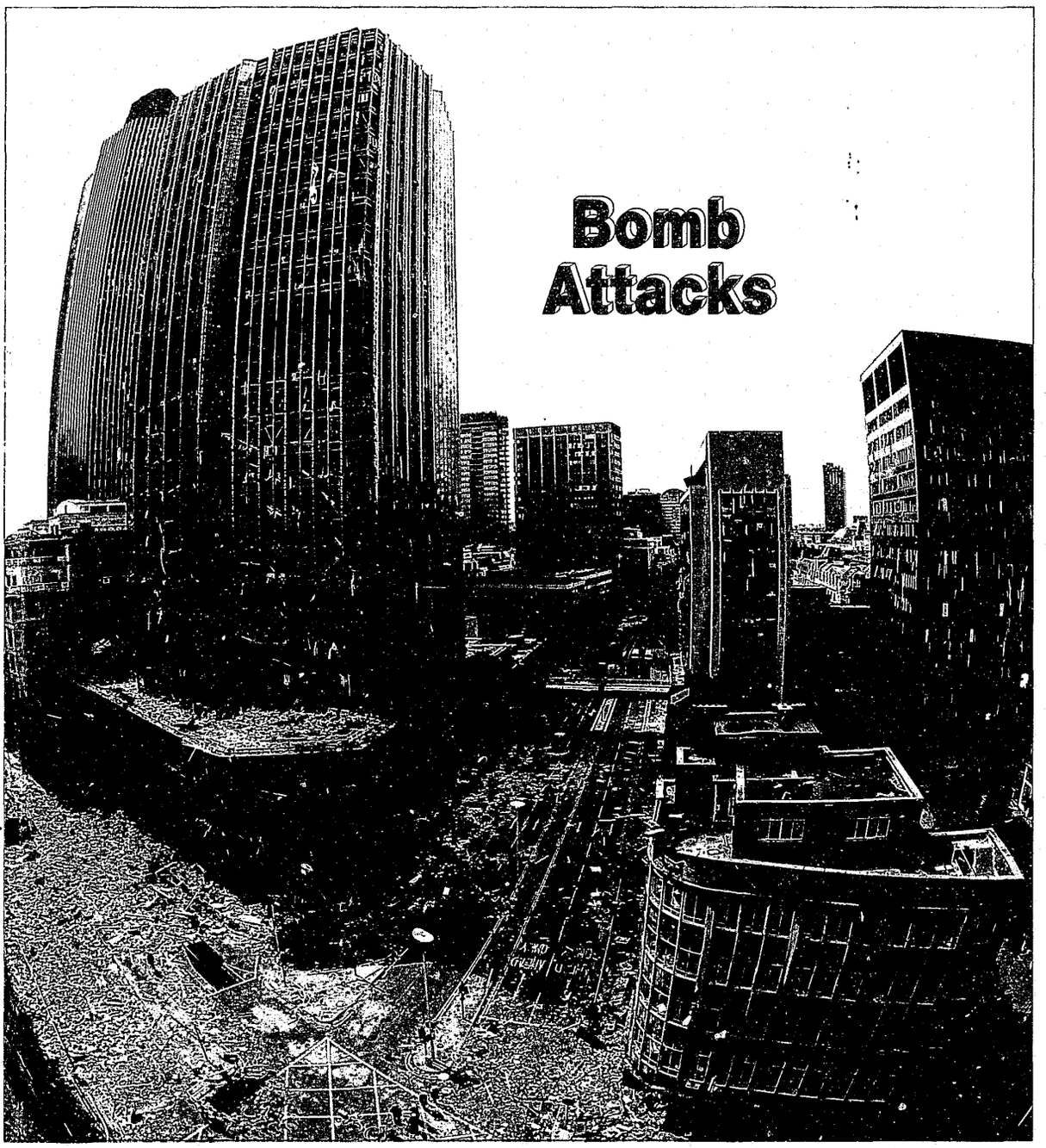
U.S. Department of Justice
Federal Bureau of Investigation



September 1994
Volume 63
Number 9

United States
Department of Justice
Federal Bureau of
Investigation
Washington, DC 20535

Louis J. Freeh
Director

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, FBI Academy, Quantico, VA 22135

Editor
Dr. Stephen D. Gladis
Managing Editor
Kathryn E. Sulewski
Art Director
John E. Ott
Associate Editors
Andrew DiRosa
Julie R. Linkins
Kimberly J. Waggoner
Assistant Art Director
T.L. Wilson
Staff Assistant
Stephanie Plucker

