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ARRESTING A SUSPECT IN THE HOME OF A THIRD PARTY: THE ISSUE OF STANDING OR LEGITIMATE EXPECTATIONS OF PRIVACY

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I. INTRODUCTION

In *Steagald v. United States*,[1] the United States Supreme Court reaffirmed the preeminence of privacy interests in the home. The Court held that absent either exigent circumstances or valid consent, law enforcement officials may not search for the subject of an arrest warrant in the residence of a third party without first obtaining a search warrant.[2]

Because this additional requirement of a search warrant undoubtedly will create practical problems for the police and the courts, the rule of law established in *Steagald* may be honored more in its breach than in its observance. For example, if the police are prohibited from intruding upon the privacy interests of a third-party homeowner without the authorization conferred by a search warrant, they still may accomplish their quest for the subject, buttressed by probable cause presence. The police then may conduct a valid incidental search of the subject or a plain view seizure. In *Steagald*, the Court stated that entry without authority of a search warrant may be justified under a claim of exigent circumstances.[3] But if an exigency

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1. 451 U.S. 204 (1981).

2. *Id.* at 213-16.

3. *Id.* at 213. This situation may arise with some frequency. *See, e.g.*, United States v. Williams, 612 F.2d 735, 737, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); Virgin Islands v. Gereau, 502 F.2d 914, 928-29 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Fisher v. Volz, 496 F.2d 333, 336-37, 344-45 (3d Cir. 1974); Lankford v. Gelston, 364 F.2d 197, 199-200, 201-02 (4th Cir. 1966) (en banc). Moreover, probable cause evidence of guilt sufficient for the issuance of an arrest warrant is not legally synonymous with probable cause evidence of situs. *See* Fisher v. Volz, 496 F.2d at 341; 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1, at

claim fails, a court will be left with the issue whether the subject of an arrest warrant has the right to invoke the privacy benefit of a search warrant in the residence of a third party.

Although *Steagald* required a search warrant, it did not address the right of the subject to insist upon the warrant. The question of a subject's privacy rights in a third-party residence will confront a court if the subject of an arrest warrant moves to suppress evidence seized without benefit of a search warrant. This question, which implicates the separate privacy interests of the subject and the homeowner and the invocation of the exclusionary rule,[4] will be the focus of this article. While narrowly drawn, it is an issue which is important to the administration of the criminal justice system.[5]

Before analyzing the right of the subject of an arrest warrant to claim the benefit of a search warrant in the home of a third party, this article first will review the requirements for standing to invoke the protections of the fourth amendment.[6] The rationale of *Steagald* then will be analyzed, with particular emphasis upon the separate privacy interests of the subject and the homeowner. The article will conclude that, as the separation of privacy concerns precludes the subject of an arrest warrant from invoking the requirement of a search warrant in the third-party residence, the courts should not re-

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384 (1978). Thus, at the time the police apply for an arrest warrant, they may not possess adequate information concerning the location or presence of the suspect to justify the issuance of a search warrant. *See* Virgin Islands v. Gereau, 502 F.2d at 928-29. The Third Circuit, in *Gereau*, recognized that "probable cause may exist to believe that a suspect . . . is in more than one location." *Id.* at 929. But this factor of fleeting presence will serve to both compound the difficulty of obtaining a valid search warrant and heighten the reliance of the police upon exigent circumstances. Finally, the duration of exigency itself may be so transitory as to be destroyed after the police have arrived to effect an arrest and just prior to entry. *Id.*

For an analysis of warrantless arrest in the home under exigent circumstances, see Donnino & Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 ALB. L. REV. 90 (1980); Mascolo, *Emergency Arrest in the Home*, 3 W. NEW ENG. L. REV. 387 (1981).

4. The exclusionary rule provides that evidence secured through an unlawful search and seizure is inadmissable at trial. The exclusionary rule was established and held applicable to federal criminal proceedings in Weeks v. United States, 232 U.S. 383 (1914). Its application was extended to state proceedings in Mapp v. Ohio, 367 U.S. 643 (1961).

5. *See* Steagald v. United States, 451 U.S. 204, 231 (1981) (Rehnquist, J., dissenting).

6. 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.

quire the presence of a search warrant in the event that entry under exigent circumstances is rejected.

