APL-2021-00096

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

TRAMEL CUENCAS,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* THE LEGAL AID SOCIETY IN SUPPORT OF DEFENDANT-APPELLANT

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New York, N.Y.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R Part 500.1(f), The Legal Aid Society discloses that it is a non-profit organization with no parent, subsidiaries, or affiliates.

INTEREST OF *AMICUS CURIAE*

Amicus curiae The Legal Aid Society is the oldest and largest legal services provider in New York. As the primary public defender in New York City, Legal Aid provides representation to hundreds of thousands of low-income New Yorkers arrested and accused of crimes in all five boroughs and, thus, has a strong interest in ensuring that this Court's precedent defining the scope of the state constitutional right to counsel is interpreted accurately and in a manner that ensures that remedies are available for violations of that right. *Amicus* regularly represents clients arrested in the same manner as the Appellant, both at the trial and appellate levels. Legal Aid attorneys spend thousands of hours a year litigating suppression issues, among them issues similar to those presented in this case. To that end, Legal Aid has a vested interest in the development of the law relating to suppression and its application as a remedy for violations of fundamental constitutional rights.

PRELIMINARY STATEMENT

A warrantless arrest inside a person's home is an unreasonable search or seizure as a matter of New York state constitutional law where police had objective evidence of probable cause to arrest before entry into the home, regardless of whether police obtained consent to enter the home. Absent exigent circumstances, police are required to obtain a warrant to arrest someone inside their home. *Payton v. New York*, 445 U.S. 573 (1980), *on remand*, *People v. Payton*, 51 N.Y.2d 169 (1980). Although this Court has allowed warrantless arrests where a suspect voluntarily exits the home, or where police remain outside the individual's personal residence and arrest a person standing on the threshold, it has never countenanced a warrantless arrest made inside the home, absent exigent circumstances, even where police had consent to enter.

Such an arrest is a constitutionally unreasonable search or seizure not only because of the intrusion into the sanctity of the interior of a private home – the core interest protected by the constitutional prohibition on unreasonable searches and seizures – but also because such an arrest would transform consent to enter the home into the waiver of a non-waivable constitutional right – the indelible right to counsel. In New York, the right to have one's attorney present when questioned by law enforcement about a criminal matter, a right which cannot be waived outside the presence of that attorney, attaches at the issuance of the arrest warrant. Because of

this firmly established rule, police in New York have a perverse incentive to avoid an arrest warrant even where one is readily obtainable on probable cause, and instead to gamble on obtaining consent to enter from any person with apparent authority over the premises, in order to retain the ability to elicit statements from an arrestee without the presence of counsel. The rule proposed by *amicus* and Appellant would remove this incentive and close an otherwise gaping loophole that threatens both the sanctity of New Yorkers' homes and their right to counsel.

ARGUMENT

A warrantless arrest inside a person's home is unreasonable where police had objective evidence of probable cause to arrest before entry into the home, regardless of whether police obtained consent to enter the home. "The touchstone of the Fourth Amendment is reasonableness," *People v. Molnar*, 98 N.Y.2d 328, 331 (2002), quoting *United States v. Knights*, 534 U.S. 112, 118 (2001). The unreasonableness of such an arrest emerges from two constitutional harms: (1) the intrusion into the interior of a home – the core interest protected by the prohibition on unreasonable searches and seizures; and (2) the effect of depriving the suspect of the indelible right to counsel, which would have attached had an arrest warrant been obtained. Allowing such warrantless arrests would cross a line that has never been, and should not be, tolerated by the New York State Constitution.

I. THE HEIGHTENED EXPECTATION OF PRIVACY INSIDE THE HOME REQUIRES SPECIAL PROTECTION FROM WARRANTLESS ARRESTS.

Forty-three years ago, the United States Supreme Court ended a New York practice of warrantless arrests in the home for felony crimes, holding that the common law practice of permitting such arrests could not be reconciled with the competing constitutional principle of the sanctity of the home. *Payton v. New York*, 445 U.S. 573 (1980). In reaching this conclusion, the U.S. Supreme Court reinforced the strong constitutional walls protecting the sanctity of the home's interior:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.

