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Fourth Amendment--Balancing the Interests in Third Party Home Arrests

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FOURTH AMENDMENT—BALANCING THE INTERESTS IN THIRD PARTY HOME ARRESTS

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

Last term, the Supreme Court protected the privacy interests of individuals whose homes police seek to search when pursuing the subject of an arrest warrant. In *Steagald v. United States*,[1] the Court resolved an important fourth amendment issue by holding that, absent exigent circumstances or consent, a law enforcement officer may not legally search for the subject of an arrest warrant in the home of a third party without a search warrant.[2] The *Steagald* Court recognized that, "the right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures"[3] is far more important than the need for the po-

[1] 101 S. Ct. 1642 (1981), *rev'g sub nom.*, United States v. Gaultney 606 F.2d 540 (5th Cir. 1979).

[2] This issue had previously divided the circuits. Three circuits had held that in the absence of exigent circumstances, a search warrant is required before law officers may enter the home of a third party to execute an arrest warrant. *See* Government of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Wallace v. King, 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 562 (1980); United States v. Prescott, 581 F.2d 1343 (4th Cir. 1978). In addition to the Fifth Circuit, which was ultimately reversed by the Supreme Court in the *Steagald* decision, United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979), two other circuits have taken the position that a search warrant is not required in such situations if the police have an arrest warrant and reason to believe that the person to be arrested is within the home to be searched. *See* United States v. McKinney, 379 F.2d 259 (6th Cir. 1967); United States v. Harper, 550 F.2d 610 (10th Cir. 1977), *cert. denied*, 434 U.S. 837 (1977). The Second Circuit has suggested in dictum that it subscribes to this latter view. *See* United States v. Manley, 632 F.2d 978, 983 (2d Cir. 1980). The Court of Appeals for the District of Columbia has indicated that it would require a search warrant in such cases. *See* United States v. Ford, 553 F.2d 146, 159 n.45 (1977). Two other courts of appeals have left the issue open. *See* United States v. Adams, 621 F.2d 41, 44 n.7 (1st Cir. 1980); Rice v. Wolff, 513 F.2d 1280, 1292 n.7 (8th Cir. 1975), *rev'd on other grounds sub nom.*, Stone v. Powell, 428 U.S. 465 (1976). The Seventh Circuit has never considered the question.

Most modern commentators agree that a search warrant should be required in *Steagald* situations. *See* 2 W. LAFAVE, SEARCH AND SEIZURE 374, 384-85 (1978); Groot, *Arrests in Private Dwellings*, 67 VA. L. REV. 275 (1981); Rotenberg & Tanzer, *Searching for the Person to be Seized*, 35 OHIO ST. L. J. 56, 67-71 (1974); Comment, *Arresting a Suspect in a Third Party's Home: What is Reasonable?*, 72 J. CRIM. L. & C. 293 (1981); Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 STAN. L. REV. 995, 997-999 (1971). *But see* Mascolo, *Arrest Warrants and Search Warrants: The Seizure of a Suspect in the Home of a Third Party*, 54 CONN. B. J. 299 (1980) (conclusion that search warrants should not be required in *Steagald* situations).

[3] *See* U.S. CONST. amend. IV:

lice to conduct a warrantless search.[4] The Court, however, failed to explain fully why, in this instance, the public's fourth amendment rights outbalanced the need for a warrantless search.[5] Justice Rehnquist, in his *Steagald* dissent, did conduct a balancing test and concluded that the need for a warrantless search was more important than the protection of the privacy of a home.[6] However, he gave far too little weight to the public's fourth amendment privacy rights and too much to the need for a warrantless search. If the majority had explicitly performed this balancing test, it not only would have reached a different result than the dissent, but would have presented a more convincing and unassailable argument in favor of individual privacy.

I. FACTS OF STEAGALD

In mid-January 1978, the Federal Drug Enforcement Administration (DEA) learned from a reliable informant the whereabouts of Ricky Lyons, a fugitive wanted on federal drug charges.[7] An arrest warrant had been issued for Lyons six months previously.[8] Two days after discovering Lyons' whereabouts, Agent Kelly Goodowens of the DEA, along with eleven other police officers and federal agents, drove to the address provided by the informant. Hoyt Gaultney and Gary Steagald

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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.

