

**RESOLVING THE REASONABLE BELIEF AND PROBABLE CAUSE CIRCUIT  
SPLIT STEMMING FROM *PAYTON* AND *STEAGALD***

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INTRODUCTION

Johnny Vasquez-Algarin was at home in Harrisburg, Pennsylvania when Deputy U.S. Marshal Gary Duncan knocked on his door in 2010.<sup>1</sup> Vasquez-Algarin did not answer the knock immediately, while Deputy Marshal Duncan “heard a lot of movement inside,” including a phone ringing and a dog barking.<sup>2</sup> But as quickly as the ringing and barking began, they stopped.<sup>3</sup> Suspicious, Deputy Marshal Duncan, officers from the Harrisburg Bureau of Police, and the Dauphin County Drug Task Force forcibly entered the home.<sup>4</sup> Moving inside, the officers identified sandwich baggies, a razor blade, and powdered cocaine.<sup>5</sup> A broader search revealed ammunition, unused plastic bags, hundreds of small plastic bands, and car keys that opened a stolen car across the street.<sup>6</sup> At his subsequent trial, Vasquez-Algarin moved to suppress the evidence from the search, but was unsuccessful.<sup>7</sup> He was ultimately convicted on two drug counts.<sup>8</sup> The rub? Deputy Marshal Duncan never had a warrant to search Vasquez-Algarin’s home. Instead, Deputy Marshal Duncan only had an arrest warrant for Edgardo Rivera—a suspect in a homicide case—and a tip from another law enforcement officer that Rivera was staying with Vasquez-Algarin.<sup>9</sup>

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<sup>1</sup> United States v. Vasquez-Algarin, 821 F.3d 467, 469–70 (3d Cir. 2016).

<sup>2</sup> *Id.* at 470.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 469–70.

<sup>5</sup> *Id.* at 470.

<sup>6</sup> *Id.* Vasquez-Algarin did not give consent for the search, and one officer later obtained a search warrant while the remaining officers stayed in Vasquez-Algarin’s apartment.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 471.

<sup>9</sup> *Id.* at 469.

## I. LEGAL FRAMEWORK

Police<sup>10</sup> in these situations are caught between two bright-line rules. In *Payton v. New York*, the Court held that “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>11</sup> But in *Steagald v. United States*, the Court held that police may not execute an arrest warrant in the home of a third person not named on the arrest warrant unless the police also have a search warrant for the third-person’s home.<sup>12</sup> This has led to an open question—how certain must police be that a suspect resides in a home before entering to execute an arrest warrant?

The Third,<sup>13</sup> Seventh,<sup>14</sup> and Ninth<sup>15</sup> Circuits have indicated that the Fourth Amendment requires an arrest warrant to arrest a suspect, and a search warrant to enter a third party’s home to execute the arrest warrant.

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<sup>10</sup> Throughout this paper, I will use the general terms “police” and “officers” to refer to all federal investigative branches of law enforcement. These include the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), United States Secret Service (USSS), and Homeland Security Investigation (DHS/HSI). While this paper focuses mainly on federal investigation, these terms also apply to state police as well, because the Fourth Amendment was incorporated against the states by the Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>11</sup> 445 U.S. 573, 603 (1980). For the purposes of this paper, I will call this the “*Payton* Standard.”

<sup>12</sup> 451 U.S. 204, 205–06 (1981). For the purposes of this paper, I will call this the “*Steagald* Standard.” The Supreme Court did leave open an exception for exigent circumstances and consent. *Id.* at 215–16. The specific factual situation at issue in this paper assumes neither exigent circumstances nor consent are present.

<sup>13</sup> *Vasquez-Algarin*, 821 F.3d at 480 (“Given this precedent and the constitutional principles at stake, law enforcement armed with only an arrest warrant may not force entry into a home based on anything less than probable cause to believe an arrestee resides at and is then present within the residence. A laxer standard would effect an end-run around the stringent baseline protection established in *Steagald* and render all private homes—the most sacred of Fourth Amendment spaces—susceptible to search by dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination. Such intrusions are ‘the chief evil against which the wording of the Fourth Amendment is directed.’ We therefore join those Courts of Appeals that have held that reasonable belief in the *Payton* context ‘embodies the same standard of reasonableness inherent in probable cause.’” (quoting *Payton*, 445 U.S. at 585, 100 S.Ct. 1371)).

<sup>14</sup> *United States v. Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) (stating, in dicta, that “[w]ere we to reach the issue, we might be inclined to adopt the view of the narrow majority of our sister circuits that ‘reasonable belief’ is synonymous with probable cause.”).

<sup>15</sup> *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002) (“We now hold that the ‘reason to believe,’ or reasonable belief, standard of *Payton* and *Underwood* embodies the same standard of reasonableness inherent in probable cause.”).

The First,<sup>16</sup> Second,<sup>17</sup> Fifth,<sup>18</sup> Eighth,<sup>19</sup> Tenth,<sup>20</sup> Eleventh,<sup>21</sup> and D.C.<sup>22</sup> Circuits have held that officers must only have a “reasonable belief” that the suspect resides in the home to execute an arrest warrant for the suspect. The Sixth Circuit has not taken a position on the issue.<sup>23</sup>

This paper analyzes both positions, taking into consideration the text of the Fourth Amendment, the historical basis for the amendment, the balance of public and private interests, and the practical safeguards in place for each side. Ultimately, probable cause is the correct standard because the reasonable belief standard ignores the text and history of the Fourth Amendment,

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<sup>16</sup> *United States v. Graham*, 553 F.3d 6, 14 (1st Cir. 2009) (“[W]here police entered a premises with both a warrant for an individual’s arrest and a reasonable belief that the individual resided at the premises entered. . . . *Payton* permits entry for the limited purpose of arresting the subject of the arrest warrant.”).

<sup>17</sup> *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995) (“[T]he proper inquiry is whether there is a *reasonable belief* that the suspect resides at the place to be entered to execute an arrest warrant, and whether the officers have reason to believe that the suspect is present.”).

<sup>18</sup> *United States v. Barrera*, 464 F.3d 496, 500 (5th Cir. 2006) (“[T]he court should review the district court’s determination that law enforcement officers had an objectively ‘reasonable belief’ that the individual mentioned in the arrest warrant resided at and was presently within a particular residence.”).

