seizure falls short of an arrest. See *supra* notes 45–61 and accompanying text. Under the *Mendenhall-Bostick* line of cases, tactics that cause a suspect to open the door under circumstances in which a reasonable person would not feel free to ignore the police, constitute a seizure. See *supra* notes 73–138 and accompanying text.

²⁷⁰ *Allen*, 813 F.3d at 88.

guidance to law enforcement through categorical rules,”²⁷¹ and is “conceptually muddled.”²⁷² The basis of this claim appears to be the need under the rule to consider a “non-exhaustive list of factors” in determining whether a seizure occurred.²⁷³ It is true that the rule requires courts to consider multiple factors in order to determine whether a suspect was seized inside of his dwelling.²⁷⁴ In *Mendenhall* and *Bostick*, the Supreme Court mandated this approach in ascertaining whether a suspect has been seized.²⁷⁵ Regarding the arrest, the *Allen* case was simple, but that does not mean that these many other factors are irrelevant in all cases.

In addition, in the *Allen* case, the focus on whether or not Allen was arrested while still inside his home may be the reason the Second Circuit ignored another important issue: whether Allen was seized when he went down the stairs and opened the door. Under the constructive entry rule, the occupant’s actions and the actions of the police would be relevant, even if he is not arrested while inside his home.

The Supreme Court’s mandate to consider multiple factors makes the issue a complex one in many cases; it is difficult to see why this makes it metaphysical or muddled. More importantly, if the constructive entry rule is to be characterized as metaphysical or muddled, it certainly is no more so than the arrest rule. The constructive entry rule is no less clear or less categorical than the arrest rule. This is because for the Second Circuit, the framework for determining whether there is an arrest is the “totality-of-the circumstances analysis” found in *Mendenhall*.²⁷⁶ In other words, the court adopts the same basic test that is at the heart of the rule the court rejects. Neither the arrest rule nor the constructive entry rule is able to provide the clear guidance to the courts and police that the Second Circuit seems to prefer,²⁷⁷ but that is because *both* of these rules are based on the multi-factor analysis in *Mendenhall*.²⁷⁸ Moreover, the list of factors that the court characterizes as creating

²⁷¹ *Id.*

²⁷² *Id.* In Hunt, *supra* note 2, the author supports the Second Circuit’s rejection of a multi-factor approach, but fails to acknowledge that this approach is mandated by the Supreme Court’s decision in *Mendenhall* and *Bostick*. See *supra* notes 73–94 and accompanying text.

²⁷³ *Allen*, 813 F.3d at 88.

²⁷⁴ See *supra* notes 73–80, 96–106 and accompanying text.

²⁷⁵ *Mendenhall*, 446 U.S. at 554; *Bostick*, 501 U.S. at 436–37.

²⁷⁶ *Allen*, 813 F.3d at 80 n.6, 86–87.

²⁷⁷ *Allen*, 813 F.3d at 88.

²⁷⁸ For the constructive entry rule, the test in *Mendenhall* is modified by the formulation in *Bostick* in order to accommodate the fact that the manifestation of consent (or refusal to consent) to interact with the

uncertainty in the *Allen* case includes items that are found in the list of factors provided in *Mendenhall*.

Is there a rule that would “provide [the] clear guidance to law enforcement through categorical rules” that the Second Circuit seeks? It is unlikely that such a rule could ever be developed because of the interplay between the concept of seizure on the one hand and consent on the other.²⁷⁹ If a suspect invites the police to enter the dwelling or the suspect exits the dwelling, there is no *Payton* violation if the suspect’s actions are voluntary. That is, if a reasonable person would not have felt compelled to exit the dwelling or allow the police to enter, then there is no *Payton* violation. There are many factors that are potentially at play in making this determination.²⁸⁰ Which factors are relevant in a particular case depends on the facts of that case. Under the facts of the *Allen* case, which were fairly simple, the court felt that the whole array of factors that are often considered under the constructive entry rule would add “an additional layer of uncertainty”²⁸¹ that would “multiply the difficulties of applying the [arrest] rule.”²⁸² It is true that in a fairly simple case such as *Allen* there is no need to consider the large array of factors, but a fairly simple case does not make the other factors irrelevant or unnecessary for all cases.²⁸³ If there had *not* been an across the threshold arrest of Allen and, instead, the police had persuaded him to step outside the apartment and then arrested him in public, the arrest rule would be totally inadequate to deal with the case. Instead, we would have to consider a potentially large array of factors to determine whether Allen was seized when he went into the porch and talked with the officers, when he went down the stairs and opened the door, or when he stepped outside of the apartment. This, of course, would be the process of determining whether a reasonable person would have

police is different for a person on a bus or in a home than it is for a person in an airport concourse. *See Dow, supra* note 1, at 26–30, and *supra* notes 73–97 and accompanying text. The court’s use of *Mendenhall* without this modification will cause difficulty in its application.