[4] Steagald v. United States, 101 S. Ct. 1642, 1653 (1981).

[5] The balancing test was first introduced in Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 537 (1967). The search in *Camara* was an administrative search in which a housing inspector from the San Francisco Department of Public Health sought to inspect an apartment building for possible violations of the city's housing code. The fourth amendment prohibits unreasonable searches and the Court has said in the past that a search or seizure without a warrant is per se unreasonable unless it falls under a carefully defined set of circumstances. Coolidge v. New Hampshire 403 U.S. 443, 474-75 (1971). A search warrant is normally issued upon a showing of probable cause to believe that evidence of a crime will be found in the place to be searched. *See* note 20 *infra*. In *Camara*, however, the reasonableness of the search was judged by a different standard than traditional probable cause. The Court instead determined the reasonableness of the search by balancing "the need to search against the invasion which the search entails." 387 U.S. at 537. The Court eventually used a watered-down standard for probable cause (belief that conditions in the area as a whole were below code standards) to permit the administrative search. *Id.* at 538.

[6] Steagald v. United States, 101 S. Ct. at 1653-55 (Rehnquist, J., dissenting).

[7] United States v. Gaultney, 606 F.2d 540, 542-43 (5th Cir. 1979). The informant contacted an agent of the DEA and revealed that he might be able to locate Ricky Lyons. The agent told him to call back when he could give Lyons' definite location. The informant called the agent ten days later and gave him a telephone number in the Atlanta, Georgia, area at which the informant claimed Lyons could be reached. Another DEA agent later contacted the Southern Bell Telephone Company and found the address corresponding to the telephone number given by the informant.

[8] 101 S. Ct. at 1644.

were standing outside the house. After frisking both men and determining that neither was Ricky Lyons, the agents walked up to the front door of the building.[9] They encountered Gaultney's wife, who told the agents that no one else was in the house. Nevertheless, she was told to place her hands against the wall while an agent searched the house for Lyons.[10] Although Lyons was not found, the agent discovered a small amount of what he believed to be cocaine. Goodowens sent an officer to obtain a search warrant while he conducted a second search of the house, which uncovered more cocaine. Pursuant to the search warrant, a third search was conducted later that day and forty-three pounds of cocaine were discovered. Steagald and Gaultney were then arrested and indicted on federal drug charges.[11]

Prior to his trial, Steagald moved to suppress all the evidence discovered during the three searches on the grounds that the officers did not have a search warrant before entering the house.[12] At the suppression hearing, Goodowens testified that he did not obtain a search warrant because he believed that the arrest warrant gave him authority to enter the house and conduct a search.[13] The district court agreed and denied the suppression motion.[14]

The Fifth Circuit, in a divided opinion, affirmed the district court's denial of Steagald's suppression motion.[15] The court of appeals relied on its previous decision in *United States v. Cravero*,[16] which held that when an officer reasonably believes that the subject of a valid arrest warrant is within premises belonging to a third party, he need not obtain a search warrant to enter the house for the purpose of arresting the subject.[17] The Supreme Court granted certiorari[18] to decide whether, under the fourth amendment, a law enforcement officer may search for the subject

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9 *Id.*

10 *Id.*

11 United States v. Gaultney, 606 F.2d at 542. Hoyt A. Gaultney and Gary K. Steagald were indicted for the possession of cocaine in violation of 21 U.S.C. § 841(a)(1), and conspiracy to possess cocaine with the intent to distribute, in violation of 21 U.S.C. § 846. Gaultney was also indicted for the unlawful importation of cocaine in violation of 21 U.S.C. § 952(a). Both men were eventually convicted on these charges.

12 Steagald v. United States, 101 S. Ct. at 1645.

13 *Id.*

14 *Id.*

15 United States v. Gaultney, 606 F.2d 540.

16 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

17 The test presented in *Cravero* was framed in terms of the officer's reasonable belief:

> Reasonable belief embodies the same standards of reasonableness [as does probable cause] but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

545 F.2d at 421.

18 449 U.S. 819 (1980).

of an arrest warrant in the home of a third party without first obtaining a search warrant.[19]

II. THE COURT'S RATIONALE

The Supreme Court, by a 7-2 vote, reversed the judgments of the lower courts. Justice Marshall wrote the majority opinion, which held that a search warrant is required to protect the privacy interests of third parties when police enter their homes in search of the subject of an arrest warrant. Justice Rehnquist, joined by Justice White, authored the dissenting opinion, which maintained that search warrants should not be required in such situations because the government's need for a warrantless search outweighs the privacy interest of the third parties.