FBI Law Enforcement Bulletin

Features

Departments

ISSN 0014-5688 USPS 383-310

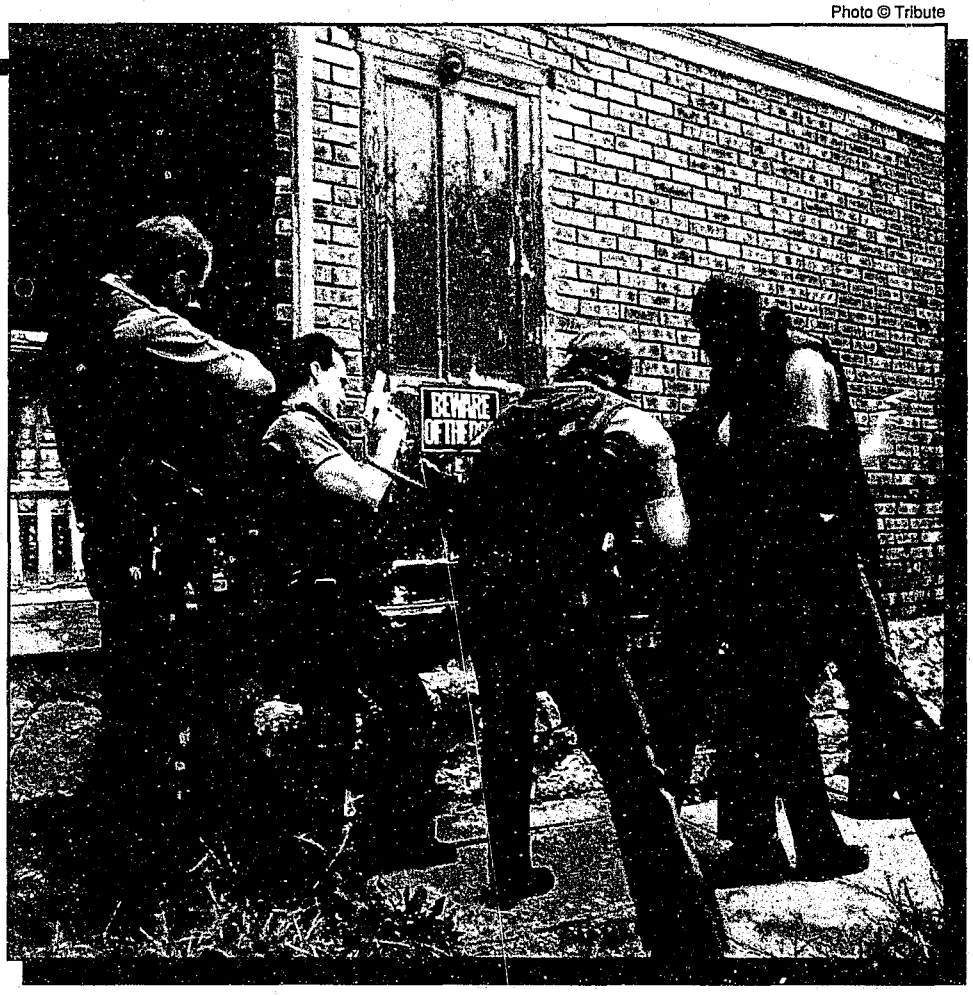
150172

Entering Premises to Arrest

The Threshold Question

By JOHN C. HALL, J.D.

Photo © Tribute



"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."

—Statement by British statesman, William Pitt (Lord Chatham), to the House of Commons in 1763.

"In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

—Payton *v.* New York, *445 U.S. 573, 590 (1980).*

These two statements reflect the historical importance of the private dwelling in Anglo-American culture and law. Deeply entrenched in the concepts of the English common law, and explicitly memorialized in the fourth amendment to the U.S. Constitution, the concept has lost none of its vigor today. While granting police considerable latitude in taking warrantless action against suspected criminals when they are located in areas outside the residence, the U.S. Supreme Court has continued to afford the highest levels of fourth amendment protection to those privacy interests normally associated with one's home.

Special Agent Hall is a legal instructor at the FBI Academy.

