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### Criminal Law--Search and Seizure: Fourth Amendment Limitations on Warrantless Entries to Arrest

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## CASENOTES

# CRIMINAL LAW—SEARCH AND SEIZURE: FOURTH AMENDMENT LIMITATIONS ON WARRANTLESS ENTRIES TO ARREST

### *Payton v. New York*<sup>1</sup>

On January 15, 1970, at 7:30 a.m., New York detectives went to Theodore Payton's apartment to arrest him for the murder of a gas station attendant, committed during a robbery. The officers had probable cause to believe that Payton had committed the crimes, but they had not obtained a warrant for his arrest. Although no response was received to their knock on the door, the officers saw light inside the apartment and heard a radio playing. They entered the apartment by breaking the door open with a crow bar. Payton was not at home, but the officers seized a .30-caliber shell casing found on top of a stereo set. Payton later surrendered and was charged with felony-murder. His motion to suppress the shell casing was denied on the ground that the warrantless entry was authorized by the New York Code of Criminal Procedure.<sup>2</sup> Since the entry was thought lawful, the evidence was held properly seized under the plain view doctrine<sup>3</sup> and admitted at trial. Payton was convicted<sup>4</sup> and the New York Supreme Court, Appellate Division, affirmed summarily.<sup>5</sup>

On March 14, 1974, at noon, officers went to Obbie Riddick's apartment to arrest him for two robberies. As in Payton's case, the officers had

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1. 445 U.S. 573 (1980).

2. At the time of Payton's arrest, warrantless entries to arrest were sanctioned by 66 N.Y. CODE CRIM. PROC. §§ 177-178 (McKinney 1958). This law had been revised at the time of Riddick's arrest, see text accompanying note 7 *infra*, and is found in 11A N.Y. CRIM. PROC. LAW §§ 120.80(4), 140.15(4) (McKinney 1971). For Missouri's statute, see note 59 *infra*.

3. 445 U.S. at 586-87. Where officers legally enter a residence, items in plain view may be seized without a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

4. *People v. Payton*, 84 Misc. 2d 973, 376 N.Y.S.2d 779 (Sup. Ct. 1974), *aff'd mem.*, 55 A.D.2d 859, 390 N.Y.S.2d 769 (1976), *aff'd*, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978), *rev'd*, 445 U.S. 573 (1980).

5. *People v. Payton*, 55 A.D.2d 859, 390 N.Y.S.2d 769 (1976) (mem.), *aff'd*, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978), *rev'd*, 445 U.S. 573 (1980).

accumulated enough evidence to establish probable cause to believe Riddick had committed the crimes, but they had not procured an arrest warrant. After the officers knocked on the door, Riddick's young son opened it and the officers observed Riddick sitting in bed. The police then entered the apartment without consent and arrested Riddick. A search incident to this arrest resulted in the seizure of narcotics and related paraphernalia.<sup>6</sup> Riddick was indicted subsequently on narcotic charges based on the evidence seized. Riddick's motion to suppress failed because the entry was authorized by a statutory revision of the New York Code of Criminal Procedure.<sup>7</sup> Furthermore, the search was held "reasonable,"<sup>8</sup> *i.e.*, constitutional under the fourth amendment,<sup>9</sup> under *Chimel v. California*.<sup>10</sup> Riddick was convicted and the supreme court, appellate division, affirmed.<sup>11</sup>

The New York Court of Appeals, in a single opinion, affirmed both convictions, upholding the constitutionality of the warrantless entries to arrest.<sup>12</sup> The court reasoned that, while normally warrants are required before entry into the home is allowed, there is in the entry to arrest situation a substantial difference in both the degree of intrusion and the gov-

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6. Police officers, making an arrest, have authority to make a warrantless search of the suspect's person and the area within his immediate control for weapons or destructible evidence and the officer need not have probable cause to believe he will find those items. *Chimel v. California*, 395 U.S. 752, 762-68 (1969). If the arrest is illegal, however, then the search is illegal. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). For a comprehensive discussion of this doctrine as it relates to entries made to arrest, see Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously with an Arrest on or Near Private Premises*, 30 SYRACUSE L. REV. 973 (1979). See also *Scope of Search Incident to Arrest: Missouri's Application of the Exception*, State v. Brasel, 42 MO. L. REV. 668 (1977).

7. See note 2 *supra*.

8. Since the fourth amendment prohibits unreasonable searches and seizures, courts often use "reasonable" as a synonym for "constitutional." See, *e.g.*, *Chimel v. California*, 395 U.S. 752, 759-65 (1969). "Reasonable" in the fourth amendment context has a special meaning and "must be viewed in the light of established Fourth Amendment principles." *Id.* at 765. See also *United States v. Watson*, 423 U.S. 411, 444 (1976) (Marshall, J., dissenting).

9. U.S. CONST. amend. IV provides:

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.

10. 395 U.S. 752 (1969). See note 6 *supra*.

11. *People v. Riddick*, 56 A.D.2d 937, 392 N.Y.S.2d 848 (1977), *aff'd*, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978), *rev'd*, 445 U.S. 573 (1980).

12. *People v. Payton*, 45 N.Y.2d 300, 312, 380 N.E.2d 224, 230, 408 N.Y.S.2d 395, 401 (1978), *rev'd*, 445 U.S. 573 (1980).

ernmental interests involved. The court viewed entries to arrest as a "minimal intrusion" and saw no reason to distinguish warrantless arrests in a residence from those made in a public place. The latter practice had been held constitutional by the United States Supreme Court in *United States v. Watson*.<sup>13</sup> Additionally, the court balanced the government's interest in apprehending criminal suspects against the citizen's interest in being free from governmental intrusion and found the former interest to be so weighty that such entries are not "unreasonable." Finally, the court felt its decision was bolstered by the "apparent historical acceptance" of such entries and the fact that numerous other states had statutes validating entries to arrest.