The majority opinion initially examined the purposes of arrest and search warrants to determine whether an arrest warrant sufficiently protected a third person's interests in the privacy of his home. Justice Marshall explained that the purpose of a warrant is to permit a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search.[20] Justice Marshall noted, however, that arrest and search warrants serve different interests. While an arrest warrant protects an individual from an unreasonable seizure, a search warrant protects the person from an unreasonable intrusion into his home. When the officers entered Steagald's home they possessed an arrest warrant which protected Ricky Lyons from an unreasonable seizure,[21] but

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[19] Steagald v. United States, 101 S. Ct. at 1644. During both the trial and the appeal of this case the Government successfully argued that Steagald had sufficient connection with the searched home to establish his constructive possession of the cocaine found in the home. In its opposition to certiorari the Government specifically maintained that the searched home was Steagald's residence. When the case reached the Supreme Court the government attempted to argue that Steagald did not have a reasonable expectation of privacy in the home and urged the Court to remand the case to the district court for re-examination of that question. The Court ruled that the government had lost its right to raise the issue because it had made contrary assertions in the courts below. 101 S. Ct. at 1645-46.

[20] Probable cause is required in order for a warrant to issue because the fourth amendment states that ". . .no Warrants shall issue but upon probable cause. . .". *See* note 3 *supra*.

Probable cause to search exists when the facts and circumstances in a given situation are sufficient to warrant a man of reasonable caution to believe that seizable objects are located at the place to be searched. Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Carroll v. United States, 267 U.S. 132, 160 (1925). *See also* C. WHITEBREAD, CRIMINAL PROCEDURE 113 (1980).

In Beck v. Ohio, 379 U.S. 89, 91 (1964), the Court noted that the police have probable cause to arrest when, ". . . the facts and circumstances within their knowledge and of which they [have] reasonable trustworthy information [are] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."

[21] In United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975), the Court declared that, "[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." Until Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court had always held that unless a seizure was based on probable cause it was

did nothing to protect Gary Steagald from an unreasonable invasion and search of his home.[22] The warrant requirement was designed to prevent the police, who are too involved with solving the crime to be neutral, from assessing whether there is probable cause to search or seize.[23] Justice Marshall noted that Agent Goodowens' personal determination of probable cause to enter and search Steagald's home was therefore exactly what the warrant requirement was designed to eliminate.[24] Since the arrest warrant involved no prior judicial determination of probable cause to search Steagald's home, Justice Marshall reasoned that the search was no more reasonable than if the police had had no warrant at all.[25]

When Justice Marshall examined the history of the fourth amendment[26] he concluded that its framers most likely would not have sanctioned the search of Steagald's home.[27] The fourth amendment was aimed against the abusive general warrants used in England and the writs of assistance employed in the colonies.[28] The arrest warrant used in *Steagald* specified only the object of the search and, thus, like the writ of assistance and general warrant, left to the discretion of the police the homes which should be searched.[29] The fourth amendment, Justice Marshall maintained was created explicitly to prevent the type of unre-

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unreasonable. C. WHITEBREAD, *supra* note 20, at 60. In *Terry*, a police officer observed three men conducting themselves in a manner that indicated they were about to commit a robbery. Although the officer did not have probable cause he seized one of the men and patted down his outside clothing. He discovered a pistol which he removed. He then repeated the process on the other two men and found another pistol. Even though the officer did not have probable cause, the Court determined that the search was reasonable by applying a balancing test. The Court concluded that protecting the officer's safety by allowing him to search for weapons was more important than preventing the brief detention and pat down of the men. 392 U.S. at 30. This procedure, known as the stop and frisk, is now permitted without a warrant or a complete showing of probable cause.

22 *See* note 36 & accompanying text *infra* for an explanation of an unreasonable search.

23 Steagald v. United States, 101 S. Ct. at 1647-48.

24 A search warrant would have resulted in a neutral judicial magistrate rather than Agent Goodowens making the determination of probable cause.