<sup>19</sup> *United States v. Risse*, 83 F.3d 212, 217 (8th Cir. 1996) (“Based on the evidence presented, it is clear that [the officer’s] belief that [the suspect] resided [at the home] was, as a matter of law, reasonable, and thus the officers could enter the residence armed only with an arrest warrant for [the suspect].”).

<sup>20</sup> *Valdez v. McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1999) (“This court finds the defendants were entitled to enter the [suspect’s] residence if there was a reasonable basis for believing that [the suspect] both (1) lived in the residence and (2) could be found within at the time of entry. As to the level of knowledge required by the officers, the Supreme Court in *Payton* explicitly indicated that entry is permissible so long as there is ‘reason to believe the suspect is within.’ 445 U.S. at 603, 100 S.Ct. 1371. There is no substantial reason to believe that the standard of knowledge should be different or greater when it comes to the other prong of the *Payton* test, whether the suspect resides at the house. It would be curious indeed if the two prongs of the test were governed by two different standards of proof.”).

<sup>21</sup> *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995) (“We think it sufficient to hold that in order for law enforcement officials to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect’s dwelling, and that the suspect is within the residence at the time of entry.”).

<sup>22</sup> *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005), *rev’g in part*, 179 F. App’x 60 (D.C. Cir. 2006) (“We think it more likely, however, that the Supreme Court in *Payton* used a phrase other than ‘probable cause’ because it meant something other than ‘probable cause.’ Accordingly, we expressly hold that an officer executing an arrest warrant may enter a dwelling if he has only a ‘reasonable belief,’ falling short of probable cause to believe, the suspect lives there and is present at the time.”).

<sup>23</sup> *United States v. Hardin*, 539 F.3d 404, 416 (6th Cir. 2008), expressly stated that the Sixth Circuit has not adopted a specific standard. This contradicts *United States v. Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007) (holding that “a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant”). However, the analysis in *Hardin* suggests that the Sixth Circuit has never had to reach a decision on the issue because the facts of the cases before it have never rested somewhere in between reasonable belief and probable cause, so any resolution of the issue was merely dicta. 539 F.3d at 410–11.

and the traditional safeguards of the Fourth Amendment are insufficient when the bar is lowered to a reasonable belief.

## II. WHAT CONSTITUTES A REASONABLE BELIEF?

Traditionally, the Fourth Amendment requires that police obtain a search warrant by demonstrating probable cause to a neutral magistrate.<sup>24</sup> Police establish probable cause when “the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.”<sup>25</sup> Police can circumvent the warrant requirement if the court has established a “well-delineated” exception.<sup>26</sup> The Supreme Court in *Payton* undoubtedly established such an exception when it allowed officers to enter a suspect’s home without a search warrant to arrest the suspect.<sup>27</sup>

Circuit courts have turned this into a two-pronged approach. “In a *Payton* analysis, this court recognizes a two-prong test: officers must have a reasonable belief the arrestee (1) lives in the residence, and (2) is within the residence at the time of entry.”<sup>28</sup> The Ninth Circuit has explicitly rejected this formulation, and would require probable cause instead of reasonable belief,<sup>29</sup> but many other circuits have adopted it. Thus, it is essential to establish the difference between “information sufficient to warrant a man of reasonable caution” that a suspect lives in a home, and a mere “reasonable belief” that a suspect lives in the home.<sup>30</sup>

For example, the First Circuit in *United States v. Graham* looked at the totality of the information available to police before they entered a home to assess whether the police had a reasonable belief that the suspect resided in

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<sup>24</sup> See U.S. CONST. amend. IV.

<sup>25</sup> *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (alterations in original) (citing *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

<sup>26</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>27</sup> See *supra* note 11 and accompanying text.

<sup>28</sup> *United States v. Gay*, 240 F.3d 1222, 1226 (10th Cir. 2001) (citing *Valdez v. McPheters*, 172 F.3d 1220, 1224–25 (10th Cir. 1999)).

<sup>29</sup> *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002) (holding that the reason to believe standard “embodies the same standard of reasonableness inherent in probable cause.”).

<sup>30</sup> For the purposes of this paper, I will not examine whether police have a reasonable belief that suspect “is within the residence at the time of entry” because the majority of cases focus on the first prong of the analysis as dispositive of the issue. The suspect tends to be in the home.

the home.<sup>31</sup> The defendant was on probation for drug offenses and connections to a violent neighborhood gang.<sup>32</sup> The defendant violated his probation, and police obtained an arrest warrant.<sup>33</sup> The defendant's probation officer thought he was living with his mother, but was mistaken.<sup>34</sup> A few months later, the defendant's probation officer learned that the defendant was "staying at" a house in the neighborhood.<sup>35</sup> When police arrived at the house to arrest the defendant, a woman denied that the defendant was present, but police entered and found the defendant in a back room with clothes, toiletries, shoes, and other assorted personal artifacts.<sup>36</sup>

Assessing whether the police had a reasonable belief that the defendant resided at the house, the First Circuit considered the totality of the circumstances and stated that "certain facts will almost always give rise to a reasonable belief that the subject of an arrest warrant resides at the place entered."<sup>37</sup> The police could point to five separate pieces of information to establish that belief. That information included (1) a police report listing the house as the defendant's address; (2) a probation officer's statement that the defendant was "staying at" the house; (3) an identification by a witness outside the house that pointed at the house when police provided a picture of the defendant; (4) the probation officer's connection between the defendant and other gang members the probation officer knew to reside at the house; and (5) the police's inability to find the defendant at his previous address.<sup>38</sup> The First Circuit also refused to assess what police found after they entered the house; only information available to the police prior to entry could be used to justify the reasonable belief.<sup>39</sup>

Courts applying the probable cause standard appear to be more stringent. In *United States v. Gorman*, the Ninth Circuit suggested that police who relied on the suspect's friend to provide the location of a home and later identified the suspect's car outside the home could possibly demonstrate "reasonable suspicion," but did not meet a probable cause standard.<sup>40</sup> Another court has held that a tip from a confidential informant and eyewitness identification are not sufficient to establish even a reasonable belief.<sup>41</sup> However,

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<sup>31</sup> *United States v. Graham*, 553 F.3d 6, 14 (1st Cir. 2009).

<sup>32</sup> *Id.* at 10.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 10–11.

<sup>37</sup> *Id.* at 13.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 14 (noting that "[t]his Monday-morning quarterbacking does nothing . . . [w]hat the police discovered *after* they entered the apartment cannot help us determine what the officers could have reasonably believed *before* entering").