> **"...police officers run grave risks if, in their zeal to arrest their suspect, they ignore the potential legal consequences associated with entries into private dwellings."**

Illustrative of this point is the Court's relatively recent application of a warrant requirement to police entries into private premises for the purpose of effecting arrests inside. In 1976, in *Watson* v. *United States*,[1] the Court declined to impose a warrant requirement for felony arrests that occur in public places, holding that the validity of such arrests hinges on the existence of probable cause and not on whether the officers have an opportunity to acquire an arrest warrant.

Just 4 years later, in *Payton* v. *New York*,[2] the Court held that if the arrest involves an entry into the suspect's private residence, an arrest warrant is necessary—absent an emergency or consent—to justify that entry. The following year, in *United States* v. *Steagald*,[3] the Court held that absent an emergency or consent, a *search warrant* is necessary to enter a third party's premises to make an arrest.

Both *Payton* and *Steagald* focus on the legality of the *entry* into a residence as the basis for fourth amendment concerns, as distinct from the lawful authority to arrest the suspects, and make it clear that the legal authority to arrest a person does not, by itself, justify an intrusion into a private dwelling to do so. The significance of this distinction between police authority to arrest and police authority to enter premises to arrest was further highlighted by the Court's decision in *New York* v. *Harris*.[4]

In *Harris*, officers made a warrantless entry into the subject's residence to arrest him. Following his arrest, and after he had waived his *Miranda* rights, the suspect made incriminating statements. A later interrogation at the police station resulted in additional incriminating statements.

The defendant filed motions to suppress both statements as the products of an unlawful arrest. However, the Supreme Court limited suppression to those statements made in the residence, reasoning that these statements alone were the product of a fourth amendment violation, i.e., an *unlawful entry* of the premises. The defendant's later statements at the station were admissible because the arrest itself was supported by probable cause.

The practical consequence of the *Payton-Steagald* rule is that while an arrest supported by probable cause is constitutional, a warrantless entry into a residence to effect the arrest may not be. As the *Harris* case illustrates, the obvious remedy for an unconstitutional entry into a private dwelling is suppression of evidence acquired against any person whose constitutional rights were infringed by the unlawful entry.

In addition to the suppression of evidence, an aggrieved party may also have redress through a lawsuit alleging a violation of constitutional rights. The point is that police officers run grave risks if, in their zeal to arrest their suspect, they ignore the potential legal consequences associated with entries into private dwellings.

Because judicial concern over police *entries* into private dwellings spawned these rules, it is critical to determine when an entry occurs. The Court's admonition that the "threshold may not be crossed" provides the starting point for the inquiry and suggests that an "entry" occurs when police "cross the threshold" of a dwelling. It is essential, however, to ascertain what is commonly meant by the term "threshold" and what constitutes crossing it.

THE THRESHOLD

The dictionary defines "threshold" as: "A sill of timber or stone forming the bottom of a doorway

and crossed in entering a house or room; the entrance to a house, building, or room."[5] The Supreme Court apparently had a similar definition in mind in *United States* v. *Santana*,[6] when it concluded that a suspect who was *standing in her doorway* as officers approached to arrest her was, for constitutional purposes, in a "public place." One officer testified that she was "standing directly in the doorway—one step forward would have put her outside, one step backward would have put her in the vestibule of her residence."[7]

Because an arrest at that location would not involve a "crossing of the threshold," the Court concluded that it would have been justified without a warrant. Accordingly, because the arrest would have been lawful if made in the doorway, the police were justified under the doctrine of "hot pursuit" to follow the suspect when she retreated into her house and complete the arrest inside.

From the holding in *Santana*, it can be concluded that *the doorway* is the "entrance to the house" to which the Supreme Court was referring in *Payton*. Because all police intrusions onto private property do not implicate the same fourth amendment interests as does an entry into a private residence,[8] the courts have permitted warrantless arrests in the yard of a residence,[9] on the porch,[10] or even in the hallway of an apartment building.[11]

As these cases demonstrate, no *actual* entry into a residence occurs if the suspect is on, or outside, the threshold at the time of the arrest. However, two significant problems have emerged as the lower courts have attempted to interpret and apply the Supreme Court decisions in *Payton* and *Steagald*. First, it is not always clear when an *actual* crossing of the threshold has occurred. Second, some courts have held that a crossing of the threshold was not necessary and that in some circumstances the police "constructively" entered a residence even though no physical entry into the dwelling occurred. The distinction between the *actual entry* and the *constructive entry* is discussed and illustrated below.

