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Fourth Amendment--The Court Further Limits Standing

Rebecca J. Lauer

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FOURTH AMENDMENT—THE COURT FURTHER LIMITS STANDING

United States v. Salvucci, 100 S. Ct. 2547 (1980).
Rawlings v. Kentucky, 100 S. Ct. 2556 (1980).
United States v. Payner, 100 S. Ct. 2439 (1980).

INTRODUCTION

The Supreme Court first announced the exclusionary rule for federal courts in 1914,[1] and extended it to the states in 1961.[2] The purpose of this judicially created rule is to protect the rights guaranteed by the fourth amendment.[3] The exclusionary rule prohibits the use of evidence obtained as the result of an illegal search, seizure, or arrest.[4] The primary justification for the exclusionary rule[5] is to deter improper police conduct. A second reason for the rule is to preserve judicial integrity.[6] In formulating the rule, the Court limited its application to those cases in which the defendant could show "standing." A defendant had standing to contest the use of illegally obtained evidence if the government had violated his personal fourth amendment rights.[7] According to *Jones v. United States*,[8] the Court defined a person's fourth amendment rights in terms of whether he had a legally recognized right, such as a possessory or ownership interest in the premises searched or the property seized. In addition, *Jones* extended standing to those "legitimately on premises where a search occurs"[9] and established an exception to the standing requirement by automatically conferring standing upon defendants charged with crimes for which possession constituted an essential element.[10] In *Rakas v. Illinois*,[11] the Supreme Court substantially altered the standing inquiry by defining fourth amendment rights in terms of whether the search or seizure unreasonably infringed upon a defendant's legitimate expectation of privacy in the invaded place.[12] Under *Rakas*, a person's ownership or possessory interest in the property searched or seized does not necessarily mean that he has a reasonable expectation of privacy in the property.

In June 1980, the Supreme Court decided three cases that severely restrict the circumstances in which an accused is entitled to exclusion of evidence obtained by illegal search and seizure. In *United States v. Salvucci*,[13] the Court overruled the *Jones* automatic standing rule, holding that a defendant charged with a crime of possession may only invoke the exclusionary rule if his own fourth amendment rights have been violated. In *Rawlings v. Kentucky*,[14] the Court further defined the circumstances in which a person can claim fourth amendment protection. The Court held that a legitimate expectation of privacy in the area searched, rather than ownership of the seized property, entitled the defendant to challenge the search. Finally, in *United States v. Payner*,[15] the Court held that where the defendant's own rights are not violated, a court cannot employ its supervisory powers to exclude evidence even if the evidence was obtained by flagrantly illegal governmental conduct.

Salvucci, *Rawlings*, and *Payner* clarify the circumstances in which a defendant may invoke the fourth amendment exclusionary rule. These cases delineate the scope of the exclusionary rule in light of the *Rakas* test which measures fourth amendment violations in terms of whether the government unreasonably invaded a defendant's legitimate expectation of privacy. In *Salvucci*, *Rawlings*, and *Payner*, the Court consistently allowed greater use of reliable evidence obtained by illegal search and seizure. In addition, these three cases developed the *Rakas* concept that standing no longer depends upon property interests, but rather derives from

[1] Weeks v. United States, 232 U.S. 383 (1914).
[2] Mapp v. Ohio, 367 U.S. 643 (1961).
[3] Stone v. Powell, 428 U.S. 465, 482 (1976). The fourth amendment provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U. S. CONST. amend. IV.
[4] Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963).
[5] Stone v. Powell, 428 U.S. at 486. For an excellent discussion of the theories underlying the exclusionary rule, *see* Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & C. (1980).
[6] Stone v. Powell, 428 U.S. at 485.
[7] Brown v. United States, 411 U.S. 223 (1973).
[8] 362 U.S. 257 (1960).
[9] *Id.* at 267.
[10] *Id.* at 264–65.
[11] 439 U.S. 128 (1978). *See* Note, *Fourth Amendment—Reasonable Expectations of Privacy in Automobile Searches*, 70 J. CRIM. L. & C. 498 (1979).
[12] *Id.* at 140; *see also* Katz v. United States, 389 U.S. 347, 353 (1967).
[13] 100 S. Ct. 2547 (1980).
[14] 100 S. Ct. 2556 (1980).
[15] 100 S. Ct. 2439 (1980).

privacy interests. The Court apparently believes that unreasonable police conduct will be deterred by allowing exclusion of evidence only where the defendant's personal privacy rights are violated.

