SEARCH WARRANT REQUIRED TO SEARCH THIRD PARTY HOME FOR SUBJECT OF ARREST WARRANT

Steagald v. United States, 101 S. Ct. 1642 (1981)

In *Steagald v. United States*,[1] the United States Supreme Court resolved a sharply disputed[2] fourth amendment[3] question by holding that, absent exigent circumstances[4] or consent,[5] police officers must ob-

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1. 101 S. Ct. 1642 (1981).

2. *See* notes 27-60 *infra* and accompanying text. *See generally* Comment, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 ILL. L.F. 655.

3. The fourth amendment states:

> 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.

4. One explanation of "exigent circumstances" is stated in Comment, *Arresting A Suspect in A Third Party's Home: What Is Reasonable?*, 72 J. CRIM. L. & C. 293 (1981):

> In deciding whether the situation is an exigent one, the officer would consider the factors suggested in *Dorman v. United States*: seriousness of the offense, reasonable belief that the suspect is armed, probable cause and reasonably trustworthy information that the suspect committed a crime, likelihood of escape, and peaceful nature of the entry. Additional considerations for the officer would be those enumerated in *Wallace v. King*: hot pursuit, fear of injury to others if the arrest is delayed, availability of a magistrate, and ability of police to keep watch while a search warrant is obtained. Conversely, a passage of time between the officer's belief that the suspect is within and the actual entry would militate against a finding of exigent circumstances. Similarly, a prior formalized strategy to execute entry by police would be a factor indicating that a search warrant should have been sought.

Id. at 313. *Accord,* Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980); Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970). *See* Latzer, *Enforcement Workshop: Police Entries to Arrest*, 17 CRIM. L. BULL. 156, 163 (1981) ("the essence of an exigency is the existence of circumstances known to the police which prevent them from taking the time to obtain a warrant because to do so would thwart or make more dangerous the arrest"). *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 157-65 (1980); Comment, *supra* note 2, at 676-87.

5. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (when person is not under arrest or in custody, police do not have affirmative duty to inform person of right to refuse consent to a search; in order to prove valid consent state need only show it was given voluntarily). *See also* United States v. Matlock, 415 U.S. 164 (1974) (reaffirming *Schneckloth*); Bumper v. North Carolina, 391 U.S. 543 (1968) (prosecutor must prove consent was freely given); United States v. Jones, 641 F.2d 425 (6th Cir. 1981) (valid consent search must be based on more than the "mere expression of approval to the search"); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 240.2(2)-(3) (1975) (person must be notified that he is not required to give consent and any evidence uncovered in the search will be used at trial; furthermore, if the person is under arrest or in police custody, he must be informed of his right to counsel before giving consent to the search). For a detailed study of searches pursuant to consent, see C. WHITEBREAD, *supra* note 4, at 197-211.

tain a search warrant prior to searching the home of a third party for the subject of an arrest warrant.

Drug Enforcement Administration Agents received information leading them to believe that a fugitive, Lyons, was staying at the Steagald residence. The agents, acting only under the authority of an arrest warrant for Lyons, entered and searched the Steagald house. The discovery of drugs during this search resulted in criminal charges against Steagald.[6] Prior to trial, Steagald moved to suppress the drugs, claiming that the fourth amendment prohibited the agents from entering his home on the authority of the Lyons arrest warrant.

The district court found that the arrest warrant was sufficient to justify the search and denied the motion to suppress the evidence.[7] Steagald was convicted. On appeal, the Fifth Circuit affirmed.[8] The United States Supreme Court granted certiorari,[9] reversed, and *held*: Absent exigent circumstances or consent, the fourth amendment to the United States Constitution requires a law enforcement officer to obtain a search warrant prior to searching the home of a third party for the subject of an arrest warrant.[10]

The fourth amendment protects individuals from unreasonable governmental intrusion into the privacy of their homes.[11] The amendment

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6. Steagald was convicted of possessing cocaine with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846 (1976).

7. United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979).

8. *Id.*

9. Steagald v. United States, 101 S. Ct. 1642, 1644 (1981).

10. *Id.*

11. *See, e.g.*, Payton v. New York, 445 U.S. 573, 590 (1980) ("[a]bsent exigent circumstances, that threshold [entrance to the house] may not reasonably be crossed without a warrant"); United States v. United States District Court, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) ("[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society") (quoting Wolf v. Colorado, 338 U.S. 25, 27-28 (1949)); Berger v. New York, 388 U.S. 41, 53 (1967) (case restating assertion in *Wolf* concerning a conversation recorded by an electronic device); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967) ("except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant"); Silverman v. United States, 365 U.S. 505, 511 (1961) ("[a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); Jones v. United States, 357 U.S. 493, 498 (1958) ("the essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy"); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 44-45 (1966) ("the amendment was designed to protect against arbitrary arrests as well as searches is evident from the history of the abuses which gave rise to the amendment"); Amster-

was developed by the constitutional founders as a response[12] to the English writs of assistance.[13] As such, the fourth amendment safeguards the sanctity of the home[14] from arbitrary invasion by requiring

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dam, *Perspectives on The Fourth Amendment*, 58 MINN. L. REV. 349, 363 (1974) ("[i]ndisputably, forcible entries by officers into a person's home or office are the aboriginal subject of the fourth amendment and the prototype of the 'searches' and 'seizures' that it covers"); 23 STAN. L. REV. 995, 997 (1971) ("[t]he right to be secure in the privacy of one's home against arbitrary governmental intrusions is the heart of the fourth amendment").