25 101 S. Ct. at 1649.

26 *Id.* at 1650-51. Justice Marshall also examined the common law but concluded that it did not address the specific fact situation in *Steagald*. Justice Marshall noted that the common law rules evolved in a society far simpler than today's. Because crime and law enforcement methods have changed considerably, the fourth amendment's prohibition against unreasonable searches and seizures should be interpreted in light of today's norms. *Id.* at 1650 n.10. *See* Payton v. New York, 445 U.S. 573, 591 n.33 (1979); Katz v. United States, 389 U.S. 347, 352-53 (1967).

27 101 S. Ct. at 1651.

28 *Id.* at 1651. *See* Payton v. New York, 445 U.S. 573, 608-09 (White, J., dissenting); Boyd v. United States, 116 U.S. 616, 624-29 (1886).

29 *See* Stanford v. Texas, 379 U.S. 476, 481-85 (1965). *See also* notes 40-43 & accompanying text *infra*.

strained search which occurred in Steagald's home.[30]

Finally, Justice Marshall engaged in a very brief balancing test by comparing the additional burden of requiring police officers to obtain a search warrant to the individual's right to be free of unjustified intrusions. Without much elaboration, he concluded that the right of the people to be secure in their homes outweighed the need for a warrantless search. Therefore, the Court held that in order to render the *Steagald* search reasonable under the fourth amendment, a search warrant was required.[31]

In his dissent, Justice Rehnquist argued that both the reasonableness standard of the fourth amendment and the common law would have permitted the search of Steagald's home.[32] According to Justice Rehnquist, the absence of a search warrant should not have been the sole measure of the reasonableness of the search. Instead, he determined the reasonableness of the search by using a balancing test.[33]

Justice Rehnquist initially asserted that the government had a compelling interest in the warrantless entry of the dwelling of a third party to execute an arrest warrant because of the inherent mobility of a fugitive. Because a fugitive could flee from the dwelling at any time, Justice Rehnquist noted that the police would have no way of knowing whether the subject of an arrest warrant would still be in the dwelling when they returned from obtaining a search warrant. He concluded that a search warrant requirement under such circumstances would frustrate the government's compelling interest in apprehending criminals.[34]

Justice Rehnquist then argued that the interference with fourth amendment rights of third parties whose homes are entered under the authority of an arrest warrant was not that significant. He also pointed out that the arrest warrant serves some of the same protective functions as a search warrant. It assures occupants that the police are there on

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30 101 S. Ct. at 1651-52.

31 *Id.* at 1652-53.

32 Justice Rehnquist and Justice Marshall simply differed in their interpretations of the common law. Marshall interpreted the common law as not addressing the specific fact situation in *Steagald* while Rehnquist said that it did. *See* note 26 *supra*.

33 101 S. Ct. at 1654 (Rehnquist, J., dissenting). As justification for his use of the balancing test, Justice Rehnquist said, "[h]ere as in all Fourth Amendment cases reasonableness is still the ultimate standard." He then cited three cases that used the balancing test to determine reasonableness: Camara v. Municipal Court of San Francisco, 387 U.S. at 537; Wyman v. James, 400 U.S. 309, 318 (1971); and Marshall v. Barlow's, Inc., 436 U.S. 307, 315-16 (1978). All three of the above cases fall under the category of administrative searches, which are exceptions to the warrant requirement. The balancing test has been used by the Court to determine the reasonableness of these searches. *See* note 5 *supra*. *Steagald*, however, was an ordinary search of an individual's home and the Court has said that such warrantless searches are per se unreasonable. *See* note 5 *supra*. Therefore, the cases that Justice Rehnquist cites provide little justification for using the balancing test in the *Steagald* case.

34 101 S. Ct. at 1654 (Rehnquist, J., dissenting).

official business and it limits the scope of the search to the subject of the arrest warrant.[35]

Justice Rehnquist concluded that the government's need for a warrantless search outweighed the public's right to be free from such an intrusion. Since the burden placed on law enforcement officers who would have to obtain a search warrant in *Steagald* situations was greater than the interference with individual privacy interests, Justice Rehnquist declared that the warrantless search should have been permitted.[36]

III. ANALYSIS OF THE COURT'S REASONING

The Court employed sound reasoning in rightly deciding the *Steagald* case. Under the Court's standard fourth amendment analysis, a search of an individual's residence without a search warrant is per se unreasonable unless it falls within a carefully defined set of exceptions.[37] Since the search of Steagald's home did not fall under any of the exceptions to the warrant requirement, the majority concluded that a search warrant was required in order to render the search reasonable.