<sup>40</sup> 314 F.3d 1105, 1107–08, 1111 (9th Cir. 2002).

<sup>41</sup> *United States v. Hardin*, 539 F.3d 404, 407–08, 420 (6th Cir. 2008) (holding that a general description from a confidential informant and an eyewitness identification by an apartment manager were

one court has found that police can rely on an anonymous tip and a witness identification to establish probable cause.<sup>42</sup>

Overall, the majority of courts applying the reasonable belief standard consider the totality of evidence available to police at the time of entry. For example, police may rely on their own observations,<sup>43</sup> confidential informants,<sup>44</sup> the suspect's own statements,<sup>45</sup> local police departments and federal investigative agencies,<sup>46</sup> eyewitnesses,<sup>47</sup> and successful contact with the suspect at the address in question.<sup>48</sup>

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insufficient to establish a reasonable belief that the suspect was a resident).

<sup>42</sup> *United States v. Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) (holding that an anonymous tip and identification of the suspect by the suspect's girlfriend in the lobby of her apartment building constituted probable cause).

<sup>43</sup> *United States v. Barrera*, 464 F.3d 496, 504 (5th Cir. 2006) (finding reasonable belief when officers observed the suspect's cars at the residence in question); *Valdez v. McPheters*, 172 F.3d 1220, 1227 (10th Cir. 1999) (finding a reasonable belief based, in part, on a Bureau of Indian Affairs officer's observations that the suspect's truck was located at the residence in question).

<sup>44</sup> *United States v. Risse*, 83 F.3d 212, 217 (8th Cir. 1996) (finding a reasonable belief based on information from a confidential informant that the suspect was living in the home); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995) (finding a reasonable belief when a confidential informant whose father owned the apartment building told ATF agents where in the building the suspect was living and that the suspect was unemployed and slept late); *United States v. Magluta*, 44 F.3d 1530, 1532, 1538 (11th Cir. 1995) (finding a reasonable belief when a confidential informant gave U.S. Marshals a map showing the location of the suspect's residence and identified a smaller residence on the premises).

<sup>45</sup> *Risse*, 83 F.3d at 216–17 (finding a reasonable belief when the suspect told police herself that she was “staying with” the homeowner, even though the suspect maintained a permanent residence elsewhere).

<sup>46</sup> *United States v. Graham*, 553 F.3d 6, 10 (1st Cir. 2009) (finding a reasonable belief in part based on information from a Boston Police Department report of domestic violence that listed the suspect's residence as the home in question); *Barrera*, 464 F.3d at 504 (finding that arrest records listing the residence in question as the suspect's address supported a reasonable belief that the suspect lived at the residence); *United States v. Thomas*, 429 F.3d 282, 285–86 (D.C. Cir. 2005) (finding that police merely stating that they have performed an investigation amounts to a “systematic official inquiry” when the only information available to police was the suspect's address on file as a condition of his parole); *Valdez*, 172 F.3d at 1226–27 (holding that information from the local police department that the suspect “comes into the city on weekends, does a burglary or two then goes back [home],” information from Bureau of Indian Affairs officers that the suspect lives with his mother, and information from the officer's personal observations about the location of the suspect's truck to be sufficient to establish a reasonable belief).

<sup>47</sup> *Graham*, 553 F.3d at 10 (finding a reasonable belief when a person who answered the outer door to a building sees a picture of the suspect and directs police to the residence in question); *Magluta*, 44 F.3d at 1532 (finding a reasonable belief when U.S. Marshals secured a positive identification from the suspect's afternoon guard).

<sup>48</sup> *Risse*, 83 F.3d at 217 (finding that successful contact with the suspect twice at the residence in question, and an unsuccessful attempt to contact the suspect at a different residence, were sufficient to establish reasonable belief).

### III. ADVOCATING FOR THE REASONABLE BELIEF (“PAYTON”) STANDARD

Practical implications and the modern Fourth Amendment suggest that the *Payton* reasonable belief standard should apply. When police have already demonstrated probable cause to a neutral magistrate that a suspect has committed a felony, that probable cause should suffice to justify a search for the suspect. Moreover, the exclusionary rule and *Bivens* actions provide significant protection to enforce the Fourth Amendment.

#### A. Police Have Already Demonstrated Probable Cause to a Neutral Magistrate

This question centers on the specific scenario in which police have already obtained an arrest warrant for a suspect. Thus, police have already demonstrated to a neutral magistrate that there is probable cause to arrest the suspect. The Supreme Court said just that in *Payton*:

It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate’s determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen’s participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.<sup>49</sup>

This position makes sense for a number of reasons. First, using an arrest warrant plus a reasonable belief saves a time when officers only have to go to the magistrate once.<sup>50</sup> Second, probable cause itself is a doctrine of reasonableness, not certainty.<sup>51</sup> Third, why should criminals benefit from a higher standard when they are potentially harboring subjects of an arrest warrant for whom police have already demonstrated probable cause to believe that a crime was committed? The Fourth Amendment protects privacy, not places.<sup>52</sup> And there are substantial penalties in place for harboring aliens and other fugitives from justice,<sup>53</sup> which indicates that the federal government

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<sup>49</sup> *Payton v. New York*, 445 U.S. 573, 602–03 (1980).

<sup>50</sup> *Magluta*, 44 F.3d at 1534–35 (quoting *United States v. Woods*, 560 F.2d 660, 665 (5th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978)).

<sup>51</sup> *Magluta*, 44 F.3d at 1534–35. *See also infra* note 105 (discussing the use of reasonable belief to define probable cause).

<sup>52</sup> *Katz v. United States*, 389 U.S. 347, 351–52 (1967), *superseded by statute*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 212–223 (codified at 18 U.S.C. §§ 2510–2520 (1968)).

<sup>53</sup> *See, e.g.*, 8 U.S.C. § 1324 (harboring aliens); 18 U.S.C. §§ 751–753, 755–757 (the escape and rescue provisions); 18 U.S.C. § 1071 (concealing a person from arrest); 18 U.S.C. § 1072 (concealing an escaped prisoner); 18 U.S.C. §§ 1073–74 (flight to avoid prosecution or giving testimony provisions).

does not feel that privacy interests are to be given the same effect when aiding criminal behavior is at play.