II. CRITERIA FOR STANDING: LEGITIMATE EXPECTATIONS OF PRIVACY

Standing embodies the right to be heard, that is, the right to challenge police action.[7] Before an individual has standing to attach the lawfulness of a search or seizure, he must show that his fourth amendment privacy interests have been violated. If he makes the requisite showing of a fourth amendment violation, he will be able to exclude evidence gathered by law enforcement officers as "a means for making effective the protection of privacy."[8]

The issue of standing, therefore, involves two inquiries: First, whether the movant for suppression or exclusion has alleged an actual injury to his interests and rights under the fourth amendment;[9] and second, whether the movant has asserted his own interests and rights "rather than basing his claim for relief upon the rights of third parties."[10] Because fourth amendment rights are personal rights that cannot be asserted vicariously,[11] and because the protections secured by the amendment are violated only when the challenged conduct invades the legitimate expectations of privacy of the complainant himself rather than those of a third party,[12] the issue of standing will not be considered distinct from the merits of a claimed infringement

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7. *See* Rakas v. Illinois, 439 U.S. 128, 133-34, 137-40 (1978); Simmons v. United States, 390 U.S. 377, 389-94 (1968); Mascolo, *The Use at Trial of Suppression Hearing Admissions: An Erosion of the Privilege Against Self-Incrimination*, 72 DICK. L. REV. 1, 30-31 (1967).

8. Jones v. United States, 362 U.S. 257, 261 (1960).

9. Rakas v. Illinois, 439 U.S. 128, 139 (1978).

10. *Id. Accord*, United States v. Payner, 447 U.S. 727, 731 (1980).

11. Rakas v. Illinois, 439 U.S. 128, 133-34 (1978); Brown v. United States, 411 U.S. 223, 230 (1973); Alderman v. United States, 394 U.S. 165, 174 (1969).

12. United States v. Payner, 447 U.S. 727, 731 (1980). This rule of restriction is so entrenched in legal precedent and adhered to that it will not brook exception even in the face of outrageous governmental conduct that shocks the conscience of the court under the rubric of due process. *See* Rochin v. California, 342 U.S. 165, 172 (1952). Again, the limitations of due process come into play only when the official activity in question violates a *personal* right of the claimant. United States v. Payner, 447 U.S. at 737 n.9. Under the target theory, those against whom a police investigation is directed have standing to object to an unreasonable search and seizure. Alderman v. United States, 394 U.S. 165, 205-06 (1967) (Fortas, J., dissenting). Carried to its logical conclusion, the target theory appears to sanction the vicarious assertion of fourth amendment rights. *See* Rakas v. Illinois, 439 U.S. 128, 132-33, 135 (1978); Jones v. United States, 362 U.S. 257, 261 (1960). *See generally* note 34 *infra*.

of a defendant's fourth amendment guarantees.[13]

In *Jones v. United States*,[14] the Supreme Court held that when the government is prosecuting for illegal possession, standing is automatically conferred. The Court reasoned that to hold otherwise would permit the prosecution to seek conviction for possession while allowing the prosecution to block suppression of the seized evidence by arguing that the defendant lacked the requisite possessory interest to establish standing.[15] The Court stated that it refused to sanction "such squarely contradictory assertions of power by the Government."[16]

The *Jones* Court offered a second rationale for the automatic standing rule in possessory offenses. The Court recognized that to require a person charged with a possessory offense to establish that he was a victim of an invasion of privacy would place him on the horns of a dilemma.[17] To establish a personal invasion of privacy, the defendant must claim either that he owned or possessed the seized property or that he had a substantial possessory interest in the premises searched.[18] If, however, the defendant claimed ownership or possession, he was faced with the possibility that his admission could be used against him at trial on the issue of guilt.[19] Forced to incriminate himself at the suppression hearing, the defendant, at the very least, would be "placed in the criminally tendentious position of explaining his possession of the premises."[20] On the other hand, if the defendant denied possession or ownership of the property or a possessory interest in the premises, standing would not be conferred. To avoid this, the Court noted that the defendant may be tempted to perjure himself by claiming possession or ownership at the suppression hearing while denying possession at trial.[21] By eliminating the necessity for a preliminary showing of an interest in the premises searched or the property seized, the automatic standing rule allowed the defendant to escape this dilemma.[22]

Finally, in a separate basis for its decision, the Court observed that "[e]ven were this not a prosecution turning on illicit possession,

13. Rakas v. Illinois, 439 U.S. 128, 138-39 (1978).
14. 362 U.S. 257 (1960).
15. *Id.* at 263-64.
16. *Id.* at 264.
17. *Id.* at 261-62.
18. *Id.* at 261.
19. *Id.* at 262.
20. *Id.*
21. *Id.*
22. *Id.* at 263.

the legally requisite interest in the premises was here satisfied. . . ."[23] The Court held that if a defendant was "legitimately on premises where . . . [the] search [occurred he] may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[24]

The persuasiveness of the dual rationale for the automatic standing rule pronounced in *Jones* has been eroded by subsequent Supreme Court decisions. *Simmons v. United States*[25] effectively undercut the self-incrimination justification by declaring that the suppression hearing testimony of a defendant could not be used against him at trial on the issue of guilt "unless he makes no objection."[26]

