In the

Supreme Court of the United States

UNITED STATES PETITIONER, V. JOHN M. SALVUCCI, JR. AND HISEOG G, ZACJYKARM RESPONDENT.	No. 79-244

Washington, D. C.
March 26, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES Petitioner, v. JOHN M. SALVUCCI, JR. and JOSEPH G. ZACKULAR, Respondents.	No. 79-244

Washington, D. C.,

Wednesday, March 26, 1980.

The above-entitled matter came on for oral argument at 11:29 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice,
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MARK I. LEVY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner

WILLIE J. DAVIS, ESQ., Ten Post Office Square, Boston, Massachusetts 02109; on behalf of Respondent Salvucci

JOHN C. McBRIDE, ESQ., 366 Broadway, Everett, Massachusetts 02149; on behalf of Respondent Zackular

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 79-244, United States v. Salvucci and Zackular.

Mr. Levy, I think you may proceed when you are ready.

ORAL ARGUMENT OF MARK I. LEVY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LEVY: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the United States Court of Appeals for the First Circuit. The respondents were charged in a 12-count indictment with unlawful possession of stolen mail. The indictment was based on twelve checks that had been stolen from the United States mails and that were determined to bear respondents' fingerprints. These checks, along with more than 700 other stolen checks, were seized by Massachusetts State Police officers during their search pursuant to a state warrant of an apartment rented by respondent Zackular's mother.

The indictment alleged that respondents unlawfully possessed this stolen mail from late 1975 to on or about December 17, 1976, the date on which the search occurred.

Prior to trial, the respondents moved to

suppress the checks because the affidavit submitted in support of the application for the search warrant failed to show probable cause. The District Court granted their motion and ordered suppression. The government then sought reconsideration of the suppression order on the ground that the respondents lacked standing to challenge the search of the mother's apartment.

The government's motion for reconsideration argued that respondents had neither a sufficient proprietary or possessory interest in a property seized or premises searched to contest the validity of the search, nor automatic standing under Jones v. United States.

The respondents filed a memorandum in opposition to this motion in which they relied solely on a claim of automatic standing. Following submission of the government's memorandum, the District Court by a handwritten notation on the face of the government's motion reaffirmed the suppression order.

On the government's appeal, the First Circuit affirmed. With respect to the issue of standing, it found that the respondents had no actual standing to contest the lawfulness of the search because they had not established a reasonable expectation of privacy in the premises searched or the property seized or claimed the proprietary or possessory interest in the premises or

the checks. Nevertheless, the court held the respondents could challenge the search based on the automatic standing rule of Jones.

Although it recognized that this Court had questioned the continued vitality of the automatic standing doctrine and that there was a split of authority in the lower courts on the issue, the Court of Appeals felt obligated to adhere to the Jones rule until this Court resolved the matter.

We submit that the Jones automatic standing rule should now be overturned. Under Jones, a defendant automatically has standing to contest a search that leads to the seizure of evidence where possession of the seized evidence at the time of the search is an essential element of the offense with which he is charged.

Automatic standing turns solely on the nature of the charge brought by the prosecutor and it enables a defendant to obtain the suppression of reliable and probative evidence even though his own constitutional rights were not implicated in the search. In this way, automatic standing is inconsistent with the well settled principle that the exclusionary rule can be invoked only by a defendant who has demonstrated that his personal Fourth Amendment rights have been violated.

The Court in Jones found that cases involving

possessory offenses presented a special problem that for two reasons warranted departure from the conventional principles of standing. First was the self-incrimination dilemma in which the defendant was confronted with either foregoing the assertion of his Fourth Amendment claim or, in order to establish standing, giving incriminating testimony as an admission could be used in the government's case in chief to prove his guilt at trial.

As this Court observed in Brown v. United States, this self-incrimination dilemma can no longer occur in light of the subsequent decision in Simmons v. United States that a defendant's testimony at a suppression hearing cannot be introduced as part of the prosecutor's direct case at trial.

We believe that Brown correctly concluded that the self-incrimination dilemma is no longer an issue after Simmons.

QUESTION: So there is no issue here about other grounds for standing here, such as an interest in the premises or being a guest on the premises?

MR. LEVY: There is not. The respondents were not present at the time of the search and they have never in the course of this proceeding asserted that they had any basis for actual standing. Indeed, respondent Zackular in his brief in the Court of Appeals and in this

Court I think expressly concedes that they have no actual standing, and there is nothing in the record to support the claim of actual standing.

Hence, as the Court recognized in Brown, the continued validity of the automatic standing rule rests solely on the second rationale in Jones, the so-called vice of prosecutorial self-contradiction whereby the government alleges the defendants' possession as an essential element of the defense charge but denies that there was possession sufficient to establish the defendants' standing to contest the search.

In our view, the automatic standing rule cannot be justified on this ground. It is not inherently contradcitory forthe government to charge a defendant with a possessory offense based on his culpable conduct prescribed by the penal code and at the same time to contend that he had no legitimate expectation of privacy that was implicated by the search that uncovered the illegally possessed items.

QUESTION: Mr. Levy, it is actually the defendant that brings a suppression motion, not the government, isn't it?

MR. LEVY: That's correct.

QUESTION: So the government is just advancing arguments as to why the suppression motion shouldn't be

granted.

MR. LEVY: I believe that is correct, and I think the holding of Jones is that the government is foreclosed from contesting the suppression motion on the ground that the defendant didn't have standing to raise it.

QUESTION: Does that really make much sense?

MR. LEVY: We don't believe that it does. This is most clearly illustrated in cases where the defendant is charged not with actual possession at the time of the search but rather is charged with constructi or vicarious possession.

For example, a defendant who exercises dominion or control over contraband, even though it is not in his actual possession, has engaged in conduct that the criminal law rightly condemns and he is subject to prosecution for a possessory offense under a theory of constructive possession, but that fact standing alone is not tantamount to a concession by the government that the defendant's Fourth Amendment rights were affected by the search of a third party's premises or property in which he had no legitimate expectation of privacy.