The United States Supreme Court reversed both convictions. The Court held that absent exigent circumstances, police officers must have an arrest warrant before entering the home of a suspect to arrest him.<sup>14</sup>

*Payton* is significant because it renders unconstitutional a practice followed in a majority of the states and a practice apparently accepted at common law.<sup>15</sup> Furthermore, while warrantless arrest related activity has historically been thought constitutional, this decision suggests a new willingness on the Court's part to scrutinize such activity and, if consistent with traditional fourth amendment analysis, to require warrant protection.<sup>16</sup> Finally, the Court's analysis lends guidance in answering a related constitutional question: whether police must have a search warrant before entering the home of a third person to arrest a suspect.<sup>17</sup>

Prior to *Payton*, the courts, both state and federal, differed on whether a warrant was needed to enter a suspect's home to effect an arrest.<sup>18</sup> Initially, such entries were thought valid at common law and were not judicially questioned. Recently, however, the Supreme Court had suggested that the constitutionality of the warrantless entry was open to ques-

13. 423 U.S. 411, 423-24 (1976).

14. 445 U.S. at 576. The *Payton* ruling, of course, renders invalid any arrest or search resulting from the illegal entry. See 445 U.S. at 591-92 & n.34.

15. 445 U.S. at 591-600. The Court noted that 24 states permitted warrantless entries to arrest in the suspect's home; 11 states had taken no position; and 15 prohibited them. The majority found the common law ambiguous, but the dissent viewed the common law as firmly accepting the view that warrantless entries were lawful. 445 U.S. at 611 (White, J., dissenting).

16. Warrantless felony arrests based upon probable cause have long been considered lawful. Not until *United States v. Watson*, 423 U.S. 411, 424 (1976), however, did the Court so hold. Prior to *Payton*, the Court had avoided the warrantless entry to arrest question. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 433, 476 (1971).

17. This question was left open in *Payton*. 445 U.S. at 583. The Court has granted certiorari to hear *Steagald v. United States*, which presents the issue. 101 S. Ct. 71 (1980).

18. 445 U.S. at 575 & nn.3 & 4.

tion<sup>19</sup> and subsequent lower court decisions had, for the most part, applied a warrant requirement.<sup>20</sup>

One difficult aspect of this area of search and seizure law is that the *Payton* situation involves features of both searches and arrests.<sup>21</sup> An entry made to arrest clearly involves a search for the person, but the supposed primary purpose of the entry is to arrest.<sup>22</sup> There would be no difficulty under a literal reading of the fourth amendment, which on its face applies equally to searches and arrests,<sup>23</sup> to find that a warrant requirement exists for an entry to make an arrest. There is, however, a firmly entrenched dichotomy between the two which was recently reaffirmed in *United States v. Watson*.<sup>24</sup> Under this tradition, warrantless arrests are presumptively

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19. *United States v. Santana*, 427 U.S. 38, 43-44 (1976) (White, J., concurring); *id.* at 45-46 (Marshall, J., dissenting); *United States v. Watson*, 423 U.S. 411, 419 (1976); *id.* at 432-33 (Powell, J., concurring); *id.* at 433 (Stewart, J., concurring); *id.* at 553-54 (Marshall, J., dissenting); *Gerstein v. Pugh*, 420 U.S. 103, 113 n.13 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443, 474-81 (1971); *id.* at 492 (Harlan, J., concurring); *id.* at 511 n.1 (White, J., dissenting); *Jones v. United States*, 357 U.S. 493, 499-500 (1958); Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 DICK. L. REV. 167, 174-78 (1977); Comment, *Warrantless Arrests in Homes: Another Crisis for the Fourth Amendment*, 7 FORDHAM URB. L.J. 93, 96-100 (1978); Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. ILL. L.F. 655, 655-59.

20. See 445 U.S. at 575 & n.4. The Court in *Payton* noted that five of the federal circuits, including the Eighth Circuit in *United States v. Houle*, 603 F.2d 1297, 1300 (8th Cir. 1979), had held the entries unconstitutional. Three others assumed, without deciding, that such entries were unconstitutional and one had upheld the entries without discussing the issue. 445 U.S. at 575 & n.4. See generally *Constitutional Law—Fourth Amendment—Warrantless In-Home Arrest in Absence of Exigent Circumstances Violates Fourth Amendment*, *United States v. Houle*, 1979 WASH. U.L.Q. 1133.

21. The traditional search warrant authorizes the search for and seizure of property based on probable cause, *i.e.*, facts and circumstances which would cause a man of reasonable caution to believe that items subject to seizure are within the place to be searched. The arrest warrant authorizes the search for and seizure of a person based on probable cause, *i.e.*, facts and circumstances which would cause a man of reasonable caution to believe a crime has been committed and that the suspect committed it. See 1 W. LAFAYE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 3.1 (1978). The *Payton* question centers on the extent to which the police can search for a suspect under the authority of an arrest warrant.

22. 445 U.S. at 587-89.

23. See note 9 *supra*.

24. 423 U.S. 411 (1976). "Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches. But logic sometimes must defer to history and experience." *Id.* at 429 (Powell, J., concurring).

constitutional<sup>25</sup> and warrantless searches and seizures of property are presumptively unconstitutional.<sup>26</sup> The difficulty, therefore, is in deciding which set of fourth amendment principles apply, *i. e.*, which presumption arises when a suspect's home is entered to effect his arrest.