In *Rakas v. Illinois*[27] and *Rawlings v. Kentucky*,[28] the Court rejected the primary holding in *Jones* that possession of seized evidence sufficient to establish criminal culpability also is sufficient to establish standing. "[L]egal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest for it does not invariably represent the protected Fourth Amendment interest."[29] The interest to be protected is that of a legitimate expectation of privacy in the area of the search.[30] Unless such a breach of privacy can be demonstrated, ownership of, or a possessory interest in, the items seized is not controlling on the issue of standing.[31] Thus, the right to invoke the protections of the exclusionary rule is dependent upon whether the rights of the accused have been violated by a particular search or seizure.[32] Neither "a possessory interest in the items seized,"[33] nor the assertion that the search is directed at the accused[34] is sufficient to establish a protected

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23. *Id.*

24. *Id.* at 267.

25. 390 U.S. 377 (1968).

26. *Id.* at 394. *Simmons* represented a vindication of both the protection of privacy conferred by the fourth amendment and the right to be free of compelled self-incrimination secured by the fifth amendment. *Id.* at 393-94.

27. 439 U.S. 128 (1978).

28. 448 U.S. 98 (1980).

29. United States v. Salvucci, 448 U.S. 83, 91 (1980).

30. 448 U.S. at 104-06.

31. *Id.*; United States v. Salvucci, 448 U.S. 83, 91-93 (1980). *See* 439 U.S. at 140, 143, 148-49.

32. United States v. Salvucci, 448 U.S. 83, 87 n.4 (1980); Rakas v. Illinois, 439 U.S. 133, 140 (1978).

33. United States v. Salvucci, 448 U.S. 83, 93 (1980).

34. 439 U.S. at 132-38. Under the target theory, an accused invokes the protection of the fourth amendment because the search or seizure complained of was directed at him, even though the execution of the search or seizure resulted in an alleged violation of the rights of a third party under the amendment. Although broader in scope than the

interest under the fourth amendment.

The premises in *Jones*—the vice of prosecutorial self-contradiction, the possibility of defendant self-incrimination, and the possession of the evidence seized as "an acceptable measure of Fourth Amendment interests"[35]—no longer remain as a viable foundation for the rule of automatic standing. *Jones* has been overruled.[36]

In view of the foregoing analysis, it is not necessary for a court, in attempting to resolve the issue of standing, to conduct "a separate inquiry" into the issue of standing distinct from the merits of a defendant's claim under the fourth amendment. Rather, a court will focus "directly on the substance of the defendant's claim that he . . . possessed a 'legitimate expectation of privacy' in the areas searched."[37] Thus, the two inquiries have merged into one: whether the conduct of the police violated any legitimate expectation of privacy possessed by the accused.[38] Further, the burden of proof rests upon the accused to demonstrate not only that the search complained of was illegal, but also that he had a legitimate expectation of privacy in the area of the search.[39] Failure to sustain this two-pronged burden will result in the denial of a motion to suppress.

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traditional concept of standing, which is premised on an infringement of personal fourth amendment guarantees, it is more limiting than the doctrine which sanctions standing whenever the fruits of *any* unreasonable search or seizure are offered in evidence against an accused. Under this latter theory, if evidence is obtained in violation of the amendment, that alone is determinative of the issue of suppression, and confers standing upon any criminal defendant against whom the fruits of the violation are proposed to be used. *See* People v. Martin, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955) (en banc) (standing conferred to deter illegal enforcement of the law, not to vindicate personal constitutional rights); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 356-58, 361, 365-66 (1967); Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488, 519-20. Moreover, this theory serves to effectively implement the deterrence rationale of the exclusionary rule. *See* Mascolo, *supra* note 7, at 4-5.

35. United States v. Salvucci, 448 U.S. 83, 92 (1980).

36. *Id.* at 85, 93, 95.

37. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); Rakas v. Illinois, 439 U.S. 128, 133, 138-40 (1978). A defendant's subjective expectation of privacy is not controlling. His expectation of privacy, to be legitimate, must be objectively reasonable. *See id.* at 143-44 n.12.

An indepth analysis of *Rakas* is beyond the scope of this article. For present purposes, it is sufficient to note that *Rakas* rejected the continued labeling of the inquiry, on a determination of a motion to suppress, as one of standing, which *Jones* identified as separate and distinct under the target theory from the merits of a defendant's claim under the fourth amendment. 362 U.S. at 261, 263, 265, 267. Instead, *Rakas* endorsed a shifting of emphasis to the substantive issue of whether the challenged search or seizure violated the rights of the movant under the fourth amendment. 439 U.S. at 133, 138-40.

