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Entry to Arrest a Suspect in a Third Party's Home: Ninth Circuit Opens the Door—United States v. Underwood, 717 F.2d 482 (1983), cert. denied, 104 S. Ct. 1309 (1984)

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ENTRY TO ARREST A SUSPECT IN A THIRD PARTY'S HOME: NINTH CIRCUIT OPENS THE DOOR—*United States v. Underwood*, 717 F.2d 482 (1983), *cert. denied*, 104 S.Ct 1309 (1984).

The late 1970's marked a judicial movement toward more restrictive interpretations of who may invoke the exclusionary rule under the fourth amendment.[1] At the same time, the Court continued to emphasize fourth amendment protection for individual privacy rights in the home.[2] In *United States v. Underwood*,[3] the Ninth Circuit Court of Appeals faced an issue, not yet addressed by the Supreme Court, which presented these two themes in opposition: whether a suspect arrested in a third party's home pursuant to an arrest warrant could successfully suppress evidence seized incident to the arrest by challenging the absence of a search warrant.

This Note examines the Supreme Court's conflicting policies and how the *Underwood* court resolved them. To set a framework for analyzing the case, it discusses the Supreme Court's protection of privacy rights in the home and the Court's recent limitations on the standing doctrine.[4] The Note reviews the facts and holding of *Underwood*, then illustrates both the problems with the court's reasoning and those created by its decision to uphold the search. Finally, this Note suggests that the Ninth Circuit's

1. *See, e.g.*, United States v. Salvucci, 448 U.S. 83, 85 (1980) (Court overruled automatic standing rule for defendants charged with possessory crimes, holding that defendants may invoke the exclusionary rule only when their own fourth amendment rights have been violated); Rakas v. Illinois, 439 U.S. 128, 138–43 (1978) (Court replaced broad fourth amendment standing inquiry with more restrictive expectations of privacy test); *see infra* notes 37–41 and accompanying text.

2. *See infra* Part IA.

3. 717 F.2d 482 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1309 (1984).

4. In *Rakas*, the Court rejected the standing terminology by concluding that the determination of whether a defendant could assert a fourth amendment violation need not be separate from the defendant's substantive fourth amendment claim. 439 U.S. at 138–39. Although the Court attempted to merge the standing inquiry into a defendant's substantive claim, courts continue to employ a traditional two-step approach. The first step, determining whether a defendant has established an expectation of privacy sufficient to challenge a search, is basically the standing inquiry that *Rakas* purportedly rejected. *See* United States v. Buckner, 717 F.2d 297, 299 (6th Cir. 1983) (in cases where defendant is challenging a search and seizure, "courts should first focus on the issue of standing"). In effect, the Court merely substituted the "expectation of privacy" test for the previous "legitimately on the premises" standing test. *See infra* notes 33–41. The issue remains whether the defendant has standing to challenge the search. *Accord* United States v. Underwood, 693 F.2d 1306, 1307 (9th Cir. 1982) (advance sheets, copy on file with the *Washington Law Review*), *withdrawn*, 704 F.2d 1059 (9th Cir. 1983), *reh'g en banc*, 717 F.2d 482 (9th Cir. 1983); Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. J. CRIM. L. 387, 387 (1981). LaFave not only continues to separate his discussions of standing and substantive fourth amendment analysis in his treatise on search and seizure, *see* 2 W. LAFAVE, SEARCH AND SEIZURE, § 6.1; 3 W. LAFAVE, SEARCH AND SEIZURE, § 11.3 (1978 & Supp. 1984), but also employs standing terminology in his discussions of *Rakas*. 3 W. LAFAVE, *supra*, § 11.3, at 216–19 (Supp. 1984).

approach in *Underwood* was wrong and proposes, instead, a two-step test for analyzing similar search and seizure cases. Not only is this approach analytically consistent with Supreme Court precedent, but it also allows wider use of the exclusionary rule to suppress illegally seized evidence than is possible under the *Underwood* holding.

I. LEGAL BACKGROUND

A. *Home Arrests:* Payton *and* Steagald

Throughout the development of fourth amendment doctrine, the Supreme Court has afforded utmost protection to the home.[5] The Court has traditionally required government agents to secure search warrants before entering private residences to search for and seize incriminating evidence.[6] For entries to arrest, however, no such requirement existed until 1980.[7] Many state statutes authorized police to enter private residences to make arrests without first satisfying any warrant requirement.[8] Thus, while all citizens could expect fourth amendment protection against governmental seizure of possessions in their homes, they could not rely on the same protection against seizures of their persons while in their homes.[9]

In *Payton v. New York*[10] the Supreme Court recognized and eliminated this inconsistency, holding that absent exigent circumstances or consent, police may not cross the threshold of a home without a warrant.[11] The Court noted that the fourth amendment was drafted to prevent the indiscriminate and widespread searches made under the guise of general warrants and that "physical entry of the home is the chief evil" against

5. For a comprehensive discussion of the Court's commitment to privacy interests in the home, see Payton v. New York, 445 U.S. 573, 585–90 (1980); *see also* Comment, *Warrantless Entries to Arrest Suspects in the Homes of Third Parties After* Payton v. New York, 9 AM J. CRIM L. 51, 65–68 (1981); Note, *Arresting a Suspect in a Third Party's Home: What Is Reasonable?*, 72 J. CRIM L. & CRIMINOLOGY 293, 316–18 (1981).