### *B. Sufficient Criminal and Civil Safeguards are in Place*

Separate criminal and civil safeguards are in place to remedy any potential Fourth Amendment violation by overzealous police officers using only the *Payton* reasonable belief standard. In criminal cases, the exclusionary rule enforces the Fourth Amendment. On the civil side, individuals may recover money damages from federal officials via *Bivens* actions. Returning to the Vasquez-Algarin case, two separate remedies were available.

#### *1. The Exclusionary Rule*

On the criminal side, the exclusionary rule allowed Vasquez-Algarin to challenge the constitutionality of the search by police and suppress the evidence at trial.<sup>54</sup> The exclusionary rule, at its core, states that “all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in . . . court.”<sup>55</sup> The exclusionary rule applies to all investigative officials, federal, state, and local.<sup>56</sup> There are two distinct rationales for the exclusionary rule: promoting “judicial integrity” and deterring “future constitutional violations.”<sup>57</sup> However, the Court has limited its analysis to only the second rationale.<sup>58</sup> In theory, the exclusionary rule should deter police from searching every single house on the block to find a suspect for whom they have an arrest warrant.<sup>59</sup> And in theory, the exclusionary rule should protect those homeowners that suffer Fourth Amendment violations at the hands of police if the police do end up searching every single house on the block.

Police will likely have to justify their reasonable belief at a suppression

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<sup>54</sup> Vasquez-Algarin did move to suppress the evidence obtained during Deputy Marshall’s search at his trial. *United States v. Vasquez-Algarin*, 821 F.3d 467, 470–471 (3d Cir. 2016). The trial court denied the motion to suppress, and Vasquez-Algarin appealed to the Third Circuit, which ultimately reversed the District Court’s denial of Vasquez-Algarin’s motion to suppress and vacated his conviction. *Id.* at 470–71, 484.

<sup>55</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), *abrogated by* *United States v. Leon*, 468 U.S. 897 (1984).

<sup>56</sup> *Mapp*, 367 U.S. at 655 (incorporating the exclusionary rule against the states via the Fourth and Fourteenth Amendments).

<sup>57</sup> THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT* 185 (2009) (analyzing the reasoning from *Mapp*).

<sup>58</sup> *See Leon*, 468 U.S. at 916 (“First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment . . . Third . . . [we don’t think] that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.”).

<sup>59</sup> *Cf. Lankford v. Gelston*, 364 F.2d 197, 198–200 (4th Cir. 1966) (detailing how police searched over 300 homes attempting to execute a single arrest warrant).



hearing. In the Vasquez-Algarin example, the defendant moved to exclude all evidence found as a result of the police's search at trial.<sup>60</sup> Deputy Marshal Duncan had to testify at the suppression hearing, where he stated that the "exact factors" that led to his reasonable belief that Edgardo Rivera was a resident at Vasquez-Algarin's home included information from another law enforcement officer and information from street informants.<sup>61</sup> Cross-examination revealed, however, that Deputy Marshal Duncan never verified the renter of the apartment.<sup>62</sup> Moreover, at trial, Deputy Marshal Duncan testified that "[t]he address was not the address of record for Mr. Rivera, so we wanted to knock and attempt to gain contact with somebody inside and gain their consent to search the address."<sup>63</sup> Based on these inconsistencies in Deputy Marshal Duncan's statements—the changed story, the lack of hard evidence demonstrating that Rivera was a resident of the apartment, and the substantial reliance on the shuffling sounds when Deputy Marshal Duncan knocked on the door—the Third Circuit reversed the District Court's denial of Vasquez-Algarin's motion to suppress and vacated his conviction.<sup>64</sup>

Admittedly, the Third Circuit held Deputy Marshal Duncan to a probable cause standard for his belief that Rivera was a resident. However, the reasoning may be extrapolated to the reasonable belief standard. This example demonstrates that legal safeguards are in place after police execute an arrest warrant.

Winning a suppression motion is far from guaranteed. And although criminal defendants face difficulties winning suppression motions, those are not the only reason that a reasonable belief standard does not adequately represent the Fourth Amendment. Concerns about the continued viability of the exclusionary rule suggest that the *Steagald* probable cause standard should win out. First, not all judges support the idea of the exclusionary rule.<sup>65</sup> The rule is not found in the text of the Fourth Amendment. Thus, it is a judicially-created remedy.<sup>66</sup> The Senate even held hearings in the 1980s to decide whether to reform or repeal the exclusionary rule.<sup>67</sup> Although the Supreme

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<sup>60</sup> United States v. Vasquez-Algarin, 821 F.3d 467, 470 (3d Cir. 2016).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 471.

<sup>64</sup> *Id.* at 480–84.

<sup>65</sup> See, e.g., Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence . . . has always been our last resort, not our first impulse."); United States v. Leon, 468 U.S. 897, 907 n.6 (1984) (pointing to empirical evidence that shows a large number of felons are released because evidence is excluded from trial).

<sup>66</sup> "This rule of evidence did not come from on high. It's man-made, not God-given . . . It's not even in the Constitution." Charles McC. Mathias Jr., *The Exclusionary Rule Revisited*, 28 LOY. L. REV. 1, 7 (1982) (quoting Judge Malcolm Wilkey).

<sup>67</sup> *The Exclusionary Rule Bills: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, on S.101, S.751 and S.1995, 97th Cong., 1 (1982).

Court has never officially repealed the exclusionary rule, the Court has consistently limited the rule since its “high water mark” in the 1960s.<sup>68</sup> For example,

The Burger Court consider[ed] the exclusionary rule as a strictly prophylactic, judicially created device legitimate only to the extent that it deters unlawful police conduct. It is not, in this view, an inherent or necessary part of the fourth amendment; rather, it is one of many possible remedial devices theoretically available to protect and preserve fourth amendment interests.<sup>69</sup>

Consequently, the exclusionary rule is not ironclad. The Court has called it merely a “judicially created remedy designed to safeguard Fourth Amendment rights generally through a deterrent effect, rather than a personal constitutional right of the party aggrieved.”<sup>70</sup> Moreover, “the rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings against all persons,” and should be “restricted to those areas where its remedial objectives are most efficaciously served.”<sup>71</sup> While courts would likely find that the remedial objective—here, deterring police from entering homes without a search warrant and encouraging them to first obtain the search warrant—to apply in cases like Vasquez-Algarin’s, the continued skepticism of the exclusionary rule in general casts doubt on the sufficiency of the remedy.