The majority could have made a much more effective argument for the unreasonableness of the *Steagald* search by elaborating on the balance between the governmental and individual interests. In *Steagald* the majority could have conducted the balancing test by determining whether Steagald's right to be free from a warrantless intrusion into his home outweighed the Government's need for a warrantless search of

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[35] *Id.* at 1654-55. Although Justice Rehnquist claimed that the search warrant limits the scope of the search to the subject of the arrest warrant, there are at least two exceptions to the warrant requirement, plain view and search incident to arrest, that can expand the scope of the search. *See generally* C. WHITEBREAD, *supra* note 20, at 133-40, 211-26.

Under the plain view doctrine, if a police officer had already made a valid intrusion and inadvertently discovers evidence in plain view he may seize it. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). The United States used the plain view doctrine to justify the first seizure of cocaine by police inside the Steagald home.

According to the search incident to arrest doctrine, when the police make a valid arrest, they are permitted to search the arrestee and the area within his immediate control. *See* United States v. Robinson, 414 U.S. 218 (1973). The search is generally not valid unless it takes place at the time and place of arrest. This doctrine was created to protect law enforcement officers and to prevent destruction of evidence.

[36] *Id.* at 1655.

[37] *See* Coolidge v. New Hampshire, 403 U.S. at 474-75; Payton v. New York, 445 U.S. at 586. The following searches are exceptions to the warrant requirement: searches incident to a lawful arrest, United States v. Robinson, 414 U.S. 218; Chimel v. California, 395 U.S. 752 (1969); consent searches, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); plain view searches, Coolidge v. New Hampshire, 403 U.S. 447; stop and frisk, Chambers v. Maroney, 399 U.S. 42 (1970), Terry v. Ohio, 392 U.S. 1; automobile searches, United States v. Santana, 427 U.S. 38 (1976), Carroll v. United States, 267 U.S. 132 (1925); hot pursuit and other emergency searches, Marshall v. Barlow's, Inc., 436 U.S. 307; United States v. Biswell, 406 U.S. 311 (1972); Warden v. Hayden, 387; U.S. 294 (1967); administrative searches, Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523.

Steagald's home. The Court usually employs the balancing test only when it is assessing the reasonableness of a search that is an exception to the warrant requirement.[38] Although *Steagald* involved no warrant exceptions, the balancing test would have improved the majority's argument in three ways. First, if the balancing test were correctly employed, it would have demonstrated the importance of protecting the public's fourth amendment privacy rights. Secondly, it would have revealed that the government's need to forego a search warrant in *Steagald* situations is not that great. Finally, it would have shown that Rehnquist improperly assessed the weights of the two opposing interests in his unchallenged use of the balancing test.[39] The majority's position would have been strongest if it had not only declared the *Steagald* search unreasonable because of the lack of a search warrant, but also showed that Steagald's privacy interests outweighed the Government's need for a search. This section outlines how the majority could have provided this missing step.

A. THE INDIVIDUAL PRIVACY INTERESTS

The history of the fourth amendment indicates the importance of the public's right to be secure in their homes. As Justice Marshall noted in *Steagald*, the fourth amendment was the framers' response to the abuses of the general warrants in England and the writs of assistance in the colonies. Writs of assistance were issued to colonial revenue officers

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[38] For cases in which the Court has employed the balancing test *see* Camara v. Municipal Court of San Francisco, 387 U.S. 523; Terry v. Ohio, 392 U.S. 1; United States v. Brignoni-Ponce, 422 U.S. 873, Marshall v. Barlow's, Inc., 436 U.S. 307. *But see* Michigan v. Summers, 101 S. Ct. 2587 (1981) (Court applies balancing test for a seizure which did not fall under one of the warrant exceptions).