Id. at 589-90. This principle led the Court to distinguish arrests inside the home from arrests in public places, where it is permissible to execute a felony arrest on probable cause without a warrant. *See United States v. Watson*, 423 U.S. 411 (1976). Although the *Watson* rule was firmly grounded in common law understandings of the validity of warrantless arrests dating back to Blackstone, the Court found that this history did not unambiguously support permitting such arrests in the home. *Payton*, 445 U.S. 590-601. And although most states (including New York) expressly authorized

warrantless home arrests by statute, such contemporary practice could not override the fundamental privacy of the home, which lies at the core of the constitutional protection from unreasonable search and seizure and requires the protection of a neutral magistrate's review of probable cause. *Id*. In *Payton*, as here, the sanctity of a home's interior demands a different, more protective rule against warrantless arrests.

Payton is but one of many cases interpreting both the Fourth Amendment and N.Y. Const. Art. I, § 12 to develop special rules applicable only to activity within the home. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 37-38 (2001) (holding that warrantless use of infrared surveillance technology that revealed details of the home was presumptively unreasonable, as "*all* details are intimate details…because they were details of the home"); *see also Silverman v. United States*, 365 U.S. 505, 509–10, (1961) (holding that eavesdropping by means of physical invasion into a home is subject to stricter Fourth Amendment rules than eavesdropping by other means); *see also People v. Xochimitl*, 32 N.Y.3d 1026, 1029 (2018) (Wilson, J. concurring) ("'[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed'") (quoting *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972)); *People v. Garvin*, 30 N.Y.3d 174, 198 (2017) (Rivera, J., dissenting) ("These constitutional protections afforded individuals reflect the societal recognition of the home as 'the sacred retreat to which families

repair for their privacy and their daily way of living"') (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

Appellant's strong privacy interest in the interior of his home, where he was arrested, is one of many factors that distinguish this case from those cited by Respondent and the Appellate Division below. A majority of this Court has held that an individual's privacy interest in the interior of the home does not extend to the home's doorway or threshold, where residents are visible to the public. In *People v. Reynoso*, this Court's memorandum opinion affirmed the Appellate Division's conclusion that "[t]he doorway to a private house is a public place for purposes of Fourth Amendment analysis, since a defendant has no legitimate expectation of privacy while standing there, exposed to public view." 309 A.D.2d 769, 770 (2003), *aff'd*, 2 N.Y.3d 820 (2004). Likewise, in *People v. Garvin*, the Court upheld a warrantless arrest "of a suspect in the threshold of a residence," finding the reasonableness of such an arrest was compelled by prior precedent such as *Reynoso*. 30 N.Y.3d at 177-180. These rulings do not support the reasonableness of the arrest in this case, where it is undisputed that police entered the suspect's apartment – the inner sanctum of the home – to arrest him after allegedly gaining consent to cross the threshold into a shared hallway.

Nor does this case require the Court to disturb its precedent holding that the *Payton* rule does not apply when a suspect voluntarily exits the home. *See Garvin*,

30 N.Y.3d at 179 ("Most critically here, the Appellate Division found that defendant was arrested at the threshold of his apartment, after he voluntarily emerged"); *People v. Spencer*, 29 N.Y.3d 302, 312 (2017) ("There is record support for the determination of the courts below that defendant voluntarily exited his home, whereupon he was arrested"); *People v. Minley*, 68 N.Y.2d 952, 953 (1986) (holding that "[n]either the letter nor the spirit of the *Payton* rule was violated" because the suspect voluntarily exited his home when officers arrived, and there was no evidence officers coerced that result). Again, however, this precedent does not support the reasonableness of the search at issue in this case, where Appellant did not voluntarily exit the inner sanctum of his home, and officers had to enter that space to arrest him. *Garvin*, 30 N.Y.3d at 182 (in discussing the Court's prior precedents, noting that "the police never entered the defendants' homes in these cases and, thus, the intrusion prohibited by *Payton* did not occur").

Indeed, it was on this basis that the *Garvin* majority distinguished the United States Court of Appeals for the Second Circuit's decision in *United States v. Allen*, 813 F.3d 76 (2d Cir. 2016) from the facts at issue in that case. *See Garvin*, 30 N.Y.3d at 183-84 (distinguishing *Allen* as involving "an across-the-threshold arrest"). That distinction, however, cannot be made here. The Court should instead adopt the sound reasoning of the Second Circuit, grounded in the constitutional value of protecting the privacy of the home, which lies at the heart of both the federal and state

prohibition on unreasonable searches and seizures, and hold that this warrantless arrest was unreasonable.