United States v. Salvucci

In *United States v. Salvucci*, the defendants, John Salvucci and Joseph Zackular, were charged with unlawful possession of stolen mail. The grand jury indicted the defendants based upon twelve checks police seized during a search pursuant to a warrant for search of an apartment rented by Zackular's mother.

Prior to trial, the district court granted the defendants' motion to suppress the checks because the affidavit used to support the search warrant application was insufficient to show probable cause. At the request of the government, the district court reconsidered its ruling and affirmed the suppression order despite the government's contention that the defendants lacked standing to contest the search and seizure.

The court of appeals affirmed[16] finding that the search warrant was constitutionally inadequate and that the defendants had standing to invoke the exclusionary rule by challenging the validity of the search.[17] The defendants did not have to show a legitimate expectation of privacy in the premises searched or the property seized because *Jones v. United States*[18] entitled the defendants to automatic standing. In *Jones*, the Supreme Court held that a defendant has automatic standing to challenge the legality of a search or seizure if that defendant is charged with a crime for which possession of the seized evidence constitutes an essential element.[19] The court of appeals questioned the viability of *Jones* but remarked that the Supreme Court must resolve whether the automatic standing rule should be altered.[20]

In a seven-to-two decision, the *Salvucci* Court overruled *Jones*, discarding the automatic standing exception to the exclusionary rule.[21] Justice Rehnquist, writing for the majority, believed that the Court's decisions since *Jones* had undermined the premises of the automatic standing rule.[22] The *Jones* Court granted automatic standing to a defendant charged with a possessory crime in order to resolve two types of problems: self-incrimination and prosecutorial self-contradiction.

Prior to *Jones*, a defendant charged with a possessory crime who wished to assert a fourth amendment claim faced a self-incrimination dilemma. At a suppression hearing, he had to allege possession of the evidence sought to be excluded. Yet possession of this evidence constituted the crime with which he was charged. If the trial court denied the motion to suppress, the defendant ran the risk that the prosecution would use his self-incriminating statements against him at the trial. Thus, the defendant faced the dilemma of asserting his fourth amendment claim at the risk of forfeiting his constitutional right against self-incrimination. *Jones* cured this problem by granting these defendants automatic standing, thereby eliminating the need to allege any personal or possessory interest in the evidence sought to be excluded.

In *Salvucci*, Justice Rehnquist believed that *Simmons v. United States*[23] had resolved the self-incrimination dilemma.[24] In *Simmons*, the Court held that testimony given by a defendant in support of a motion to suppress cannot be admitted against him at trial as evidence of his guilt.[25] Thus, *Simmons* allowed a defendant to assert his fourth amendment claim without having to balance the effect of this assertion on his fifth amendment right against self-incrimination. By eliminating the risk of self-incrimination *Simmons* also alleviated the need for the automatic standing rule.[26]

The *Salvucci* Court also noted the defendants' contention that despite *Simmons* the automatic standing rule was necessary to prevent prosecutorial use of suppression testimony for impeachment at trial. Since *Salvucci* did not present an impeachment issue, the Court refused to answer the defendant's argument. Thus, the question of whether *Simmons* should be extended to provide all defendants more complete protection against self-incrimination by forbidding the use of suppression testimony for impeachment purposes remains an open question.