> ***"...while an arrest supported by probable cause is constitutional, a warrantless entry into a residence to effect the arrest may not be."***

ACTUAL ENTRIES—CROSSING THE THRESHOLD

It is not disputed that an actual, physical entry into private premises to effect an arrest is the kind of police activity the *Payton-Steagald* rule was designed to control. In both of those cases, law enforcement officers physically crossed the threshold—i.e., walked through the door—and entered a private residence. But a number of questions arise if the police do not actually step across the threshold.

For example, a suspect may be standing just inside the doorway at the time of arrest, so that the officers do no more than reach across the threshold. Or the suspect may choose to respond to the arrest announcement by inviting the officers inside or by stepping outside the residence. Unlike the cases where police officers unquestionably enter the residence by crossing the threshold, doorway arrests present the police and the courts with a number of variables.

On the Threshold

Predictably, after the decisions in *Payton* and *Steagald*, cases arose where officers made warrantless arrests of unwary suspects who responded to a knock at the door. In many cases, courts have simply analogized the facts to those in the *Santana* case and held that no entry occurred during these "doorway" arrests because the defendant was in a "public place" while standing *in* the doorway of the house.[12] In these cases, the courts either concluded or assumed that the officers did not have to cross the threshold to effect the arrests.

Typical of this approach is *United States* v. *Carrion*,[13] where Federal agents gained the assistance of a hotel housekeeper to effect the arrest of one of the guests. When the housekeeper knocked on the hotel room door and announced "Housekeeping," the suspect opened the door to discover agents with pointed guns announcing that he was under arrest. The agents then entered the room, conducted a protective sweep for other individuals, and discovered evidence.

In response to the defendant's motion to suppress the evidence on the theory that the warrantless arrest "in his hotel room" was unconstitutional, the court held:

> "...the arrest was effected before the agents entered [defendant's] hotel room...[His] arrest occurred as he stood in the doorway of his hotel room and was first confronted by [the agents], who were standing in the hallway."[14]

The court in *Carrion* did not make an intense inquiry into the defendant's precise location at the moment of his arrest, simply concluding that he "stood in the doorway."

Inside the Threshold

If the facts of the case more clearly indicate that the suspect was located *inside* the threshold at the time of the arrest, some courts have concluded that a police entry occurred. Furthermore, some courts have taken a strict view of *Payton* and considered any intrusion across the threshold—no matter how incidental—as constituting an entry.

In *State* v. *Johnson*,[15] the court held that an entry occurred when an officer placed his foot partially in the doorway to keep the suspect from slamming the door. The court stated that "even though [the officer's] position in the doorway was from just the 'toenails' to the 'balls of the feet,'" it was the type of entry that the Supreme Court had warned against in *Payton*.[16] Most courts have chosen not to be as strict in applying the *Payton* standard, perhaps either because the facts regarding the precise locations of officers and suspects are frequently difficult to ascertain or because judges are influenced by the Supreme Court's admonition that fourth amendment issues cannot be readily resolved by resort to "metaphysical subtleties."[17]

Accordingly, if no more is involved than reaching across the threshold to grab the suspect, most courts have found that no entry occurred. This view seems most consistent with the language of *Payton* that describes the crossing of the threshold as fourth amendment concern and avoids what one commentator characterized as the "plumb bob" approach to analyzing the entry question.[18]

CONSTRUCTIVE ENTRIES

The notion of a "constructive entry" has emerged in cases where the facts cannot reasonably support the conclusion that a physical entry into private premises has occurred. For example, the police may knock on a suspect's door, demand entry, and then announce that he is under arrest when he appears "in the doorway"; or the police may surround a suspect's residence and demand that he surrender. While no actual entry into a private residence has occurred in either case, some courts construe such police actions as tantamount to a physical crossing of the threshold.

The primary impetus for this view seems to be a concern that the police will seek to accomplish warrantless arrests by simply coercing or otherwise luring suspects into areas where no actual entry into private premises is implicated. Courts that adopt this view hold that if the arrestee did not voluntarily put himself in a "public place," then a constructive entry occurred.