The New York court was persuaded that the issue was best resolved under arrest principles. Important to its decision was the conclusion that the entries involved such a minimal intrusion that there was no reason to distinguish an arrest in public from one made in the home.<sup>27</sup> Thus, the court concluded that a warrantless entry to arrest was presumptively constitutional.

The Supreme Court, however, analyzed *Payton* under those principles traditionally applied to questions involving the search for and seizure of property.<sup>28</sup> The Court began with the propositions that an arrest is "quintessentially a seizure"<sup>29</sup> and that "[t]he simple language of the Amendment applies equally to seizures of persons and to seizures of property."<sup>30</sup> A central factor resulting in this approach was that entry was made into the suspect's home. The majority observed that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," and noted that the Court had "long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort."<sup>31</sup> To distinguish *Watson* from the question presented, the Court said that while warrantless seizures in plain view are presumptively valid, searches and seizures inside the home are not.<sup>32</sup> The distinction, according to the majority, applied equally when the seizure of a person was involved.<sup>33</sup> In the Court's opinion both entries to search for property and entries to search for persons share "the same fundamental characteristic: the breach of the entrance to an individual's home."<sup>34</sup> Accordingly, the Court re-

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*supra* note 19, at 660 with Rotenberg & Tanzer, *Searching for the Person to be Seized*, 35 OHIO ST. L.J. 56, 56-60, 70 (1974).

25. Until *Payton*, this Court had not required police to have an arrest warrant to make arrests in public or in the home. See *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (warrantless arrest on private property held constitutional when suspect seen in plain view); *United States v. Watson*, 423 U.S. 411, 414 (1976) (warrantless public arrest held constitutional).

26. 445 U.S. at 586. See also *United States v. Watson*, 423 U.S. 411, 427 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

27. 45 N.Y.2d at 310-11, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

28. 445 U.S. at 585.

29. *Id.* (quoting *United States v. Watson*, 423 U.S. at 428 (Powell, J., concurring)).

30. 445 U.S. at 585.

31. *Id.* at 585-86. See also *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (quoted by the Court in *Payton*, 445 U.S. at 586 n.24).

32. 445 U.S. at 586-89.

33. *Id.*

34. *Id.* at 589.

jected the New York court's suggestion that entries to arrest are significantly less intrusive than those made to search.<sup>35</sup> Thus, the Court concluded, "In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."<sup>36</sup>

The Court did not ignore the New York court's characterization of the issue as one best solved by arrest principles. The Court considered and ultimately rejected considerations which in *Watson* led to the conclusion that warrantless arrests in public places are constitutional.<sup>37</sup> The majority decided there was no well-settled common law view that warrantless entries to arrest are lawful.<sup>38</sup> They rejected the contention that there is a clear consensus among the states adhering to such a common law view. The Court also denied an argument that Congress had expressed its judgment that warrantless entries to arrest are reasonable.<sup>39</sup> Furthermore, the vitality of the *Watson* reasoning, criticized by some legal scholars as lacking merit as a method of fourth amendment analysis,<sup>40</sup> was cast in doubt by the *Payton* majority's suggestion that history and past experience alone will not be enough to overcome a warrant requirement otherwise mandated by traditional fourth amendment analysis.<sup>41</sup> This would seem especially true where the *Watson* factors are not overwhelmingly present.<sup>42</sup>

An interesting aspect of *Payton* is that the Court stopped short of completing its search analysis by requiring only an arrest warrant and not a search warrant.<sup>43</sup> An arrest warrant, it reasoned, was "sufficient to interpose the magistrate's determination of probable cause between the zealous officer and the citizen."<sup>44</sup> This result is not, at first glance, logical<sup>45</sup> if the

35. *Id.*

36. *Id.* at 590.

37. *Id.* at 601.

38. *Id.* at 591-98. See note 15 *supra*.

39. 445 U.S. at 598-601.

40. See, e.g., 2 W. LAFAVE, *supra* note 21, § 5.1(b). LaFave notes, "The Court's opinion in *Watson* is remarkable for its lack of analysis." *Id.* § 5.1(b), at 227. See Note, *supra* note 19, at 660. See also *United States v. Watson*, 423 U.S. at 436-56 (Marshall, J., dissenting).

41. "In this case, however, neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." 445 U.S. at 601.

42. Indeed, there are probably few fourth amendment questions on which the common law and the states have taken such a unanimous view.

43. 445 U.S. at 602-03.

44. *Id.* at 602.

45. Subject to a few exceptions, the search for and seizure of property within the home has repeatedly been held unconstitutional in absence of a search warrant. See note 26 and accompanying text *supra*. In *Payton*, the Court concluded

fourth amendment indeed "applies equally to seizures of persons and to seizures of property,"<sup>46</sup> but other considerations might justify it.<sup>47</sup> The concurring opinion suggests that the Court implicitly balanced the government's interest in apprehending suspects against the citizen's privacy rights.<sup>48</sup> The result might also be justified by decisions which have stated that the fourth amendment protects the citizen's "legitimate expectation of privacy."<sup>49</sup> A person inside his home no doubt has a "legitimate expecta-

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that an entry into the home to seize a person merits the same constitutional protection. 445 U.S. at 587-89. Were that true, a search warrant would also be required in the latter situation. The Court, however, did not reach that result. *Id.* at 602-03.

46. 445 U.S. at 585.

47. See notes 48-55 and accompanying text *infra*.

48. 445 U.S. at 603 (Blackmun, J., concurring).