12. *See* Payton v. New York, 445 U.S. 573, 583 (1980) ("it is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment"). For commentaries that support this proposition, see Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 46-53 (1960); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362 (1921); Mascolo, *Arrest Warrants and Search Warrants: The Seizure of a Suspect in the Home of a Third Party*, 54 CONN. B.J. 299, 302 (1980). *See also* Comment, Watson *and* Ramey*: The Balance of Interests in Non-Exigent Felony Arrests*, 13 SAN DIEGO L. REV. 838 (1976), in which the author states: "The fourth amendment was adopted precisely in reaction to the general warrant. The framers drafted the amendment to neutralize the arbitrary power of the government to search and arrest at will." Id. at 846 (footnotes omitted).

For an in depth discussion of the history of the fourth amendment and the influence of English law on the writers of the Constitution, see J. LANDYNSKI, *supra* note 11, at 19-48. *See also* 3 ELLIOTT'S DEBATES 448, 449, 588 (1854) (debates over language of Bill of Rights).

13. Writs of assistance were general warrants that described the object, but not the place, of the search. *See generally* R. MORELAND, MODERN CRIMINAL PROCEDURE 100-03 (1959). The Supreme Court explains the founders' hostility to the general writ in Boyd v. United States, 116 U.S. 616 (1886):

> Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer."

Id. at 625. *Boyd* has been reiterated in numerous cases. *See, e.g.,* Payton v. New York, 445 U.S. 573, 583-84 n.21 (1980). *See also* Amsterdam, *supra* note 11, at 411:

> [T]he objectionable feature of general warrants and writs must be their indiscriminate character. Warrants are not to issue indiscriminately: that is the office of the probable cause requirement. Nor may indiscriminate searches be made under them: that is why particularity of description of the persons or things to be seized is demanded. . . . [T]he framers decreed that it was unreasonable and should be unconstitutional to subject his premises or possessions to indiscriminate seizure.

See generally N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 100-03 (1937).

14. The value that underlies the fourth amendment was derived from the English adage that every man's home is his castle. *See* Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1603) ("that the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his respose"). *See also* Steagald v. United States, 101 S. Ct. 1642, 1650 (1981);

that judicial scrutiny precede the search and seizure process.[15]

The Supreme Court historically has required a search warrant[16] ex-

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Payton v. New York, 445 U.S. 573, 592-93 (1980); Accarino v. United States, 179 F.2d 456, 460-62 (D.C. Cir. 1949).

Another English case that emphasized the sanctity of the home and influenced American case law was Entick v. Carrington, 93 Eng. Rep. 807 (K.B. 1765), which is discussed in Boyd v. United States, 116 U.S. 616 (1886):

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employe's of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .

Id. at 630. *See* Amsterdam, *supra* note 11, at 381 (referring to *Entick* as "something of a lexicon of the 'original understanding' of the Fourth Amendment"). *See also* Miller v. United States, 357 U.S. 301 (1958), which quotes a remark made in Parliament by William Pitt in 1763:

> 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!

Id. at 307.

15. The Court articulates this point in Coolidge v. New Hampshire, 403 U.S. 443 (1971):

> [T]he magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that *any* intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity . . . . The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings.

Id. at 467. *See also* Note, *Arrests on Third Party Premises: Reasonableness Under the Fourth Amendment*, 18 AM. CRIM. L. REV. 449 (1981):

> The warrant requirement serves two constitutional objectives: ensuring the existence of a credible justification of police intrusion by interposing a neutral magistrate between police and public, and limiting the scope of the intrusion by circumscribing police discretion. Because the abuses potentially present during arrest on third party premises closely parallel the evils sought to be avoided by the warrant requirement, the safeguard provided by the warrant requirement, including prior judicial review, are particularly appropriate to such arrests.

Id. at 457 (footnotes omitted). *See generally* Amsterdam, *supra* note 11, at 422-39.

16. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (warrantless taking of letters from defendant's house by U.S. Marshal held unconstitutional); Boyd v. United States, 116 U.S. 616 (1886) (law requiring defendant accused of smuggling goods into United States without paying duties to produce business records or papers requested by prosecutor held unconstitutional). In *Weeks*, the Court stated:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value . . . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution . . . . In *Adams v.*

cept in a few limited situations,[17] to justify the search of any home.

New York, 192 U.S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the Government and officers of the law acting under it. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Id. at 393-94. In Agnello v. United States, 269 U.S. 20 (1925), the Court explained:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted. . . . But the right does not extend to other places. Frank Agnello's house was several blocks distant from Alba'a house, where the arrest was made. . . . That search cannot be sustained as an incident of the arrests.
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> . . . [I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. . . . The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws.

