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### Searches and Seizure

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## SEARCH AND SEIZURE

*N.Y. CONST. art. I, § 12:*

*The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

*U.S. CONST. amend. IV:*

*The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

## COURT OF APPEALS

People v. Harris<sup>998</sup>  
(decided February 12, 1991)

Harris, a criminal defendant, claimed that his right to be secure against unreasonable searches and seizures, protected under both the federal<sup>999</sup> and state<sup>1000</sup> constitutions, was violated when he was arrested after a warrantless and non-consensual entry into his home. He, thus, contended that his station house statement, made one hour after his arrest, and in violation of *Payton v. New York*,<sup>1001</sup> should have been suppressed.<sup>1002</sup> Upon remand from

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998. 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991) (*Harris II*).

999. U.S. CONST. amend. IV.

1000. N.Y. CONST. art. I, § 12.

1001. 445 U.S. 573 (1980). In *Payton*, the Court held that the fourth amendment “prohibits the police from making a warrantless and

the United States Supreme Court,<sup>1003</sup> the New York Court of Appeals held that “statements obtained from an accused following an arrest made in violation of *Payton* are not admissible under the State Constitution if they are a product of the illegality.”<sup>1004</sup> The court also based its decision on the New York State Constitution’s right to counsel provision,<sup>1005</sup> determining that the “causal connection between the illegal arrest and [Harris’] statement [at] the police station was not sufficiently attenuated from the *Payton* wrong because of the temporal proximity between the arrest and the statement, the absence of intervening circumstances, and the purpose and flagrancy of the police misconduct.”<sup>1006</sup> Consequently, the court of appeals ruled that Harris’ station house statement must be suppressed under article I, section 12 of the New York State Constitution.<sup>1007</sup>

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nonconsensual entry into a suspect’s home in order to make a routine felony arrest.” *Id.* at 575.

1002. *Harris II*, 77 N.Y.2d at 434, 570 N.E.2d at 1051, 568 N.Y.S.2d at 702.

1003. *New York v. Harris*, 110 S. Ct. 1640 (1990), *rev’g* 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988) (the Supreme Court reversed the court of appeals’ suppression of the defendant’s station house statement on fourth amendment grounds and reinstated the judgment against the defendant).

1004. *Harris II*, 77 N.Y.2d at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706. The court of appeals noted that New York’s right to counsel clause is unique because it attaches once an arrest warrant is authorized and prevents interrogation of the suspect absent his or her attorney. Under the federal rule, criminal proceedings do not necessarily begin once an arrest warrant is issued, and the suspect may be interrogated absent his or her attorney without violating the suspect’s federal right to counsel. *Id.* at 439-40, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705.

1005. N.Y. CONST. art. I, § 6 (“In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him.”).

1006. *Id.* at 440-41, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706; *see also* *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). In *Brown*, the Supreme Court first outlined the factors to consider in deciding whether a confession obtained after an illegal arrest is sufficiently attenuated from the illegality so that it may be admitted into evidence. *Brown*, 422 U.S. at 603-04.

1007. *Harris II*, 77 N.Y.2d at 441, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706.

Harris was convicted of second degree murder for killing his girlfriend.<sup>1008</sup> The police had arrested him at his apartment.<sup>1009</sup> Although the police had probable cause, for five days, to arrest Harris, they nevertheless failed to obtain an arrest warrant, which constituted a violation of *Payton v. New York*.<sup>1010</sup> Harris made inculpatory statements at his apartment in the presence of the police, and these statements were suppressed at trial as a product of an illegal arrest.<sup>1011</sup> A subsequent statement made on videotape was also suppressed at trial because it was deemed involuntary.<sup>1012</sup> However, Harris' written statement, made at the police station one hour after his arrest, was admitted into evidence,<sup>1013</sup> and Harris was subsequently convicted.

The appellate division affirmed Harris' conviction after concluding that the station house statement was properly admitted.<sup>1014</sup> The court of appeals reversed and ordered a new

1008. *People v. Harris*, 72 N.Y.2d 614, 616, 532 N.E.2d 1229, 1229, 536 N.Y.S.2d 1, 1 (1988) (*Harris I*), *rev'd in part and remanded*, 110 S. Ct. 1640 (1990), *on remand*, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991). A non-jury trial was held without defense counsel at Harris' request. *Id.*

1009. *Id.* at 616-17, 532 N.E.2d at 1229-30, 536 N.Y.S.2d at 2. The court of appeals adopted the trial court's finding that the officers went to Harris' house intending to take him into custody -- they came with guns drawn, blocking the exits before Harris answered their knock. *Harris II*, 77 N.Y.2d at 436 n.1, 570 N.E.2d at 1052 n.1, 568 N.Y.S.2d at 703 n.1. The dissent argued that the police only intended to "locate" Harris, and did not intend to "arrest him illegally." *Id.* at 445, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting).