38. Rawlings v. Kentucky, 448 U.S. 98, 106 (1980).

39. *Id.* at 104; United States v. Payner, 447 U.S. 727, 731 (1980). This is a stricter

The expectation of privacy standard recognizes that the relationship between a movant for exclusion and the area searched is essential to a determination of the privacy interests implicated by a particular search or seizure; that is, unless the movant can demonstrate a personal privacy interest in the area searched, suppression will be denied, regardless of the illegality of the police conduct involved.[40] Thus, evidence may be excluded only if a search or seizure has violated the defendant's fourth amendment rights. This question can be answered only by determining whether "the challenged conduct [has] invaded [the movant's] legitimate expectation of privacy rather than that of a third party."[41]

The descriptive phrase "expectation of privacy" embodies a determination of the nexus between the area of a search and the individual seeking to invoke fourth amendment issues, as well as an assessment of whether the conduct complained of is a search subject to constitutional limitations.[42] The nexus between an individual seeking to invoke the protections of the fourth amendment and the area of a search is crucial to determining whether he has a legitimate expectation of privacy in the area of the search.[43] In other words, a movant for suppression must demonstrate a relationship to the area searched sufficient to raise objections under the fourth amendment for the exclusionary rule to be invoked.

Whether an individual has a legitimate expectation of privacy will be assessed in light of the totality of the surrounding circumstances. Among the factors to be considered in a legitimate expecta-

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standard than the legitimate presence rationale of *Jones* for invoking "the privacy of the premises searched." 362 U.S. at 267.

40. United States v. Payner, 447 U.S. 727, 731, 735-37 (1980) (refusing to suppress evidence illegally seized from third party); Comment, Rakas v. Illinois: *The End of Fourth Amendment Standing But Not of Fourth Amendment Confusion*, 46 BROOKLYN L. REV. 123, 140 n.92 (1979). *See* Rakas v. Illinois, 439 U.S. 128, 142-43, 148-49 (1978). This position clearly is inconsistent with the deterrence rationale of the exclusionary rule. *E.g.*, United States v. Calandra, 414 U.S. 338, 347-48 (1974); Elkins v. United States, 364 U.S. 206, 217 (1960). It would appear, that the unwillingness of the Supreme Court to expand the scope of the exclusionary rule reflects a certain discontent with the rule itself. For an analysis of the positive impact upon deterrence of the target theory of standing, see White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 349-56 (1970).

41. United States v. Payner, 447 U.S. 727, 731 (1980) (emphasis in original).

42. Williamson, *Fourth Amendment Standing and Expectations of Privacy*: Rakas v. Illinois *and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831, 845-46 (1979).

43. *See* Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980); United States v. Payner, 447 U.S. 727, 731, 735-37 (1980); Rakas v. Illinois, 439 U.S. 128, 140, 142-43, 144 n.12,

tion of privacy determination are the use made of the premises, the normal precautions taken to maintain privacy, the property interests of the objecting party in the area of the search, and whether the intrusion at issue would have been objectionable to the framers of the fourth amendment.[44] Although legitimate presence on the premises is relevant to this analysis, it is not controlling.[45] Moreover, a proprietary or possessory relationship to the area of a search also is relevant[46] because "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas. . . ."[47] Ultimately, the determinative factor will be a demonstrated privacy interest in the invaded place, with consideration of property concepts in assessing the legitimacy of expectations of privacy under the fourth amendment.[48]

III. *STEAGALD*

In *Payton v. New York*,[49] the Supreme Court held that a warrantless entry into the home of a suspect to execute a warrantless felony arrest is unreasonable under the fourth amendment in the absence of either consent or exigent circumstances.[50] The Court reasoned that both an arrest and a search effect a breach of the entrance to the home, and that "any differences in the intrusiveness [of either type of entry] are merely ones of degree rather than kind."[51] Hence, both an arrest and a search implicate the same privacy interests and

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44. Rakas v. Illinois, 439 U.S. 128, 152-53 (1978) (Powell, J., concurring). *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). It has been noted that "*Rakas* has defined the scope of access to fourth amendment protection . . . as being intimately related to the interpretation accorded the substantive right." Note, Rakas v. Illinois: *The Fourth Amendment and Standing Revisited*, 40 LA. L. REV. 962, 972 (1980). Thus, the narrower the interpretation, the more restrictive the access to the afforded protection. *Id.*

45. Rakas v. Illinois, 439 U.S. 128, 148 (1978).

46. *See id.* at 144 n.12, 149. For a discussion of the implications of *Rakas*' limiting the reach of fourth amendment protections to those individuals with substantial property interests in the area searched, see Gutterman, *Fourth Amendment Privacy and Standing: "Wherever the Twain Shall Meet,"* 60 N.C. L. REV. 1 (1981); Mickenberg, *Fourth Amendment Standing After* Rakas v. Illinois: *From Property to Privacy and Back*, 16 N. ENG. L. REV. 197 (1981); Williamson, *supra* note 42; Note, *Criminal Procedure—The Demise of Standing to Assert Fourth Amendment Violations*—United States v. Salvucci, 448 U.S. 83 (1980), 3 W. NEW ENG. L. REV. 527 (1981); Comment, *supra* note 40.