For example, consider a defendant who without permission conceals contraband narcotics on the property of a stranger with the intention later to reclaim the

drugs and sell them. If the police illegally enter and search the third party's property and seize the narcotics, it can hardly be thought that the defendant's Fourth Amendment rights were infringed for he had no reasonable privacy interest in the place that was illegally searched. In these circumstances, it would be fully proper for the government to charge the defendant with unlawful possession at the time of the search and yet object to his standing to seek the suppression of evidence on the basis of the illegal search.

Another example suggested by the decision in Rakas v. Illinois in which the Court held that the defendant's Fourth Amendment rights were not violated by the illegal search of the car in which they were riding. The defendants in Rakas were charged with armed robbery. If, however, they had been prosecuted and convicted with the unlawful constructive possession of the rifle that was found during the course of the search, it is difficult to see that their suppression claim would be enhanced in the slightest or that the government would be acting in a contradictory fashion by prosecuting on that charge while denying that the defendants could challenge the search under the Fourth Amendment.

QUESTION: Mr. Levy, could I ask you a question. Suppose the defendants in this case contended that the

checks had been duly endorsed over to him or some such claim pursuant to which he claimed some rightful entitlement to the checks, would he have standing (a) to ask for their return, and (b) to object to the search in the third party's premises?

MR. LEVY: Well, we think if he had standing at all it would not be under the theory of automatic standing.

QUESTION: Well, I am not asking about the theory, I am just asking what your position is.

MR. LEVY: If he could establish that the checks were his and that they were --

QUESTION: He alleges they are his.

MR. LEVY: Well, he would file a motion under Rule 41 of the Federal Rules of Criminal Procedure for the return of property. He would need to establish more than simply --

QUESTION: So you agree he would by that allegation have standing to seek their return?

MR. LEVY: I agree.

QUESTION: Would he also have standing by that allegation to object to the search of the premises in which they were found by illegal conduct of the police?

MR. LEVY: I do not believe so. It seems to me there are two distinct interests that are protected by the

Fourth Amendment. One is against unreasonable searches and the other is against unreasonable seizures.

QUESTION: So your argument doesn't depend at all on the contraband character of the items that the police seized?

MR. LEVY: We have a secondary argument that relies on the contraband character, that if this Court contrary to our argument should conclude that the defendants' legitimate interest in the property seized does entitle him to challenge the search, then that rule would be inapplicable where the defendant was in possession of contraband material such as narcotics or stolen goods.

QUESTION: But you do not agree that even if he had title to the property, say it was a gun and he claimed it was registered and he acknowledged he owned it and so forth and there was nothing illegal about its possession and it was taken out of a third party's premises, that would not give him standing to challenge the search of those premises?

MR. LEVY: That's correct, we do not think that would give him standing to challenge the search. It might give him standing to challenge the seizure if he alleged there was something --

QUESTION: He would ask for his property back, yes.

MR. LEVY: That's correct, or he might be able to seek suppression at trial on the basis that the seizure rather than the search was unlawful if he had a ground for challenging the seizure of the gun in your hypothetical, Mr. Justice Stevens. But we think that is a distinct matter from his ability to challenge the search that led to the seizure of the gun.

QUESTION: Well, what ground could he claim the seizure was unlawful?

MR. LEVY: Well, if --

QUESTION: If he cannot challenge the search, which would be the only basis as I understand your --

MR. LEVY: Well, there may be some basis on which a seizure itself could be challenged. For example, if the incriminating nature of the evidence were not immediately apparent under a plain view doctrine, for example --

QUESTION: Oh, I see.

MR. LEVY: -- or if the police were entitled to seize something temporarily as a means of protection but they retained the item longer than was necessary, there might be some grounds for challenging the seizure itself apart from the search that led to the seizure.

One way to see we think the absence of any prosecutorial self-contradiction in the automatic standing

situations is to ask whether the defendant would be entitled to pursue applicable remedies other than the exclusionary rule such as a damage action for the assertedly unconstitutional search. We think it plain that in the hypotheticals I mentioned a few moments ago that the defendant would not be awarded monetary damages since his Fourth Amendment rights were not violated by the illegal search.

For the same reason, he should not be able to invoke the exclusionary rule remedy, and that conclusion is independent of the nature of the charges brought against him.

Thus, we think that the Jones rationale or prosecutorial self-contradiction does not support the continuation of the automatic standing rule.

Apart from the two rationales of Jones itself, the respondent, Salvucci, contends in his brief that the automatic standing rule can be justified by reference to principles of actual standing. Salvucci argues that a defendant's possessory interest in contraband that is seized entitles him without more to seek suppression of that evidence on the ground that the underlying search violated the Fourth Amendment. Salvucci then argues that the charging of a possessory offense necessarily constitutes an admission by the government that the

defendant has the requisite possessory interest in the seized contraband to enable him to challenge the search and therefore that the automatic standing rule should be retained to avoid the needless formality of an inquiry into standing at the suppression hearing.

We submit that this line of argument is entirely unsound. In our view, as I just discussed with Mr. Justice Stevens, a defendant's proprietary or possessory interest in items seized does not in and of itself entitle him to contest the validity of the search. Moreover, regardless of the general rule, an asserted possessory interest in contraband, such as stolen property, is totally illegitimate and cannot served as the basis for a Fourth Amendment challenge to either a search or a seizure.

Finally, even if a possessory interest in contraband could suffice to confer standing with respect to the search, the automatic standing rule still would not be warranted, since not all possessory interests should be considered adequate but rather only those interests that establish a sufficient personal nexus between the seized contraband and the defendant.

First, a defendant's proprietary or possessory interest in the items seized does not in itself entitle him to challenge the legality of the search. Salvucci's

argument to the contrary reflects a misconception of the Fourth Amendment's protections against unreasonable searches and unreasonable seizures.