II. PROTECTING THE INDELIBLE RIGHT TO COUNSEL REQUIRES HEIGHTENED PROTECTION FROM WARRANTLESS ARRESTS IN THE HOME.

The safeguard of the warrant requirement is essential not only to protect the fundamental privacy of the home but also because, in New York, the police have a perverse incentive to attempt warrantless arrests in order to avoid the application of the indelible right to counsel, which otherwise inhibits their ability to elicit incriminating statements outside the presence of counsel. This additional factor reinforces the unreasonableness of the arrest in this case.

In New York, the indelible right to counsel – the right to have one's attorney present when questioned by law enforcement about a criminal matter, which cannot be waived outside the presence of that attorney – attaches at the issuance of the arrest warrant. *See Kirby v. Illinois*, 406 U.S. 682 (1972) (establishing that the federal right to counsel attaches at the "commencement of criminal proceedings"); *People v. Samuels*, 49 N.Y.2d 218 (1980) (affirming this principle as a matter of both federal and state constitutional law and acknowledging that, as a matter of New York law, the commencement of criminal proceedings occurs prior to the issuance of an arrest

warrant).[1] Because of this firmly established rule, police in New York have a perverse incentive to avoid an arrest warrant, even where one is readily obtainable on probable cause, and instead to gamble on obtaining consent to enter from any person with apparent authority over the premises, in order to retain the ability to elicit statements from an arrestee without the presence of counsel.

The experience of *amicus* Legal Aid's over 1,000 criminal defense attorneys is that police officers in New York City often act upon this incentive and succeed in their aim of obtaining incriminating statements following the warrantless arrest – statements that Legal Aid's attorneys likely would have advised their clients not to make. Indeed, it was conceded in the courts below that police acted on that incentive in this case and, absent this Court's intervention, they will once again succeed in depriving a criminal suspect of the advice of counsel prior to making an incriminating statement. *People v. Cuencas*, 192 A.D.3d 109, 113 (2d Dep't 2020) ("The hearing evidence fully supports the defendant's view that the police went to the subject residence with the intent of making a warrantless arrest."). This Court also observed this phenomenon in practice in *People v. Harris*, 77 N.Y.2d 434, 440 (1991) (discussing the perverse incentive New York's right to counsel jurisprudence

[1] In New York, criminal proceedings commence upon the filing of an accusatory instrument. CPL § 100.05. Filing such an instrument is necessary for the issuance of an arrest warrant. CPL §120.10. Additionally, in New York, the right to counsel attaches at any critical stage of the prosecution, even if formal proceedings have not commenced. *People v. Blake*, 35 N.Y.2d 331 (1974).

creates to violate *Payton* and noting that "the evidence indicated that the police were motivated by just such considerations in this case.")

As noted above, this perverse incentive poses a constitutionally unacceptable threat to *Payton*'s protection of the privacy of the home by enticing police to exploit consent and dodge the review of a neutral magistrate. It also directly undermines the core purposes of the indelible right to counsel – both the purpose to "protect the individual, often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State" from self-incrimination "unadvised by anyone who has his interests at heart" and the purpose to prevent "the more significant risk of inaccurate, sometimes false, and inevitably incomplete descriptions of the events described." *People v. Hobson*, 39 N.Y.2d 479, 485 (1976).

This Court has held that our state constitutional search and seizure jurisprudence – in particular, the *Payton* rule itself – must consider threats to the right to counsel when considering whether an arrest is unreasonable. *Harris*, 77 N.Y.2d at 439 (suppressing statements obtained in violation of *Payton* because a contrary rule "is not adequate … because of our right to counsel rule"). Here as well, the Court should weigh the threat to the indelible right to counsel and conclude that – particularly combined with the threat to the sanctity of the home – this arrest was unreasonable.

Acknowledging the constitutional harm of violating the right to counsel in assessing the reasonableness of a search or seizure is further supported by the special regard in which this Court has consistently held the right to counsel. *See, e.g.*, *Harris*, 77 N.Y.2d at 439 ("Manifestly, protection of the right to counsel has become a matter of singular concern in New York"); *People v. Settles*, 46 N.Y.2d 154, 161 (1978) ("So valued is the right to counsel in this State … it has developed independent of its Federal counterpart …. Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal well before certain Federal rights were recognized."); *People v. Cunningham*, 49 N.Y.2d 203, 207 (1980) (the "highest degree of [judicial] vigilance" is required to "safeguard" [the right to counsel]"); *People v. Witenski*, 15 N.Y.2d 392, 396–97 (1965) (noting opinions dating back to the 19th century that signal New York State's deep commitment to an expansive right to counsel). This Court's commitment to the right to counsel should extend to interpreting exceptions to the warrant requirement narrowly to avoid undermining that right.