The fourth amendment is comprised of two clauses. *See* note 3 *supra*. The first clause protects the public from "unreasonable searches and seizures." The second clause demands that warrants be based upon probable cause in order to be valid. *See* note 20 *supra*. The fourth amendment does not explicitly state whether a warrant is required for a search or seizure to be reasonable. The majority of the Court currently holds the position, however, that a search without a warrant is per se unreasonable. The majority therefore uses the balancing test only to judge the reasonableness of a warrantless search if it involves one of the exceptions to the warrant requirement. *See* note 37 *supra* for a list of the exceptions to the warrant requirement.

[39] For other examples of Justice Rehnquist's balancing test *see* Marshall v. Barlow's, Inc., 436 U.S. at 325 (Stevens, J., dissenting); Michigan v. Tyler, 436 U.S. 499, 516 (1978) (Rehnquist, J., dissenting).

Other Justices have at times agreed with Justice Rehnquist's views on warrantless searches. *See* Marshall v. Barlow's, Inc., 436 U.S. at 325 (Stevens, J., dissenting), in which Justice Rehnquist and Justice Blackmun joined in Justice Stevens' use of the balancing test; Steagald v. United States, 101 S. Ct. at 1653-54, in which Justice White joined Justice Rehnquist's use of the balancing test. More than any other justice, however, Justice Rehnquist has championed the position that a warrantless search can be shown to be reasonable through the use of the balancing test.

to enable them to search any home or building that they suspected contained smuggled goods.[40] By the mid-1700s, the citizens of the colonies began to rebel against this intolerable practice. In February 1761, a famous debate occurred in Boston over the practice. During this debate, James Otis called the writs of assistance, "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that was ever found in an English law book."[41] The Supreme Court called this debate, "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." It went on to say that the event was, "fresh in the memories of those who achieved our independence and established our form of government."[42] As a result the fourth amendment was directed primarily toward protection from physical entry into the home.[43]

Since the enactment of the fourth amendment the courts have unwaveringly upheld the right of the public to be free from unwarranted forcible intrusions into their homes.[44] Recently, in *Payton v. New York*, the Court observed that, "[t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."[45]

The right of the people to be free in their homes from unwarranted forcible intrusions is an essential element of a free society. This right was violated when the police forcibly entered Gary Steagald's home without a search warrant. The sanctioning of such a practice would deal a heavy blow to the privacy rights that the fourth amendment was specifically designed to protect.

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40 *See* Boyd v. United States, 116 U.S. at 625.

41 *Id.*

42 *Id.*

43 In United States v. United States District Court, 407 U.S. 297, 313 (1972), the Court said, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."

44 *See* Boyd v. United States, 116 U.S. at 630, in which the Court said that the principles embodied in the fourth amendment

> apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .

The following are some of the many cases that have upheld the public's right to be free from warrantless intrusions into their homes: United States v. Reed, 572 F.2d 412, 423 (2d Cir.), *cert. denied sub nom.*, Goldsmith v. United States, 439 U.S. 913 (1978); Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970); Berger v. New York, 388 U.S. 41, 53 (1967); Jones v. United States, 357 U.S. 493, 498 (1958); Wolf v. Colorado, 338 U.S. 25, 27 (1949); McDonald v. United States, 335 U.S. 451, 455 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948); Taylor v. United States, 286 U.S. 1, 6 (1932); Agnello v. United States, 269 U.S. 20, 33 (1925).

45 445 U.S. at 589.

The framers of the fourth amendment placed the probable cause requirement in the fourth amendment to prevent the police from indiscriminately searching people's homes as was done under the general warrants and writs of assistance. A neutral judicial magistrate must determine probable cause in order to avoid biased decisions to search made by law enforcers, as well as to assure the people of impartial approval of police action. In *Johnson v. United States*, the Supreme Court recognized that permitting the police to make a search of a home based only upon their belief that a suspect was within would reduce "the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."[46] The warrant requirement thus provides a safeguard from unreasonable intrusions by the police into individual homes.