A search is defined under the Fourth Amendment in terms of a governmental intrusion upon a person's legitimate expectation of privacy. It depends not on a property right but, rather, on a reasonable privacy interest. A seizure of a physical object, on the other hand, is defined in terms of a governmental interference with the bundle of property rights that attends a person's interest in or relation to that object. It implicates precisely those property rights that a person has by virtue of his ownership or possession of a given object.

Under this analysis, a proprietary or possessory interest in items seized could give rise to standing to challenge the validity of the seizure, since it was the act of seizure that dispossessed the defendant of his property.

QUESTION: The government has a right of eminent domain, I take it, in any of these cases, that it could seize items and pay for them?

MR. LEVY: I think that would satisfy the Fifth Amendment taking problem. I don't think the government here purported to seize items under its eminent domain power or would be willing to pay for the items that they

found to be unlawfully seized. The government here is not asserting that as items seized it is a transfer of title to the government if it was an item that the defendant was entitled to own, but rather than the government is entitled to temporary possession for use of the item in the criminal proceeding against the defendant. I think it is a different problem than a taking issue that might be posed in other circumstances.

The defendant's interest in his property, however, even if allowing him to challenge the seizure, would not entitle him to challenge the antecedent search of a third party's premises in which by hypothesis the defendant has no legitimate expectation of privacy. Nor can standing be based on the proposition that a defendant has a cognizable privacy interest in a place simply because his property is kept there.

We acknowledge that in some circumstances a defendant who stores his property in the premises of a third party may have a sufficient privacy interest in those premises to challenge a search. On the other hand, not all such uses of a third party's premises would demonstrate a privacy interest. For instance, if the defendant illegally entered someone's home and without the knowledge or permission of the owner concealed incriminating evidence in the basement, he should not be heard to

complain that his reasonable expectation of privacy was infringed if the police unlawfully search the basement for that evidence.

Likewise, if the defendant simply asks a third party briefly to keep something for him, without any understanding as to the particular location of where it would be kept or the need for it to be securely and privately stored, then we doubt that the defendant has an expectation of privacy in the place where the third party eventually decides to put the object.

In these cases, the pertinent inquiry is not whether the defendant had a proprietary or possessory interest in the items that were seized but whether taking into account all relevant considerations, including his use of the area to store his belongings, the defendant had a legitimate expectation of privacy with respect to the area searched.

The fact that the defendant's property was legitimately on the third party's premises does not by itself give him a privacy interest in those premises, just as in Rakas the defendant's legitimate presence in the car that was searched did not by itself entitle him to challenge the legality of the search.

We do not think that the decisions of this Court compel different analysis than the government

presents here. In particular, we do not read United States v. Jeffers to be a contrary holding. We believe that the defendant's standing in Jeffers was based onhis interest in the hotel room that was searched. He had a key to that room, he had permission to use the room at will, and in fact he often entered for various purposes. This was clearly an adequate ground on which to find standing, and we don't think that the Court's opinion in Jeffers is best understood to rest on a possessory interest in the items that were seized.

QUESTION: Mr. Levy, there were actually three theories in Jeffers. I am sure they are hinted at in different parts of the opinion. One of them was this theory of when a search is directed at a particular defendant. I don't understand that theory as being involved in this case at all. Is that correct? By directed at, do you understand what I mean?

MR. LEVY: Yes, I do.

QUESTION: That theory isn't presented in this case at all, is it?

MR. LEVY: It hasn't been raised in this case and I think the Court rejected it in Rakas. I am not aware of whether the police officers at the time they conducted this search were subjectively seeking the evidence against the defendants or others. I think --

QUESTION: There is no claim of that kind, is there?

MR. LEVY: There is no claim of that kind here.

To the extent that standing in Jeffers was based on the property that was seized, which we think is not the best reading of the opinion, the Court indicated that it declined to separate the search and the seizure because, in the Court's words, they were bound together by one sole purpose, to locate and seize the narcotics of the respondent.

QUESTION: Is there ever any different separable purpose in searches and seizures?

MR. LEVY: There conceivably could be if entry is made to search for incriminating evidence against one defendant and other incriminating evidence against the second defendant --

QUESTION: Well, if you find other evidence not in the warrant, but then you have other problems, don't you, if you have a warrant? I just didn't understand your separation point.

MR. LEVY: I think that the Court's reliance on that theory is, as Mr. Justice Stevens just suggested, a variant of the target theory which was rejected in Rakas. We think that is the basis on which the Court declined to separate the search and the seizure. To that

extent, we think that Jeffers has already been discredited by Rakas and doesn't present a controlling view of the Fourth Amendment.

In any event, to the extent that Jeffers rested in some other way on a defendant's interest in the items seized, we submit that it is inconsistent with subsequent doctrine that clearly distinguishes between an unreasonable search and an unreasonable seizure and therefore it can no longer be regarded as controlling.

At this point, I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. Davis.

ORAL ARGUMENT OF WILLIE J. DAVIS, ESQ.,

ON BEHALF OF RESPONDENT SALVUCCI

MR. DAVIS: Mr. Chief Justice, and may it please the Court:

Twenty years ago, when this Court decided Jones, it did so on two very distinct grounds which we contend have not been changed since that time. As far as the vice of prosecutorial -- well, let me put it this way: All of the cases that have been decided by this Court and most of the cases relied on by the Solicitor General in seeking cert in this case did not involve a situation where possession was an essential element of the crime. And it is our decision in presenting the matter to the

District Court and the Court of Appeals that we should separate the two types of crimes, that is, one we call the possessory crime, and one a non-possessory crime.

We have no quarrel with any decision of any court where they rely on the invasion of one's own privacy to establish standing where the crime is non-possessory. But we submit that Justice Frankfurter was absolutely correct when speaking for a unanimous Court in Jones, that where you have this possessory crime, that this ought to set it apart, it ought to be separate and distinct.

Now, if we chose not to --

QUESTION: What reason did the Justice have for saying that, though? What reason did he give?

MR. DAVIS: Because the government would be allowed to talk out of both sides of its mouth in a possessory crime.