49. *Payton* is surprising for not using a "legitimate expectation of privacy" analysis as used in many recent fourth amendment cases. In *Katz v. United States*, 389 U.S. 347 (1967), the Court decided that agents violated the defendant's fourth amendment rights when they attached a "bug" to the outside of a telephone booth and listened to his conversation. The Court rejected the Government's contention that the search was not illegal because there was no physical entry into an area owned by the defendant. The Court stated that the fourth amendment protects people, not places, and rejected the concept that the scope of a defendant's protection from a search or seizure depended on property concepts. The Court stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52 (citations omitted). The majority concluded that the government's activity violated the privacy on which the defendant "justifiably relied." *Id.* at 353.

Justice Harlan, in his concurrence, understood the Court to hold that the defendant had a constitutionally protected "reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). A person has this protected expectation, he said, if he meets a "two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." *Id.* at 360-61 (Harlan, J., concurring).

Subsequent decisions have often been based on Harlan's view of *Katz*. See *Rawlings v. Kentucky*, 100 S. Ct. 2556, 2561 (1980); *United States v. Salvucci*, 100 S. Ct. 2547, 2552-55 (1980); *Rakas v. Illinois*, 439 U.S. 128, 133-43 & 143 n.12 (1978).

While *Katz* stands for the proposition that property interests are not determinative in deciding whether one has a legitimate expectation of privacy, they are an important factor. The Court in *Rakas* noted that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Id.* at 143 n.12. Since the home entry is the chief evil against which the wording of the fourth amendment is directed, in most instances one will have a "legitimate expectation of privacy" in his own home. *Id.* See *Mincey v. Arizona*, 437 U.S. 385, 591 (1978); *United States v.*



tion of privacy" notwithstanding the fact that he is suspected of criminal activity.<sup>50</sup> An entry into the home to arrest is an invasion of the person's expectation of privacy which cannot be justified in absence of a warrant.<sup>51</sup> Such warrantless entries are per se "unreasonable" and thus violate the fourth amendment. Once a neutral and detached magistrate has determined the existence of probable cause to believe a person has committed a felony, however, an entry for the limited purpose to arrest is thought a reasonable invasion of the suspect's privacy interests.<sup>52</sup> The Court noted that 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 up 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.<sup>53</sup>

When the suspect is afforded a magistrate's determination of the facts,

Chadwick, 433 U.S. 1, 6-13 (1977); *Caldwell v. Lewis*, 417 U.S. 583, 588-92 (1974); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970).

The level of one's expectation of privacy also has been quantified in degrees. See *Caldwell v. Lewis*, 417 U.S. at 588-92, which implies that one has lesser expectation of privacy in his car which warrants less protection than, e.g., the expectation of privacy one has in his own home. See notes 97-99 and accompanying text *infra*.

50. A person does not forfeit his expectation of privacy simply because he commits or is suspected of committing a crime. *Mincey v. Arizona*, 437 U.S. 385, 391 (1978); *United States v. Reed*, 572 F.2d 412, 422 (2d Cir. 1978).

51. See *United States v. Reed*, 572 F.2d 412, 422-25 (2d Cir. 1978), where the court employed the expectation of privacy analysis to the warrantless entry to arrest question and reached the *Payton* result.

52. 445 U.S. at 602-03. An entry for the limited purpose of making an arrest when based on a reasonable belief that the suspect is within may be thought reasonable on a number of grounds. It may be thought that with an arrest warrant no search warrant is required because, in this situation, the scope and frequency of the entry will be so limited that the burden of requiring a search warrant to the legitimate needs of law enforcement far outweighs the suspect's interest in privacy. This is a specie of the balancing test mentioned in the concurring opinion. See 445 U.S. at 603. See also note 69 *infra*. Another alternative analysis is that once an arrest warrant is issued then the suspect has a lesser expectation of privacy which receives sufficient protection because the police must have a reasonable belief he is within his home, and further, because the scope of the entry and search is limited to circumstances related to making the arrest. See *Caldwell v. Lewis*, 417 U.S. 583, 588-92 (1974). Finally, the least viable alternative analysis is that once an arrest warrant is issued the suspect has no expectation of privacy as it concerns entries to his home to arrest. *But see Mincey v. Arizona*, 437 U.S. 385, 391-95 (1978).

53. 445 U.S. at 602-03.

there is less danger of an arbitrary and capricious invasion by the police and one of the basic purposes of the fourth amendment is fulfilled.<sup>54</sup> Thus, under a legitimate expectation of privacy analysis, the fourth amendment is satisfied when police who wish to enter the suspect's home have an arrest warrant and probable cause<sup>55</sup> to believe that the suspect is within.

The implications of *Payton* in other fourth amendment areas are unclear.<sup>56</sup> Nevertheless, *Payton* does present a basis on which another constitutional question, soon to be decided by the Court in *Steagald v. United States*,<sup>57</sup> can be analyzed. That question "concern[s] the authority of the police, without either an arrest or search warrant, to enter a third party's home to arrest a suspect."<sup>58</sup> Since *Payton* requires warrant and probable cause protection in situations involving the suspect's home, it seems at least as much protection will be afforded the third party. Indeed, the majority of courts require an arrest warrant and probable cause to believe the suspect is in the third party's residence before such entries can be made.<sup>59</sup>

54. *Id.* at 582 n.17.

55. It is not entirely clear that police officers must have probable cause to believe the suspect is within his home. The Court says that the officers must have "reason to believe"; however, the difference between the two standards may not be significant. *See* 445 U.S. at 616 & n.13 (White, J., dissenting); *United States v. Steagald*, 606 F.2d 540, 544 (5th Cir. 1979), *cert. granted*, 101 S. Ct. 71 (1980). *But see id.* at 548-49 (Kravitch, J., dissenting).