The fourth amendment protects the public from all unreasonable searches of their homes regardless of their intrusiveness. In his dissent, Justice Rehnquist argued that the interference with Steagald's fourth amendment privacy rights was not significant because the police had obtained an arrest warrant which limited the scope of their search by specifying the object of the search.[47] In *Payton v. New York*, however, the Supreme Court noted that the scope of the search is not as important as the fact that the police have breached the entrance to the individual's home.[48] The presence of an arrest warrant did nothing to protect Steagald from an unreasonable intrusion into his home. In fact, if the arrest warrant were used as intended by Agent Goodowens in *Steagald*, there would be little distinction between it and the writs of assistance used during the colonial days. The police could use a single arrest warrant to search any home in which they believed that the suspect might be hiding.[49] Therefore the use of an arrest warrant to enter a third party's home to "unintrusively" search for a suspect infringes greatly upon the individual's right to be free of unreasonable intrusions into his home.

B. THE GOVERNMENTAL INTERESTS

The primary governmental interest served by the warrantless

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46 333 U.S. at 14.

47 101 S. Ct. at 1654-55 (Rehnquist, J., dissenting).

48 445 U.S. at 589.

49 Steagald v. United States, 101 S. Ct. at 1649. Although the police would be required to make an assessment of probable cause to search before entering the home, "history shows that the police acting on their own cannot be trusted." McDonald v. United States, 335 U.S. at 456. *See also* Fisher v. Volz, 496 F.2d 333, 337 (3d Cir. 1974) (officer testified that in twenty-six years on the police force he had never obtained a single search warrant); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (police used arrest warrants for two fugitives to search more than 300 homes).

search of a third party's home is assuring the capture of the suspect.[50] That goal, however, would not have been frustrated if the police had been required to obtain a search warrant for Steagald's home. Justice Rehnquist argued that requiring a search warrant would hinder police efforts in apprehending suspects because of the inherent mobility of fugitives.[51] This argument would not apply to the Steagald case because the police were aware of the alleged whereabouts of Ricky Lyons for two days before they actually went to Steagald's home. The police could easily have obtained a search warrant during the two day period preceding their initial arrival at Steagald's house.[52]

Furthermore, a lengthy interval between a crime or a decision to arrest and the actual arrest is not peculiar to the *Steagald* case. According to a 1967 study conducted for the President's Commission on Law Enforcement and Administration of Justice, in the majority of situations where the police would need to enter someone's residence to apprehend a suspect, a search warrant could be obtained and executed before the suspect had fled.[53]

Even if the police had come upon Lyons' hideout without the aid of a tip or other warning, they could have quickly obtained a search warrant by telephone.[54] The police could have set up a stakeout while they obtained the warrant in case Lyons attempted to flee the residence.[55]

Another governmental interest in conducting a warrantless search

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[50] In Terry v. Ohio, the Court recognized that effective crime prevention and detection is a legitimate governmental interest. 392 U.S. at 22.

[51] 101 S. Ct. at 1649 (Rehnquist, J., dissenting).

[52] Agent Goodowens testified that there had been no "physical hindrance" preventing him from obtaining a search warrant and that he did not obtain one because he believed that the arrest warrant for Ricky Lyons was sufficient to justify the entry and search. 101 S. Ct. at 1645. A more credible explanation for the absence of a search warrant is Goodowens' realization that the information received from the informant was insufficient to convince a neutral magistrate that there was probable cause to believe that Ricky Lyons was at the location to be searched.

[53] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 96 (1967). For a concise summary of this study's findings *see* 2 W. LAFAVE, *supra* note 2, at 374, 380-81 (1978).

[54] 101 S. Ct. at 1652. *See* FED. R. CRIM. P. 41(c)(1)-(2).

[55] In his Steagald dissent, 101 S. Ct. at 1654, Justice Rehnquist quoted from Justice White's dissent in *Payton v. New York* which observed that "the police could reduce the likelihood of escape by staking out all possible exits . . . the costs of such a stakeout seems excessive in an era of rising crime and scarce police resources." 445 U.S. at 619.

Extensive police stakeouts will seldom be necessary since the situations in which a search warrant will be necessary are not numerous. Steagald v. United States, 101 S. Ct. at 1652. An arrest warrant alone is sufficient to enter the arrestee's own home in order to effect his arrest. Payton v. New York, 445 U.S. at 602-03. Furthermore, no warrant at all is required to arrest a suspected felon in a public place if probable cause exists. United States v. Watson, 423 U.S. 411 (1976).