QUESTION: Also his statements could be used against him.

MR. DAVIS: That's correct. That's correct.

QUESTION: Can it be used against him any more?

MR. DAVIS: Well, let me put it this way: We say that Simmons does not overrule Jones in this respect. We submit that Simmons only applied to non-possessory crimes. As a matter of fact, the Court in Simmons

explicitly said that. They explicitly said that they resolved the problem of possessory crimes with Jones, and now we go on to the non-possessory crimes --

QUESTION: Well, what if we said in this case that his statements couldn't be used against him?

MR. DAVIS: Well, I still say it is not enough.

QUESTION: Why is that?

MR. DAVIS: It is not enough for the simple reason that if he were to take the stand at a motion to suppress and to admit having possession, then it would lead the prosecution perhaps to some evidence that he could use in his direct case without the testimony of the defendant coming in at the trial.

For example, what if the prosecutor asked the defendant at a hearing on a motion to suppress, where did you get the stolen checks, and the defendant said I got them from Sam Jones. The government now has a lead. They can go talk to Sam Jones and indeed perhaps present Sam Jones in their direct case in anticipation of a defense presented by the defendant.

QUESTION: But it is the defendant's motion to suppress, not the government's.

MR. DAVIS: Sure it is.

QUESTION: So the defendant is certainly talking out of both sides of his mouth.

MR. DAVIS: The defendant is what?

QUESTION: The defendant would certainly be talking out of both sides of his mouth.

MR. DAVIS: Oh, no, he would not. No, he would not. The defendant would take the stand at a motion to suppress and say, yes, I did have possession of them. That is not talking out of both sides of his mouth. He is admitting it, and I am saying that his admission could later be held against him.

QUESTION: But he isn't pleading guilty --

MR. DAVIS: No, he is not pleading guilty but he --

QUESTION: -- not guilty, he says I didn't have possession.

MR. DAVIS: If he took the stand and said I didn't have possession, that is entirely another matter. We don't say that he has a right to take the stand at any hearing and lie.

QUESTION: But when he pleads not guilty, it puts all the material issues and material elements in issue.

MR. DAVIS: It does, and he simply says by that I did not commit the crime as charged, and this crime has, as all of the proof, more than the element of possession. You go further, the element of possession

with knowledge that the checks were stolen. Now, he could certainly admit at a motion to suppress that he had possession of the checks and then go on to say, yes, but I had no criminal intent because I didn't know they were stolen, I received them from Sam Jones who said to me, hey, take a look at what I have here, hold this for me, or anything like that. That is not and cannot be prosecuted under the particular statute because he didn't possess it knowing the checks had been stolen.

QUESTION: I am not sure I got your point about the lead, if he answered "I got them from Sam Jones" --

MR. DAVIS: Yes.

QUESTION: -- do you see that there is something impermissible or wrong about there going to Sam Jones and saying did you --

MR. DAVIS: Oh, it is not wrong. It is not wrong. It just gives the government more ammunition than they had before.

QUESTION: Impermissible in some way?

MR. DAVIS: I am not speaking of impersssible. I agree that it is proper. As a matter of fact, defendants do it themselves at a motion to suppress. How often do they use it as a forum for discovery, trying to get as much of the government's case as they can. I am saying now that the government would be allowed to explore the

defendant's case at a motion to suppress and tighten its case as a result of it.

QUESTION: Why?

MR. DAVIS: Because they got it initially by illegal means. And if you say that they got it by illegal or unlawful means, the defendant has no way to combat it. He has no way to combat it.

QUESTION: But that is the whole point at issue in the suppression, isn't it, whether or not the personal Fourth Amendment rights of the defendant were violated?

MR. DAVIS: I don't agree with that. I don't agree that that is the whole of a motion to suppress, that his personal rights were violated. That is why we asserted the automatic standing rule of Jones in response to the government's subsequent motion to reconsider the denial --

QUESTION: The automatic standing rule means that a defendant wins the motion to suppress even though his own personal Fourth Amendment rights were not violated.

MR. DAVIS: It doesn't mean that at all. It doesn't mean that at all.

QUESTION: Why not?

MR. DAVIS: It simply means that he has standing to say that the search was unlawful, but it doesn't mean that the search was.

QUESTION: Suppose a person is accused of the possession of stolen goods and the officers retrieved the stolen goods by breaking into a house without a warrant and seizing the goods, but the house didn't belong to the defendant and the defendant didn't claim any interest in the premises, he moves to suppress. Well, I guess under your approach he would have standing to raise it but he would lose.

MR. DAVIS: No, I wouldn't say that he had automatic standing under those conditions unless possession was an essential element of the crime.

QUESTION: Well, he was accused in the indictment of stolen property.

MR. DAVIS: All right, possession of stolen property. All right, possession is an essential element of the crime, so I think that that in and of itself gives him automatic standing because the government has said he possessed it.

QUESTION: All right. So you would say then he should win his suppression motion?

MR. DAVIS: Yes, on your theory, because the search was positively unlawful.

QUESTION: So the standing rule means that he can win the suppression motion even though the goods were seized in somebody else's house.

MR. DAVIS: It's only right under Jones.

QUESTION: Wouldn't you agree, Mr. Davis, that both Alderman and Rakas significantly questioned the automatic standing rule, and Brown too?

MR. DAVIS: No, I do not. I do not read them as questioning the automatic standing rule because all of those cases did not apply to a crime where possession was an essential element and we have to rely on that.

QUESTION: But isn't there a footnote in Rakas that says we don't have to face it, it is up in the air, in effect?

MR. DAVIS: Well, you said it was up in the air and I believe because of all of the decisions from the circuits emanating after Simmons. That is why I think maybe you put the footnote there, because the circuits were interpreting differently all around, and I still say that after Simmons you still have the same thing, even the self-incriminating aspect of it. I still say we have the same thing.

And as far as the automatic standing because of the vice of self-prosecution contradictions, I think still was standard. There is nothing that has happened in any circuit, there is nothing that happened in this Court which changes that one iota.