6. A brief discussion can be found in Steagald v. United States, 451 U.S. 204, 211 (1981), and Payton v. New York, 445 U.S. 573, 587–88 (1980).

7. *See* Payton v. New York, 445 U.S. 573 (1980) (creating warrant requirement for entries to arrest).

8. *See id.* at 598 n.46 (overruled 23 such statutes). The New York statute overruled by the Court in *Payton* authorized police to enter any private home without a warrant to make a routine felony arrest. *Id.* at 574.

9. *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 (1980).

10. 445 U.S. 573 (1980).

11. *Id.* at 590.

which the constitutional protections of the fourth amendment are directed.[12]

In *Payton,* the Court stated that privacy interests of an arrestee in his home deserve the same constitutional protection as the privacy interests of a subject of a residence search.[13] After declaring that the fourth amendment applies equally to seizures of property and seizures of people in the home, however, the Court stated that police may lawfully enter a suspect's own home to arrest him when they have a valid arrest warrant and reason to believe the suspect is inside.[14] Acknowledging that an arrest warrant affords the suspect less protection than a search warrant,[15] the Court failed to explain why an arrest warrant was constitutionally sufficient.[16] The Court merely stated that when there is evidence of a person's participation in a felony sufficient to show probable cause for his arrest, it is "constitutionally reasonable to require him to open his doors to the officers of the law."[17] The Court concluded that implicit in a valid arrest warrant is the "limited authority" to enter the suspect's own home when there is reason to believe the suspect is inside.[18]

During the term following the *Payton* decision, the Court again addressed police entries to arrest without a search warrant, this time in a third party residence setting. In *Steagald v. United States,*[19] the Court

12. *Id.* at 585 (quoting United States v. United States Dist. Ct., 407 U.S. 297, 313 (1972)).

13. The Court noted that arrest is a species of seizure and that the language of the amendment applies equally to seizures of property and seizures of people. 445 U.S. at 585; *see also* Mascolo, *supra* note 9, at 302.

14. 445 U.S. at 603. Arguably, this language from *Payton* is dicta because in the case itself the police acted without any warrant at all. *Payton* could be narrowly construed to hold only that statutes authorizing police entry without any warrant are unconstitutional. This argument was considered but rejected by the Ninth Circuit in United States v. Underwood, 717 F.2d 482, 484–86 (1983) (citing several cases which refer to the *Payton* dicta as its rule), *cert. denied,* 104 S. Ct. 1309.

15. *Payton,* 445 U.S. at 602.

16. A search warrant is issued upon a probable cause showing that evidence of a crime is at a particular location. An arrest warrant is issued upon a probable cause showing that the named suspect committed a crime. *See infra* notes 25–26 and accompanying text. Attempting to explain the apparent inconsistency in *Payton,* two commentators have suggested that the majority was swayed by the state's argument that a search warrant requirement would be impracticable, but sought to lessen the arrest warrant-search warrant probable cause gap with a requirement that police have a reason to believe the suspect is at home before entering. Feiner & Reilly, *Criminal Procedure,* 1981 ANN. SURV. AM. L. 561, 564. Another writer has suggested that the Court's reluctance to impose a search warrant requirement was based on its conclusion that the added protection of a search warrant given to a suspect in his own home did not outweigh the potential diversion of police resources inherent in a search warrant requirement. Mascolo, *supra* note 9, at 302 n.23. Several writers, criticizing the result in *Payton,* have suggested that the Court should have imposed a search warrant requirement. *See, e.g., The Supreme Court, 1979 Term,* 94 HARV. L. REV. 75, 186 (1980); Note, *supra* note 5, at 322; *see also* Groot, *Arrests in Private Dwellings,* 67 VA. L. REV. 275, 282–83 (1981).

17. *Payton,* 445 U.S. at 602–03.

18. *Id.* at 603.

19. 451 U.S. 204 (1981).

held that, absent exigent circumstances or consent, police must obtain a search warrant before entering the home of a third party to make an arrest.[20] In *Steagald,* police had a valid arrest warrant for suspect Ricky Lyons and made a non-consensual entry into a third party home to search for him. Although they did not find Lyons, they did find narcotics. As a result, the homeowner, Steagald,[21] was indicted on federal drug charges.[22] The Supreme Court held that the warrantless search violated Steagald's fourth amendment rights.[23] Reiterating the *Payton* policy of utmost protection for the home, the Court found that an arrest warrant provides insufficient protection for a third party when police enter his home to search for and arrest a different person.[24]

In *Steagald,* the Court relied on the difference between arrest warrants and search warrants. An arrest warrant is issued upon a probable cause showing that the person named in the warrant has committed a crime. It protects people from the unreasonable and unnecessary seizure inherent in an arrest not based on probable cause.[25] A search warrant, however, is issued upon a probable cause showing that evidence of a crime is at a particular location. It protects people's privacy interests in their homes and personal effects.[26]

The Court concluded that only a search warrant provides adequate protection when police search a third party's residence for a suspect named in an arrest warrant. Distinguishing *Payton,* the Court reasoned that although the arrest warrant authorized an entry into Lyons' home to arrest Lyons,[27] it provided no constitutional protection for Steagald or his

20. *Id.* at 205–06.