1010. 445 U.S. 573 (1980).

1011. *Harris I*, 72 N.Y.2d at 617, 532 N.E.2d at 1230, 536 N.Y.S.2d at 2. Harris admitted to slitting his girlfriend's throat, in fact almost decapitating her, claiming that she was a bad mother. *Harris II*, 77 N.Y.2d at 443, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Bellacosa, J. dissenting).

1012. *Harris I*, 72 N.Y.2d at 617, 532 N.E.2d at 1230, 536 N.Y.S.2d at 2.

1013. *Id.* Harris made this written statement after he was read his *Miranda* warnings a second time. *Id.*

1014. *Harris*, 124 A.D.2d 472, 507 N.Y.S.2d 823 (1st Dep't 1986). The court accepted the trial court's finding that there had been sufficient attenuation to justify admitting Harris' station house statement as it was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* at 472, 507 N.Y.S.2d at 823 (quoting *Wong Sun v. United*

trial based on its ruling that the statement should have been suppressed on Fourth Amendment grounds.<sup>1015</sup> The Supreme Court granted *certiorari*, reversed the court of appeals, and reinstated the judgment against Harris.<sup>1016</sup>

On remand, the court of appeals concluded that the Supreme Court's ruling did not "adequately protect the search and seizure rights of the citizens of New York."<sup>1017</sup> A sharply divided court of appeals considered whether Harris' statements, though

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States, 371 U.S. 471 (1963)). The court further noted that as there was probable cause to arrest Harris, the arrest would have otherwise been legal had it not occurred in his apartment. Thus, the illegality was relevant in determining whether the statement "represented an improper exploitation of the underlying [ ] act." *Id.* at 472-73, 507 N.Y.S.2d at 823-24. The court concluded that the statement was not made because Harris "felt committed by what he had said at the apartment but because of a considered decision made prior to the expected arrival of the police," thus removing the taint of illegality. *Id.* at 473, 507 N.Y.S.2d at 824.

1015. *Harris I*, 72 N.Y.2d at 616, 532 N.E.2d at 1230, 536 N.Y.S.2d at 2. The court relied on *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Brown v. Illinois*, 422 U.S. 590 (1975), in determining that Harris' statement was not sufficiently attenuated from the illegal arrest to be admitted into evidence. *Harris I*, 72 N.Y.2d at 619-20, 622, 532 N.E.2d at 1231-34, 536 N.Y.S.2d at 4, 6. The court noted that *Wong Sun* stood for the proposition that the "exclusionary rule operates to bar from trial any verbal statements obtained as a direct result of an unlawful invasion." *Harris I*, 72 N.Y.2d at 619, 532 N.E.2d at 1232, 536 N.Y.S.2d at 4. *Brown* then clarified *Wong Sun* by addressing the "proper effect that should be given to *Miranda* warnings administered after an illegal arrest." *Id.* The court then applied the three factors laid out in *Brown* to determine whether the statement "was sufficiently purged of this Fourth Amendment *Payton* violation" and concluded that it was not. *Id.* at 620, 532 N.E.2d at 1232, 536 N.Y.S.2d at 4.

1016. *New York v. Harris*, 110 S. Ct. 1640 (1990). The Court held that when "the police have probable cause to arrest a suspect, the exclusionary rule does not bar the state's use of a statement made by the defendant outside his home, even though the statement is taken after an arrest made in the home in violation of *Payton*." *Id.* at 1644-45. The Court noted that *Payton* was only designed to "protect the physical integrity of the home" and was not intended as "protection for statements made outside [the suspect's] premises where the police have probable cause to arrest . . ." *Id.* at 1643. This analysis is contrary to the court of appeals' interpretation of *Payton*. See *Harris I*, 72 N.Y.2d at 623-24, 532 N.E.2d at 1234-35, 536 N.Y.S.2d at 6-7.