As a matter of fact, you intimated in Brown

that it still is viable, and Rakas was a little after Brown, of course.

QUESTION: But we certainly didn't reaffirm it in Brown.

MR. DAVIS: No, the occasion wasn't there for you to reaffirm.

QUESTION: Right.

MR. DAVIS: I believe that my brother has fifteen minutes and I will leave the remaining arguments to him.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McBride.

ORAL ARGUMENT OF JOHN C. McBRIDE, ESQ.,

ON BEHALF OF RESPONDENT ZACKULAR

MR. McBRIDE: Mr. Chief Justice, and may it please the Court:

The facts and the law enunciated in Rakas, the facts and the law enunciated in Simmons and in Brown do not, I most respectfully suggest, undercut the theory that we are advocating today.

We, the respondents in this case, are asking the Court to uphold the decision, the stare decisus enunciated by Mr. Justice Frankfurter in Jones v. United States. In Rakas, decided in December 1978 by this Court, the Court was confronted with defendants

charged with armed robbery. They were not charged with unlawful possession of the shotguns and of the shotgun shells that were found respectively inside the glove compartment that was locked and inside the car, underneath the front seat that was discovered by the police.

I submit most respectfully that there might have been a different result if they were charged with unlawful possession of those particular items.

QUESTION: Don't you think Judge Janu thought that the matter was in considerable doubt in the opinion of the First Circuit?

MR. McBRIDE: I certainly think he did, Your Honor, in light of the opinions of the many circuits that have construed Jones in different respects, and I think most respectfully it is time for this Court to reaffirm --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. McBride.

(Whereupon, at 12:00 o'clock noon, the Court was in recess, to resume at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION - 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: Mr. McBride, you may pick up where you left off.

MR. McBRIDE: Thank you. Mr. Chief Justice, and may it please the Court:

Before the luncheon recess, I was addressing myself to the cases of Rakas, Simmons and Brown. I submit most respectfully that those three cases do not undercut Jones v. United States. Jones is viable now. Those cases, especially the Rakas case is limited to its facts.

QUESTION: Why do you think then that Rakas expressly reserved the question as to whether Jones was still good law?

MR. McBRIDE: Because in that case, Your Honor, the limitation of the facts, namely the defendants being arrested for the crime of armed robbery. The footnote in the opinion reserved decision on that because of the different array of decisions in the federal circuits concerning the viability of Jones. And I think this case gives this Court the power to once again reaffirm Jones.

QUESTION: Or to overrule it.

MR. McBRIDE: I agree wholeheartedly, Your Honor, but the point that has not been raised or has been raised but not directly answered by my brother is

the issue of the prosecutorial self-contradiction.

In this particular case, the government would seem to have the best of both worlds. At one point in time, they are saying that defendant Zackular does not have standing to attack the validity of the search because he was not in possession or had no reasonable expectation of privacy at his mother's house; and on the other hand they are saying -- and contradictory, just as Justice Frankfurter had pointed out in Jones, that on the other hand he clearly had possession enough to find him guilty before a jury beyond a reasonable doubt.

QUESTION: Well, what is your answer to Justice White's question to your colleague that the defendant is also talking out of both sides of his mouth when he asserts possession for purposes of a suppression motion, whether it be the substantive Fourth Amendment issue or standing query, and then enters a plea of not guilty, which means a general denial to all of the allegations?

MR. McBRIDE: Automatic standing protects the defendant, Your Honor.

QUESTION: Well, why should it?

MR. McBRIDE: The answer to your question is the defendant, especially my defendant, Mr. Zackular, did not testify at the motion to suppress hearing

because I felt at the time, in reliance upon Jones, that we had automatic standing to assert a violation of our rights. I did not want Mr. Zackular to make a statement at the motion to suppress hearing, full well knowing that under a Simmons context it couldn't be used against him substantively on the issue of guilt or innocence but in light of Jones we were constricted at that time by a search pursuant to a warrant that was governed by the four corners of the affidavit in the search warrant at that time, and in light of Jones I felt strongly that my client should absolutely exercise his right to remain silent and not say anything because he was given the benefit of the automatic standing rule enunciated by Judge Frankfurter in Jones.

In terms of speaking out of both sides of his mouth, if you advocate the prosecutor's position, in answer to your question, Your Honor, then the prosecutor would have my client get on the witness stand and testify yes, I lived with my mother, or yes I had some type of proprietary or possessory interest in the house in Melrose where the checks were found. Clearly, if he testified at trial, he has to testify consistently with this.

QUESTION: Well, your client doesn't have to testify at all at trial, as I understood the response to

Mr. Justice White's question. Simply by pleading not guilty, he puts in issue, that is he denies the allegation of possession.

MR. McBRIDE: But he has got the right to testify if he so elects, Your Honor, and --

QUESTION: Exactly, and then that is his problem, not the government's.

MR. McBRIDE: But the dilemma that is posed against him at this particular juncture is he, if you advocate the government's position, would have to get on the witness stand at the motion to suppress hearing and purge himself, yes, I owned those particular pieces of mail.

QUESTION: Well, there are lots of dilemmas in criminal trials that defendants face.

MR. McBRIDE: An automatic standing solves the dilemma, Your Honor. What it does is it allows the defendant to remain silent and it allows the defendant to assert a violation of a Fourth Amendment right by remaining silent and gaining the benefit of Jones and the Fourth Amendment.

QUESTION: Do you think it helps the jury or judge to determine the truth of the charges brought against the defendant?

MR. McBRIDE: Well, that is not the purpose of

a motion to suppress, to determine the truth. The judge at this juncture doesn't determine truth, as you well know, Your Honor. He determines whether or not the exclusionary rule has been violated.

QUESTION: Do you think the automatic standing rule helps in the long run a jury or fact-finder to determine the truth of the charges brought?

MR. McBRIDE: It may not help a jury but the automatic standing rule is not for the jury to assess. It is up to the judge at pretrial to dispose of an issue and determine whether the exclusionary rule has been violated.