21. Steagald was not in fact the homeowner; he was apparently a visitor in the home. However, because the government failed to raise this issue at the trial court level, the Court refused to address it on appeal. *Id.* at 208–11. Had the government argued that Steagald lacked the requisite expectation of privacy, the Court would have faced the standing issue. It would then have provided closer guidelines for the Ninth Circuit to decide *Underwood,* although the case still would have been distinguishable because Steagald was not named in the arrest warrant while Underwood was.

22. *Id.* at 207.

23. *Id.* at 213–14.

24. *Id.* at 212–14. The Court stated that entry into a private home to search or arrest is per se unreasonable unless pursuant to a valid warrant. *Id.* at 211. Explaining that the purpose of the warrant requirement is to place a neutral magistrate between the police and the citizen, *id.* at 212, the Court noted that it has consistently held that police determinations of probable cause are not reliable enough to justify entry except in a few well-defined circumstances. *Id.* at 213–14. Finally, the court stressed that the commands of the fourth amendment do not discriminate between entries to search for objects and entries to search for people, and that both require a warrant. *Id.* at 214 n.7.

25. *Id.* at 213.

26. *Id.*

27. Explaining the *Payton* arrest warrant requirement, the Court stated that, "[b]ecause an arrest warrant authorizes the police to deprive a person 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." *Id.* at 214 n.7.

home, and was insufficient to deprive him of any privacy or liberty interest.[28] The Court stated that a contrary result would create a substantial potential for abuse because police could search all the homes of a suspect's friends and acquaintances solely on the basis of an arrest warrant for the suspect.[29] Further, an arrest warrant could serve as a pretext for entering homes in which police suspect illegal actvity taking place, but lack sufficient probable cause to support a search warrant.[30]

Together, *Payton* and *Steagald* provide the Supreme Court's guidelines on entries to arrest. In *Payton* the Court concluded that an arrest warrant combined with reason to believe the suspect is inside is constitutionally sufficient for entry to arrest a suspect in his own home. In *Steagald,* however, the Court insisted that entry into another's residence to arrest a suspect requires the judicial determination of probable cause embodied in a search warrant to protect the third party's privacy interests.

B. The Contemporary "Standing" Doctrine—Reasonable Expectations of Privacy

The standing doctrine determines which defendants may invoke the exclusionary rule to exclude evidence seized during an illegal search.[31] Not all illegally seized evidence is suppressible; rather, each defendant must establish a violation of his own fourth amendment rights before invoking the benefits of the exclusionary rule.[32] While in *Payton* and *Steagald* the Court called for stronger fourth amendment protection of individual rights, in other cases the Court has significantly narrowed the class of persons who may successfully seek to suppress evidence seized in violation of the fourth amendment.

The standing doctrine was originally based on property rights and extended only to defendants who established a proprietary interest in either the area searched or the evidence seized.[33] In *Jones v. United States,*[34] the Supreme Court expanded the doctrine by holding that any person

28. *Id.* at 213.
29. *Id.* at 215.
30. *Id.*
31. *See generally* 3 W. LAFAVE, *supra* note 4, § 11.3; *see also* Slobogin, *supra* note 4 (discussion of recent developments in the law of standing); Note, *Criminal Procedure—The Demise of Standing to Assert Fourth Amendment Violations,* 3 W. NEW ENG. L. REV. 527 (1981) (same); Harbaugh & Faust, *"Knock on Any Door"—Home Arrests After* Payton *and* Steagald, 86 DICK. L. REV. 191, 233–238 (1982) (effect of recent standing developments on *Payton* and *Steagald*); Mascolo, *Arresting a Suspect in the Home of a Third Party: The Issue of Standing or Legitimate Expectations of Privacy,* 4 W. NEW ENG. L. REV. 381 (1982) (same).
32. Rakas v. Illinois, 439 U.S. 128, 133–34 (1978).
33. Slobogin, *supra* note 4, at 389; Note, *supra* note 31, at 527–28.
34. 362 U.S. 257 (1960).

"legitimately on the premises" during a search had standing to challenge the legality of the search.[35] Additionally, any defendant charged with a possessory crime was granted "automatic standing."[36] This avoided the conflict defendants faced when statements of ownership made at supression hearings were admitted on the issue of guilt at trial.

Rakas v. Illinois[37] marked the demise of the liberal standing policies under *Jones*. Reasoning that the *Jones* "legitimately on the premises" standard was too broad, the Court reformulated the standing doctrine based on the substantive fourth amendment doctrine of legitimate expectations of privacy.[38] The Court held that before invoking the exclusionary rule, a defendant must establish that the search violated his or her own legitimate expectation of privacy.[39] Several commentators have interpreted *Rakas* and its progeny[40] as requiring that defendants show a proprietary interest in the area searched to establish a legitimate expectation of privacy.[41]

35. *Id.* at 267.