The rule is not absolute either. In fact, the Court has stated that whether application of the exclusionary rule is appropriate is to “be resolved by weighing the costs and benefits of preventing the use in the prosecution’s case in chief of inherently trustworthy tangible evidence” against an insufficient warrant, or a lack of a warrant altogether.<sup>72</sup> So, hypothetically, if police enter a third-party’s home and find significant evidence of criminal activity, the third party’s interests are only to be weighed by a judge; the Fourth Amendment rights are not absolute.<sup>73</sup> The trend of the Roberts Court has been to find more situations where the costs of exclusion are too high.<sup>74</sup>

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<sup>68</sup> MCINNIS, *supra* note 57, at 186.

<sup>69</sup> John. M. Burkhoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Doctrine*, 58 OREGON L. REV. 151, 152 (1979).

<sup>70</sup> *United States v. Calandra*, 414 U.S. 338, 348 (1974).

<sup>71</sup> *Id.*

<sup>72</sup> *United States v. Leon*, 468 U.S. 897, 906–07 (1984).

<sup>73</sup> Police tend to find lots of evidence of illegal activity when they enter homes. *See, e.g.*, *United States v. Graham*, 553 F.3d 6, 11 (1st Cir. 2009) (finding a shotgun and various types of ammunition in violation of the defendant’s parole); *United States v. Hardin*, 539 F.3d 404, 408, 420 (6th Cir. 2008) (finding three firearms, crack cocaine, marijuana, and approximately \$2,000 in cash); *United States v. Barrera*, 464 F.3d 496, 498 (5th Cir. 2006) (finding two firearms and \$10,000 in cash); *United States v. Gorman*, 314 F.3d 1105, 1108 (9th Cir. 2002) (finding three mailbox keys in violation of 18 U.S.C. § 1704 and several checks made out to other people in violation of 18 U.S.C. § 1708); *United States v. Lauter*, 57 F.3d 212, 214 (2d Cir. 1995) (finding a loaded shotgun and bag of ammunition to charge the defendant with felon in possession of a firearm under 18 U.S.C. § 922(g)(1)).

<sup>74</sup> MCINNIS, *supra* note 57, at 211. The Roberts Court has also allowed the prosecution to use tainted

Last, the good faith exception to the exclusionary rule would also likely subvert the protections that the rule should provide in cases like Vasquez-Algarin's. Allowing police to use only their reasonable belief as a substitute for a search warrant issued by a neutral magistrate opens up a whole host of possibilities. Just as "[t]he discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant,"<sup>75</sup> the discovery of facts demonstrating that an officer's reasonable belief was unnecessarily broad could serve as a broad good-faith exception to the exclusionary rule and essentially kill the application of the rule. The Court has already demonstrated a willingness to expand the good faith exception.<sup>76</sup>

The application of the exclusionary rule is too tenuous to justify the lower *Payton* reasonable belief standard. The Supreme Court in *Steagald* summed up the problems with the exclusionary rule the best:

Indeed, if suppression motions and damages actions were sufficient to implement the Fourth Amendment's prohibition against unreasonable searches and seizures, there would be no need for the constitutional requirement that in the absence of exigent circumstances a warrant must be obtained for a home arrest or a search of a home for objects. We have instead concluded that in such cases the participation of a detached magistrate in the probable-cause determination is an essential element of a reasonable search or seizure.<sup>77</sup>

While the exclusionary rule is good in theory, it is not sufficient to justify such a broad exception to the warrant requirement here.

## 2. *Bivens* Actions

On the civil side, Vasquez-Algarin could bring a *Bivens* action against specific federal officers for violations of his Fourth Amendment rights. In a *Bivens* action, a plaintiff sues federal officers directly in their individual capacities for violations of constitutional rights.<sup>78</sup> A *Bivens* action is analogous to a § 1983 action brought against state and local employees for violations of enumerated federal rights.<sup>79</sup> The remedy in a *Bivens* action is monetary

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evidence in its case-in-chief. *Id.*

<sup>75</sup> *Maryland v. Garrison*, 480 U.S. 79, 85 (1987).

<sup>76</sup> *See* MCINNIS, *supra* note 57, at 205–11.

<sup>77</sup> *Steagald v. United States*, 451 U.S. 204, 215–16 (1981).

<sup>78</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 392 (1971). The name of the action is based on the name of the case. *Id.*

<sup>79</sup> *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."). A plaintiff in a § 1983 case must overcome qualified immunity of the local officials. *See, e.g., Karen Blum et al., Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633 (2013). A civil plaintiff could also sue for injunctive relief to prevent state and local officials from continuing the warrantless searches.

damages.<sup>80</sup>

In theory, a *Bivens* action could provide adequate relief. But when a *Bivens* action is paired with the *Payton* reasonable belief standard, it becomes almost impossible for a plaintiff to recover. For example, Rosanna Valdez sued FBI Special Agent Samuel Michael McPheters and Bureau of Indian Affairs Police Officer Gregory Littlewhiteman (collectively, “the Officers”) in a *Bivens* action, alleging that the Officers violated her Fourth Amendment rights when they searched her home for her son, Raymond.<sup>81</sup> The Officers returned to the Valdez residence at least twice looking to arrest Raymond.<sup>82</sup> The Tenth Circuit affirmed the District Court’s grant of summary judgment to the Officers because the Officers were able to demonstrate that they had a reasonable belief—and thus qualified immunity—that Raymond resided with Rosanna.<sup>83</sup> The Officers were awarded summary judgment even though Rosanna denied that Raymond lived with her, and even though the fact sheet prepared in connection with the investigation listed Raymond’s address as “transient.”<sup>84</sup> This case demonstrates how difficult it is for a plaintiff to win in a *Bivens* action.

Critics of this *Bivens* will also note that, while it was presumably codified in the Westfall Act,<sup>85</sup> there appears to be an open question as to whether *Bivens* is still viable.<sup>86</sup> The Supreme Court has been skeptical of *Bivens* actions recently, and has taken steps to limit their use.<sup>87</sup> This skepticism is not

*See Ex parte Young*, 209 U.S. 123, 162 (1908). Suits for prospective injunctive relief are difficult, however, because the plaintiff must prove that there is a sufficiently plausible threat of future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111–12 (1983). Lyons sued the city of Los Angeles after police placed him in a chokehold and rendered him unconscious. *Id.* at 97–98. The Court found that, for Lyons to have standing to sue the city, he needed to show “either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.” *Id.* at 106. For a longer discussion of injunctive relief under the Lyons analysis, see Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOYOLA U. CHI. L. J. 1085 (1987).