The factors that led a majority of this Court in *Garvin* to look away from right to counsel concerns are not present in this case. As noted above, the majority there was concerned about overruling precedent relating to arrests made outside a home or on the threshold, but those factors are absent here. *Garvin*, 30 N.Y.3d at 184–85 ("[S]uppressing defendant's statements here would require us to overrule our prior

cases holding that preplanned, warrantless arrests do not violate *Payton* where the defendant exited his residence or stood on the threshold either due to a police request or to a ruse employed by the police").[2]

Nor does the rule proposed by *amicus* raise the specter of subjective intent that concerned the *Garvin* majority. *Garvin*, 30 N.Y.3d at 182 n.5, 184-86. The Court need not examine what was in the arresting officers' minds; the question is whether the officers possessed objective indicia of probable cause prior to the attempted entry into the suspect's home. Examples of such objective indicia include so-called "perpetrator I-cards" (such as the one that indisputably existed in the instant case), internal 'wanted' alerts, or communications that invoke the fellow officer rule. In the experience of *amicus*, documents of this nature are regularly produced in the course of criminal discovery in New York, *see* CPL § 245 *et seq.*, providing an ample, stable, objective evidentiary basis for courts to examine this question.

[2] These distinctions render any discussion of whether *Garvin* is entitled to stare decisis irrelevant; the case is simply distinguishable on these grounds. To the extent that aspects of Part III of the majority opinion in *Garvin* are in tension with a ruling in favor of Appellant here, those aspects are *dicta* arising out of a dialogue between the majority and the dissent that was not essential to the case's holding. If the Court finds cause to depart from the "barely hardened footprint" of some aspect this *dicta*, that departure would be justified to avoid the constitutional harms the Court would otherwise inflict. As this Court noted in *Hobson*, "[t[he nub of the matter is that Stare decisis does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel." *Hobson*, 39 N.Y.2d at 488.

The objective rule proposed by *amicus* not only avoids the evidentiary vagaries of a subjective intent inquiry, it also is more in line with how this Court has approached analogous instances where the knowledge of arresting officers is essential to examining the constitutional validity of their actions. *See People v. Ferro*, 63 N.Y.2d 316, 319 (1984) ("What constitutes "interrogation" of a suspect who, after *Miranda* warnings, has declined to answer questions is determined not by the subjective intent of the police, but by whether an objective observer with the same knowledge concerning the suspect as the police had would conclude that the remark or conduct of the police was reasonably likely to elicit a response."); *People v. Lopez*, 16 N.Y.3d 375 (2011) (applying an objective test to assess whether the police should have known that an accused person was already represented by counsel); *People v. Robles*, 72 N.Y.2d 689, 699 (1988) (same). As in those cases, the question is whether, based on the knowledge available to the police, an objective observer would have understood there to be probable cause to arrest prior to the attempted entry into the home. If so, faithfulness to *Payton* and respect for the indelible right to counsel requires officers to obtain a warrant before invading the interior of the home. If not, then the approach may be justified as an investigatory step and probable cause for any resulting arrest must be judged based on facts that developed at the scene.

While Respondent and the Appellate Division correctly identify precedent suggesting that the fact that police could have obtained a warrant does not, standing alone, render a warrantless arrest unreasonable, *see, e.g.*, *Kentucky v. King*, 563 U.S. 452, 467 (2011) ("Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution"), there is no precedent to suggest the Court is forbidden from considering this fact in assessing the overall reasonableness of an arrest. *Cf. People v. McBride*, 14 N.Y.3d 440, 447 (2010) ("[W]e are not unmindful of the fact that the police could have obtained an arrest warrant for defendant from a neutral magistrate before it dispatched five members from its force to defendant's home" but nonetheless holding the arrest reasonable because of exigent circumstances). Reasonableness is a fact-specific inquiry, *see, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); the Court should not ignore factors relevant to that inquiry. On the facts presented by this case, the threat to the sanctity of the home and the right to counsel vastly outweigh law enforcement's interest in executing a warrantless arrest, and that is all the more evident because a warrant was readily obtainable.