Justice Rehnquist also believed that the problem of prosecutorial self-contradiction no longer existed. This problem is the converse of the defendant's self-incrimination dilemma. In possession cases prior to *Jones*, the government had to oppose

[16] United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979).
[17] *Id.* at 1097.
[18] 362 U.S. 257 (1960).
[19] *Id.*; *see also* Brown v. United States, 411 U.S. at 229.
[20] United States v. Salvucci, 599 F.2d at 1097-98.
[21] 100 S. Ct. 2547.
[22] *Id.* at 2551.
[23] 390 U.S. 377 (1968) (defendant's suppression testimony may not be used against him at trial as evidence of his guilt).
[24] 100 S. Ct. at 2551.
[25] Simmons v. United States, 390 U.S. at 395.
[26] 100 S. Ct. at 2552.

a motion for suppression by contending that a defendant did not possess the seized goods for purposes of the fourth amendment. At trial, however, the government had to prove that the same defendant possessed the goods in order to secure a conviction. By automatically granting standing to defendants charged with possessory crimes, the *Jones* Court removed the issue of possession from the suppression hearings, thereby resolving the problem of prosecutorial self-contradiction.

According to the *Salvucci* majority, the Court's decisions since *Jones* have resolved the problem of governmental self-contradiction. *Jones* was premised on the concept that possession of a seized good in itself conferred standing upon a defendant to challenge the legality of the search and seizure. However, *Rakas* altered this concept by establishing that standing depends only upon a legitimate expectation of privacy in the area searched. Justice Rehnquist reasoned that "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation."[27] Thus, a prosecutor can without contradiction argue that a defendant suffered no invasion of fourth amendment rights warranting suppression and that the defendant unlawfully possessed the goods. In light of both *Simmons* and *Rakas*, the Court concluded that "the original foundations of *Jones* are no longer relevant . . . ."[28] In conclusion, the majority urged not only that the automatic standing rule lacked justification, but also that its only present purpose was to benefit those whose rights had not been violated. The Court reversed and remanded the cause to give the defendants an opportunity to demonstrate that they had a legitimate expectation of privacy in the place searched.[29]

Justice Marshall, joined by Justice Brennan, dissented. He argued that the self-incrimination rationale still provided adequate justification for the automatic standing rule. In his view, *Simmons* did not resolve that dilemma. Justice Marshall stressed that the prosecution may still use suppression testimony for impeachment purposes and for the development of trial strategy.[30] Faced with the possibility that suppression testimony may be used in this way, a defendant may decide not to challenge the admissibility of evidence on fourth amendment grounds in order to avoid the risk of aiding the prosecution by self-incrimination. Thus, despite *Simmons*, the dissent argued that a defendant may still confront the dilemma of asserting a fourth amendment claim at the risk of producing self-incriminating statements which might aid the prosecution's case.

Justice Marshall also asserted that a possessory interest in the goods seized should be sufficient to confer standing regardless of the defendant's expectation of privacy in the premises searched. The dissent believed that the requirement of standing is unnecessary in possession cases where the charge itself alleges an interest that should be sufficient to confer standing.[31]

ANALYSIS

The *Salvucci* decision narrows the scope of the exclusionary rule. *Jones* created an exception to the traditional standing requirements by allowing defendants charged with possessory crimes to invoke the exclusionary rule whether or not their own fourth amendment rights were violated. After *Salvucci*, defendants charged with possessory offenses will not be entitled to exclusion unless they prove a violation of their own privacy rights.

In light of its recent fourth amendment opinions, the Court's decision to overrule *Jones* was not surprising.[32] The *Salvucci* Court relied on *Alderman v. United States*[33] to reaffirm the position that deterrence of illegal police conduct does not constitute a sufficient basis for extending the protections of the exclusionary rule to persons whose fourth amendment rights were not violated.[34] In reaching this conclusion, the *Alderman* Court found that the fourth amendment does not mandate exclusion in every case that may deter illegal searches.[35] The Court requires exclusion only when the defendant's own privacy rights have been violated by an unreasonable search or seizure. However, weighing the competing societal interests in prosecution of the guilty and in deterrence of police misconduct, the *Alderman* Court found that the marginal deterrent impact that would result by extending the