36. *Id.* at 263–64, 267. For a discussion of the automatic standing rule, see Mascolo, *supra* note 31, at 384–85; Note, *supra* note 31, at 532–33. The doctrine of automatic standing has since been overruled. United States v. Salvucci, 448 U.S. 83, 85 (1980).

37. 439 U.S. 128 (1978).

38. *Id.* at 143. The expectations of privacy analysis for substantive fourth amendment rights originated in Katz v. United States, 389 U.S. 347 (1967), in which the Court replaced the old property-based definition of fourth amendment rights with a much broader "expectations of privacy" definition. *Id.* at 351–52. In *Katz*, the Court greatly expanded the scope of fourth amendment protections, stating that the fourth amendment protects "people, not places," and what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. Justice Harlan's concurrence suggested that the fourth amendment extends protection to expectations of privacy which society is willing to recognize as reasonable. *Id.* at 360–62, (Harlan, J. concurring). This expectation of privacy test was later adopted by a majority of the Court. *See* United States v. White, 401 U.S. 745, 751–52 (1971); Terry v. Ohio, 392 U.S. 1, 9 (1968). For a discussion of *Katz* and expectations of privacy, see Amsterdam, *Perspectives of the Fourth Amendment*, 58 MINN L. REV 349, 382–88 (1974).

39. *Rakas*, 439 U.S. at 143. In *Katz* the expectations of privacy language was designed to expand the scope of fourth amendment protection beyond property concepts to include expectations of privacy. 389 U.S. at 351–53. In *Rakas* the Court used this language to restrict the procedural fourth amendment standing inquiry. *See* Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV 1289, 1294 (1981); Harbaugh & Faust, *supra* note 31, at 234; Slobogin, *supra* note 4, at 393–97.

40. In United States v. Salvucci, 448 U.S. 83, 85 (1980), the Court overruled the automatic standing rule for defendants charged with possessory crimes. In Rawlings v. Kentucky, 448 U.S. 98, 106 (1980), the Court held that a defendant did not establish the requisite expectation of privacy in an acquaintance's purse to challenge a search of its contents.

41. Feiner & Reilly, *supra* note 16, at 579 n.149; Harbaugh & Faust, *supra* note 31, at 233–37; Mascolo, *supra* note 31, at 387–88; Note, *supra* note 31, at 537–38. Arguably, *Rakas* need not be interpreted so narrowly. *See infra* Part IIIC.

II. *UNITED STATES V. UNDERWOOD:* FACTS AND HOLDING

Jack Underwood was an escapee from a federal correctional institution. An informant told police that Underwood was staying at the house of a friend, Johnny Duckett, and that he had a weapon secreted in a black coffin-like box.[42] Acting under the authority of an arrest warrant for Underwood, police went to Duckett's home and announced their presence.[43] Receiving no response, the police made a non-consensual entry.[44] They searched for and found Underwood, armed, hiding in a bedroom closet. They arrested him and seized the box containing a shotgun, which they also found in the closet.[45]

Underwood was charged with possession of an unregistered firearm and possession of a firearm by a felon.[46] The district court granted his motion to suppress the weapons. The trial judge noted that the arrest warrant was valid and that police had reason to believe Underwood was inside, but held that the entry into Duckett's house without a search warrant violated the fourth amendment.[47] On appeal, a three-judge panel affirmed.[48] On rehearing en banc, however, the Ninth Circuit reversed.[49]

The majority concluded that the case was controlled by *Payton v. New York*.[50] The court stated that, for purposes of fourth amendment violations, nothing turned on the fact that in *Payton* the arrestee was in his own home while Underwood was in a third party's home.[51] The court reasoned that a person has no greater rights of privacy in a third party's home than in his own home.[52] It concluded that Underwood's rights were not violated because the police met the *Payton* requirements: an arrest warrant for the defendant and reason to believe he was inside.[53]

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42. 717 F.2d 482, 483 (9th Cir. 1983); Brief for Appellant at 7, United States v. Underwood, 717 F.2d 482 (9th Cir. 1983).

43. 717 F.2d at 483.

44. *Id.*; Brief for Appellant, *supra* note 42, at 6–7.

45. *Id.*

46. *Id.*

47. *Id.*

48. United States v. Underwood, 693 F.2d 1306 (9th Cir. 1982) (advance sheets, copy on file with the *Washington Law Review*), *withdrawn*, 704 F.2d 1059 (9th Cir. 1983), *reh'g en banc*, 717 F.2d 482 (9th Cir .1983).

49. *Underwood*, 717 F.2d at 486.

50. *Id.* at 483.

51. *Id.* at 484.