1017. *Harris II*, 77 N.Y.2d at 437, 570 N.E.2d at 1052-53, 568 N.Y.S.2d at 703-04.

admissible under federal standards, could withstand the scrutiny of New York's constitutional prohibition against illegal searches and seizures.<sup>1018</sup> Because *Harris* sought relief under both the federal and state constitutions, the majority rejected the dissent's view that the remand was controlled by the Supreme Court's ruling. The court of appeals was bound to address the state claim to determine whether the conduct complained of violated the state constitution.<sup>1019</sup>

The court of appeals noted that its earlier decision to suppress Harris' statement on Fourth Amendment grounds because it was "tainted by the prior illegality and unredeemed by attenuation," represented what it thought the Federal Constitution required and was consistent with prior state and federal decisions.<sup>1020</sup> The court then noted that the Supreme Court's determination differed sharply from this in its conclusion that "the police illegality was in the entry, not the arrest," and that the causal connection between the illegality and the statement was broken once Harris exited the apartment.<sup>1021</sup> Thus, under the Supreme Court's

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1018. *Harris II*, 77 N.Y.2d at 435, 570 N.E.2d at 1051, 568 N.Y.S.2d at 702 (in both court of appeals decisions, the court was split 5-2 with identical judicial alignment).

1019. *Id.*; see also *People v. Barber*, 289 N.Y. 378, 384, 46 N.E.2d 329, 331 (1943) (where a right is guaranteed under federal and state constitutions, courts may exercise independent judgment regarding scope and effect of state constitutional rights and are not bound by Supreme Court judgments limiting the scope of similar rights under the Federal Constitution); *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986); *People v. Alvarez*, 70 N.Y.2d 375, 378, 515 N.E.2d 898, 899, 521 N.Y.S.2d 212, 213 (1987) (court is bound by Supreme Court decisions in federal matters, but may exercise its independent judgment when determining scope of individual rights under state constitution).

1020. *Harris II*, 77 N.Y.2d at 436, 570 N.E.2d at 1052, 568 N.Y.S.2d at 703; see *People v. Conyers*, 68 N.Y.2d 982, 983, 503 N.E.2d 108, 109, 510 N.Y.S.2d 552, 553 (1986) (statements made as product of illegal arrest must be sufficiently attenuated from arrest to be purged of illegality); see also *United States v. Johnson*, 626 F.2d 753, 759 (9th Cir. 1980), *aff'd*, 457 U.S. 537 (1982) (statements made by defendant after illegal arrest in his home are inadmissible if they were fruits of unlawful arrest).

1021. *Harris II*, 77 N.Y.2d at 436, 570 N.E.2d at 1052, 568 N.Y.S.2d at 703. See also *Harris I*, 72 N.Y.2d at 625-26, 532 N.E.2d at 1236, 536 N.Y.S.2d at 8 (Titone, J., concurring) (the wrong in *Payton* cases is not the

analysis, “[n]o attenuation was required . . . because the deterrent value of suppressing this . . . statement was minimal . . . .”<sup>1022</sup>

This distinction led the majority to declare that the Supreme Court’s interpretation of the Fourth Amendment provided inadequate protection for New York citizens against an illegal search and seizure, and to require that statements made by an accused subsequent to a *Payton* violation “must be suppressed unless the taint resulting from the violation has been attenuated.”<sup>1023</sup>

The court distinguished New York’s search and seizure requirements from those of the Federal Constitution. The majority conceded that the language in the respective state and federal constitutions prohibiting illegal searches and seizures is identical.<sup>1024</sup> However, the court noted that state courts may adopt a differing construction of a state provision “unconstrained by a contrary Supreme Court interpretation of [its] Federal counterpart” where sufficient reasons appear.<sup>1025</sup> Relying on *People v. P.J. Video, Inc.*,<sup>1026</sup> the majority outlined the general rules governing independent state review, contrasting an interpretive review of New York constitutional provisions, which examines its textual language as compared to its federal

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detention itself, but manner in which arrest is carried out).

1022. *Harris II*, 77 N.Y.2d at 436-37, 570 N.E.2d at 1052, 568 N.Y.S.2d at 703.

1023. *Id.* at 437, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704.

1024. *Id.* Both the fourth amendment to the United States Constitution and article I, § 12 of the New York Constitution state:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

1025. *Harris II*, 77 N.Y.2d at 437-38, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704. *See also* *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986) (function of comparable state constitutional provisions, if not to be considered redundant, may supplement those rights to meet state’s particular needs and expectations).

1026. 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987).

counterpart, with a noninterpretive review, which “proceeds from a judicial perception of sound policy, justice and fundamental fairness.”<sup>1027</sup> The court opted for the noninterpretive analysis to enable it to focus on matters peculiar to the state of New York.<sup>1028</sup>

The majority noted that in determining whether a special rule was needed to protect the constitutional rights of the accused, the consequences emanating from the police illegality and the need for a deterrent to remove any incentive on the part of the police to violate the law must be considered. They rejected, as dispositive, the fact that Harris voluntarily waived his *Miranda* rights before making his statement, because the “interest in deterrence does not disappear just because the defendant’s statement was voluntary or because he waived his right to counsel.”<sup>1029</sup>

The New York right to counsel rule formed the basis for rejecting the Supreme Court’s ruling. The majority stated that under New York’s right to counsel rule attenuation is necessary to deter *Payton* violations.<sup>1030</sup> They recounted the history of New York’s rule, noting that it has developed “independent[ly] of its federal

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1027. *Harris II*, 77 N.Y.2d at 438, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704 (quoting *P.J. Video*, 68 N.Y.2d at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911).