56. *Payton*, holding that arrest-related activity will no longer be free from the imposition of warrant requirements, represents a significant departure from past constitutional practice and thus much of the law concerning arrest-related activity is thrown into question. In view of this, the *Payton* Court should have more clearly stated the reasoning employed in reaching the arrest warrant requirement. Since the "legitimate expectation of privacy" test has been increasingly used in fourth amendment cases, an analysis of that type would have been most useful to lawyers and judges seeking to apply the *Payton* decision to related fourth amendment questions. *See* notes 90-102 and accompanying text *infra*.

57. *Steagald v. United States*, 606 F.2d 540 (5th Cir. 1979), *cert. granted*, 101 S. Ct. 71 (1980).

58. 445 U.S. at 583.

59. The circuits which have decided or discussed this issue are not in agreement. Most appear to embrace the arrest warrant plus probable cause rule. Direct holdings requiring or rejecting a search warrant are rare because often the existence of exigent circumstances or lack of probable cause has made it unnecessary for the court to decide the issue. *See, e.g.*, *United States v. Hammond*, 585 F.2d 26, 28 n.1 (2d Cir. 1978) (dicta noting that a search warrant may not always be required; excellent review of authorities); *United States v. Williams*, 612 F.2d 735, 738 (3d Cir. 1979) (dicta interpreting *Fisher v. Votlz*, 496 F.2d 333 (3d Cir. 1974), as requiring an arrest warrant plus probable cause), *cert. denied*, 445 U.S. 935 (1980); *Virgin Islands v. Gereau*, 502 F.2d 914, 928-30 (3d Cir. 1974) (dicta that absent exigent circumstances a search warrant is required), *cert. denied*, 420 U.S. 909 (1975); *Lankford v. Gelston*, 364 F.2d 197, 201-06 (4th Cir. 1966) (court enjoined search of third person's home unless police had an arrest

But while the suspect under the *Payton* arrest warrant rule suffers no invasion of the privacy of his home until a neutral and detached magistrate's determination of probable cause, the third party would have no such protection. The issue, then, is whether the Court should require further protection for the third party in the form of a search warrant.<sup>60</sup>

warrant plus probable cause; left open the question of whether a search warrant required); *United States v. Steagald*, 606 F.2d 540 (5th Cir. 1979) (arrest warrant plus probable cause), *cert. granted*, 101 S. Ct. 71 (1980); *United States v. Cravero*, 545 F.2d 406, *modified on reconsideration*, 545 F.2d 420, 421 (5th Cir. 1976) (arrest warrant plus probable cause), *cert. denied*, 420 U.S. 983 (1977); *United States v. Sumlin*, 567 F.2d 684, 687 n.1 (6th Cir. 1977) (dicta that a search warrant may be required), *cert. denied*, 435 U.S. 932 (1978); *United States v. McKinney*, 379 F.2d 259, 262-63 (6th Cir. 1967) (arrest warrant plus probable cause); *Rice v. Wolff*, 513 F.2d 1280, 1292 & n.7 (8th Cir. 1975) (court indicates arrest warrant plus probable cause required, at a minimum, and leaves open question of whether a search warrant is required), *rev'd on other grounds sub nom. Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978) (arrest warrant sufficient if it describes place to be searched and person to be seized); *United States v. Erb*, 596 F.2d 412, 419 (10th Cir. 1979) (unclear if search warrant is required absent exigent circumstances), *cert. denied*, 444 U.S. 848 (1980); *United States v. Harper*, 550 F.2d 610, 613-14 (10th Cir.) (arrest warrant plus probable cause held sufficient), *cert. denied*, 434 U.S. 837 (1977); *United States v. Ford*, 553 F.2d 146, 159 n.45 (D.C. Cir. 1977) (dicta interpreting *United States v. Brown*, 467 F.2d 419 (D.C. Cir. 1972), as requiring exigent circumstances when entry made upon arrest warrant plus probable cause).

Missouri's view on warrantless entries of the homes of third parties is unclear. In *State v. Novak*, 428 S.W.2d 585, 591-93 (Mo. 1968), the court construed RSMO § 544.200 (1959) (current version at RSMO § 544.200 (1978)), a statute which applies equally to the entry of the suspect's home and entry of the third party's home. While the statute purports to give police almost unlimited power to enter homes to arrest, the court seemed only to excuse the lack of a search warrant when officers entered the suspect's home because there were exceptional circumstances. This ruling was upheld in *Novak v. Swenson*, 357 F. Supp. 901, 904 (E.D. Mo.), *aff'd mem.*, 489 F.2d 760 (8th Cir. 1973), on the grounds that officers had probable cause to believe the suspect committed a crime and probable cause to believe he was within his home. *But cf. State v. Tomlin*, 467 S.W.2d 918, 919-20 (Mo. 1971) (court applies statute without considering whether search warrant required).

For an interesting application of Missouri's statute to the entry of the third person's home question, see *United States v. Boyer*, 574 F.2d 951, 952-55 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978); note 102 *infra*.

RSMO § 544.200 (1978) provides: "To make an arrest in criminal actions, the officer may break open any outer or inner door or window of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance." Of course, this statute must be considered unconstitutional after *Payton*.

60. A few courts have stated that a search warrant is required. *Houtari v. Vanderport*, 380 F. Supp. 645, 649 (D. Minn. 1974) (dicta); *State v. Jones*, 274

It is clear from *Payton* that the analysis of the "entry to a third party's home to arrest" question should begin with the rules applicable to the search for and seizure of property in the home. Normally, warrantless searches and seizures inside a home are unconstitutional.<sup>61</sup> Thus, presumably a search warrant will be required. As in *Payton*, however, other reasons which *may* justify something less than a search warrant requirement must be considered.