QUESTION: But the automatic standing rule does permit the defendant to take advantage of a violation of somebody else's Fourth Amendment rights.

MR. McBRIDE: I agree, Your Honor, especially in a case like this.

QUESTION: Yes, and the only reason that was ever given for it is that the evidence that he might give at the suppression hearing might be used against him at the trial. That is the only meaningful reason it has ever been used, ever been given.

MR. McBRIDE: Well, Judge Frankfurter said, Your Honor, that the defendant isn't given the unjust advantage at that time, the prosecution was given the

unjust advantage by getting the best of both worlds and they should not have the benefit of the best of both worlds.

QUESTION: That may be, but the reason that the defendant could rely on the violation of somebody else's rights is that they didn't want to put him to the trouble of claiming his own right, because it could be used against him at the trial. If he claimed that he himself had an interest in the premises or he himself had an interest in the goods seized, that might be used against him at the trial and he shouldn't be put in that dilemma. Isn't that the reason it was done?

MR. McBRIDE: That's correct, Your Honor, but we are not in an Alderman-type situation in this particular case.

QUESTION: How do you know?

MR. McBRIDE: Because the defendant is charged with a possessory crime here, unlike the situation in Alderman where the defendant --

QUESTION: The automatic standing rule prevents you from knowing whether you are in an Alderman situation or not. You just don't even inquire. Whosever rights were violate, the defendant gets the advantage of it by the automatic standing rule. That's the purpose of it, isn't it?

MR. McBRIDE: Clearly.

QUESTION: I am a little puzzled by this "who gest the special advantage." Isn't a motion to suppress evidence inherently a motion to suppress the truth? Isn't that the very function of it?

MR. McBRIDE: The very function, I submit, of a motion to suppress is to insure and make sure that the police do not violate constitutional rights.

QUESTION: That is not what I was addressing myself to. The operational function of it is to suppress some of the truth that is likely to be or may be used against him. It isn't necessarily all of the truth, but it is some truth that he does not, the defendant does not want the jury to know about, otherwise he wouldn't move to suppress, would he?

MR. McBRIDE: Mr. Chief Justice, I have trouble with your question because you say that a motion to suppress is seeking to suppress the truth. I don't say for a minute that a motion to suppress is used to suppress the truth. I say that it is being used to suppress constitutional violations of the defendant's Fourth Amendment rights.

QUESTION: But the purpose of it is to prevent the evidence from being adduced at trial, so presumably you wouldn't do it unless you thought the evidence was

relevant and material and probative.

MR. McBRIDE: It certainly could be relevant and material, in this case especially, since there were fingerprints found, latent fingerprints found on the checks that were discovered at the mother's house. It certainly could be probative of the defendant's guilt or innocence, but that is for a jury to assess, not a judge at a pretrial motion to suppress, Your Honor, which --

QUESTION: The judge doesn't make any decision at the pretrial except whether it will or will not be admitted in evidence.

MR. McBRIDE: Clearly.

QUESTION: He isn't making any judgment about the case, is he?

MR. McBRIDE: He is not making a judgment about the case. In this case he is deciding that the government does not have any evidence to use against the defendant because the only evidence that the state police had at that time were the checks taken from Zackular's mother's house --

QUESTION: How many checks were there altogether?

MR. McBRIDE: There were a multitude of checks, Your Honor, some --

QUESTION: Several hundred?

MR. McBRIDE: Yes, several hundred, I believe,

and there were some that had latent fingerprints of the defendant on the checks, but Mr. Zackular's mother was arrested also, and I submit that clearly Judge Garrity was correct at the motion stage in ruling that, number one, the search warrant was invalid, and there is no question about that; and, number two, that the defendants, Mr. Zackular and Mr. Salvucci, had standing to assert a violation of their Fourth Amendment rights. It may have been done vicariously. The search may have violated Mrs. Zackular's rights to her reasonable expectation of privacy, but the very nature of the charge, i.e., unlawful possession of checks stolen from the mail, most respectfully confers automatic standing on the defendants to assert a violation of his motion to suppress.

QUESTION: May I ask you, in a case like this, how does a motion to suppress proceed?

MR. McBRIDE: Well, when we were up before Judge Garrity in Boston, Your Honor, the judge was bound to --

QUESTION: You made the motion to suppress?

MR. McBRIDE: Yes, sir.

QUESTION: Then what happened?

MR. McBRIDE: And we went before Judge Garrity and the judge was bound by the four corners of the affidavit. At the very motion to suppress, nothing was

brought up concerning the defendant's standing to assert a violation of the motion to suppress. There was argument made --

QUESTION: Did the defendant ever take the stand at that --

MR. McBRIDE: No, sir. The prosecutor and the defendants simply argued on the basis of the affidavit and produced the affiant, Trooper Bellanti, who testified to certain facts, but basically Judge Garrity found, as you can see from a reading of the appendix, that the affidavit did not contain probable cause. And only after, at a later did, approximately three to four weeks later did the government --

QUESTION: Do you think that Jones, if the Jones case had involved facts like these, the Court would ever have decided it the way it did, where the defendant wasn't going to say a thing or ever admit a thing, just on the four corners of a -- there wouldn't have been any occasion to say anything like what they said in Jones, would there?

MR. McBRIDE: Well, that is because Jones was limited to its expressed facts, namely Mr. Jones being present --

QUESTION: I know, but the danger that Jones averted to was something the defendant might say at the

suppression hearing that might be used against him at the trial. Here you make the motion and say the warrant was deficient. He doesn't testify, and nothing can be used against him at the trial. Do you think Jones would ever have set automatic standing in a situation like that? I would have thought they would have said this affidavit-warrant doesn't relate to any property that -- it relates to your mother's property or your brother's property or your friend's property.