An illustrative case is *United States* v. *Morgan*.[19] Law enforcement officers surrounded a

suspect's residence and ordered him and the other occupants to come outside. Although the suspect complied with the commands and was taken into custody outside the house, the court held that "the arrest of [the suspect] occurred *while he was present inside a private home.*"[20] (Emphasis added). The court explained:

> "Although there was no direct police entry into the...home prior to [the suspect's] arrest, the constructive entry accomplished the same thing...."[21]

The court based this conclusion on the principle that "...it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home."[22]

Other courts distinguish cases where the police simply knock on the door and await the suspect's response from those where the police knock on the door and demand the suspect's presence. For example, in *McKinney* v. *George*,[23] the suspect opened his door when police knocked and submitted to them when told he was under arrest. The court held that no fourth amendment violation had occurred and observed:

> "[The officers] did not cross the threshold of [the suspect's] apartment. When he opened the door to their knock they told him to come along with them and he did so. If he had refused and they had come in and taken him we might have a different case."[24]

A contrary result was reached in *United States* v. *Edmonson*,[25] where the suspect responded to a knock on his door by looking through the peephole when an FBI agent yelled, "FBI. Open the door!". The suspect opened the door and allowed the agents to enter and place him under arrest. The court held that the suspect did not voluntarily place himself in a position where a warrantless arrest would be permissible.[26]

While this rationale has gained some support among the courts, it seems inconsistent with both the explicit language in *Payton* and recent Supreme Court decisions that define fourth amendment seizures of persons. To the extent it rests on the assumption that the Supreme Court's concerns in *Payton* related to *the location of the suspect* at the time of arrest, it is difficult to square with the clear language of the Court that focused on the warrantless crossing of the residential threshold.

> **"...[the] Court has continued to afford the highest levels of fourth amendment protection to those privacy interests normally associated with one's home."**

A court's discontent with the police tactic of ordering the suspect to come out of the house is easier to share if the purpose of the *Payton* and *Steagald* decisions was to create a warrant requirement for arrests that is comparable to the warrant requirement for searches. However, as previously noted, the Supreme Court has not only rejected a general requirement for warrants to effect arrests but also has emphasized that it is not the arrest of the person but the entry into the private domain of the home that demands the higher level of fourth amendment protection.

If it is a correct assumption that the location of the suspect inside a residence at the time of arrest is sufficient to trigger the *Payton-Steagald* rules, it does not necessarily follow that an arrest has occurred just because the police have demanded surrender and the suspect has complied. Recent Supreme Court cases in which the "seizures" of persons have been at issue raise significant questions regarding the correctness of the constructive entry approach.

For example, in *Brower* v. *County of Inyo*, the Court described a fourth amendment seizure of a person as occurring "...only when there is a governmental termination of freedom of movement through means intentionally applied."[27] Subsequently, in *California* v. *Hodari D.*,[28] the Court held that "an arrest requires *either* physical force...or, where that is absent, *submission* to the assertion of authority"[29] and rejected the defense argument that a mere "show of authority" is sufficient.

The "constructive" entry theory seems to depend in large part on the assumption that verbal commands by police, spoken from outside a residence, are tantamount to the physical crossing of the threshold

so that if the suspect complies by surrendering, the seizure may be said to have occurred inside. However, if a "seizure" of the person can occur while the suspect is inside his home and the police are still outside, it is still debateable whether an entry of the type that *Payton* and *Steagald* were designed to control has occurred.

CONCLUSION

The Supreme Court's decisions in *Payton* and *Steagald* represent a logical extension of the traditional requirement for judicial approval before the forces of government can intrude into the private domain of one's dwelling. Absent emergency circumstances or consent, an arrest warrant is required to enter the residence of the suspect to effect the resident's arrest, while a search warrant is necessary to justify an entry into a third party's residence. Because there is no warrant requirement for making felony arrests in public places, law enforcement officers are free to devise arrest plans aimed at avoiding entries into private dwellings, and thereby, avoiding the need to acquire warrants.

In devising such plans, however, officers must be aware that legal risks may yet arise, even though no actual, physical entry into a residence occurs, and should understand that steps can be taken to minimize those risks. For example, one obvious way to avoid an actual entry into a dwelling is to wait until the suspect exits. Because that may not always be a practicable option, there should be relatively little risk of knocking on the suspect's door and awaiting a response. If the suspect opens the door under these circumstances, the cases indicate that there should be no problem in announcing the arrest. If someone other than the suspect answers the door, there is no legal risk in asking that person to request that the suspect come to the door.