1028. In doing so the majority considered such factors as:

Any pre-existing state statutory or common law defining the scope of the individual right in question; the history and traditions of the state in its protection of the individual right; any identification of the right in the state constitution as being one of peculiar State or local concern; and any distinctive attitudes of the state citizenry toward the definition, scope or protection of the individual right.

*Id.* (citing *P.J. Video*, 68 N.Y.2d at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911).

1029. *Id.* at 438-39, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705. *See also* *Brown v. Illinois*, 422 U.S. 590, 602-03 (1975) (*Miranda* warnings, while an important factor in determining whether confession was obtained by exploitation of illegal arrest alone, are not sufficient to attenuate taint of unconstitutional arrest because “the effect of the exclusionary rule would be substantially diluted.”).

1030. *Harris II*, 77 N.Y.2d at 439, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705.



counterpart.”<sup>1031</sup> The majority then concluded that New York’s right to counsel rule is “far more expansive than the Federal counterpart”<sup>1032</sup> and, thus, has become a matter of “singular concern” in New York.<sup>1033</sup> Furthermore, the majority determined that the differing views between the Supreme Court and the court of appeals on the present case “illustrate the distinctive Federal and State right to counsel rules and the concerns they engender.”<sup>1034</sup>

In support of its reasoning, the majority stated that there was little incentive for the police to violate *Payton* under the federal rules when attempting to secure a statement from a suspect. Under federal law, criminal proceedings do not necessarily commence once a warrant is issued, thus, the police could interrogate a suspect absent a lawyer without violating his or her right to counsel.<sup>1035</sup> In New York, however, criminal proceedings must be instituted before the police can obtain a warrant.<sup>1036</sup> Therefore, the majority, relying on *People v. Samuels*,<sup>1037</sup>

1031. *Id.* (quoting *People v. Settles*, 46 N.Y.2d 154, 161, 385 N.E.2d 612, 615, 412 N.Y.S.2d 874, 877 (1978), *overruled by* *People v. Skinner* 52 N.Y.2d 24, 417 N.E.2d 501, 436 N.Y.S.2d 207 (1980) (“we have extended the protections afforded by our State Constitution beyond those of the Federal [Constitution] . . .”).

1032. *Id.* at 439, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705 (quoting *People v. Bing*, 76 N.Y.2d 331, 339, 558 N.E.2d 1011, 1015, 559 N.Y.S.2d 474, 478, (1990); *see also* *People v. Davis*, 75 N.Y.2d 517, 521, 553 N.E.2d 1008, 1011, 554 N.Y.S.2d 460, 463 (1990) (New York’s right to counsel extends “well beyond” its federal counterpart).

1033. *Harris II*, 77 N.Y.2d at 439, 570 N.E.2d at 1056, 568 N.Y.S.2d at 705.

1034. *Id.*

1035. *Id.* at 440, 570 N.E.2d at 1054-55, 568 N.Y.S.2d at 705-06. In its support, the majority cited *United States v. Reynolds*, 762 F.2d 489, 493 (6th Cir. 1985) (right to counsel attaches only after adversarial judicial proceedings have been initiated, while issuance of a warrant merely indicates probable cause to arrest – certainly not an adversarial proceeding); and *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987) (sixth amendment right to counsel does not attach upon the issuance of a warrant).

1036. *See* Peter Preiser, Practice Commentary to N.Y. CRIM. PROC. LAW § 120.20 (McKinney 1992) (“authority to issue an arrest warrant is dependent upon the existence of a filed accusatory instrument”).

1037. 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980).

declared that "in New York once an arrest warrant is authorized, criminal proceedings have begun, the indelible right to counsel attaches and police may not question a suspect in the absence of an attorney."<sup>1038</sup>

In sum, in New York, if the police arrest a suspect in his or her residence without a warrant, *Payton* is violated. However, once a warrant is issued, criminal proceedings have begun and the defendant's right to counsel attaches, the police cannot question the defendant absent his or her counsel. It is with this interplay that the majority sought to prevent abuse, and which "provide[d] the compelling reason for deviating from the Supreme Court's ruling."<sup>1039</sup> Had the police entered Harris' apartment pursuant to a warrant, he could not have been questioned without his attorney being present. Therefore, the majority concluded that the police "should not enjoy greater latitude simply because they neglected to obtain a warrant, as *Payton* requires, and entered the apartment illegally."<sup>1040</sup> Consequently, in order for Harris' statement to be admissible, it had to be sufficiently attenuated from the *Payton* violation.