Although *Payton* held that an arrest warrant implies authority to enter the suspect's home, it does not follow that the arrest warrant gives such authority with respect to the homes of third persons. An arrest warrant which implied authority to search for a person anywhere the police think he can be found would be in conflict with the basic historical purpose of the fourth amendment. The fourth amendment was, in great measure, adopted to restrict police activity which occurred in the American colonies under the authority of general warrants.<sup>62</sup> Those warrants empowered officers to search anywhere they suspected illegal items to be.<sup>63</sup> The danger of massive house searches, much like those conducted under authority of general warrants, exists if officers are allowed to search any home for a suspect named in an arrest warrant.<sup>64</sup>

Consideration of the third party's legitimate expectation of privacy also cuts in favor of a search warrant requirement. While the *Payton* conclusion with respect to the suspect's home can be reconciled with the expectation of privacy test,<sup>65</sup> the arrest warrant plus probable cause rule as applied to searches of the third party's residence cannot. The third party has a legitimate expectation of privacy in his home even though police officers have probable cause to believe a criminal suspect can be found therein.<sup>66</sup> In the *Payton* situation, the suspect's expectation of privacy is

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N.W.2d 273, 275-76 (Iowa 1979) (dicta); *England v. State*, 488 P.2d 1347, 1348-49 (Okla. Crim. App. 1971); *State v. Werth*, 18 Wash. App. 530, 536-37, 571 P.2d 941, 944 (1977).

61. See cases cited note 26 *supra*.

62. 445 U.S. at 583-85 & 583 n.21.

63. *Id.*

64. See *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966). In this case over 300 homes were searched by officers seeking to execute arrest warrants on two dangerous suspects. The court enjoined further searches by the police unless they had probable cause to believe the suspects were within the home to be searched. *Id.* at 206.

A requirement that police have probable cause to believe a suspect is within the third party's home is some protection against massive searches; the fourth amendment, however, additionally mandates that a magistrate appraise the facts which police believe justify an entry of the home. See, e.g., 445 U.S. at 602; *Jones v. United States*, 357 U.S. 493, 498 (1958); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). See also note 66 *infra*.

65. See notes 49-55 and accompanying text *supra*.

66. Officers can have probable cause to believe the suspect is within a residence without being certain. See note 21 *supra*. If there is probable cause the

protected by the issuance of the arrest warrant.<sup>67</sup> The third party's expectation of privacy, however, is not protected by the arrest warrant and thus can only be protected by a magistrate's determination that probable cause exists to believe the suspect is within the third party's home.<sup>68</sup> Therefore, unless the government's interest in consummating arrests is so important that the warrant requirement can be dispensed with, a search warrant is required under the expectation of privacy analysis.<sup>69</sup>

Since such entries are clearly arrest related, the *Watson* considerations should also be examined. They do not, however, afford a persuasive argument against a search warrant requirement. The common law appears unsettled.<sup>70</sup> As in *Payton*, the applicable common law rules are concerned primarily with the civil liability of officers who enter a third party's home to arrest a suspect.<sup>71</sup> One common law commentator, Hale, said that the officers were liable for trespass unless they in fact found the suspect on the premises.<sup>72</sup> Thus, while no search warrant was required, this restrictive rule indicates that the entry of a third party's home was not encouraged at common law. The majority of states do not appear to require search war-

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search is not infirm simply because the officers do not find the suspect upon entry. For an example of this concept as applied to warrantless entries to arrest, see *Virgin Islands v. Gereau*, 502 F.2d 914, 928-30 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).

Additionally, one does not lose his expectation of privacy once officers have established probable cause to believe items subject to seizure are within his home—a warrant is still required. See 445 U.S. at 588 n.26 (quoting *Jones v. United States*, 357 U.S. 493, 497 (1958)): "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant." In *Payton*, the court indicated that this held true when officers were seeking persons as well as property. *Id.* at 588-89.

67. 445 U.S. at 602-03. See notes 49-52 and accompanying text *supra*.

68. See notes 62-64 and accompanying text *supra*.

69. The government's interest could conceivably be so strong that the third party would have no legitimate expectation of privacy because, under the *Katz* test, his expectation would not be one that society is prepared to recognize as reasonable. See note 49 *supra*. See also text accompanying note 48 *supra*. The Court is unlikely, however, to embrace this argument. See *United States v. United States District Court*, 407 U.S. 297, 318-24 (1972) (Court rejects contention that the government's interest in matters relating to domestic national security was strong enough to dispense with the warrant requirement).

70. There is little common law authority available which distinguishes warrantless entries of the suspect's home to arrest from those made in a third party's home. The Court clearly indicated that the law as to the former situation was unsettled. 445 U.S. at 591-98. See Comment, *The Constitutionality of Warrantless Home Arrests*, 78 COLUM. L. REV. 1550, 1551-53 (1978). See also note 15 *supra*.

71. 445 U.S. at 592.

72. 2 W. HALE, PLEAS OF THE CROWN 117 (1736). See also Wilgus, *Arrest Without a Warrant* (pts. 1-2), 22 MICH. L. REV. 541, 798, 800-04 (1924).

rants. *Payton* makes clear, however, that this fact is not dispositive.<sup>73</sup> Federal statutes afford no basis for an argument that Congress has expressed its view that such entries are reasonable.<sup>74</sup> In short, these considerations do not compel resolution of the issue one way or another.