Indeed, other than closing a loophole routinely used to circumvent the attachment of the indelible right to counsel, there is little about the rule proposed by *amicus* that should concern law enforcement. Nothing in such a rule prevents a

warrantless arrest of a suspect outside the home's interior. *Minley*, 68 N.Y.2d at 953. Nothing requires the Court to disturb the conclusion of *United States v. Santana*, 427 U.S. 38 (1976), that the completion of an arrest inside a home is reasonable if it results from a "hot pursuit" following the initiation of the arrest outside the home, including on the threshold. Nothing in such a rule limits police authority to execute an arrest in a suspect's home where there are exigent or emergency circumstances, even when police could have obtained an arrest warrant prior to arriving at the home and discovering those exigent circumstances. *McBride*, 14 N.Y.3d 440; *Molnar*, 98 N.Y.2d 328. Nothing in such a rule prevents police from going to a suspect's home for investigatory purposes, obtaining consent to enter, and arresting on probable cause that developed based on the on-scene investigation. *Cf. Kentucky*, 563 U.S. at 469-70 (suggesting that the Fourth Amendment is not implicated when a police officer merely "knocks on the door and requests the opportunity to speak").

A limitation on warrantless arrests inside the home where there is objective evidence of probable cause thus does little to constrain the legitimate concerns of law enforcement, but is essential to preserve the sanctity of the home and the indelible right to counsel. For that reason, such an outcome would be in keeping with the way this Court's jurisprudence "has continuously evolved with the ultimate goal of 'achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and

investigation of crime, on the other.'" *People v. Grice*, 100 N.Y.2d 318, 322-323 (2003), quoting *People v. Waterman*, 9 N.Y.2d 561, 564 (1961).

III. UNDER THE CIRCUMSTANCES PRESENTED BY THIS CASE, CONSENT TO ENTER A HOME DOES NOT RENDER THIS WARRANTLESS ARREST REASONABLE.

The fact that police gained consent to enter the common area of Appellant's two-family home does not render this warrantless arrest reasonable. Consent to enter a home may waive an individual's right to privacy in that home, but it does not waive the right to counsel in any respect, just as it does not waive the individual's privacy in personal belongings inside the home. *People v. Gonzalez*, 88 N.Y.2d 289 (1996) (holding that third party's consent to search of apartment did not furnish apparent authority for search of personal property within that apartment). Because consent to enter under these circumstances functionally waived Appellant's indelible right to counsel, the basic premise of the consent exception – that it operates as a knowing and intelligent waiver of the individual's protected constitutional interest – crumbles.

Indeed, the right to have counsel present during police interactions after the commencement of criminal proceedings is deemed "indelible" precisely because it cannot be waived outside the presence of counsel. *Samuels*, 49 N.Y.2d at 222-23; *Settles*, 46 N.Y.2d at 162-63. "These rules are necessary, we have said, not only as a matter of decency, to protect those in custody from the coercive power of the State

and to enforce the ethical rules protecting represented clients, but also to insure that if those held by the police waive their rights they do so competently, intelligently and voluntarily." *People v. Davis*, 75 N.Y.2d 517, 521 (1990); *see also Hobson*, 39 N.Y.2d at 484 (indelible right to counsel "breathe[s] life into the requirement that a waiver of a constitutional right must be competent, intelligent, and voluntary.")

There is simply no argument that consent to allow police to enter a home constitutes a knowing and intelligent waiver of a person's right to counsel – particularly when, as here, such consent is granted by a third person with apparent authority over the general premises. Such an illogical rule would have a disproportionate impact on low-income New Yorkers and New Yorkers of color, who are more likely to live in multi-family buildings than more wealthy and white New Yorkers.[3] In a state with an ongoing and worsening housing crisis, such disparities are likely to increase over time.[4] Indeed, over 4.5 million New Yorkers reside in apartments.[5]

The consent exception is a judge-made doctrine developed out of a logical application of the prohibition on unreasonable search and seizure in cases dealing

[3] Office of the NYS Comptroller, *Homeownership Rates in New York* (Oct. 2022), https://www.osc.state.ny.us/reports/homeownership-rates-new-york.
[4] Luis Ferre-Sadurni and Mihir Zaveri, *New York Officials Failed to Address the Housing Crisis. Now What?*, NY TIMES (Apr. 27, 2023), https://www.nytimes.com/2023/04/27/nyregion/nyc-housing-crisis.html.
[5] National Multifamily Housing Council, *Geography of Apartment Residents. Quick Facts: Resident Demographics* (November 2021), https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/geography-of-apartment-residents/.

with searches and seizures outside the home.[6] It has been shaped and must continue to be shaped to give effect to this prohibition and to avoid adverse effects on other fundamental rights, such as the right to counsel. Holding that consent to enter a home does not waive all the rights that attach upon issuance of an arrest warrant simply serves to further refine the consent doctrine through faithful application of constitutional principles.