47. Rakas v. Illinois, 439 U.S. 128, 153 (1978) (Powell, J., concurring). *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

48. *See* Rakas v. Illinois, 439 U.S. 128, 143, 144 n.12 (1978).

49. 445 U.S. 573 (1980).

50. *Id.* at 576, 589-90.

51. *Id.* at 589.

require the authority of a warrant.[52]

Although the Court required that an arrest warrant be issued before the police may enter a suspect's home, the Court refused to sanction the additional requirement of a search warrant. The Court conceded that the presence of a search warrant might afford the individual greater privacy protection than that provided by requiring only an arrest warrant.[53] The Court, however, determined that the requirement of an arrest warrant would "suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen."[54] Therefore, if the evidence of guilt was sufficient to satisfy the standards of probable cause for the issuance of an arrest warrant, it would be "constitutionally reasonable to require [the subject of the warrant] to open his doors to the officers of the law."[55] Accordingly, a valid arrest warrant "implicitly" authorizes entry into a suspect's residence when the officers executing the warrant have probable cause to believe that he is within.[56]

The speciousness of this reasoning, in particular the relevance of probable cause evidence of guilt to the claim of a breach of the separate privacy interest in the home,[57] was recognized implicitly in *Steagald*.[58] In *Steagald*, the Supreme Court refined the *Payton* analysis by arguing that because an arrest warrant authorizes the police to deprive the subject of the warrant of his liberty, "it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home."[59]

In *Steagald*, the Court addressed an issue left open in *Payton*: the need for a search warrant in the routine execution of an arrest warrant when the suspect sought is in the home of a third party. The

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52. *Id.* at 589-90.

53. *Id.* at 602.

54. *Id.*

55. *Id.* at 602-03.

56. *Id.* at 603.

57. *See* Mascolo, *Arrest Warrants and Search Warrants: The Seizure of a Suspect in the Home of a Third Party*, 54 CONN. B.J. 299, 301-02 (1980).

58. 451 U.S. 204 (1981).

59. *Id.* at 214 n.7. This, of course, does not justify or clarify the inexplicable relevance of probable cause evidence of guilt to probable cause presence in the home, *see* note 3 *supra*, nor does it address the separate privacy interests of other individuals residing in the home of the suspect. For a discussion of the separate privacy interests of these residents, see Comment, *Arresting a Suspect in a Third Party's Home: What is Reasonable?*, 72 J. CRIM. L. & CRIMINOLOGY 293 (1981). Finally, it fails to explain why a probable cause determination of situs by police officers poses a lesser risk to privacy interests in the home of a suspect than it does to those interests in the residence of a third party.

Court concluded that there was such a need.[60]

The Court began its analysis by reiterating its concern that law enforcement officers may lack that degree of objectivity required of a neutral and detached magistrate "to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home."[61] Moreover, an arrest warrant and a search warrant protect distinct interests under the fourth amendment, even though they both serve to subject the probable cause determination of law officers to judicial review and assessment. The primary function of an arrest warrant is to protect the individual from an unreasonable seizure by requiring a magistrate to issue such process only upon a showing that probable cause exists to believe that the subject sought has committed a criminal offense.[62] In contrast, a search warrant serves to protect the privacy interest of the individual in his home and possessions from the unjustified intrusion of the police by requiring a showing of probable cause to believe that the legitimate object of a search is situated in a particular place.[63]

Thus, while the presence of an arrest warrant will protect the subject of the warrant from an unreasonable seizure, it will do nothing to protect the privacy interests of a third party in the sanctity of his home when the police attempt to execute the warrant there on the basis of their personal determination of probable cause. The Court held that such judicially "untested determinations" are too unreliable to justify a routine entry into a person's home to search for a suspect in the absence of a search warrant.[64] The Court observed that to permit the police, absent exigent circumstances, to decide if there is sufficient justification to search the home of a third party for the subject of an arrest warrant creates "a significant potential for abuse."[65] Armed with an arrest warrant for a single person, the police, for example, could "search all the homes of that individual's friends and acquaintances."[66] As the fourth amendment operates to

60. 451 U.S. at 222.