In his concurring opinion, Judge Titone agreed "wholeheartedly" with the majority's conclusion that New York's right to counsel rules "provide sound support for a departure from Federal precedent and justify applying our own State attenuation analysis in cases involving *Payton* violations."<sup>1041</sup> However, Judge Titone remained unwilling to extend *Brown v. Illinois*<sup>1042</sup> and its progeny to suppress statements made subsequent to an arrest which violated *Payton*, providing it would

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1038. *Harris II*, 77 N.Y.2d at 440, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705 (citing *Samuels*, 49 N.Y.2d at 222-23, 400 N.E.2d at 1346-47, 424 N.Y.S.2d at 894 (defendant's right to counsel attached when felony arrest warrant was issued and could only be waived in the presence of counsel)).

1039. *Id.* at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706. The majority rationalized that the police had every reason to violate *Payton* because it enabled them "to circumvent the accused's indelible right to counsel." *Id.*

1040. *Id.*

1041. *Id.* at 441, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Titone, J., concurring).

1042. 422 U.S. 590 (1975) (attenuation analysis required where police lacked probable cause and warrant to arrest defendant).

have been an otherwise lawful arrest.

As Judge Titone maintained in his concurrence, "I continue to have serious misgivings about the unquestioning use of the *Brown* [attenuation] analysis in cases involving *Payton* violations."<sup>1043</sup> Instead, before attenuation should be considered, the courts, as a threshold matter, should determine whether "the challenged evidence is in some sense the product of illegal governmental activity."<sup>1044</sup> Judge Titone distinguished *Brown* from *Payton*, noting that in *Brown* the threshold matter need not have been addressed (it was assumed) because the police lacked probable cause to arrest the defendant in the first place. Therefore, in *Brown* the police did not have the right to control the defendant's person at the time he made the incriminating statement.<sup>1045</sup> In contrast, Judge Titone suggested the "wrong" in *Payton* was not the detention itself, but the manner in which the arrest was made.<sup>1046</sup> Thus, before the attenuation analysis is made the court should determine "[w]hether there is a sufficient causal relationship between this unlawful *entry* and the police's subsequent obtaining of a statement."<sup>1047</sup>

The dissent, on remand, fervently derided the majority's decision for failing to adhere to the Supreme Court's ruling on the *Payton* issue; injecting a "significantly expanded State right to counsel concept"; converting a "search and seizure dwelling protection case into a theoretical right to counsel construct"; and, necessitating its decision on a "perceived enhancement of deterrence policy."<sup>1048</sup> Judge Bellacosa asserted that the

1043. *Harris I*, 72 N.Y.2d at 625, 532 N.E.2d at 1235, 536 N.Y.S.2d at 7 (Titone, J., concurring).

1044. *Id.* (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980)).

1045. *Id.* at 625, 532 N.E.2d at 1235-36, 536 N.Y.S.2d at 7-8 (Titone, J., concurring) ("In these cases, the 'challenged evidence' — i.e., the post-arrest confession — is unquestionably 'the product of [the] illegal government activity' — i.e., the wrongful detention.") This analysis was cited with approval in *Harris*, 110 S. Ct. at 1643-44.

1046. *Harris I*, 72 N.Y.2d at 625, 532 N.E.2d at 1236, 536 N.Y.S.2d at 8 (Titone, J., concurring).

1047. *Id.* at 626, 532 N.E.2d at 1236, 536 N.Y.S.2d at 8 (Titone, J., concurring).

1048. *Harris II*, 77 N.Y.2d at 442, 570 N.E.2d at 1056, 568 N.Y.S.2d at

majority's holding "metamorphosize[d] the *Payton* private dwelling sanctuary into the public precinct house, and then further transform[ed] the jurisprudence by converting *Payton*'s Fourth Amendment dwelling right into a fused Fifth and Sixth Amendments personal right to counsel -- State version."<sup>1049</sup> Consequently, according to the dissent, "[t]he majority effectively relegate[d] [the] Supreme Court's work to an academic judicial exercise . . . ."<sup>1050</sup>