If a stakeout should become necessary it would take little time to obtain a search warrant by telephone; the length and cost of the stakeout would thus be minimal.

is the protection of police officers and citizens.[56] The police and the third parties with whom the suspect is living could be endangered if the search warrant requirement gave the suspect more time to arm himself in the third party home.[57] However, in most cases the police will have established probable cause to obtain a search warrant before arriving at the suspected hideout of the fugitive.[58] The police would be at the door before the suspect was even aware that he had been discovered. If a situation arose where the police had to stake out a dwelling where a dangerous suspect was hiding while they waited for a search warrant, the exigent circumstances doctrine would allow them to forego the warrant requirement since it would endanger their safety and the safety of third parties in the home.[59]

In his *Steagald* dissent, Justice Rehnquist speculated that a search warrant requirement could cause increased uncertainty for police officers, committing magistrates, and trial judges who must decide whether a search warrant is required when confronting variations of the *Steagald* situation.[60] For instance, if a suspect is believed to have been living for a short period of time in a dwelling owned by a third party, law enforcement officials would need to decide whether that dwelling could be considered the suspect's home for fourth amendment purposes. If the dwelling is considered the suspect's home, then the police could search the dwelling without a warrant.[61] On the other hand, if the dwelling is not considered the suspect's home, then a search warrant would be needed.[62] If the police fear that a suspect is about to flee from a third party's home and they do not have a search warrant, they must decide whether the exigent circumstances doctrine will permit them to enter without a search warrant.[63] This uncertainty places a valid bur-

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56 In Terry v. Ohio, 392 U.S. at 23, the Court recognized the protection of police officers as a valid governmental interest. *See* Comment, *supra* note 2, at 315-16 for a further discussion.

57 *See* Comment, *supra* note 2, at 315-16.

58 *See* notes 50-55 & accompanying text *supra*.

59 *See* 2 W. LAFAVE, *supra* note 2, at 374, 380-81. According to the exigent circumstances doctrine if a search or seizure involves imminent danger to the police or the impending destruction or disappearance of possible evidence, the police are not required to obtain a warrant. This is one instance where the privacy protection afforded by the warrant requirement is outweighed by the needs of effective law enforcement. *See* C. WHITEBREAD, *supra* note 20, at 152-53. The most common situation involving exigent circumstances is hot pursuit. For instance, if the police witness a crime and chase the felon into a house a search warrant is not required. *See* United States v. Santana 427 U.S. 38 (1976); Warden v. Hayden, 387 U.S. 294 (1967).

60 101 S. Ct. at 1657 (Rehnquist, J., dissenting).

61 *See* Payton v. New York, 445 U.S. at 602-03.

62 101 S. Ct. at 1644.

63 *See* note 59 *supra*.

den on law enforcement officials and must be considered in the balancing process.

A final governmental interest promoted by a warrantless search is the avoidance of administrative inconvenience that would occur from a search warrant requirement. The Supreme Court has previously suggested, however, that inconvenience for law enforcement officials is not an adequate reason to overlook fourth amendment privacy rights.[64]

C. BALANCING THE INTERESTS

Bypassing the search warrant requirement in *Steagald* situations would result in a serious erosion of the public's fourth amendment privacy rights. Enforcing the search warrant requirement would do nothing more than cause increased uncertainty for law enforcement officials. Protecting the privacy interests of the public is a much more important goal than decreasing police uncertainty. The fourth amendment was enacted to do away with the writs of assistance and general warrants. The absence of a search warrant requirement in *Steagald* situations would result in a large step back to the days when the writs of assistance and general warrants were issued freely, and the people were "secure in their homes only at the discretion of the police."[65] The avoidance of uncertainty for law enforcement officials is not nearly a compelling enough reason to justify such a drastic step.

IV. CONCLUSION

The balancing test provides an instructive method for determining whether a search is reasonable under the fourth amendment. Instead of simply stating that the *Steagald* search was unreasonable because the police did not have a warrant, the Supreme Court majority could have balanced the interests of the public against the interests of the government to demonstrate why the search was unreasonable. By doing so, the majority would have shown that a search which is per se unreasonable under its analysis does not suddenly become reasonable under a balancing test analysis. The public's fourth amendment privacy rights are heavy, and thus they are not easily outweighed.

G. ANDREW WATSON

64 Johnson v. United States, 333 U.S. at 15.

65 *See* note 46 *supra*.