61. *Id.* at 212. *See also*, Payton v. New York, 445 U.S. 573, 586 n.24 (1980); Mincey v. Arizona, 437 U.S. 385, 395 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 449-51 (1971) (plurality opinion); Jones v. United States, 357 U.S. 493, 498 (1958); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

62. 451 U.S. at 212.

63. *Id.* at 212-13.

64. *Id.* at 213.

65. *Id.* at 215.

66. *Id.*

prevent, not simply to redress, unlawful action by the police, it mandates the participation of a neutral and detached magistrate in the probable cause determination as "an essential element of a reasonable search or seizure. . . ."[67] The Court reasoned that absent a particularized judicial determination that the subject is present in the home of a third party, the search is as unreasonable from the homeowner's perspective as a search conducted in the absence of warrant.[68]

Finally, the Court addressed the interests implicated in *Payton*. The Court stated that when an individual is the subject of an arrest warrant, his interest in being free from an unreasonable entry into his home is subordinate to the authority conferred by the arrest warrant to deprive the subject of his freedom: This authority necessarily sanctions a limited invasion of the subject's privacy interest in the execution of the warrant process.[69] This reasoning, however, is inapplicable when an arrest warrant is executed in the residence of a third party. The Court emphasized that in the latter situation the warrant "embodies no judicial determination whatsoever regarding the person whose home is to be searched."[70] Because the arrest warrant does not authorize the police to deprive the third-party homeowner of his liberty, it may not be used to deprive him of his privacy interest in his home. Absent exigent circumstances or valid consent, such an interest only can be deprived by a magistrate upon an adequate showing that the object of the search is located in the third party's home.[71]

By demonstrating the distinct privacy interests protected respectively by arrest and search warrants, *Steagald* served to dichotomize the legitimate expectations of privacy of the subject of an arrest warrant from those of a third-party homeowner. As to the former, he seeks protection from an unreasonable seizure. As to the latter, he seeks protection from unjustified intrusions into the privacy of his home and his possessions. These respective interests are mutually exclusive. Therefore, the respective expectations of privacy are equally exclusive, with the derivative result that each is irrelevant to the other. This, in turn, will prevent either the subject of an arrest warrant or the owner of a residence where the subject is appre-

67. *Id.* at 216. *See* United States v. Calandra, 414 U.S. 338, 347 (1974); Elkins v. United States, 364 U.S. 206, 217 (1960).

68. 451 U.S. at 216.

69. *Id.* at 214 n.7.

70. *Id.*

71. *Id.*

hended from complaining about unreasonable governmental intrusions upon the privacy interests of the other.[72]

IV. THE SEPARATE PRIVACY INTERESTS IN THE THIRD-PARTY RESIDENCE

A fundamental fourth amendment principle is that the individual's " 'legitimate expectations of privacy' "[73] from unreasonable searches or seizures are most pronounced in the home.[74] To secure these interests, the framers of the fourth amendment erected certain barriers to forcible and warrantless entries by government officers into the home.[75] Chief among these barriers is the requirement of a warrant.[76] Accordingly, and in furtherance of this broadly perceived requirement, the execution of an arrest warrant for a suspect in the home of a third party requires the authority of a search warrant to secure the privacy concerns of the homeowner.[77] These privacy interests, however, are personal to the homeowner and may not be asserted vicariously by those for whom the privacy expectations are not justified.[78]

Wherever an individual may be, he carries with him expectations of privacy with regard to the integrity and dignity of his person.[79] Thus, he may invoke his fourth amendment right to privacy wherever he may legitimately anticipate freedom from unwarranted governmental intrusion.[80] As these expectations are most pronounced in private areas, such as residences,[81] when the subject of

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72. This separation of interests serves to reinforce the prohibition against the vicarious assertion of fourth amendment rights. *See* notes 10-12 & 37-41 *supra* and accompanying text.

73. Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

74. Payton v. New York, 445 U.S. 573, 585-90 (1980).

75. *See* United States v. United States Dist. Court, 407 U.S. 297, 313 (1972); Boyd v. United States, 116 U.S. 616, 624-30 (1886); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 363 (1974).

76. *See* Payton v. New York, 445 U.S. 573, 585-90 (1980).

77. Steagald v. United States, 451 U.S. 204, 213-16 (1981).

78. *See id.* at 213-14 & n.7; United States v. Salvucci, 448 U.S. 83, 86-87 (1980); Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979); Rakas v. Illinois, 439 U.S. 128, 133-34, 142 (1978); United States v. Briones-Garza, 651 F.2d 364, 365 (5th Cir. 1981) (by implication); United States v. Boyer, 574 F.2d 951, 955 (8th Cir.) (Ross, J., concurring), *cert. denied*, 439 U.S. 967 (1978).