Id. at 30-32. *See also* Vale v. Louisiana, 399 U.S. 30 (1970) (when defendant is arrested in front of his residence, police are not justified in searching his home without a search warrant); Shipley v. California, 395 U.S. 818 (1969) (same); Chimel v. California, 395 U.S. 752 (1969) (Court rejected search as incident to an arrest with arrest warrant when search was without consent; search for possible weapons or destructible evidence may only be of the person and the immediate area in his control); Stoner v. California, 376 U.S. 483 (1964) (search incident to arrest valid only if it is substantially contemporaneous with arrest and confined to immediate vicinity of arrest).

The Court has limited the protection of the home by characterizing the fourth amendment as a personal right that may be asserted only by the victim of the illegal search. *See, e.g.,* Alderman v. United States, 394 U.S. 165, 174 (1969) (personal rights of fourth amendment may not be vicariously asserted—exclusion of evidence against one defendant to protect rights of another not necessary); Simmons v. United States, 390 U.S. 377, 390-94 (1968) (to assert fourth amendment right defendant must acknowledge personal ownership of the premises searched or property seized—such an acknowledgement may not be used against defendant at trial); Wong Sun v. United States, 371 U.S. 471, 492 (1963) (defendant has no personal right of privacy in the premises searched).

See also Rakas v. Illinois, 439 U.S. 128 (1978) (mere passengers in a car did not have a legitimate expectation of privacy in the areas searched; thus no violation of their fourth amendment rights); Katz v. United States, 389 U.S. 347 (1967) (FBI tape recordings of defendant's conversations on a public telephone did not violate fourth amendment rights); Jones v. United States, 362 U.S. 257 (1960) (guest staying in an apartment for a few days allowed to challenge a search of the apartment during his stay).

See generally Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493 (1980).

17. *See, e.g.,* Michigan v. Tyler, 436 U.S. 499, 509 (1978) (police may search without a search warrant "when there is a compelling need for official action and no time to secure a warrant"); Warden v. Hayden, 387 U.S. 294, 298 (1967) (Court permitted warrantless search of defendant's home when police suspected defendant had just committed a robbery). For an in depth review of the exigent circumstances exception, see 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 384-85 (1978).

Thus the Court ensured that a neutral and detached magistrate[18] would balance the need for the search against the invasion of the sanctity of an individual's home.[19] However, the Court compromised the uni-

18. *See* Johnson v. United States, 333 U.S. 10 (1948). In *Johnson*, the police smelled burning opium outside a hotel room. Without an arrest warrant or search warrant, they entered and arrested the occupant. A search of the room uncovered a quantity of opium. The Court refused to sanction the search and stated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in a reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Id. at 13-14 (footnotes omitted). *Accord,* McDonald v. United States, 335 U.S. 451 (1948). In *McDonald*, police broke into defendant's rented room without an arrest warrant or search warrant, acting on the belief that defendant was operating an illegal lottery. The Court refused to admit the fruits of the search into evidence. The Court reasoned:

> The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Id. at 455-56. For a discussion of *McDonald*, see Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 DICK. L. REV. 167, 170 (1977).

The attitude of the Court in warrantless administrative searches is different and dependent on the consequences of refusal. *See* Wyman v. James, 400 U.S. 309 (1971) (warrantless search by welfare caseworkers upheld when refusal to permit the search results in termination of benefits and not criminal sanctions); Camara v. Municipal Court, 387 U.S. 523 (1967) (warrantless search pursuant to the housing code held unreasonable when the penalty for refusing to allow the search was criminal prosecution).

19. *See, e.g.,* United States v. United States District Court, 407 U.S. 297 (1972) (statute allowing warrantless searches when national security affected did not grant authority for warrantless searches in domestic security surveillance; fourth amendment protection and the overriding individual privacy interests mandated prior judicial approval of searches). *See generally* Rotenberg &

formity of its search warrant requirement in *Payton v. New York*.[20] In *Payton*, the Court recognized the importance of search warrants,[21] but nevertheless held that an arrest warrant, alone, is sufficient justification for police to enter the suspect's home.[22] The Court reasoned that the magistrate, in evaluating the probable cause to arrest and deciding to issue the arrest warrant, implicitly considered entry by the police into the suspect's home to execute the warrant.[23]

In *Payton*, the Court recognized the potential for violation of third parties' fourth amendment rights when, without a search warrant, police search third party homes for the subject of an arrest warrant.[24] Because the *Payton* decision is limited to the arrest of a suspect in his own home,[25] the opinion cannot be adapted to the issue of warrantless en-

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Tanzer, *Searching for the Person to be Seized*, 35 OHIO ST. L.J. 56 (1974); 23 STAN. L. REV. 995 (1971).

20. 445 U.S. 573 (1980). For an in depth discussion of *Payton,* see Latzer, *supra* note 4, at 159-60 (*Payton* decision is a "step in the right direction" but it has shortcomings); 4 AM. J. TRIAL ADV. 447, 449 (1980) (commentator in agreement with the *Payton* decision); 14 CREIGHTON L. REV. 907, 914 (1981) (*Payton* result was consistent with the fourth amendment, but the amendment requires "a stronger and more coherent method of reasoning"); 58 DEN. L.J. 197, 209 (1980) (*Payton* deviates from accepted common law practice but is "long overdue ruling"); 94 HARV. L. REV. 178, 186 (1980) (*Payton* result "laudable but insufficient"); 10 STETSON L. REV. 343, 362-63 (1981) (*Payton* a "clear and simple rule" that is "easy to follow and should not admit of diverse interpretations"); 49 U.M.K.C. L. REV. 232, 244 (1981) (*Payton* decision very narrow and does not finally resolve the issue of warrantless arrest entries).