52. *Id.*

53. *Id.* Similar reasoning was recently adopted by the Sixth Circuit. United States v. Buckner, 717 F.2d 297 (1983) (defendant arrested in third party home by police who acted without search warrant did not establish requisite expectation of privacy; even if he had, under *Payton* the arrest warrant was sufficient because defendant could not assert greater rights of privacy in third party's home than in his own home). Similarly, the Eighth Circuit concluded that a suspect has no greater right of privacy in a third party's home than the third party, who is protected under *Payton* by an

The four dissenting judges argued that the majority's holding was an unnecessary extension of *Payton*.[54] The dissent reasoned that the *Payton* decision represented a narrow exception to the search warrant requirement,[55] and that the principles of *Steagald* and Ninth Circuit precedent[56] provided the proper guidelines for deciding the case.[57] It concluded that Underwood, an invited guest with a legitimate expectation of privacy in Duckett's home, could challenge the warrantless entry and that the absence of a search warrant resulted in an unlawful search under the fourth amendment.[58]

III. ANALYSIS

A. *Analytical and Practical Problems Created by* Underwood

The *Underwood* case falls between the *Payton* and *Steagald* fact patterns. In *Payton* the Court addressed the rights of a suspect in his own home and held that police may enter to arrest him when they have a valid arrest warrant and reason to believe that he is inside.[59] *Steagald* addressed the rights of a third party homeowner when police enter his home to search for a non-resident suspect named in an arrest warrant and held that police must obtain a search warrant before entering the third party's home.[60] In *Underwood* the court addressed the rights of a suspect arrested in a third party's home when police enter without a search warrant but pursuant to an arrest warrant for him and with reason to believe that he is inside.[61] The Ninth Circuit was, therefore, without explicit direction from the Supreme Court for deciding *Underwood*.

Rather than extending *Payton*, the *Underwood* court should have applied *Steagald*, which was more closely on point. By extending *Payton*,

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arrest warrant and reason to believe that he is inside. United States v. Clifford, 664 F.2d 1090, 1093 (8th Cir. 1981). LaFave comments that "such bizarre reasoning renders *Steagald* a virtual nullity." 3 W. LAFAVE, *supra* note 4, § 11.3, at 221 (Supp. 1984). *But cf.* Mascolo, *supra* note 9, at 307 n.52 and accompanying text.

54. *Id.* at 486 (Skopil, J., dissenting).

55. *Id.* at 487.

56. United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978) involved facts similar to *Payton*. The Ninth Circuit overturned the conviction of a homeowner whose home was entered and searched by police without a warrant. The court held that "[t]he warrant, whatever it be called, must describe 'the place to be searched, . . . and the persons or things to be seized' . . . ." *Id.* at 1350. The *Underwood* dissent argued that this language suggested a search warrant requirement. 717 F.2d at 489 (Skopil, J., dissenting).

57. 717 F.2d at 486.

58. *Id.* at 486–87.

59. *See supra* notes 10–18 and accompanying text.

60. *See supra* notes 19–30 and accompanying text.

61. *See supra* Part II.

the court ignored both the policies of fourth amendment doctrine expressed in *Payton* and *Steagald,* and the language of the fourth amendment itself.[62] In addition, by failing to provide guidelines for police to follow in applying the reasonable belief standard, the court invited abusive violations of the *Steagald* search warrant requirement.

The reasoning of the court in *Underwood* extends *Payton* beyond its self-imposed limitations. In *Payton,* the Court expressly limited its holding to entries into a suspect's own home to effect his arrest.[63] The Court flatly stated that it was making no determinations concerning the authority of police to enter a third party's home to arrest a suspect.[64] In *Steagald,* on the other hand, the Court specifically addressed the issue of entries into third party homes and held that police must secure a search warrant before entry. Thus *Steagald* was the proper precedent to apply.[65]

The policies underlying *Payton* and *Steagald* also suggest that the *Underwood* court improperly extended *Payton.* Both decisions stressed the importance of privacy interests in the home and set specific warrant requirements for entries into private residences to make arrests.[66] In *Payton,* the Court adopted the policy that entries to search and entries to arrest are equally protected by the fourth amendment; in *Steagald,* the Court required a search warrant to enter a third party's home to arrest a suspect.[67] If search and arrest entries require equal constitutional protection, then the less protective arrest warrant requirement of *Payton* makes sense only when viewed as an exception to the general search warrant rule. The exception is based on the implicit determination embodied in an arrest warrant that a suspect is likely to be found at home and strengthened by the police's actual belief that the suspect is at home at the time of entry.[68] Together, *Payton* and *Steagald* stand for the principle that police must secure a search warrant before entering any private residence to arrest a suspect unless entries are: (1) consensual,[69] (2) under exigent

62. *See* Note, *supra* note 5, at 297–311; *see also supra* notes 10–30 and accompanying text.

63. *Payton,* 445 U.S. at 603.

64. *Id.* at 583.

65. Although in *Steagald* it was the third-party homeowner who challenged the search, the arrestee's ability to challenge the absence of a search warrant is a standing inquiry separate from the warrant issue. In his section on entries to arrest, LaFave poses a hypothetical identical to the facts of *Underwood* and then suggests that the true issue is standing, which he addresses in another section of his treatise. 2 W. LAFAVE, *supra* note 4, § 6.1, at 130 (Supp. 1984).

66. *Payton,* 445 U.S. at 585–590, 603; *Steagald,* 451 U.S. at 211, 222.

67. *See supra* notes 13–30 and accompanying text.

68. *See Underwood,* 717 F.2d at 487 (Skopil, J., dissenting); Note, *supra* note 5, at 300.

69. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

circumstances,[70] or (3) into a suspect's own home pursuant to a valid arrest warrant and with reason to believe the suspect is inside.[71]

The language of the fourth amendment commands that "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."[72] Thus, the probable cause determinations under the warrant clause are threefold: connection to the crime, persons or things to be seized, and location. These requirements permit judicial control over the scope of a search.[73] A search warrant embodies the probable cause determination that certain things or persons which will aid in apprehension or conviction of a crime are located in a specific place.[74] An arrest warrant, on the other hand, embodies only the probable cause determination that a suspect committed a crime, which makes that suspect seizable,[75] but includes no determination as to the suspect's probable whereabouts.[76] An arrest warrant lacks the judicial control over the scope of a search for a suspect. Thus, in *Underwood,* the court ignored the explicit fourth amendment criteria when it upheld the warrantless entry to search for and arrest Underwood.[77]

Underwood not only fails analytically, but it presents practical problems as well. The holding provides no guidelines for police to apply the "reason to believe the suspect is inside" standard. It therefore creates the potential for the very abuse warned against by the Supreme Court in *Steagald.*[78] Once police have an arrest warrant for a suspect, nothing in the *Underwood* holding prevents them from reasonably believing that the suspect is staying with friends, relatives, or acquaintances and subsequently conducting warrantless searches of each and every home until the suspect is found.[79] By delegating the probable cause determination that a suspect is in a given home to the police, the *Underwood* holding fails to prevent and indeed encourages unconstitutional police activity.

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70. *See, e.g.*, Vale v. Louisiana, 399 U.S. 30, 34–35 (1970).

71. *See Payton*, 445 U.S. 573, 602–03 (1983).

72. U.S. CONST. amend. IV.

73. Note, *supra* note 5, at 298.

74. *Steagald*, 451 U.S. at 213; Groot, *supra* note 16, at 282 (1981).

75. *Steagald*, 457 U.S. at 213.

76. *See* Groot, *supra* note 16, at 281–82; Note, *supra* note 5, at 298.

77. Although there are several recognized exceptions to the search warrant requirement, none applied in *Underwood*. *See supra* notes 69–71 and accompanying text; *see also infra* note 93 and accompanying text.

78. *See supra* notes 29–30 and accompanying text.

79. *Accord* Comment, *supra* note 5, at 61 (probable cause standard for police better than reasonable belief standard, but both leave decision of whether to enter private premises to police rather than to judiciary). Private § 1983 actions tend not to be a desirable remedy for fourth amendment violations. 42 U.S.C. § 1983 (1976); *see infra* note 94.

B. *A Two-step Analysis of* Underwood: *Expectations of Privacy and* Steagald

The *Underwood* court reached the wrong result because it applied the wrong law. The *Rakas* and *Steagald* decisions provide the proper guidelines and suggest that the court should have conducted a two-step analysis. First, it should have decided whether Underwood had a legitimate expectation of privacy in Duckett's home. This is the standing inquiry transformed by *Rakas*,[80] which the court in *Steagald* did not address.[81] Second, had the court concluded that Underwood met the *Rakas* test, it should then have determined whether the entry without a search warrant was unconstitutional. Under this approach, the court should have concluded that (1) Underwood, as an overnight guest, had a legitimate expectation of privacy in Duckett's home and could therefore challenge the search, and (2) the entry was unconstitutional because no search warrant exception applied. The dissent correctly concluded that police violated Underwood's fourth amendment right to privacy when they entered the house without a search warrant.[82]

There is no simple test for determining whether a guest in a third party's home has a sufficient legitimate expectation of privacy to enjoy fourth amendment protection.[83] Courts have found or failed to find legitimate expectations of privacy through a "totality of the circumstances" approach, analyzing facts on a case-by-case basis.[84]

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80. *See supra* note 4.

81. *Steagald*, 451 U.S. at 219. There is some confusion in *Underwood* about the expectations of privacy issue. The majority never addressed the issue in the body of its opinion, yet the dissent stated that the majority did not contest the fact that Underwood had a legitimate expectation of privacy. 717 F.2d at 486 n.1 (Skopil, J., dissenting). If this is the case, then the majority may have followed the line of reasoning adopted by other circuits that even if a defendant can establish a legitimate expectation of privacy in a third party's home, he is constitutionally protected under *Payton* by an arrest warrant and a reason to believe that he is inside. *See supra* note 53. This conclusion misconstrues *Payton*. *See supra* notes 63–71 and accompanying text.

82. *Underwood*, 717 F.2d at 486 (Skopil, J., dissenting).

83. In several cases with facts similar to those in *Underwood*, courts have concluded that the defendant-guest did not establish a constitutionally protected expectation of privacy. *Compare* United States v. Buckner, 717 F.2d 297 (6th Cir. 1983) (defendant-guest visiting mother's home possessed no expectation of privacy) and United States v. Clifford, 664 F.2d 1090 (8th Cir. 1981) (defendant-guest in friend's home between two and six hours possessed no expectation of privacy) *with* United States v. Robertson, 606 F.2d 853, 858 n.2 (9th Cir. 1979) (defendant-guest staying overnight and storing personal belongings in friend's home possessed expectation of privacy) and Rakas v. Illinois, 439 U.S. 126, 141–42 (1978) (court notes that in Jones v. United States, 362 U.S. at 257, defendant-guest staying alone in friend's apartment possessed expectation of privacy).