A real obstacle to a search warrant requirement is the fear that it would put undue restraint on law enforcement activity.<sup>75</sup> Indeed, to many courts deciding cases involving entries into third party's homes, practical considerations are paramount.<sup>76</sup> One recent decision, *State v. Jordan*,<sup>77</sup> is illustrative. The Oregon Supreme Court inferred that while maximum protection could be afforded the citizen by requiring a search warrant, this would constitute an intolerable handicap for legitimate law enforcement.<sup>78</sup> Primarily, the court saw a difference in the seizures of persons from seizures of things in that "[a] suspect will not stay in one place; he will attempt to avoid capture. And this inherent mobility to escape often presents unforeseeable dangers that necessitate swift police action."<sup>79</sup> The court reasoned that the constitutional requirement of reasonableness did not mandate that it "handicap police apprehension efforts by requiring officers to wait at the threshold to return for a warrant to search each time the suspect flees to hide in another house or apartment."<sup>80</sup>

There are counterarguments to suggestions that suspects are inherently more mobile than things and that a search warrant requirement would unduly hamper law enforcement. In the first instance, it is not abundantly clear that persons will disappear any faster than certain types of evidence.<sup>81</sup> Also, the exigent circumstances and hot pursuit doctrines are available in those situations in which it is truly impracticable for officers to obtain a warrant.<sup>82</sup> On the other hand, some members of the

73. 445 U.S. at 600.

74. The *Payton* majority found no federal statute that reflected a congressional determination that warrantless entries to arrest are reasonable. *Id.* at 601. The dissent, however, believed that 18 U.S.C. §§ 3052, 3109 (1976), supported an opposite conclusion. 445 U.S. at 614-15 (White, J., dissenting).

75. *E.g.*, 445 U.S. at 601; *id.* at 618-20 (White, J., dissenting); *Watson v. United States*, 423 U.S. 411, 423-24 (1976); *id.* at 431-32 (Powell, J., concurring); *id.* at 449-53 (Marshall, J., dissenting).

76. *See, e.g.*, *United States v. McKinney*, 379 F.2d 259, 263 (6th Cir. 1967); *State v. Jordan*, 288 Or. 391, \_\_\_\_, 605 P.2d 646, 650-51 (1980).

77. 288 Or. 391, 605 P.2d 646 (1980).

78. *Id.* at \_\_\_\_, 605 P.2d at 650-51.

79. *Id.* at \_\_\_\_, 605 P.2d at 651.

80. *Id.*

81. *See* 2 W. LAFAVE, *supra* note 21, § 6.1(b).

82. According to the exigent circumstances doctrine, which includes hot pursuit, a warrant to search is unnecessary when the delay in time required to procure it could result in danger to the lives of the police or others or the destruction of evidence. *See United States v. Santana*, 427 U.S. 38, 42-43 (1976); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967); *Dorman v. United States*, 435

Court seem reluctant to rely on these doctrines for, among other reasons, the fear that there would be a flood of exigent circumstances litigation.<sup>83</sup> This fear, in part, stems from the view of some that arrest related activity by its very nature presents recurring exigent circumstances problems.<sup>84</sup>

The *Jordan* majority's argument about practical considerations was countered by the dissent which suggested that officers seeking an arrest warrant could request authority to search third-party residences to be noted on the arrest warrant.<sup>85</sup> That authority, according to the dissent, could be granted if officers established probable cause to expect the suspect to be at one or more specified residences in the future.<sup>86</sup> While not formally a search warrant, the dissent noted that

[t]he constitutional warrant requirement is not a matter of forms. Its crux is that a magistrate has made a decision to authorize an unconsented entry and search, upon his independent judgment that the importance of making the arrest and the probability of finding the person to be arrested justify it.<sup>87</sup>

The United States Court of Appeals for the Ninth Circuit, in *United States v. Prescott*, has implied in dicta that it would require similar protection for the third party.<sup>88</sup> If officers are allowed to seek what is, in substance, an anticipatory search warrant,<sup>89</sup> then some of the inconvenience to law enforcement could be alleviated. This possibility, then, cuts in favor of a search warrant requirement.

Another impediment to a search warrant requirement is the Court's reluctance to expand the application of the exclusionary rule.<sup>90</sup> An argument can be made, however, that a search warrant requirement in the third-party entry situation will not result in added application of the rule as to the suspect. In *Rakas v. Illinois*,<sup>91</sup> the Court held that a defendant can only benefit from the exclusionary rule if his personal fourth amend-

F.2d 385, 391-96 (D.C. Cir. 1970). See generally Kelder & Statman, *supra* note 6, at 1041-47.

83. 445 U.S. at 620 (White, J., dissenting); *United States v. Watson*, 423 U.S. 411, 423-24 (1976).

84. See cases cited note 83 *supra*.

85. 288 Or. at \_\_\_\_, 605 P.2d at 655-56 (Linde, J., dissenting).

86. *Id.* at \_\_\_\_, 605 P.2d at 655 (Linde, J., dissenting).

87. *Id.* (Linde, J., dissenting).

88. 581 F.2d 1343, 1350 (9th Cir. 1978).

89. An anticipatory search warrant is based on probable cause to believe an item subject to seizure will be in a certain place in the future as opposed to the normal requirement of probable cause to believe the item is presently there. 1 W. LAFAVE, *supra* note 21, § 3.7(c).

90. See 445 U.S. at 618-19 (White, J., dissenting); *id.* at 620-21 (Rehnquist, J., dissenting). Opposition to the exclusionary rule's operation is also manifested in *Rakas v. Illinois*, 439 U.S. 128, 137-38 (1978).