79. State v. Dias, 52 Hawaii 100, 106, 470 P.2d 510, 514 (1970). *See* Terry v. Ohio, 392 U.S. 1, 9 (1968).

80. State v. Matias, 51 Hawaii 62, 65-66, 451 P.2d 257, 259 (1969). *See* Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979); Katz v. United States, 389 U.S. 347, 351-52, 359 (1967).

81. Payton v. New York, 445 U.S. 573, 585-90 (1980).

an arrest warrant enters the home of a third party the protections of the fourth amendment enter with him.[82] His expectations of privacy in the home, however, may be "separate and distinct" from those of other individuals, depending upon the degree of legitimacy that attaches to such interests in the area searched.[83]

The privacy concerns of a third party in his home primarily are those of the third party himself. These include the right to be free from unreasonable governmental intrusions into his home, possessions, and private papers.[84] These interests are separate and distinct from those of the subject of an arrest warrant, and are not the concern of the subject who is in the home of a third party as a casual visitor or guest.[85] Nor are they those of the subject of an arrest warrant who resides in the third party's home when the warrant is being executed for his person.[86] He can have no subjective expectation that the third-party residence will remain free from governmental intrusion.[87] The subject is entitled to insist upon the authority of an arrest warrant to protect him from an unreasonable seizure.[88] Beyond that, he may not insist. As a casual visitor, guest, or resident, he receives all the protection he may legitimately expect when he is apprehended in execution of an arrest warrant in the home of a third party. In this setting, the execution of an arrest warrant permits a limited intrusion upon the subject's otherwise legitimate expectations of privacy.[89]

Undoubtedly, the subject of an arrest warrant possesses certain privacy interests in the home of a third party. These interests encompass the right to be free from an unreasonable seizure[90] and the freedom to secure the personal integrity of one's papers and effects from unwarranted governmental encroachment.[91] But these inter-

82. *See* Terry v. Ohio, 392 U.S. 1, 9 (1968).

83. *See* Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980); Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979).

84. *See* Steagald v. United States, 451 U.S. 204, 213 (1981); Boyd v. United States, 116 U.S. 616, 624-30 (1886).

85. *See* Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979); Rakas v. Illinois, 439 U.S. 128, 142 (1978); *id.* at 153 (Powell, J., concurring). For example, the homeowner possesses a separate right to exclude others, which itself confers upon him a legitimate expectation of privacy, and constitutes one of the fundamental rights attaching to property. *Id.* at 143-44 & n.12.

86. *See* Payton v. New York, 445 U.S. 573, 602-03 (1980).

87. *See* Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).

88. *See* Steagald v. United States, 451 U.S. 204, 213 (1981).

89. *See id.* at 214 n.7; Payton v. New York, 445 U.S. 573, 602-03 (1980).

90. *See* Steagald v. United States, 451 U.S. 204, 213 (1981).

91. *See* Rakas v. Illinois, 439 U.S. 128, 142 n.11 (1978).

ests are secured fully by the presence of an arrest warrant, which protects the individual from an unreasonable seizure and limits the scope of the intrusion to the areas of the residence where the subject may be located.[92] It will not sanction a rummaging among his papers and effects. The scope of a properly conducted incidental search and plain view seizure will be limited, respectively, to the person of the arrestee, the area within his immediate reach,[93] and the area that is in open view while the police are conducting a properly limited quest for the subject or incidental search.[94]

In the typical situation, it is only the third-party homeowner who has a legitimate expectation of privacy in his own residence sufficient to invoke the protection of a search warrant.[95] The subject of an arrest warrant, however, may not vicariously assert the security of such protection.[96] Thus, in order to invoke the protection of the fourth amendment, an accused must establish that he had a legitimate expectation of privacy in the area of an illegal search or seizure.[97] Even if an accused can demonstrate the existence of such a privacy interest in the premises of a third party,[98] he may not thereby invoke a protection that exceeds the privacy ambit attaching to him in his own home. It is in precisely such a setting that *Payton* taught the lack of a need for a search warrant.[99]

Steagald "[rested] on a very special set of facts. . . ."[100] If the subject of an arrest warrant resides in a particular dwelling for a significant period of time, it will be considered his home for purposes of the fourth amendment.[101] This will be so even if it is the residence of a third party, others are living there, "and . . . the suspect concur-

92. Coolidge v. New Hampshire, 403 U.S. 443, 518 (1971) (White, J., concurring & dissenting); United States v. Ford, 553 F.2d 146, 159 n.45 (D.C. Cir. 1977) (dictum).