21. Payton v. New York, 445 U.S. 573, 585 (1980).

22. *Id.* at 603. The Court explained the significance of the home:

> [A]ny differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. 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."

Id. at 589.

23. The Court states:

> It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

445 U.S. at 602-03.

24. *Id.* at 583.

25. *Id.* One commentator writing on this part of the *Payton* decision states:

> [T]he Court for the first time has placed the privacy interests of an arrestee in his home

tries into third party residences. In addition, the magistrate's determination of probable cause to arrest did not consider the propriety of an invasion of the fourth amendment rights of third parties.[26]

Payton thus raised, but did not decide, the question as to the legitimacy of entering a third person's home to execute a valid arrest warrant. With no guidance from the Supreme Court, the federal circuits divided into three positions:[27] one, that entry is justified by the arrest warrant alone;[28] two, that entry is justified by the arrest warrant plus a reasonable belief that the suspect is in the third party's dwelling;[29] and three, that absent exigent circumstances or consent, entry cannot be justified without a valid search warrant.[30]

In *United States v. Harper*,[31] the Tenth Circuit adopted the position that an arrest warrant, alone, justified the search of a third party's

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on an equal constitutional footing with those of a victim of a search, and, in so doing, has expanded the zone of privacy protected by the fourth amendment. And, finally, it recognizes arrest as a species of seizure under the amendment, and reaffirms its commitment to the precept that the amendment, above all else, protects people.

Mascolo, *supra* note 12, at 302.

26. A critique of the *Payton* decision comments:

> In addition to these differences in judicial determination, the two warrants cannot be treated as interchangeable as search warrant determinations are not made when an arrest warrant issues. In the context of any entry into the suspect's home, the *Payton* Court argued that the magistrate implicitly considers the privacy rights of the suspect when issuing an arrest warrant by logically assuming that the officers will go to the arrestee's home first to make the arrest. Regardless of whether this principle could withstand scrutiny in the suspect home entry situation, it certainly would not apply to the third party home entry. Under current warrant practices, the magistrate makes no determination that the suspect might be at a friend's or relative's home. Even if the magistrate implicitly considers that an arrest warrant could be executed in *any* home, that consideration does not have the same kind of particularlity as an implicit determination that a suspect will be arrested in his own home. The latter determination is limited to the residence of a named person, while the former is a limitless inclusion of every residence without any determination as to a particular person's residence. Therefore, in contrast to the arrestee home entry situation, the third party's right to be free from unreasonable searches is not considered implicitly or otherwise when the magistrate issues the arrest warrant for the suspect.

Comment, *supra* note 4, at 300 (footnotes omitted).

27. Only two circuits had not ruled on the issue prior to *Steagald*. *See* United States v. Gillespie, 650 F.2d 127, 128 (7th Cir. 1981) (court postponed decision until after Supreme Court handed down *Steagald* and then acted in harmony); United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980) (police entered and searched third party's residence without arrest or search warrant; court suppressed evidence due to the lack of exigent circumstances and refused to decide whether an arrest or search warrant was necessary).

28. *See* notes 31-33 *infra* and accompanying text.

29. *See* notes 34-49 *infra* and accompanying text.

30. *See* notes 50-60 *infra* and accompanying text.

31. 550 F.2d 610 (10th Cir.), *cert. denied*, 434 U.S. 837 (1977).

home for an arrest warrant suspect. The court asserted that the entry into a third party's dwelling was a "lawful utilization"[32] of an arrest warrant.[33]

Five circuits,[34] in varying degrees, found sufficient justification for entry into a third party home when the officer had an arrest warrant and reasonably believed the subject of the warrant to be in the dwelling.[35] The Fifth Circuit, in *United States v. Cravero*,[36] and the District

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32. *Id.* at 613.

33. *Id.* The Tenth Circuit held that the lower court "properly determined the agents' initial entry to be a lawful utilization of the arrest warrant for Black, and that the evidence seized at that time, and thereafter pursuant to the search warrant, was properly seized and admissible in evidence." *Id.*

The court found additional support for its position in the Federal Rules of Criminal Procedure, which specify the territorial boundaries of an arrest warrant as "*any place* within the jurisdiction of the United States." FED. R. CRIM. P. 4(d)(2) (emphasis added). The Tenth Circuit concluded: "The [arrest] warrant has efficacy throughout the United States and constitutes authority for arresting the defendant *wherever found.*" 550 F.2d at 614 (emphasis added).

34. The Second, Fifth, Sixth, Eighth, and District of Columbia Circuits have accepted this position. *See* notes 35-50 *infra* and accompanying text.

35. *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.6(1) (1975):

> Section 120.6 *Place of Arrest: Private Premises*
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> (1) *Demand to Enter and Entry into Private Premises to Make an Arrest.* If a law enforcement officer has reasonable cause to believe that a person whom he is authorized to arrest is present on any private premises, he may, upon identifying himself as such an officer, demand that he be admitted to such premises for the purpose of making the arrest. If such demand is not promptly complied with, the officer may thereupon enter such premises to make the arrest, using such force as is reasonably necessary.