The dissent claimed that the issue did not concern the police invading Harris' dwelling but, rather, it involved the legality of his station house confession.<sup>1051</sup> Thus, the court of appeals did not act in conformity with the Supreme Court's ruling, despite the Court's mandate directing the court of appeals to proceed consistently with its opinion.<sup>1052</sup> Furthermore, the dissent contended that the court should construe the Fourth Amendment consistently with article I, section 12 because of the similarity of verbiage and history.<sup>1053</sup>

Judge Bellacosa explained that the "fundamental flaw" in the majority's argument is that its prior decision embraced only Fourth Amendment rights resulting from *Payton* violations and "not the infringement of some artificially triggered right to counsel."<sup>1054</sup> Additionally, the dissent noted that the majority strayed from the precise holding of *People v. Samuels*,<sup>1055</sup> creating a fictional extension of the rule itself. The dissent argued

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707 (Bellacosa, J., dissenting).

1049. *Id.* at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting).

1050. *Id.* (Bellacosa, J. dissenting).

1051. *Id.* (Bellacosa, J. dissenting).

1052. *Id.* at 443, 570 N.E.2d at 1056-57, 568 N.Y.S.2d at 707-08 (Bellacosa, J., dissenting).

1053. *Id.* at 443-44, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

1054. *Id.* at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

1055. 49 N.Y.2d 218, 221-23, 400 N.E.2d 1344, 1346-47, 424 N.Y.S.2d 892, 894-95 (1980) (right to counsel attaches once felony complaint is filed and warrant is issued and cannot be waived absent counsel, thus, statements made by defendant absent counsel must be suppressed).

that *Samuels* did not even apply in this case because "Harris was arrested *without a warrant* and with *no felony complaint filed* and with *no criminal proceeding having been begun*."<sup>1056</sup> Furthermore, the dissent submitted that the majority's extension was even more incredulous in light of the court of appeals' recent decision in *People v. Bing*,<sup>1057</sup> which contracted the right to counsel protection.<sup>1058</sup>

The dissent also rejected the deterrence argument propounded by the majority, and asserted that the conduct *Payton* sought to deter was the violation of the "dwelling sanctuary protection."<sup>1059</sup> Thus, the dissent considered as speculative the majority's argument that the police intended to violate Harris' *Payton* right and "evade any of his New York counsel rights."<sup>1060</sup> Instead, the dissent subscribed to the Supreme Court's "common sense" analysis regarding the incentive to obey *Payton* and thus saw no reason to "stretch precedent and twist logic" in order to rescue Harris from the Supreme Court decision against him.<sup>1061</sup>

On the federal level, in *New York v. Harris*,<sup>1062</sup> the Supreme Court ruled that *Payton* does *not* protect criminal defendants for

1056. *Harris II*, 77 N.Y.2d at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

1057. 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

1058. *Harris II*, 77 N.Y.2d at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting). See *Bing*, 76 N.Y.2d at 348-50, 558 N.E.2d at 1021-22, 559 N.Y.S.2d at 484-85 (defendant represented by counsel on prior unrelated charge was not deprived of right to counsel under state constitution when, in absence of that counsel, waived his right to counsel when questioned by police on matters unrelated to prior pending charge).

1059. *Harris II*, 77 N.Y.2d at 445, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

1060. *Id.* (Bellacosa, J., dissenting). In fact, the dissent argued that the police were under "no constitutional or legal obligation to obtain a warrant and thus commence the criminal proceeding" at the time which a court, in retrospect, might determine to be "the moment of truth." *Id.* (Bellacosa, J., dissenting).

1061. *Harris II*, 77 N.Y.2d at 445, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting).

1062. 110 S. Ct. 1640 (1990), *rev'g* 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988).

statements made outside their homes when the police had probable cause to arrest the defendant for committing the crime.<sup>1063</sup> Instead, the Court stated that *Payton* was “designed to protect the physical integrity of the home . . . .”<sup>1064</sup> Consequently, the Court found “[n]othing in the reasoning of [*Payton* to] suggest[] that an arrest in a home without a warrant . . . somehow renders unlawful continued custody of the suspect once he is removed from the house” providing there was probable cause for the arrest.<sup>1065</sup> A defendant whose arrest is otherwise grounded on probable cause is not unlawfully in custody when removed to the police station. Therefore, the admissibility of the defendant’s subsequent statements, made after waiver of his or her *Miranda* right, would not be dependent upon an attenuation analysis since such statements would not be “an exploitation of the illegal entry.”<sup>1066</sup>

The *Harris* court distinguished the instant case from *Brown v. Illinois*<sup>1067</sup> and its progeny<sup>1068</sup> on the ground that the evidence

1063. *Harris*, 110 S. Ct. at 1644-45. Under *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court held that the fourth amendment “prohibits the police from making a warrantless and non-consensual entry into a suspect’s home in order to make a routine arrest.” *Payton*, 445 U.S. at 576.