[27] *Id.*
[28] *Id.* at 2553.
[29] *Id.* at 2555.
[30] *Id.* at 2555-56 (Marshall, J., dissenting).
[31] *Id.* at 2556.
[32] *See* Rakas v. Illinois, 439 U.S. 128 (adopting the legitimate expectation of privacy test); Alderman v. United States, 394 U.S. 165 (1969) (holding that suppression of the product of a fourth amendment violation can be successfully urged only by one whose own rights were violated by the search); Simmons v. United States, 390 U.S. 377 (holding that suppression testimony may not be admitted against a defendant as evidence of guilt).
[33] 394 U.S. 165.
[34] 100 S. Ct. at 2554.
[35] 394 U.S. at 174.

exclusionary rule to defendants whose own rights were not violated did not justify "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[36]

Recent decisions also support the majority's argument that the problem of prosecutorial self-contradiction no longer exists. Since *Rakas*[37] and *Rawlings*[38] establish that a privacy interest rather than a possessory interest is the crucial factor in proving a fourth amendment interest, a prosecutor can properly argue that a defendant criminally possessed a seized good and yet suffered no fourth amendment violation by its illegal seizure. Even though Justices Marshall and Brennan asserted in *Salvucci* that possessory interests should be sufficient to confer standing, they acknowledged that the *Rawlings* holding, which limited standing to assert fourth amendment claims to those situations in which a defendant has a privacy interest in the area searched, resolved the problem of prosecutorial self-contradiction.[39]

As for self-incrimination problems, *Jones* correctly recognized that defendants charged with possessory offenses faced far greater risks of self-incrimination from producing evidence at suppression hearings than did defendants charged with nonpossessory offenses. In order to invoke the exclusionary rule before *Jones*, a defendant had to prove a possessory or ownership interest in the place searched or the item seized. Hence, for possessory-crime defendants, the testimony they presented in order to establish standing proved an element of the offense with which they were charged.[40] However, for nonpossessory-crime defendants, the risk of aiding the prosecution was not so great since testimony they produced to establish standing did not prove an element of the offense with which they were charged. *Jones* resolved the self-incrimination dilemma for possessory-crime defendants by affording them automatic standing to challenge the legality of the search and seizure. Later, *Simmons* sought to protect both classes of defendants from incrimination risks by prohibiting the prosecution's use of suppression testimony to prove a defendant's guilt.[41] The *Salvucci* Court has now overruled *Jones* on the grounds that *Simmons* provides adequate protection from self-incrimination to defendants charged with either possessory or nonpossessory crimes.

With regard to the prosecution's case-in-chief, *Simmons* clearly resolved the dilemma of asserting one's fourth amendment claims at the risk of aiding the prosecution. However, the *Salvucci* dissent voiced concern that suppression testimony might still be used for impeachment and to aid the prosecution in the preparation of its case and trial strategy. In response to these concerns, the *Salvucci* majority argued that the possibility of aiding the prosecution in the development of its case constituted a risk equally applicable to possessory and nonpossessory situations.[42] Despite this possibility, the Court has refused to extend the automatic standing rule to nonpossessory-crime defendants. Therefore, the Court will not retain the rule only for possessory-crime defendants who face the same risks.[43]

Similarly, the risk that suppression testimony may aid the prosecution by its use for impeachment purposes appears to apply equally to both classes of defendants. Under *Rakas* and *Rawlings*, regardless of whether possession is an element of the charge, a defendant need only prove that his own privacy rights have been violated to invoke the exclusionary rule. Thus, both classes of defendants must present evidence of a legitimate expectation of privacy at the suppression hearing. Suppression testimony by both the defendant seeking exclusion of a murder weapon and the defendant seeking exclusion of controlled substances provides the prosecution with evidence that they had privacy interests in the areas searched. This suppression testimony will connect the defendant to the evidence seized only insofar as the defendant must show a privacy interest in the place where police seized the evidence. Such testimony may indeed be damaging to the defendant's case, but suppression can only be used to impeach the defendant who alleges that he did not have an interest in the place where the evidence was found. Thus, while a possessory-crime defendant may still have to assert a possessory interest in the evidence seized as a factor tending to establish a privacy interest, the prosecution can only use this testimony to impeach the defendant's credibility, not to prove his guilt. Similarly, the nonpossessory-crime defendant may give damaging testimony at the suppression hearing