The Restatement (Second) of Torts provides:

> § 204 *Entry to Arrest for Criminal Offense*
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> The privilege to make an arrest for a criminal offense carries with it the privilege to enter land in the possession of another for the purpose of making such an arrest, if the person sought to be arrested is on the land or if the actor reasonably believes him to be there.
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> . . . .
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> § 206 *Forcible Entry of Dwelling to Arrest, Recapture, Prevent Crimes, and Related Sitatuations*
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> . . . .
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> (2) Although the person sought is not in the dwelling, the actor is privileged to use force . . . if he reasonably believes him to be there, and enters in the exercise of a privilege
>
> (a) to make a criminal arrest under a warrant valid or fair on its face.

RESTATEMENT (SECOND) OF TORTS §§ 204, 206 (1965).

36. 545 F.2d 406 (5th Cir. 1976) (en banc), *cert. denied,* 430 U.S. 983 (1977). In Vasquez v. Snow, 616 F.2d 217 (5th Cir. 1980), the court adhered to *Cravero* but found that the officer's belief was not "reasonable":

> [A]n arrest warrant permits pursuit into the premises of a third party if and only if the investigating officers' knowledge and trustworthy information would cause a man of reasonable caution to believe that the suspect 'is in [that] *particular building*.' . . . It follows conversely that an arrest warrant alone cannot sanction pursuit into a private residence

of Columbia Circuit, in *United States v. Brown*,[37] explicitly adopted this position. The court in *Cravero*[38] reasoned that the arrest warrant, which is the product of a magistrate's finding of probable cause, has "particularized" the search[39] and therefore obviated the need for a search warrant.

The Second, Sixth, and Eighth Circuits, in dicta, accepted the warrant plus reasonable belief standard. In *United States v. McKinney*,[40] the Sixth Circuit explained that the issuance of an arrest warrant, together with the inherent mobility of a fugitive, might constitute an exceptional circumstance and therefore eliminate the need[41] for a search

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where, as here, there exists a substantial likelihood that the suspect is at a location other than the target.

Id. at 219-20 (citations omitted) (emphasis in original).

See United States v. James, 528 F.2d 999 (5th Cir.) (court upheld police entrance and search of a building pursuant to an arrest warrant and asserted that a search warrant is not necessary), *cert. denied,* 429 U.S. 959 (1976); Rodriguez v. Jones, 473 F.2d 599 (5th Cir.)(court upheld search of third party home without a search warrant to execute an arrest warrant for a known, dangerous, and armed fugitive), *cert. denied,* 412 U.S. 953 (1973). *Cf.* Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) (civil suit for damages to petitioners' fourth amendment rights when police searched their home without a search warrant; court applied *Cravero* standard of arrest warrant plus reasonable belief).

37. 457 F.2d 419 (D.C. Cir. 1972). The *Brown* decision was based on the standard of review announced in Palmer v. United States, 192 A.2d 801 (D.C. Cir. 1963). In *Palmer*, the District of Columbia Court of Appeals declared: "An officer with a warrant outstanding for the arrest of an individual named therein may enter upon private premises if he has reasonable cause to believe that such party can be found there." *Id.* at 803. Additionally, in *Brown*, the District of Columbia Circuit found support for its position in the Federal Rules of Criminal Procedure and cited to rule 4(b)(1) (currently at Rule 4(d)(2)). 457 F.2d at 423-24. *See* note 33 *supra*. *But see* United States v. Ford, 553 F.2d 146, 159 n.45 (D.C. Cir. 1977) (court distinguished *Brown* in holding that police must obtain search warrants prior to invading a house to install or remove electronic bugging devices).

38. Cravero, the defendant, for whom the police had an arrest warrant, was in the home of the third party at the time of the search. The police entered the house with the arrest warrant and with a reasonable belief that Cravero was inside. United States v. Cravero, 545 F.2d 406, 412-13 (5th Cir. 1976) (en banc), *cert. denied,* 430 U.S. 983 (1977).

39. *Id.* at 421 n.1. The court reasoned:

> One explanation for not requiring a search warrant to enter a third person's home to execute an arrest is that there is no need to particularize the search—the arrest warrant has already done that. There is not the same danger of the 'general writ' which is the reason for requiring that a search warrant describe what specific items police are allowed to search for.

Id.

Additionally, *Cravero* served as the precedent for the lower court decisions in *Steagald.* *See* notes 7-8 *supra* and accompanying text.

40. 379 F.2d 259 (6th Cir. 1967). For a discussion of *McKinney*, see Rotenberg & Tanzer, *supra* note 19, at 68.