1064. *Harris*, 110 S. Ct. at 1643. See *Payton*, 445 U.S. at 585 (“the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’”) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

1065. *Harris*, 110 S. Ct. at 1643.

1066. *Id.* at 1644. See *United States v. Crews*, 445 U.S. 463, 471 (1980) (as a threshold matter, before attenuation analysis is required, court must determine that challenged evidence is somehow a product of illegal government activity); see also *United States v. Ceccolona*, 435 U.S. 268, 276 (1978) (“we have declined to adopt a ‘per se or but for rule’ that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest.”). But see *United States v. Johnson*, 626 F.2d 753 (9th Cir. 1980) (statements made by defendant after his arrest, albeit based on probable cause, in violation of *Payton*, deemed inadmissible as the fruits of an unlawful arrest), *aff’d*, 457 U.S. 537 (1982).

1067. 422 U.S. 590 (1975) (court suppressed inculpatory statements made by defendant arrested without probable cause or warrant although given *Miranda* warning). *Id.* at 604-05.

1068. See *Taylor v. Alabama*, 457 U.S. 687 (1982) (confession obtained

obtained from the defendants in those cases after their arrest, was suppressed because the police lacked probable cause.<sup>1069</sup> The Court maintained that those cases stood for the "proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality."<sup>1070</sup> The Court submitted that the illegality in *Brown* was the lack of probable cause and the wrong was the police custody of the defendant at the time the inculpatory statements were made. Conversely, in the *Harris* case, the illegality was the *Payton* violation, not the subsequent detention of Harris.<sup>1071</sup> Thus, the police were justified in questioning Harris. As a result, the Court concluded that Harris' statement made at the station house "was not an exploitation of the illegal entry into [his] home."<sup>1072</sup> As such, the attenuation analysis was not applicable to determine whether Harris' statements should be suppressed.<sup>1073</sup>

The Supreme Court had previously addressed the policies underlying the exclusionary rule<sup>1074</sup> when determining whether to suppress evidence. In *Wong Sun v. United States*,<sup>1075</sup> the Court noted that the exclusionary rule seeks to deter "lawless conduct by federal officers" as well as "closing the doors of the federal

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through custodial interrogation after defendant arrested without warrant or probable cause should be suppressed as fruit of illegal arrest); *Dunaway v. New York*, 442 U.S. 200 (1979) (confession made by defendant at police station after his illegal arrest was not sufficiently attenuated to be admitted at trial).

1069. *Harris*, 110 S. Ct. at 1643.

1070. *Id.*

1071. *Id.* at 1643-44.

1072. *Id.* at 1644.

1073. *Id.* at 1643.

1074. The fourth amendment does not contain a provision expressly prohibiting the use of evidence obtained in violation of its commands. *United States v. Leon*, 468 U.S. 897, 906 (1984). Instead, the exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

1075. 371 U.S. 471 (1963).

courts to any use of evidence unconstitutionally obtained.”<sup>1076</sup> However, the *Harris* Court also noted that the exclusionary rule does not require that ““anything which deters illegal searches is thereby commanded by the Fourth Amendment.””<sup>1077</sup> The *Harris* Court stated that the Federal Constitution did not require them to “go further and suppress statements later made . . . in order to deter police from violating *Payton*.”<sup>1078</sup> The Court reasoned that “the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found or statements taken inside the home.”<sup>1079</sup> However, the need to suppress subsequent statements made outside the home is minimal where probable cause exists to arrest the defendant as the police “need not violate *Payton* in order to interrogate the suspect.”<sup>1080</sup> The *Harris* Court concluded that “[i]t is doubtful . . . that the desire to secure [such] a statement from a criminal suspect would motivate the police to violate *Payton*.”<sup>1081</sup>

When a defendant is arrested with probable cause, but in violation of *Payton*, statements made by the defendant within his or her dwelling at the time of the arrest will be suppressed pursuant to both article I, section 12 of the New York State Constitution and the Fourth Amendment of the Federal Constitution. However, in New York, statements obtained from that defendant subsequent to the *Payton* violation will be further protected by New York’s constitutional right to counsel, article I, section 6, to the extent that the police must show that the subsequent statement was sufficiently attenuated from the illegal arrest to preclude suppression.

New York courts are not alone in extending greater protection to citizens from searches and seizures than is extended by the United States Supreme Court. Subsequent to the *Harris* decision,

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1076. *Id.* at 486.