<sup>80</sup> *Bivens*, 403 U.S. at 397.

<sup>81</sup> *Valdez v. McPheters*, 172 F.3d 1220, 1222 (10th Cir. 1999).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1225–28.

<sup>84</sup> *Id.* at 1227–28.

<sup>85</sup> Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. § 2679(b)). *See also* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEORGETOWN L. J. 117, 132 (2009) (noting that “the statute suggests that any alleged violation of the Constitution will support a claim against federal officials. In other words, the statute . . . presumes a right to sue so long as the plaintiff alleges a constitutional violation.”).

<sup>86</sup> Carlos M. Vázquez & Stephen I. Vladeck, *State Law, The Westfall Act, and the Nature of the Bivens Question*, 161 U. PENN. L. REV. 509, 570–83 (2013) (analyzing the possibility that the Westfall Act precludes *Bivens* actions when state tort law remedies are available).

<sup>87</sup> Lyle Denniston, *New curb on Bivens remedy?*, SCOTUSBLOG (May 16, 2011), <http://www.scotusblog.com/2011/05/new-curb-on-bivens-remedy/> (noting that the Supreme Court has only expanded *Bivens* remedies twice in the past 40 years). *See also* Stephen I. Vladeck, *The Bivens Term:*

new. Chief Justice Burger dissented in *Bivens*.<sup>88</sup> He would have “(1) waive[d] sovereign immunity for law enforcement officers who commit illegal acts in the performance of their duties; (2) create[d] a cause of action for damages resulting from such illegal actions; (3) create[d] a quasi-judicial tribunal to adjudicate damages for such claims; (4) clarif[ied] that this process would be in lieu of exclusion of evidence; and (5) provide[d] that no evidence be excluded from criminal trials due to violations of the Fourth Amendment.”<sup>89</sup> However, there is no evidence to suggest that any of Chief Justice Burger’s recommendations will take effect, so plaintiffs are left with *Bivens* as the only remedy against federal officials. Requiring federal officers to demonstrate probable cause will raise the bar for federal officers to receive qualified immunity, and hopefully make *Bivens* somewhat viable as a remedy.

### C. Concluding the Reasonable Belief Arguments

In sum, there are viable arguments to suggest that the reasonable belief standard is the correct interpretation of *Payton* and *Steagald*. The *Payton* opinion explained why probable cause for an arrest warrant should suffice for search warrants. Moreover, the exclusionary rule and *Bivens* actions are criminal and civil safeguards against overzealous police officers. And at the most basic level, a reasonable belief just lets officers do their jobs:

More importantly, requiring actual knowledge of the suspect’s true residence would effectively make *Payton* at dead letter. In the real world, people do not live in individual, separate, hermetically-sealed residences. They live with other people, they move from one residence to another. Requiring that the suspect actually reside at the residence entered would mean that officers could never rely on *Payton*, since they could never be certain that the suspect had not moved out the previous day and that a *Bivens* or a 42 USC § 1983 claim would then be made against them by another resident.<sup>90</sup>

Despite all of these valid reasons to advocate for the reasonable belief standard, many problems still exist with that interpretation.

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*Why the Supreme Court Should Reinvigorate Damages Suits Against Federal Officers*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (Jan. 2017), [https://www.acslaw.org/sites/default/files/The\\_Bivens\\_Term.pdf](https://www.acslaw.org/sites/default/files/The_Bivens_Term.pdf) (noting that “[i]n recent years, however, lower courts have . . . left a growing array of plaintiffs (with meritorious constitutional claims) with no legal remedies whatsoever.”).

<sup>88</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

<sup>89</sup> MCINNIS, *supra* note 57, at 194 (citing *Bivens*, 403 U.S. at 422-23 (Burger, C.J., dissenting)).

<sup>90</sup> *Valdez*, 172 F.3d at 1225.

#### IV. ADVOCATING FOR THE PROBABLE CAUSE (“*STEAGALD*”) STANDARD

Prior to the 1981 *Steagald* decision, commentators identified three reasons why the Court should impose a search warrant requirement when police execute an arrest warrant in a third-party’s home. They were concerned that (1) requiring only an arrest warrant and reasonable belief ignores the distinction between arrest and search warrants; (2) the Supreme Court has only read in narrow exceptions to the broad protections of the Fourth Amendment; and (3) the balance between private interests and government interests tilts toward private interests.<sup>91</sup> A fourth reason, the historical basis of the Fourth Amendment, is also relevant. Each of these rationales is applicable to the distinction at issue after *Steagald* and merit discussion here.

##### A. Arrest Warrants and Search Warrants are Different

The Fourth Amendment reads:

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.<sup>92</sup>

The pertinent portion of the Fourth Amendment for the purposes of this discussion is the phrase “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.*”<sup>93</sup>

Despite this general reference to “warrants,” there is a distinct difference between search warrants and arrest warrants.<sup>94</sup> Search warrants must describe the places to be searched and things to be seized, and may be issued to find (1) evidence of a crime; (2) contraband, fruits of crime, or other items illegally possessed; (3) property designed for use, intended for use, or used in committing a crime; or (4) *a person to be arrested or a person who is unlawfully restrained.*<sup>95</sup> The fact that the Federal Rules of Criminal Procedure identify the possibility of receiving a search warrant for “a person to be arrested” indicates that the arrest warrant itself is not sufficient to search for a person to be arrested. To allow reasonable belief to substitute for probable cause essentially merges the two together and allows an arrest warrant to

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<sup>91</sup> Linda Imes, *Arresting a Suspect in a Third Party’s Home: What is Reasonable?*, 72 J. CRIM. L. & CRIMINOLOGY 293 (1981).

<sup>92</sup> U.S. CONST. amend IV.

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> Imes, *supra* note 91, at 298. See also *Steagald v. United States*, 451 U.S. 204, 213 (1981) (explaining that “[a]n arrest warrant . . . primarily serves to protect an individual from an unreasonable seizure” while a search warrant “safeguards an individual’s interest in the privacy of his home and possessions against the unjustified intrusion of the police”).