MR. McBRIDE: Again, Your Honor, my answer to that is Jones was limited to the case where a person on the premises, as long as he was reasonably on the premises, had a right to assert a motion to suppress. Rakas, of course, the test in Rakas is whether you had a legitimate expectation of privacy in that particular case as passengers in an automobile. Here we are in a different position because the crime charged is a different crime. It is possession, Your Honor. Again, the vice that this Court can protect against is the vice of prosecutorial self-contradiction, Your Honor, and I submit that to overturn Jones would be to give the government the best of both worlds in saying on the one hand that Mr. Zackular has no standing because he has not shown any possessory interest, and on the other hand to say that he is guilty of unlawful possession of

checks found at his mother's house.

QUESTION: Mr. McBride, how do you respond to the alternative argument the government makes that standing as we use the term doesn't really turn on possession at all, it turns on invasion of a privacy area rather than even if you had ownership of the article you would not have standing, according to their alternative argument, to object to an invasion of the home in which you have no privacy interest.

MR. McBRIDE: Well, I submit -- I disagree with that one-hundred percent.

QUESTION: Is there any case holding that ownership of an item is sufficient to give you standing to object to a search of premises in which you have no privacy interest?

MR. McBRIDE: Well --

QUESTION: If ownership isn't enough, then it would seem to follow a fortiori that possession wouldn't be enough.

MR. McBRIDE: The case that comes to mind for me, Your Honor, is United States v. Chadwick, where --

QUESTION: He had a privacy interest in the trunk, rather, the container in which the goods were found.

MR. McBRIDE: There is another case that I

can't put my hand on now, Your Honor, where a fellow was in a cab and had a suitcase with drugs in it --

QUESTION: Arkansas v. Sanders, yes.

MR. McBRIDE: Arkansas v. Sanders -- and he could --

QUESTION: You see, those don't reach my question which is you have either a possesory or a legal or any kind of an interest in the item seized but no claim to privacy in the location in which the item happened to be found by the police, and I don't know of any case that really squarely meets that issue.

QUESTION: There are plenty of cases that say that if the officers are lawfully where they are when they find the evidence of crime, they can seize it. What if they had found whatever was seized here in the street?

QUESTION: My issue is whether they are unlawfully there. There aren't any on that point, as far as I know.

QUESTION: I think there are cases that say that if the officers are lawfully where they are supposed to be, they can -- for example, if they are lawfully on the premises, they can seize items that they see in plain sight, even though they are not listed in the warrant.

MR. McBRIDE: I agree, Your Honor, as long as they are evidence of contraband or crime, and possibly

under Warden v. Hayden mere evidence of a crime, but this isn't that type of case.

QUESTION: And certainly here if the warrant had been good, the fact that you had an interest, even if you owned the property that was seized, you couldn't have objected to it, to the seizure?

MR. McBRIDE: If Mr. Zackular owned the house --

QUESTION: No, no, say if the warrant was good, say the warrant was good, it was a good warrant, nothing wrong with the warrant. The officers were lawfully in the house and lawfully making a search and they ran across this evidence.

MR. McBRIDE: I would still submit, Your Honor, I have grounds to submit a motion to suppress --

QUESTION: Well, you would lose it, that's all.

MR. McBRIDE: -- based on the very nature of the charge.

QUESTION: The question is whether if the warrant is bad, would you have a standing to attack the warrant, that is --

MR. McBRIDE: My answer is in the affirmative. I certainly do have standing because --

QUESTION: My only point is I don't know of a case directly in point on the proposition.

MR. McBRIDE: Well, I can't give you a case on

point other than the previous stare decisus of Jones v. United States, Your Honor, which I am asking the Court to uphold.

QUESTION: What Fourth Amendment right of your client was violated, if the warrant was bad?

MR. McBRIDE: The Fourth Amendment right is his right under Jones --

QUESTION: Don't talk about Jones, talk about the Fourth Amendment. What Fourth Amendment right of your client was violated if the warrant was bad?

MR. McBRIDE: Under Rakas, Your Honor, he clearly would have no legitimate expectation of privacy in his mother's home, and that is the test that was advocated in Rakas v. Illinois.

QUESTION: Well, it was not only advocated, it was a Court opinion.

MR. McBRIDE: I'm sorry, Your Honor, but the Fourth Amendment right is the right of a person like Mr. Zackular to be free from unreasonable searches and seizures in a crime where he is charged with possession, which is the particular case here.

QUESTION: Well, Jones doesn't rest upon any notion that the defendant's Fourth Amendment rights were violated. Concedely, they might be somebody else's, but he nevertheless has standing to get suppression based

on the violation of somebody else's Fourth Amendment rights in order to avoid a dilemma, under Jones.

MR. McBRIDE: Only because he was lawfully on the premises and had access to the premises at that particular time, Your Honor.

QUESTION: Well, that is another branch of Jones.

MR. McBRIDE: I agree.

QUESTION: That is another branch of Jones.

MR. McBRIDE: The fact that still sticks out in Jones is the protection against the prosecutorial self-contradiction and with that argument in mind I would ask this Court to affirm the ruling on the motion to suppress by Judge Garrity and to affirm the opinion of the First Circuit Court of Appeals in Boston.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Levy, do you have anything further?

ORAL ARGUMENT OF MARK I. LEVY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. LEVY: Just a couple of points, Mr. Chief Justice.

First, we think that the Fourth Amendment situation has changed since Jones. At that time, the doctrine of standing and the now settled limitation of standing to

defendants whose personal Fourth Amendment rights were violated was not yet fully developed by the Court.

Secondly, the privacy formulation of Fourth Amendment rights exemplified in later decisions, such as Katz, Alderman and Rakas, was --

QUESTION: Could I ask you, suppose in this case where the warrant was presented, the motion was made to suppress, the warrant was presented and the government said to the judge, "Judge, we have evidence to show you that this defendant had no interest whatsoever in this house," and you put on evidence to show absolutely that he had no interest in the house. He wasn't a guest, he didn't own it, had no property interest -- why should there be automatic standing?

MR. LEVY: We don't believe that there should be, Your Honor.

QUESTION: I know, but under Jones would there be?