1077. *Harris*, 110 S. Ct. at 1644 (quoting *Leon*, 468 U.S. at 910).

1078. *Id.*

1079. *Id.*

1080. *Id.* Unlike its New York counterpart, the federal right to counsel does not necessarily attach once an arrest warrant has been issued.

1081. *Id.*



the Appellate Court of Connecticut, in *State v. Geisler*,<sup>1082</sup> concluded that the "federal exclusionary rule, as narrowed by *New York v. Harris*, . . . does not ensure that Connecticut citizens' rights, as guaranteed by our state constitution, will be adequately protected."<sup>1083</sup> The court held that the Connecticut Constitution<sup>1084</sup> "bars the state from using evidence acquired outside a defendant's home following a *Payton* violation, unless the taint resulting from the violation is sufficiently attenuated from the initial entry into the home."<sup>1085</sup> The *Geisler* court voiced concerns about the deterrent value of the *Harris* decision on police conduct. It stated that "[b]y requiring that only evidence acquired *inside* a home following a *Payton* violation be suppressed, the per se rule in *Harris* does not grant to Connecticut citizens the scope of the exclusion that we believe is necessary to deter the police from entering a home without a warrant."<sup>1086</sup>

The California Supreme Court chose to follow the rationale of *New York v. Harris* in *People v. Marquez*.<sup>1087</sup> Although the court determined that *Harris* was not "necessarily determinative in this case because the crimes here were committed before the passage of Proposition 8,"<sup>1088</sup> it nevertheless adhered to the *Harris* ratio-

1082. 594 A.2d 985 (Conn. App. Ct. 1991) *appeal granted, in part*, 597 A.2d 342 (1991).

1083. *Id.* at 990.

1084. CONN. CONST. art. I, § 7. The pertinent language of the Connecticut Constitution is similar to that contained in the fourth amendment of the United States Constitution:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as clearly as may be, nor without probable cause supported by oath or affirmation.

*Id.*

1085. *Geisler*, 594 A.2d at 990.

1086. *Id.* at 989.

1087. 822 P.2d 418 (Cal. 1992).

1088. *Id.* at 425. Proposition 8 was a 1982 amendment to the California Constitution, CALIF. CONST. art. I, § 28(d), which provides, in pertinent part, that "relevant evidence shall not be excluded in any criminal proceeding . . . ." The crimes in this case were committed in 1979. Proposition 8 was not

nale. In determining whether a station house confession made after a *Payton*<sup>1089</sup> violation should be suppressed, the court decided that “[f]or the reasons stated in *New York v. Harris*, . . . we are persuaded that the California Constitution does not require that the confession be suppressed . . . .”<sup>1090</sup> Therefore, the court concluded that the lack of an arrest warrant will not require suppression of subsequent statements made by the defendant at the police station.<sup>1091</sup>

People v. Offen<sup>1092</sup>  
(decided November 19, 1991)

A criminal defendant contended that his right to be protected against unreasonable searches under the New York State Constitution<sup>1093</sup> was violated. The defendant contended that a canine “sniff” and x-ray of a package addressed to him

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applied retroactively.

1089. The court also relied upon *People v. Ramey*, 545 P.2d 1333 (Cal.), *cert denied*, 429 U.S. 929 (1976), in which the court held that warrantless arrests within the home are per se unreasonable absent exigent circumstances. *Id.* at 1341.

1090. *Marquez*, 822 P.2d at 426.

1091. *Id.* See also *State v. Christiansen*, 810 P.2d 1127, 1130 (Idaho Ct. App. 1990) (court cited *Harris* when it stated: “Where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the use of defendant’s statements made outside of his home, even if it is taken after an invalid warrantless arrest in violation of *Payton*.”); *People v. Brown*, 574 N.E.2d 78, 80 (Ill. App. Ct. 1991) (court cited *Harris* in support of its decision not to suppress statements outside defendant’s home subsequent to warrantless arrest in defendant’s home); *State v. Corpier*, 793 S.W.2d 430, 439 (Mo. Ct. App. 1990) (“We therefore hold, as in *Harris*, that the police had probable cause to arrest the defendant prior to the unlawful entry . . . and thus the subsequent confession . . . not obtained at the apartment, w[as] not the fruit[] of the illegal arrest.”).

1092. 78 N.Y.2d 1089, 585 N.E.2d 370, 578 N.Y.S.2d 121 (1991). For additional case analysis see the discussion of the appellate division, fourth department’s decision in *New York State Constitutional Decisions: 1990 Compilation*, 8 TOURO L. REV. 235, 428-432 (1991).

1093. N.Y. CONST. art. I, § 12. (“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .”).