91. 439 U.S. 128 (1978).

ment rights are violated.<sup>92</sup> The defendant must show a legitimate expectation of privacy in the area searched and an illegal invasion of that privacy.<sup>93</sup> *Rakas* rejected the proposition that a person who is merely "legitimately on the premises" of a third party always has a legitimate expectation of privacy.<sup>94</sup> Similarly, the Court rejected the theory that persons who are the "target" of law enforcement efforts may always assert the exclusionary rule.<sup>95</sup> The scope of one's legitimate expectation of privacy must be defined on a case-by-case basis,<sup>96</sup> but *Payton* suggests that the invasion of any privacy interest the suspect does have in the third party's residence would not be one on which he could assert fourth amendment rights. The suspect named in an arrest warrant probably has the highest expectation of privacy when in his own home.<sup>97</sup> This is because of the special emphasis the fourth amendment places on protection of the home. *Payton* makes clear, however, that an arrest warrant and probable cause to believe the suspect is within his home justify an invasion of his expectation of privacy in the form of an entry to arrest.<sup>98</sup> Therefore, an entry into an area where the suspect arguably has a lesser expectation of privacy, *i. e.*, a third person's home, solely on an arrest warrant and probable cause would also appear lawful as to the suspect.<sup>99</sup> Assuming a search warrant was also required but not obtained prior to the entry, the third party could benefit from the exclusionary rule because his legitimate expectation of

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92. *Id.* at 133-34.

93. *Id.* at 139-40; *Rawlings v. Kentucky*, 100 S. Ct. 2556, 2562 (1980); *id.* at 2564-65 (Blackmun, J., concurring).

94. 439 U.S. at 148-49.

95. *Id.* at 133-37.

96. *Id.* at 143-48; *id.* at 150-56 (Powell, J., concurring). See note 49 *supra*.

97. See note 49 *supra*.

98. 445 U.S. at 602-03. See notes 49-53 and accompanying text *supra*.

99. From the suspect's standpoint, the *Payton* rule may suggest that once an arrest warrant has been issued for him then the police may search anywhere they have probable cause to believe he may be. See note 52 *supra*.

Alternatively, even an arrest warrant may not be necessary because a person might not have any legitimate expectation of privacy if he is a casual visitor in a third party's home. This, for example, may be true if he is attending a social function at the residence. It may not be true, however, if he is hiding in the attic with the subjective purpose of avoiding capture. See *Rawlings v. Kentucky*, 100 S. Ct. 2556, 2561 (1980) (Court found petitioner did not take normal precautions to maintain privacy, hence, no subjective expectation of privacy); *Rakas v. Illinois*, 439 U.S. 128, 144-48 (1978) (whether person legitimately on premises is merely a factor in determining whether he has a legitimate expectation of privacy); *id.* at 150-57 (Powell, J., dissenting); *Katz v. United States*, 389 U.S. 347, 353 (1967) (suspect in public telephone booth who attempted to keep conversation private had legitimate expectation of privacy). See also note 49 *supra*. If the suspect in the third party's residence is found to have no legitimate expectation of privacy, then under *Rakas*, he cannot assert the exclusionary rule regardless of the fact that the officers had no arrest warrant. See text accompanying note 93 *supra*.



privacy was wrongfully invaded.<sup>100</sup> The suspect, however, could not. The difference in treatment is warranted because the suspect has had the benefit of a magistrate's determination that an invasion of his privacy interests is justified while the third party, in absence of a search warrant, has not. This result does not suggest that the entry is lawful but rather that the suspect cannot vicariously assert the third party's rights. The Court has made it clear that, in its view, the third party's ability to assert the exclusionary rule if evidence is found against him or to bring state and federal civil suits is a sufficient deterrent against illegal searches and seizures.<sup>101</sup> Thus, the *Rakas* decision would allow the Court to afford the third party the protection of a search warrant without expanding the operation of the exclusionary rule as to the suspect.<sup>102</sup>

Analysis of the "entry to a third party's residence to arrest" question leads then to a search warrant requirement. Unlike *Payton*, in this situation an arrest warrant plus probable cause rule cannot be harmonized with the applicable rules of search and seizure law. A search warrant requirement possibly would create some practical problems for law enforcement, but there are doctrines available, *e.g.*, exigent circumstances, which can be utilized to reduce such problems. To the extent that all warrant requirements pose a handicap on the police, the practical problem argument loses some force. At any rate, such considerations should not override the basic fourth amendment principle that a magistrate must determine the existence of probable cause before the police may enter the home of a private citizen.

The upcoming *Steagald* case<sup>103</sup> presents the Court with an opportunity to refine the method of analysis applicable to arrest related questions. Because, under *Rakas*, the Court relies so heavily on the "legitimate expectation of privacy" test to determine whether a citizen's fourth amendment rights have been violated, it should employ similar reasoning on these arrest related questions. After all, whether the criminal defendant can successfully procure exclusion of illegally obtained evidence is the para-

100. See notes 66-69 and accompanying text *supra*.

101. *United States v. Salvucci*, 100 S. Ct. 2547, 2554 (1980); *Rakas v. Illinois*, 439 U.S. 128, 134, 137 (1978). The third-party resident probably has no right to resist physically an illegal entry to arrest a suspect. See *United States v. Ferrone*, 438 F.2d 381, 389-90 (3d Cir.), *cert. denied*, 402 U.S. 1008 (1971); *State v. Hatton*, 116 Ariz. 142, 147-48, 568 P.2d 1040, 1045-46 (1977). *But see* *People v. Cedeno*, 218 Cal. App. 2d 213, 227, 32 Cal. Rptr. 246, 255 (1963).

102. See generally *United States v. Boyer*, 574 F.2d 951 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978). The court of appeals held that the suspect could not challenge an entry made to a third party's home to arrest him when the police complied with RSMO § 544.200 (1969) (now 1978). See note 59 *supra*. The court indicated, however, that the third party might be able to assert the exclusionary rule or bring civil suit. 574 F.2d at 954 n.9; *id.* at 955 (Ross, J., concurring).

103. 606 F.2d 540 (5th Cir. 1979), *cert. granted*, 101 S. Ct. 71 (1980).