MR. LEVY: I believe so, as long as the defendant were simply charged with the possessory offense, where possession was charged at the time of the search, then there would be automatic standing under Jones.

QUESTION: On account of how the government might want to say, well, he made a motion to suppress which in itself is an assertion of property interest?

MR. LEVY: Well, I think the more substantial reasoning of Jones was the self-incrimination dilemma as it has come to be called, and that was eliminated in Simmons.

QUESTION: Where he does not testify as here? He did not testify at the suppression hearing, did he?

MR. LEVY: No, he did not.

QUESTION: Then there wasn't any possibility of self-incrimination, compelled self-incrimination.

MR. LEVY: That's correct. That's correct.

QUESTION: He wasn't compelled to assert the ownership, the automatic standing had taken the place of that.

MR. LEVY: That's correct.

QUESTION: The only reason for the automatic standing rule was to protect the defendant so that he could assert the ownership for purposes of suppression without jeopardizing his -- without incriminating himself by having that very testimony thown in his face before the jury. Wasn't that it?

MR. LEVY: That was one of the rationales relied on in Jones, that's right.

QUESTION: Isn't that the basic rationale?

MR. LEVY: We believe it is.

QUESTION: What did the motion say in this case

to suppress?

MR. LEVY: The motion as I recall was very brief and simply alleged that the warrant was invalid on its face.

QUESTION: Of course, the motion itself against our ordinary Fourth Amendment cases is in itself an assertion that I am entitled to suppress this evidence.

MR. LEVY: I think that would be inherent as part of the filing of a motion.

QUESTION: But that assertion can't be used, even that limited assertion can't be used against him at trial.

MR. LEVY: Not as part of the prosecution's direct case on the issue of guilt or innocence, that is the holding in --

QUESTION: Under Harris and the others it could be used to impeach him perhaps.

MR. LEVY: We believe that is correct, but even if that it is correct it does not reimpose the self-incrimination dilemma that was of concern to the Court in Jones.

I also note that at the time --

QUESTION: Mr. Levy, may I ask you a question. We've talked a lot about Rakas, in your view is your position consistent with the position taken by the dissenters in Rakas?

MR. LEVY: I believe it is. I think there was no disagreement on the Court about the test to be applied.

QUESTION: Because the dissenters placed stress on the privacy aspect, the expectation of privacy, is that right?

MR. LEVY: That's correct.

QUESTION: There is no claim in this case of that which the dissent in Rakas focused on, there is no privacy claim in this case.

MR. LEVY: That's correct.

QUESTION: It is just the automatic standing part of Jones?

MR. LEVY: That's correct.

QUESTION: Is it not a fact that the majority in Raka, unlike the dissenters, attach significance to the absence of a property interest in the automobile?

MR. LEVY: Well --

QUESTION: So doesn't the majority actually cut more against you than the dissent does in the Rakas case?

MR. LEVY: I don't believe so. I think our position is consistent in both the majority and the dissent because as I read the majority opinion in Rakas, the --

QUESTION: But the extent that you contend that a property interest in the property is irrelevant. There

is language in the majority opinion that is inconsistent with your view.

MR. LEVY: I don't believe our position is that it is totally irrelevant. Our position is that it is not sufficient. I think there may be circumstances in which the property --

QUESTION: How could it ever be relevant to the legality of the invasion of privacy which is caused by an improper search?

MR. LEVY: One consideration in assessing the expectation of privacy is how the property was used. To the extent it was used to store one's possessions, then that is a factor to be taken into account in assessing the privacy interest. It is not a dispositive factor, but I think it is one factor among many that could be considered by the Court in evaluating the defendant's expectation of privacy.

QUESTION: You would agree that the majority attached greater significance to property than the dissenters did in Rakas?

MR. LEVY: I read the Rakas majority simply to leave open the question of the effect of a property interest --

QUESTION: Well, you don't think that the passenger in Rakas had been a part owner of the car, that

he would have had standing?

MR. LEVY: I'm sorry, I didn't understand.

QUESTION: Suppose the passenger in Rakas had been a part-owner of the car, would you have thought he still did not have standing? You only have standing for the driver, would that be your view?

MR. LEVY: No, he might have standing in that case, but that goes to a different property interest. That is the property interest in the area that is searched, like the suitcase in Arkansas v. Sanders. That does not go to a property interest in the items that are seized, and that is the basis --

QUESTION: Well, wouldn't that have been the critical fact as in Rakas the passenger did not have standing, but if he had been a part owner of the car, presumably he would have had standing so therefore doesn't that make ownership the critical test under the Rakas approach on which you seem to rely?

MR. LEVY: Well, I don't think that Rakas goes that far. But in any event, Rakas was concerned only with the property interest in the area that was searched. I think that is an entirely different question than a property interest in the item seized as a basis for suppressing the evidence obtained during the search.

In answer to your question before, Mr. Justice

Stevens, there is only one case of which I am aware, United States v. Mazzelli, from the Ninth Circuit, that deals with the question of a possessory interest in the item seized as a sufficient basis for challenging -- that holds that a possessory interest in the item seized is a sufficient basis for challenging the search.

QUESTION: There is another case, you know, that deals with the problem.

MR. LEVY: There are many cases that deal with it, including your opinion in United States v. Lisk. Mazzelli is the only one of which I am aware that goes the other way, and that is presently pending before the Court on our petition for certiorari under the name of Conway. Other than that, I am not aware of any cases that have so held.

We would also like to emphasize that the arguments that we present in our reply brief are applicable not only to the automatic standing issue that is presented in this case but are also fully applicable in cases where the defendant claims actual standing.

In particular, we believe that the defendant in Rawlings v. Kentucky, which is to be argued in tandem with the instant case today, does not have actual standing simply because his property interest in the items that were seized from his companion's purse, that basis

by itself in our view does not suffice to establish his Fourth Amendment standing for the reasons set forth in our reply brief.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:27 o'clock p.m., the case in the above-entitled matter was submitted.)

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