41. *Id.* at 263. The Sixth Circuit stated:

warrant. More recently, in *United States v. Jones*,[42] the Sixth Circuit questioned its *Cravero* position and asserted that the arrest warrant plus reasonable belief standard constituted only the "constitutional minimum."[43] The Eighth Circuit paralleled the *Jones* rationale in *Rice v. Wolff*.[44] Although the court in *Rice* declared that the fourth amendment protection against unreasonable searches and seizures extends to people as well as property,[45] it reluctantly denied the need for a search warrant and accepted the arrest warrant plus reasonable belief standard as the constitutional minimum.[46]

> [A] search warrant is not necessary to execute an arrest warrant in such circumstances. We agree with the observation that the guarantee of the Fourth Amendment that people shall be secure in their homes from unreasonable searches applies whether the government is searching for objects or for a person for whom an arrest warrant has been issued. But even if we were to accept appellant's premise that a search warrant must be obtained in the absence of exceptional circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant. An arrest warrant is validly issued only when a magistrate is convinced that there is probable cause to believe that the named party has committed an offense. This determination, together with the inherent mobility of the suspect, would justify a search for the suspect provided the authorities reasonably believe he could be found on the premises searched.

Id. (footnote omitted). *But cf.* Payton v. New York, 445 U.S. 573 (1980) (all "routine" felony arrests in the suspects' homes must be with an arrest warrant); Latzer, *supra* note 4, at 164 ("[c]learly, the mere issuance of an arrest warrant does not convert a routine arrest into an exigent circumstance").

42. 641 F.2d 425 (6th Cir. 1981). In *Jones*, the court rejected the complaint by the subject of the arrest warrant that the search of the third party's house was illegal due to the absence of a search warrant.

43. The Sixth Circuit explained:

> We begin with the obvious—an arrest warrant is not a search warrant. By itself, an arrest warrant signifies no more than there is a reason to believe the person named in the warrant has committed a crime. It is, however, fundamental that government officials cannot invade the privacy of one's home without probable cause for the entry. As a constitutional minimum therefore, an arrest warrant can authorize entry into a dwelling only where the officials executing the warrant have reasonable or probable cause to believe the person named in the warrant is within.

Id. at 428 (footnote omitted).

44. 513 F.2d 1280 (8th Cir. 1975), *rev'd on other grounds sub nom.* Stone v. Powell, 428 U.S. 465 (1976).

45. *Id.* at 1291. The Eighth Circuit declared:

> Police entry into a private dwelling without a search warrant in search of a suspect for whom an arrest warrant has been issued carried precisely the same fourth amendment implications as entry into a dwelling to make a warrantless search for tangible property. Citizens are entitled to the same constitutional protection from unreasonable searches and seizures when the police are seeking a suspect for arrest as when they are seeking some contraband for evidence.

Id.

46. *Id.* at 1292. For a discussion of *Rice*, see Comment, *supra* note 4, at 309-10.

The Second Circuit, in *United States v. Arboleda*,[47] rationalized its adoption of the arrest warrant plus reasonable belief standard by minimizing the differences between arrest and search warrants. The court suggested that an arrest warrant would have the "same legal effect" as a search warrant in authorizing the search of a third party's residence.[48] *United States v. Manley*[49] reaffirmed the Second Circuit's commitment to this standard.

Three Circuits adopted the position that police officers must obtain search warrants prior to executing arrest warrants in third parties'

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47. 633 F.2d 985 (2d Cir. 1980) (police went to defendant's house to arrest his brother without an arrest or search warrant; police found drugs and defendant was convicted), *cert. denied,* 450 U.S. 917 (1981).

48. *Id.* at 989. The court stated:

> Although there was no search warrant for Arboleda's apartment, the police officers were going to the apartment to arrest Gilberto (defendant's brother), and if they had an arrest warrant for Gilberto this would have the same legal effect as a search warrant in justifying entry into Arboleda's home to effect the arrest.

Id. Some suggest that in effect, the Second Circuit required only an arrest warrant to enter a third party's home. In a spirited dissent from *Arboleda*, Circuit Judge Oakes advocated the position taken by the Third Circuit. Judge Oakes stated:

> While the probable cause requirement for entries based solely on arrest warrants affords some protection against police discretion, there remains a danger that relatively indiscriminate entries will be justified subsequently by elaborate explanations concerning probable cause. It would be safer to adopt a standard for arrests in the homes of third parties that is analogous to seizures of property: absent exigent circumstances, a warrant must specify the location to be entered in advance.

Id. at 995. For a complete discussion of the Third Circuit position, see notes 51-60 *infra* and accompanying text.

See also Comment, *supra* note 4, at 297-98 n.27 (*Arboleda* decision "provides the best example of minimization of the difference between the two warrants"). *But cf.* United States v. Reed, 572 F.2d 412 (2d Cir.) (police arrest suspect in his home without an arrest or search warrant), *cert. denied,* 439 U.S. 913 (1978). In *Reed*, the Second Circuit stated: "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant." *Id.* at 423. One commentator interpreted *Reed* to require a search warrant. *See* Comment, *supra* note 4, at 310 n.92.