<sup>95</sup> Fed. R. Crim. P. 41(c)(1)–(4) (emphasis added).

substitute for a search warrant.<sup>96</sup> But this interpretation violates the rule against surplusage.<sup>97</sup> Indeed, “[the words in the Federal Rules of Criminal Procedure] cannot be meaningless, else they would not have been used.”<sup>98</sup> Therefore, proponents of the *Payton* reasonable belief standard ignore the distinction between the two types of warrants present in both the Fourth Amendment and the Federal Rules of Criminal Procedure.

### B. “Reasonableness” Has Been Expanded Too Far

Allowing officers to execute a search without a warrant or other exception is a direct assault on the text of the Fourth Amendment. “The whole thrust of the Fourth, Fifth, and Sixth Articles of the Bill of Rights which [the Framers] appended to the Constitution was to set limits for law enforcement—even at some sacrifice of efficiency.”<sup>99</sup> By allowing police to cut corners like in Vasquez-Algarin’s situation, courts are increasing the exceptions to the warrant requirement for the sake of “reasonableness.” The text of the Fourth Amendment sets a warrant as the normative baseline for a search. Searches conducted without a warrant need a specific exception:

Over and over again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to the judicial processes [...] and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.<sup>100</sup>

But the Supreme Court in *Payton* did not explicitly delineate this exception for police to execute warrants in third-party homes. The language from *Payton* reads “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>101</sup> There are three issues with reading *Payton* to require only a reasonable belief standard. First, *Payton* itself says the rule is “limited.”<sup>102</sup>

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<sup>96</sup> See *infra* Section V(d) regarding general warrants.

<sup>97</sup> See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) (“If possible, every word and every provision is to be given effect . . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”).

<sup>98</sup> *United States v. Butler*, 297 U.S. 1, 65 (1936).

<sup>99</sup> *Foreword*, ALAN BARTH, *THE PRICE OF LIBERTY* at X (1961).

<sup>100</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967). For a longer discussion of the various exceptions, see MCINNIS, *supra* note 57, at 75–114 (detailing the exceptions to the warrant requirement as exigent circumstances, searches incident to lawful arrest, hot pursuit, plain view, nonexigent searches, consent, community caretaking, open fields, border searches, searches at sea, pervasively regulated industries, and individuals on parole).

<sup>101</sup> *Payton v. New York*, 445 U.S. 573, 603 (1980).

<sup>102</sup> *Id.*

This suggests that the expansion of the doctrine by the Circuit Courts is improper.

Second, the “reason to believe” language only modifies the “suspect is within” portion of the rule; the dwelling language precedes the “reason to believe” language. And where “the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.”<sup>103</sup> The language “to enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within*” demonstrates such a case. “When there is reason to believe” refers only to “the suspect is within,” not “dwelling in which the suspect lives.” Therefore, the two-prong test advocated by all of the *Payton* reasonable belief courts is flawed.

Third, the Supreme Court uses language like “reason to believe” to refer to probable cause.<sup>104</sup> For example, in *Maryland v. Pringle*, the Supreme Court uses reasonable belief to define probable cause.<sup>105</sup> Thus, reasonable belief can be differentiated from the lower reasonable suspicion standard.<sup>106</sup> Some argue that if the Supreme Court in *Payton* meant probable cause when it stated reasonable belief, it would have used the phrase probable cause.<sup>107</sup> But the argument here is not that *Payton* is incorrect; the argument is that *Payton* is limited in scope to only those situations in which officers have probable cause that a suspect resides in a home, and a reasonable belief that the suspect is in the home. That interpretation conforms to the text of the rule outlined in *Payton* while likewise preserving the heart of the Fourth Amendment.

### C. *The Balance Between Public and Private Interests Favors the Public*

In *Steagald*, Justice Marshall, writing for the majority, balanced the burden on police officers to obtain a search warrant against an individual’s right to be free of unjustified intrusions.<sup>108</sup> Without much analysis, Justice Marshall concluded that the right to privacy outweighed the burden on police

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<sup>103</sup> Scalia & Garner, *supra* note 97, at 152. Scalia and Garner call label this the “nearest-reasonable-referent canon.”

<sup>104</sup> *United States v. Pruitt*, 458 F.3d 477, 490 (6th Cir. 2006) (Clay, J., concurring) (internal citations omitted).

<sup>105</sup> 124 S.Ct. 795, 800 (2003) (“We have stated . . . that ‘the substance of all the definitions of probable cause is a reasonable ground for belief of guilt.’” (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983))).

<sup>106</sup> *See, e.g., Dunaway v. New York*, 442 U.S. 200, 216 (1979) (treating probable cause as a higher standard than reasonable suspicion); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (allowing police officers to stop and frisk individuals without probable cause when the officers have reason to believe the individuals may be “armed and dangerous”).

<sup>107</sup> *See, e.g., Pruitt*, 458 F.3d at 484 (reasoning that, by using both “reason to believe” and “probable cause,” the Supreme Court “indicate[d] that it intended different standards to apply” to the terms).

<sup>108</sup> *Steagald v. United States*, 451 U.S. 204, 221–22 (1981) (“Whatever practical problems remain . . .



because when “police know the location of the felon when they obtain an arrest warrant, the additional burden of obtaining a search warrant at the same time is miniscule.”<sup>109</sup> Justice Marshall was likewise dismissive of the burden on police in situations where police first have an arrest warrant and later learn the location of the suspect.<sup>110</sup> Police, when they establish probable cause of a suspect’s location, suffer minimal harm from waiting to get a search warrant. Police can stake out the exits of a home in the short amount of time it takes to get the warrant. Police do not even need to leave the scene—telephonic search warrants are a distinct possibility.<sup>111</sup>

Justice Rehnquist, writing in dissent in *Steagald*, also used a balancing test, but analyzed a different set of factors.<sup>112</sup> Framing the issue as a question of reasonableness, Justice Rehnquist noted that fugitives are inherently mobile, and that “police officers will generally have no way of knowing whether the subject of an arrest warrant will be at the dwelling when they return from seeking a search warrant.”<sup>113</sup> Further, the suggestion that police simply stake out the residence while they wait for a search warrant is “beguilingly simple”<sup>114</sup> because “the costs of such a stakeout seem[] excessive in an era of rising crime and scarce political resources.”<sup>115</sup>

While the concerns surrounding police efficiency are duly noted, they are not dispositive of this issue. Exigent circumstances and hot pursuit are two well-delineated exceptions to the warrant requirement that serve to mitigate those efficiency concerns.<sup>116</sup> Moreover, the probable cause standard does not necessarily mean that police will always have to seek out a warrant before executing the search. Even the Ninth Circuit—the strongest advocate of the probable cause standard—has recognized that officers may justify their probable cause after the fact at a suppression hearing.<sup>117</sup> Therefore,

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cannot outweigh the constitutional interests at stake.”).