As the cases illustrate, the most risky tactic is to demand that the suspect either come to the door or come outside. Although the law is still unsettled in this area, there is a significant risk that a court will view such action as a "constructive entry" into the residence, even though a physical entry was avoided. ✦

> ***"Absent emergency circumstances or consent, an arrest warrant is required to enter the residence of the suspect to effect the resident's arrest...."***

Endnotes

[1] 423 U.S. 411 (1976).
[2] 445 U.S. 573 (1980).
[3] 451 U.S. 204 (1981).
[4] 495 U.S. 14 (1990).
[5] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.
[6] 427 U.S. 38 (1976). *See also United States* v. *Sewell*, 942 F.2d 1209 (7th Cir.), *cert. denied*, 112 S. Ct. 1567 (1992).
[7] *Id.*
[8] *Oliver* v. *United States*, 466 U.S. 170 (1984).
[9] *See, e.g., United States* v. *Varkonyi*, 645 F.2d 453 (5th Cir. 1981); and *United States* v. *Bustamente-Saenz*, 894 F.2d 114 (5th Cir. 1990).
[10] *Kirkpatrick* v. *Butler*, 870 F.2d 276 (5th Cir.), *cert. denied*, 493 U.S. 1051 (1990).
[11] *See, e.g., United States* v. *Barrios-Moriera*, 872 F.2d 12 (2d Cir.), *cert. denied*, 493 U.S. 953 (1989); and *United States* v. *Nohara*, 3 F.3d 1239 (9th Cir. 1993).
[12] *Duncan* v. *Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, 110 S.Ct. 152 (1989); *United States* v. *Carrion*, 809 F.2d 1120 (5th Cir. 1987); *United States* v.*Whitten*, 706 F.2d 1000 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *United States* v. *Burns*, 624 F.2d 95 (10th Cir.), *cert. denied*, 449 U.S. 954 (1980).
[13] 809 F.2d 1120 (5th Cir.1987).
[14] 809 F.2d, at 1128.
[15] *State* v. *Johnson*, 501 N.W.2d 876 (Wisc. App. 1993). *See also State* v. *Holeman*, 693 P.2d 89 (Wash. 1985).(The court held that it depends on where the arrestee is located, and not on the location of the police, and concluded that "police are prohibited from arresting a suspect while the suspect is standing in the doorway of his house" even if "the police never crossed the threshold.")
[16] 501 N.W.2d, at 879.
[17] *Frazier* v. *Cupp*, 394 U.S. 731 (1969).
[18] LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, vol. 2, 590 (2d ed. 1987).
[19] 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985); and *United States* v. *McCraw*, 920 F.2d 224 (4th Cir. 1991).
[20] 743 F. 2d, at 1166.
[21] *Id.*
[22] *See also United States* v. *Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd.*, 457 U.S. 537 (1982).
[23] 726 F.2d 1183 (7th Cir. 1984).
[24] 726 F.2d, at 1188.
[25] 791 F.2d 1512 (11th Cir. 1986).
[26] *See, e.g., United States* v. *Al Azzawy*, 784 F.2d 890 (9th Cir.), *cert. denied*, 476 U.S. 1144 (1986); *United States* v. *Morgan*, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985); *United States* v. *Davis*, 785 F.2d 610 (8th Cir. 1986); and *United States* v. *Johnson*, 626 F.2d 753 (9th Cir. 1980), *aff'd.*, 457 U.S. 537 (1982).
[27] 486 U.S. 593, at 597 (1989).
[28] 499 U.S. 621 (1991).
[29] 499 U.S., at 625.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Second Class Mail
Postage and Fees Paid
Federal Bureau of Investigation
ISSN 0014-5688

Superintendent of Documents Subscription Order Form

Order Processing Code:
* 5386

Charge your order. It's Easy!

To fax your orders (202) 512-2233

☐ **YES,** enter ____ subscriptions to the **FBI LAW ENFORCEMENT BULLETIN** (FBIEB) at $18 ($22.50 foreign) per year.

The total cost of my order is $ _____. Price includes regular domestic postage and handling and is subject to change.

(Company or Personal Name) (Please type or print)

(Additional address/attention line)

(Street address)

(City, State, ZIP Code)

(Daytime phone including area code)

(Purchase Order No.)

For privacy protection, check the box below:
☐ Do not make my name available to other mailers

Please choose method of payment:
☐ Check Payable to the Superintendent of Documents
☐ GPO Deposit Account ☐☐☐☐☐☐☐-☐
☐ VISA or MasterCard Account
☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐
☐☐☐☐ (Credit card expiration date)

Thank you for your order!

(Authorizing Signature) 5/93

Mail To: Superintendent of Documents
P.O. Box 371954, Pittsburgh, PA 15250-7954