49. 632 F.2d 978 (2d Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981). The court stated: "The law in this Circuit now holds that police may enter a dwelling to execute an arrest warrant for a person other than its owner or tenant where there exists 'reasonable belief' that the party sought will be found therein." *Id.* at 983. *Accord,* United States v. Hammond, 585 F.2d 26 (2d Cir. 1978). In *Hammond*, the police entered defendant's house with an arrest warrant for Hansen. They searched the house and found incriminating evidence against defendant. At trial the defendant's attorney failed to question the police's authority to enter defendant's home, but the court asserted that "an arrest warrant may be all that is required for law enforcement officers to enter a private residence, or to search that residence, for purposes of arresting the subject of the warrant." *Id.* at 28 n.1.

homes.[50] In *Government of the Virgin Islands v. Gereau*[51] the Third Circuit stated unequivocally that an arrest warrant is not a substitute for a search warrant.[52] According to this reasoning an officer may invade the home of a third party under the authority of an arrest warrant only when he has probable cause to believe the suspect is within the dwelling *and* exigent circumstances exist.[53] The Fourth Circuit, in *Lankford v. Gelston*,[54] had recognized in dictum the necessity of a search warrant to protect the interests of the third party.[55] The court subsequently ratified this position in *Wallace v. King*[56] by holding that a police officer, in non-exigent circumstances, must obtain a search warrant.[57]

The decision in *United States v. Prescott*[58] addressed the issue in a different manner. The Ninth Circuit discarded the labels "arrest" and "search" warrant[59] and instead required a warrant, regardless of its title, to specify the "place to be searched" and the "persons or things to

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50. *See* notes 51-60 *infra* and accompanying text.

51. 502 F.2d 914 (3d Cir. 1974), *cert. denied,* 420 U.S. 909 (1975). For a discussion of *Gereau*, see 17 WAKE FOREST L. REV. 120, 129-30 (1981).

52. 502 F.2d at 928. *Accord,* Fisher v. Volz, 496 F.2d 333, 338 (3d Cir. 1974) (civil suit for damages brought against the police officers who entered and searched plaintiff's apartment for a third party named in an arrest warrant).

53. Virgin Islands v. Gereau, 502 F.2d 914, 928 (3d Cir. 1974), *cert. denied,* 420 U.S. 909 (1975). *Cf.* United States v. Williams, 612 F.2d 735 (3d Cir. 1979) (warrantless entry into third party dwelling by police is upheld because of exigent circumstances), *cert. denied,* 445 U.S. 934 (1980).

54. 364 F.2d 197 (4th Cir. 1966).

55. *Id.* at 205-06. The court stated:

> [F]rom the standpoint of the victim the invasion of the privacy of his home is unaffected by the object of the policeman's search. The gravity of the invasion is precisely the same whether the policeman's objective is to search for a person or for an inanimate object, and the resulting injury is not mitigated by the fact that the officer may have a warrant to arrest some person but has not bothered to obtain a warrant from a judicial officer to search specified premises—not the premises of the person in the arrest warrant. The contention is that the determination of probable cause for searching a particular home for a suspect who does not live there is the function of the magistrate, not the policeman.

Id.

56. 626 F.2d 1157 (4th Cir. 1980), *cert. denied,* 101 S. Ct. 2045 (1981).

57. *Id.* at 1161. *But see* United States v. Phillips, 593 F.2d 553 (4th Cir. 1978) (court upheld search of residence known to be the headquarters of a narcotics distribution ring with only arrest warrant and reasonable belief that suspect was inside), *cert. denied,* 441 U.S. 947 (1979), *cited with approval in* Wallace v. King, 626 F.2d 1157, 1162 (4th Cir. 1980) (Hall, J., dissenting), *cert. denied,* 101 S. Ct. 2045 (1981).

For a discussion of *Wallace*, see Groot, *Arrests in Private Dwellings*, 67 VA. L. REV. 275 (1981); Note, *supra* note 15, at 466-67; Comment, *supra* note 4, at 308 n.77, 311. *See also* 17 WAKE FOREST L. REV. 120 (1981); 38 WASH. & LEE L. REV. 610 (1981).

58. 581 F.2d 1343 (9th Cir. 1978).

59. *Id.* at 1350.

be seized."[60] This, in effect, required the equivalent of a search warrant.

In *Steagald v. United States*,[61] Justice Marshall, writing for the majority, proclaimed that police officers must obtain a search warrant, absent consent or exigent circumstances, in order to search a third party's residence for the subject of an arrest warrant.[62] Although recognizing that the purpose of both search and arrest warrants, in general, is to interject impartial judicial scrutiny into the probable cause determination, the Court distinguished between the interests protected by the search and arrest warrants.[63] Thus, the Court noted that a magistrate's finding of probable cause for an arrest warrant fails to consider third parties' rights.[64] Because an unjustified intrusion into the privacy of an innocent person's home is a serious encroachment on his rights, the Court held that the decision to enter a third party's home, in non-exigent circumstances, must not be left to the police officer's unfettered discretion.[65] By imposing a search warrant requirement, the Court believed that it was effectuating the framers' intentions by protecting the rights of third parties from arbitrary intrusion.[66]

In dismissing the government's contention that a search warrant requirement would create significant problems for the law enforcement community, the Court noted that a suspect may be apprehended without a search warrant when he is in public or in his own residence.[67] Furthermore, the Court emphasized that the exigent circumstances ex-

60. *Id.* The court reasoned: "[T]he distinction between a search warrant and an arrest warrant is an artificial one. The Fourth Amendment makes no such distinction. . . . The warrant, whatever it be called, must describe 'the place to be searched,' . . . and 'the persons or things to be seized.'" *Id.*

See also United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974) (earlier dicta that support the *Prescott* decision). For a discussion of *Prescott,* see Note, *supra* note 15, at 467.