<sup>109</sup> *Id.* at 222.

<sup>110</sup> *Id.* (“[I]f the police know of the location of the felon when they obtain an arrest warrant, the additional burden of obtaining a search warrant at the same time is miniscule.”).

<sup>111</sup> Fed. R. Crim. Proc. 41(d)(3).

<sup>112</sup> *Steagald*, 451 U.S. at 224 (Rehnquist, J., dissenting) (“Resolution of that issue depends upon a balancing of the ‘need to search against the invasion which the search entails.’” (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537 (1967))).

<sup>113</sup> *Id.* at 225.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 225–26 (quoting *Payton*, 445 U.S. at 619 (White, J., dissenting)).

<sup>116</sup> See, e.g., *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) (police may enter a home without a search warrant to preserve life or avoid serious injury); *United States v. Santana*, 427 U.S. 38 (1976) (police may enter a home without a search warrant when in hot pursuit of a fleeing felon).

<sup>117</sup> *United States v. Gorman*, 314 F.3d 1105, 1111–12 (9th Cir. 2002) (holding that Gordon’s motion to suppress the fruit of a warrantless search could only succeed if the officers “*did not* have reason to believe that Gorman was present in [the] home” when they conducted the search); cf. *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (“[T]he after-the-event justification for the arrest or search is a far less reliable procedure than an objective predetermination of probable cause because it is influenced by the shortcomings of hindsight judgment.”).

under the probable cause standard, police do not have their hands tied behind their back. They are just held to the normal search standard.

*D. The Fourth Amendment was Drafted to Prevent Police From Issuing General Warrants*

Fourth Amendment analysis is one of reasonableness.<sup>118</sup> In a reasonableness analysis, the Fourth Amendment “simply requires that each and every search or seizure be reasonable.”<sup>119</sup> Nowhere in the text of the Fourth Amendment is there a third clause stating “warrantless searches and seizures are inherently unreasonable.”<sup>120</sup> Therefore, requiring only a reasonable belief that a suspect resides in a home before executing an arrest warrant pursuant to *Payton* comports with the Fourth Amendment.

But the *Katz* reasonableness analysis is just a judicial fiction.<sup>121</sup> To truly understand the purpose of the Fourth Amendment, one must consider the reasons for which it was passed because “[t]he meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.”<sup>122</sup>

British officials were allowed to use general warrants, which gave them broad discretion in searches.<sup>123</sup> Officials seeking these warrants did not need to be supported by oath or affirmation, they did not need to explain the basis of their suspicions, nor did they have to limit the warrants to a single location.<sup>124</sup> However, throughout the seventeenth and eighteenth centuries, British legal theorists criticized the use of general warrants, and general warrants were eventually outlawed.<sup>125</sup>

As the American states sought independence from England, the early state constitutions rejected general warrants in three ways. First, the positive right to be secure in one’s person, house, papers, and effects meant that government officials were prohibited from a promiscuous search and seizure.<sup>126</sup>

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<sup>118</sup> See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801 (1994).

<sup>119</sup> Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 55 (1996).

<sup>120</sup> AKHIL REED AMAR, *THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC* 232 (2015).

<sup>121</sup> Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”-“Fourth Amendment Reasonableness” Is Only A Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 56 (2010).

<sup>122</sup> THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 55 (2d ed. 1871).

<sup>123</sup> MCINNIS, *supra* note 57, at 15.

<sup>124</sup> *Id.*

<sup>125</sup> Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1196–220 (2016) (explaining the evolution of the English law with regard to general warrants).

<sup>126</sup> *Id.* at 1264.

Second, particularized warrants—not general warrants—became the only way the government could enter the home besides actively pursuing felons.<sup>127</sup> Third, states outlined the specific information government officials would have to provide to get a search warrant, including the information “to be presented, by whom, which procedures would have to be followed, and who could issue warrants for them to be considered valid.”<sup>128</sup> These three issues became the basis for the Fourth Amendment.<sup>129</sup>

The Supreme Court, when analyzing the historical basis of the Fourth Amendment, has suggested that the only exception to the broad warrant protections found at common law was hot pursuit.<sup>130</sup> The Court did not extend that exception for police to search a third-party’s home because “[a]rmed solely with an arrest warrant for a single person, the police could search all the homes of that individual’s friends and acquaintances”<sup>131</sup> and “an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place.”<sup>132</sup> Allowing the *Payton* reasonable belief standard to take effect essentially turns an arrest warrant into a search warrant. This merger makes the arrest warrant a general warrant that the Founders found so repugnant. “Under a Republican Constitution, to ensure that [police] remain within their just powers, . . . lawmaking power must itself be limited by law.”<sup>133</sup> The Fourth Amendment needs to be the limit here—the Amendment requires probable cause, nothing less.

## CONCLUSION

Johnny Vasquez-Algarin was caught in a tough spot. U.S. Marshals and other local law enforcement entered his home without a search warrant to search for someone else. Vasquez-Algarin undoubtedly possessed drug paraphernalia, and had the police followed proper procedures, all of that drug paraphernalia would be admissible evidence at trial. His case illustrates the fundamental tension between the need for police to be able to do their job and the right to privacy in one’s own home. Police should be required to demonstrate probable cause to a neutral magistrate and acquire a search warrant before executing an arrest warrant in a third-party’s home. Allowing police to use only their reasonable belief returns law enforcement back to the

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Stegald v. United States*, 451 U.S. 204, 217–19 (1981) (citing *Semanye’s Case*, 5 Co.Rep. 91a, 92b–93a (K.B. 1603)).

<sup>131</sup> *Id.* at 215 (citing *Lankford v. Gelston*, 364 F.2d 197, 197 (4th Cir. 1966)).

<sup>132</sup> *Id.*

<sup>133</sup> RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 23 (2016).

days of general warrants and the British government. While there are undoubted governmental interests in using the reasonable belief standard—including time and cost efficiency—the availability of exigent circumstances and other exceptions to the warrant requirement mitigates those needs severely.