93. Chimel v. California, 395 U.S. 752, 762-63 (1969).

94. Coolidge v. New Hampshire, 403 U.S. 443, 465 & n.24 (1971) (plurality opinion).

95. *See* Steagald v. United States, 451 U.S. 204, 213-14 & n.7 (1981); Rakas v. Illinois, 439 U.S. 128, 142 (1978).

96. United States v. Boyer, 574 F.2d 951, 955 (8th Cir.) (Ross, J., concurring), *cert. denied*, 439 U.S. 967 (1978). *See* United States v. Salvucci, 448 U.S. 83, 86-87 (1980); Rakas v. Illinois, 439 U.S. 128, 133-34 (1978); Groot, *Arrests in Private Dwellings*, 67 VA. L. REV. 275, 284 n.44 (1981).

97. Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980).

98. *See* United States v. Salvucci, 448 U.S. 83, 95 (1980); Rakas v. Illinois, 439 U.S. 128, 142-43 (1978); Combs v. United States, 408 U.S. 224, 227-28 (1972) (per curiam).

99. 445 U.S. at 602. *See* Steagald v. United States, 451 U.S. 204, 230-31 (1981) (Rehnquist, J., dissenting); Note, *Criminal Law—Search and Seizure: Fourth Amendment Limitations on Warrantless Entries to Arrest*, 46 MO. L. REV. 423, 437 (1981).

100. 451 U.S. at 230 (Rehnquist, J., dissenting).

101. *Id.* at 230-31.

rently maintains a residence elsewhere as well."[102] In this situation, the police may enter the premises with only an arrest warrant.[103] On the other hand, if the subject is a mere transient visitor or guest in the residence of a third party, he may not invoke the privacy interests of his host so as to require the additional authority and protection of a search warrant.[104] The more fleeting his connection with the premises, "the more likely that exigent circumstances will exist justifying immediate police action without departing to obtain a search warrant."[105]

Surely, the subject's expectations of privacy in the home of the third party cannot exceed those in his own residence where he may not demand the additional protection of a search warrant. Moreover, as *Steagald* held, the protection to which the subject is entitled under the fourth amendment—the authority of an arrest warrant—is that which he is receiving.[106] The presence of the warrant secures him from an unreasonable seizure and is the essence of the privacy protection to which he is entitled under the amendment.

V. CONCLUSION

In *Steagald v. United States*,[107] the Supreme Court required that a search warrant be issued before an arrest warrant could be executed in a third party's home. The requirement of a search warrant for the execution of an arrest warrant in the home of a third party secures to the homeowner the protection of his legitimate expectations of privacy in his residence. These are separate and distinct from the privacy concerns of the suspect, which are protected by the

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102. *Id.* at 231.

103. *Id.* at 230-31. *See* Payton v. New York, 445 U.S. 573, 602-03 (1980).

104. *See* Steagald v. United States, 451 U.S. 204, 213-14 & n.7 (1981); Rakas v. Illinois, 439 U.S. 128 (1978); Lee v. Gilstrop, 661 F.2d 999, 1000 (4th Cir. 1981) (per curiam); United States v. Meyer, 656 F.2d 979, 981-82 (5th Cir. 1981) (transient visitor lacked requisite expectation of privacy to insist upon presence of search warrant for resident's apartment); United States v. Boyer, 574 F.2d 951, 955 (8th Cir.) (Ross, J., concurring), *cert. denied*, 439 U.S. 976 (1978); People v. Ponder, 54 N.Y.2d 160, 445 N.Y.S.2d 57, 429 N.E.2d 735 (1981); Note, *supra* note 99, at 437-38; *cf.* United States v. Clifford, 664 F.2d 1090, 1093 (8th Cir. 1981) (arrestee's legitimate expectation of privacy in third party's home not crucial; *Payton* sanctions presence of only an arrest warrant for homeowner himself, and arrestee-guest can claim no greater protection); United States v. Briones-Garza, 651 F.2d 364, 365 (5th Cir. 1981) (questionable whether guard at "drop house" for illegal aliens had standing to object to absence of search warrant in the execution of an arrest warrant for a third party; vacated and remanded for hearing on issue).

105. 451 U.S. at 231 (Rehnquist, J., dissenting).

106. *Id.* at 214 n.7.

107. *Id.* at 204.

presence of the arrest warrant. Further, the suspect may not vicariously invoke the privacy interests of a third party under the fourth amendment and is entitled only to the same privacy expectations in the home of the third party that are secured to him in his own residence. Although *Steagald* did not address the question whether the subject of an arrest warrant has the right to the privacy protection of a search warrant, the presence of the arrest warrant secures him from an unreasonable seizure. The courts should not require a search warrant in the event that a claim of exigent circumstances is rejected.