Neither *Payton* nor any of this Court's other precedent requires a different conclusion. In both *Payton* and its consolidated companion case, courts were "dealing with entries into homes made without the consent of any occupant." *Payton*, 445 U.S. at 583. Thus, contrary to the assertion of the Respondent in this case, Resp. Br. at 33-34, neither the Supreme Court nor this Court in *Payton* ruled on how the consent exception should interact with the requirement for a warrant to execute an arrest within someone's home. As the U.S. Supreme Court did in *Payton*, 445 U.S. at 576, this Court has, in *dicta*, assumed the existence of a consent exception in cases adjudicating other matters, but none of them declined to apply the exclusionary rule

[6] *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (automobile search); *People v. Lane*, 10 N.Y.2d 347 (1961) (automobile search); *People v. Whitehurst*, 25 N.Y.2d 389 (1969) (stop and search in a public place); *Davis v. United States*, 328 U.S. 582 (1946) (search of a business consensually open to the public); *Zap v. United States*, 328 U.S. 624 (1946), *vacated*, 330 U.S. 800 (1947) (same).

to a warrantless arrest in a home based on consent to enter the premises, and none of them considered the legal justification for doing so. In *People v. Levan*, 62 N.Y.2d 139, 142 (1984), this Court reaffirmed *Payton* against a challenge seeking to carve out from the warrant requirement instances where police could see the suspect inside the house through a window or open door. No party to that case litigated any issue of consent. In *People v. Burr*, 70 N.Y.2d 354, 360 (1987), this Court once again affirmed that "the warrantless arrest of defendant in his home would violate both the State and Federal Constitutions (NY Const, art I, §12; US Const 4th Amend) unless based on probable cause and justified by exigent circumstances" but held that exigent circumstances existed in that case, based in part on the suspect's declared intention to flee. Again, consent was not raised or litigated. The same is true of *McBride*, 14 N.Y.3d 440, another case that turned on exigent circumstances, not consent to enter. The Court in *Molnar*, 98 N.Y.2d 328, upheld a warrantless home arrest based on an "emergency" exception to the warrant requirement, once again avoiding any question of consent. In this Court's cases involving arrests made of suspects who either exited a home or stood on the threshold – *Minley*, 68 N.Y.2d 952; *Reynoso*, 2 N.Y.3d 820; and *Spencer*, 29 N.Y.3d 302 – the question of consent never arose, as officers never entered the home. And while the majority in *Garvin* also assumes that consent may operate as an exception to the warrant requirement, *see Garvin*, 30 N.Y.3d at 180, its categorization of that arrest as a "threshold" arrest

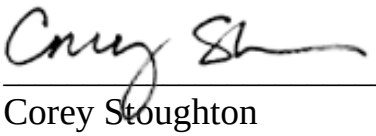
renders that assumption, which is in any case based on a misreading of the cases cited above, nonbinding *dicta*.

None of this Court's prior cases turned directly on the question of whether consent to enter a home renders constitutional the otherwise unreasonable arrest of a person inside their home without the safeguard of a warrant. Presented with that question today, the Court should hold that, absent exigent or emergency circumstances, a warrantless arrest inside a person's home is an unreasonable search or seizure as a matter of state constitutional law, regardless of whether police obtain consent to enter the home, at least where police had objective evidence of probable cause to arrest prior to the attempted entry into the home.

CONCLUSION

For the forgoing reasons, the Court should hold that a warrantless arrest inside a person's home is an unreasonable search or seizure as a matter of New York state constitutional law where police had objective evidence of probable cause to arrest prior to the attempted entry into the home, regardless of whether police obtain consent to enter the home.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York, the undersigned attorney for Amicus Curiae hereby certifies that this Brief was prepared on a computer; that Times New Roman, a 14-point proportionally spaced typeface, was used; that the body of the brief is double-spaced, with 12-point singled spaced footnotes; and that, according to the Microsoft Word Processing System used, the total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the Table of Contents, the Table of Authorities, Disclosure Statement, proof of service, and certificate of compliance is 5,004.

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