61. 101 S. Ct. 1642 (1981).

62. *Id.* at 1649. Initially, the Court refused to consider the government's contention that petitioner lacked a sufficient expectation of privacy. The Court reasoned that the government not only failed to raise the issue in the lower courts, but articulated statements directly to the contrary. *Id.* at 1646-47.

63. The Court concluded that an arrest warrant protects an "individual from an unreasonable seizure" whereas a search warrant protects an individual's "interest in the privacy of his home and possessions" from unreasonable invasion by the police. *Id.* at 1648.

64. The decision to issue an arrest warrant implies that there is probable cause to believe that the suspect committed a crime. *Id.*

65. *Id.*

66. *Id.* at 1650-51.

67. *Id.* at 1652.

ception and the availability of telephonic search warrants provide law enforcers with adequate flexibility.[68]

In dissent, Justice Rehnquist argued that in light of the partial protection given third parties by the arrest warrant,[69] the government's interest in apprehending felons outweighs the need for a search warrant.[70] Additionally, in rejecting the distinction between a suspect's residence and a third party's residence, the dissent noted that the majority opinion failed to specify how long a fugitive must live in a dwelling for it to be considered his "home."[71] Therefore, the dissent argued that this distinction without guidelines will serve only to further complicate the police officer's already difficult decision making task.[72]

By holding that a search warrant is necessary to search a third party's home, the Supreme Court, in *Steagald v. United States*,[73] effected a more equal protection of people and objects under the fourth amendment.[74] The Court arrived at this conclusion by correctly interpreting the intent of the framers of the Constitution.[75] The Court rightly distinguished the different interests protected by the two types of warrants.[76] A third party's privacy interests should not be diminished solely because a police officer believes a fugitive to be in the third party's home. An entry into a third party's home pursuant to an arrest warrant coupled with a reasonable belief that the suspect can be found there suffers from the same deficiency as the English writs of assistance. Both fail to provide judicial scrutiny to protect rights of innocent parties not named in the warrant.[77]

The *Steagald* majority adequately answered the government's charge that a search warrant requirement would seriously impede police oper-

68. *Id. See* FED. R. CRIM. P. 41(c)(2): "If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means." *See also* Marek, *Telephonic Search Warrants: A New Equation for Exigent Circumstances*, 1980 CRIM. L. REV. 45; Miller, *Telephonic Search Warrants: The San Diego Experience*, 9 PROSECUTOR 385 (1973).

69. The arrest warrant insures that police are on official business and limits the scope of the search to finding the suspect. *Id.* at 1654-55 (Rehnquist, J., dissenting).

70. *Id.* at 1655 (Rehnquist, J., dissenting).

71. *Id.* at 1655-57 (Rehnquist, J., dissenting).

72. *Id.* at 1657 (Rehnquist, J., dissenting).

73. 101 S. Ct. 1642 (1981).

74. *Id.* at 1647.

75. *See* notes 11-15 *supra*.

76. *See* note 26 *supra*.

77. *See* notes 13-16 *supra*.

ations.[78] This contention was without merit given the options of warrantless arrests in the fugitive's home[79] or in a public place,[80] the exigent circumstance exception, and telephonic search warrants.[81]

The dissent, however, raised an important point which the Court will have to consider in the future: namely, the length of time a fugitive must live in a dwelling before it is considered his home so that *Payton* rather than *Steagald* will be the controlling law.[82] The Court does not specify a requisite term of residence or any other guideline to assist lower courts in distinguishing a resident from a guest.

Like *Payton*, the *Steagald* decision also raises new questions. Lower courts are left to speculate as to the rights of other non-resident persons present at the time of the search. The Court left unresolved the issues of whether an arrest warrant subject or a mere visitor can object to the search without a search warrant of a third-party house.[83]

Nevertheless, the *Steagald* decision is an important step by the Court in preserving the fourth amendment's intended function of protecting the sanctity of every person's home from unreasonable searches and seizures.

B.A.P.

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78. 101 S. Ct. 1642, 1652 (1981).

79. Payton v. New York, 445 U.S. 573 (1980). *See* notes 20-26 *supra*.

80. United States v. Watson, 423 U.S. 411 (1976).

81. *See* note 68 *supra*.

82. Steagald v. United States, 101 S. Ct. 1642, 1657 (1981) (Rehnquist, J., dissenting). *See also* Comment, *supra* note 4, at 317 n.134, which asserts:

> The attempt to define the third party home illustrates why distinguishing between a suspect's home and a third party's home as a basis for a warrant requirement is a fruitless exercise. One reason is that the line may be difficult for police officers to draw when, for example, the suspect lives with a friend with or without maintaining a separate residence. Another is that it is tenuous to base the *suspect's* fourth amendment rights on what may be a distinction without a difference. If a suspect lives with her brother and her brother is considered a third party, both an arrest and search warrant would be required to arrest her in the residence. However, if the brother is not considered a third party because the suspect lives at the residence that they share, only an arrest warrant and reasonable belief would be required under *Payton*.

Id.

83. *See* note 16 *supra*. Rakas v. Illinois, 439 U.S. 128 (1978), which restricted standing to assert fourth amendment violations, will influence the Court in answering these questions.