84. *See* Slobogin, *supra* note 4, at 399–416. The general factors of the totality of the circumstances test include: interest in the searched premises, including the ability to exclude other persons; interest in the items seized; and precautions taken to protect privacy. *Id.* at 400–416.

A close examination of the *Underwood* facts reveals that Underwood possessed a constitutionally protected, legitimate expectation of privacy in Duckett's home. The facts are strikingly similar to those in *Jones*.[85] Although *Rakas* ended the *Jones* "legitimately on the premises" standing inquiry, the Court did not overrule the holding of that case. Rather, it stated that the defendant in *Jones* had a legitimate expectation of privacy in the area searched and would therefore have met the *Rakas* test.[86] Jones was an invited overnight guest who had a suit and shirt in the apartment. He was the only occupant at the time of the warrantless search, and had the use of a key.[87] These combined factors led the *Rakas* Court to conclude that Jones had a protected expectation of privacy which was violated by the warrantless search.[88]

Similarly, Underwood was an invited overnight guest. He had permission to be in the house alone, and was the only occupant at the time of the warrantless entry.[89] The only discernible difference between *Underwood* and *Jones* is that Jones had a key and a few articles of clothing in the apartment and Underwood had neither. Because the Supreme Court advocates a totality of the circumstances approach to fourth amendment analysis, the determination of a legitimate expectation of privacy should not turn on the presence or absence of a key.[90] At most, possession of a key indicates the ability to exclude others, which is but one of several factors courts consider in determining expectations of privacy.[91] Furthermore, Underwood was the only occupant at the time of the entry and could in fact have excluded others by locking the door. Underwood therefore enjoyed a constitutionally protected expectation of privacy in Duckett's home and could have challenged the search.

Once it is established that Underwood had the requisite expectation of privacy to challenge the search, the second step of the inquiry addresses the legality of the entry: the court must decide whether the warrantless entry violated the fourth amendment. The policies behind and the

85. *See infra* note 87 and accompanying text.

86. *Rakas*, 439 U.S. at 141–42.

87. *Id.* at 141.

88. *Id.* at 143.

89. United States v. Underwood, 693 F.2d 1306, 1308 (9th Cir. 1982) (advance sheets, copy on file with the *Washington Law Review*), *withdrawn*, 704 F.2d 1059, *reh'g en banc*, 717 F.2d 482 (1983), *cert. denied*, 104 S. Ct. 1309 (1984).

90. The fact that Jones had clothing, and thus possessions, in the apartment might suggest that he had a subjective expectation of privacy in the apartment. Under similar reasoning, Underwood had possessions in Duckett's home and thus also had a subjective expectation of privacy. Because Jones had only a shirt and jacket in the apartment, however, as opposed to a full suitcase, the clothing factor was most likely a minor influence on the *Rakas* Court. The Court was more likely swayed by the fact that Jones had a key to the apartment which allowed him free access and the ability to exclude others.

91. *See supra* note 84.

holdings of *Payton* and *Steagald* indicate that police should have secured a search warrant before entering Duckett's home to arrest Underwood.[92] Because Underwood was not arrested in his own home, the *Payton* exception did not apply to relieve police of the search warrant requirement. Further, because police neither had consent nor acted under exigent circumstances,[93] the warrantless entry to arrest Underwood and the subsequent seizure of evidence was unlawful. Under this two-step analysis, the court should have upheld the trial court's granting of Underwood's motion to suppress the illegally seized evidence.

C. A Totality of the Circumstances Approach to Standing

The erroneousness of the *Underwood* decision is easily shown under the two-step *Rakas* and *Steagald* approach because Underwood's standing follows from *Jones,* and because no search warrant exception applied. More pressing are those problems potentially created by *Rakas* when facts in new cases vary from the *Jones-Underwood* pattern.

Under *Rakas,* if a court determines that a given defendant did not have a constitutionally sufficient expectation of privacy, an unconstitutional search and seizure will go unredressed regardless of the degree of police misconduct.[94] If the concept of legitimate expectations of privacy is narrowly construed, police will have little incentive to comply with the warrant requirements created by *Payton* and clarified by *Steagald.*[95] The parade of horrors that prompted the *Steagald* Court to impose a search warrant requirement for entries into third party homes may become commonplace.[96] Police, armed solely with an arrest warrant and the slightest suspicion that a suspect is in the house of some friend, acquaintance, or relative can make warantless searches of each home until they find the suspect. Yet this is the sort of activity which the framers of the fourth amendment sought to halt and precisely the behavior warned against by the Court in *Steagald.*[97]

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92. *See supra* notes 63–71 and accompanying text.

93. *See supra* notes 69–70.

94. Courts may not use their supervisory powers to exclude illegally seized evidence. United States v. Payner, 447 U.S. 727 (1980). The only other remedy available to those who are victims of unconstitutional police activity is a § 1983 action. 42 U.S.C. § 1983 (1976). These are both time consuming and expensive, and there is no guarantee that violations will be redressed, especially when the police have acted in good faith. *See Steagald,* 451 U.S. at 216 n.9; Comment, *supra* note 5, at 64.