²⁷⁹ *See Dow, supra* note 1, at 30.

²⁸⁰ The Supreme Court can aid the lower courts by addressing the host of factors that might be relevant and, more importantly, looking at whether or not a police uniform and other manifestations of authority should be included. *See Dow, supra* note 1, at 36–37.

²⁸¹ *Allen*, 813 F.3d at 88.

²⁸² *Id.*

²⁸³ The Second Circuit was lulled into believing that the constructive entry rule was unnecessary in the *Allen* case because the facts were relatively simple.

believed that these actions were not optional on his part—that he was not free to ignore the police and go about his business inside his home.

Finally, the Second Circuit suggests that the constructive entry rule would needlessly add complexity to doorway confrontation cases by adding “an additional layer of uncertainty” to the issue of whether an arrest occurred while the suspect was inside his dwelling.²⁸⁴ This claim is another indication that the court misunderstands the constructive entry rule. Determining whether an arrest occurred can indeed be difficult.²⁸⁵ But, the constructive entry rule would not *add* to the difficulty. It would be used *instead of* the arrest rule to determine whether *Payton* was violated. And, it would be able to encompass far more cases—cases in which police actions constituted an arrest as well as cases with a seizure that fell short of an arrest. Without the constructive entry rule, the privacy rights of occupants of homes would be unprotected from the police tactics that gave rise to that rule in the first place.²⁸⁶

V. CONCLUSION

The law surrounding doorway arrests and the problem of constructive entry have remained unchanged since 2010. The long-standing conflict and disarray among the federal and state appellate courts remain, and the recent decision in *United States v. Allen* manifests this. The primary problem is the failure of the Supreme Court to address the conflict and clarify the key issues relating to it. To remedy this, the Court should undertake two key tasks. The first task is to resolve the issue of whether the actual, physical entry into a dwelling by the police is a requirement for finding a *Payton* violation. The trend of the federal courts of appeal is to hold that it is not, but some federal and state appellate courts continue to hold that there is no *Payton* rule violation if the police do not cross the threshold or otherwise physically enter the dwelling, a position that clearly “undermine[s] the constitutional precepts emphasized in *Payton*.”²⁸⁷

The second key task is to articulate the appropriate verbal test for ascertaining whether a seizure occurred inside a dwelling. This could be accomplished by

²⁸⁴ *Allen*, 813 F.3d at 88.

²⁸⁵ *Id.* (citing LAFAVE, *supra* note 60, § 6.1(e) (“[T]he need to sort out whether an arrest occurred in, at, on, or by the threshold already presents close fact-finding issues for the district courts.”)).

²⁸⁶ See *supra* notes 4–12 and accompanying text.

²⁸⁷ *People v. Gillam*, 734 N.W.2d 585, 595–96 (Mich. 2007) (Kelly, J., dissenting) (quoting *United States v. Morgan*, 743 F.2d 1158, 1166–67 (6th Cir. 1984)).

formulating a test that is similar to the one articulated in *Mendenhall* and *Bostick*²⁸⁸ for the context of a public seizure, but a seizure would be triggered by interference with the suspect's "freedom to stay" instead of "freedom to leave." In specifying the relevant factors, the Court should reiterate the point, made nearly seventy years ago in *Johnson v. United States*,²⁸⁹ that coercion can be found in a show of authority as well as the use or threatened use of force. The empirical research on the matter should prompt the Court to add "wearing a uniform" and "displaying a badge" to the list of factors that should be considered in determining whether police actions seized an occupant inside a dwelling.

Until this is done, the *Payton* rule will continue to be undermined by those police officers who employ an array of tactics and technologies to coerce occupants to exit a dwelling. This significantly diminishes the Fourth Amendment protection of privacy within a home and marginalizes the courts with respect to the important supervisory role they should occupy over encounters between police and citizens, especially those that take place at the doorway of a home.

²⁸⁸ See, e.g., *Florida v. Bostick*, 501 U.S. 429, 436–37 (1991); *United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980).

²⁸⁹ *Johnson v. United States*, 333 U.S. 10, 13 (1948).