95. For the warrant requirements, *see supra* notes 66–71 and accompanying text.

96. *See* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (§ 1983 action involving police searches of over 300 homes for two suspects in a police killing); *see supra* notes 29–30 and accompanying text; *see also supra* note 92.

97. *Steagald,* 451 U.S. at 220.

The most inviting resolution to the problems *Rakas* potentially creates is a return to the pre-*Rakas* standing doctrine. The "legitimately on the premises" standard allowed for wider use of the exclusionary rule to check unconstitutional police activities by restricting the admission of tainted evidence at trial.[98] A return to the "legitimately on the premises" standard, however, is unlikely given the Court's current trend restricting use of the exclusionary rule.[99] If courts narrowly construe *Rakas* to require a proprietary interest in the area searched to attain standing,[100] defendants arrested in third party homes will be powerless to challenge warrantless entries. However, courts could enforce the *Payton* and *Steagald* warrant requirements through a more generous reading of what constitutes a "legitimate expectation of privacy" under *Rakas*.

In *Rakas*, the Court recognized that a person can have a legitimate expectation of privacy that is sufficient to invoke fourth amendment protections in a place other than his own home.[101] In fact, the Court expressly stated that visitors in a home might be able to challenge a search when their own property is seized during the search.[102] Given this language in *Rakas*, and the fact that in *Rakas* the Court upheld *Jones* on its facts, the conclusion that expectations of privacy will only be recognized when grounded in proprietary interests in the area searched may misconstrue *Rakas*.[103]

Under prior substantive fourth amendment case law, expectations of privacy have been determined through a totality of the circumstances test. Courts applying the *Rakas* standing analysis should also adopt the totality of the circumstances test for the standing inquiry. In *Rakas*, the Court in

98. It is unquestionably easier for a defendant to show that he was legitimately on the premises or charged with a possessory crime than it is to show that he had a legitimate expectation of privacy violated by the search. Both the legitimately on the premises and possessory crimes standards are straightforward requirements. The tests are whether the defendant was trespassing and what the defendant was charged with. The legitimate expectations of privacy standard, on the other hand, is not easily defined and does not provide defendants with specific criteria for meeting the requirement.

99. *See supra* note 1; *see also* Ashdown, *supra* note 39, at 1290–94 (1981).

100. *See supra* note 41 and accompanying text.

101. *Rakas*, 439 U.S. at 142.

102. *Id.* at n.11. Note that Underwood's property was seized from Duckett's home and that arguably Underwood could have challenged the search and seizure on this basis.

103. The conclusion that *Rakas* requires an expectation of privacy to be grounded in proprietary interests may result from a misreading of Rawlings v. Kentucky, 448 U.S. 98 (1980), in which the Court held that the defendant did not establish a legitimate expectation of privacy in a third party's purse into which he had thrown contraband. Important factors in *Rawlings* were that the defendant and the owner of the purse were merely acquaintances, however, and the defendant himself stated that he had no expectation that the purse would remain free from governmental intrusion. *Id.* at 105. Under a totality of the circumstances analysis, the defendant had no legitimate expectation of privacy in the purse. *Rawlings*, therefore, does not necessarily stand for the proposition that expectations of privacy in seized items are insufficient to invoke the exclusionary rule unless the defendant establishes a property interest in the area searched.

fact used this approach in its analysis of *Jones* to conclude that Jones had a legitimate expectations of privacy.[104] Such a test for standing would allow a wider application of the exclusionary rule to redress illegal searches and seizures than an approach which relies on proprietary interests to establish an expectation of privacy. The totality of the circumstances approach reinforces the vitality of *Steagald* and strengthens the deterrent effect of *Payton* and *Steagald* on improper police activity because it grants more defendants the ability to suppress evidence seized in violation of the fourth amendment.

IV. CONCLUSION

In *United States v. Underwood,* the Ninth Circuit invited police abuse of search warrant requirements by holding that the *Payton* predicates satisfy fourth amendment requirements for entries into a third party residence to search for a suspect. Although under *Steagald* police are required to obtain a search warrant before entering a third party's home to make an arrest, *Underwood* precludes the guest-arrestee from challenging the absence of a search warrant. The holding in *Underwood* thus invites violations of *Steagald.* Instead of extending *Payton,* the court should have employed a two-step inquiry, asking first whether Underwood had a legitimate expectation of privacy, and second whether the warrantless search and seizure was unlawful. Applying this analysis, the court would have reached the opposite result—Underwood possessed a legitimate expectation of privacy in his friend's house, and the warrantless search was unconstitutional because no warrant exception applied.

To determine whether any particular defendant enjoyed a sufficient expectation of privacy to challenge a search and seizure, courts should employ the totality of the circumstances test currently used in substantive fourth amendment analysis. Use of this test will lead to a greater use of the exclusionary rule at trial and will provide police with more incentive to follow the warrant requirements which are set forth in the language of the fourth amendment and reinforced by the Supreme Court in *Payton* and *Steagald.*

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104. *See supra* notes 86–88 and accompanying text.