[36] *Id.* at 175.
[37] 439 U.S. 128.
[38] 100 S. Ct. 2556; *see also* text accompanying notes 50–83 *infra*.
[39] 100 S. Ct. at 2556 (Marshall, J., dissenting).
[40] Simmons v. United States, 390 U.S. at 391.
[41] *Id.* at 394.
[42] 100 S. Ct. at 2554 n.7.
[43] *Id.*

which would link him with the place where a murder weapon or other incriminating evidence was found. Yet, this testimony is only available to the prosecution for impeachment purposes. Consequently, both classes of defendants face the same risk of aiding the prosecution and both are dissuaded from giving false testimony at trial. Therefore, to provide automatic standing to possessory-crime defendants and to deny such protection to nonpossessory-crime defendants would be unjust since both classes should be afforded constitutional protections against both fourth amendment violations and self-incrimination.

Although suppression testimony may aid the prosecution against both classes of defendants, the potential harm does not justify extending automatic standing to both classes. Such an extension would totally destroy the requirement that one must prove a violation of his own fourth amendment rights to urge suppression. The result would be to relegate the requirements of the exclusionary rule to a mere showing that the evidence sought to be admitted was the fruit of an illegal search or seizure. The Court repeatedly has refused to extend the exclusionary rule's protection to those whose rights were not violated[44] because it views the societal cost of excluding such relevant and reliable evidence as greatly impeding the search for truth.[45] Thus, exclusion would frustrate two of the basic values underlying standing rules: society's interest in truth-finding and in prosecuting the guilty.

Although the question of whether suppression testimony can be used for impeachment purposes was not at issue in *Salvucci*, it will probably come before the Court at a future date. In *Harris v. New York*[46] and *Oregon v. Hass*[47] the Court allowed the prosecution to use *Miranda*[48]-violative statements for impeachment when such statements could not be used as evidence of guilt. In *United States v. Havens*[49] the Court further permitted the use of illegally obtained evidence to impeach statements made by the defendant on cross-examination even though such evidence was otherwise inadmissible. In light of these decisions, the Court will probably allow prosecutors to use suppression testimony for impeachment purposes. While such a decision would substantially further society's interest in truth-finding, defendants would then certainly face the dilemma of whether to assert fourth amendment claims at the risk of aiding the prosecution. Such a result illustrates the inherent conflicts between the goals of deterrence and truth-finding that arise when an exclusionary rule is used to protect fourth amendment rights.

Rawlings v. Kentucky

While *Salvucci* held that a charge of possession was not sufficient to confer standing automatically upon a defendant, *Rawlings v. Kentucky*[50] presented the issue of whether a defendant is entitled to exclusion of evidence obtained during an illegal search when he does not have a legitimate expectation of privacy in the place searched but he does claim ownership of the evidence seized.

On October 18, 1976, six police officers went to the home of Lawrence Marquess with a warrant for his arrest. Five people were at the house when the police arrived. During an unsuccessful search for Marquess, the police smelled the odor of marijuana and saw marijuana seeds in one of the bedrooms. Two of the officers left temporarily to obtain a search warrant, and the other four detained the occupants of the house. During this time, police allowed two of the occupants to leave after they consented to body searches required as a condition to their release. After approximately forty-five minutes, the two officers returned with a search warrant for the house. One officer read the warrant and *Miranda* warnings to the three remaining occupants, who included Vanessa Cox, and the defendant David Rawlings.

An officer ordered Cox to empty the contents of her purse. Contained in the purse were 1,800 tablets of LSD and a number of other controlled substances. Upon emptying the purse, Cox turned to Rawlings and told him " 'to take what was his.' "[51] Rawlings then claimed ownership of the controlled substances. An officer searched Rawlings and placed him under formal arrest.

At a suppression hearing, Rawlings challenged the admissibility of the drugs and statements he made to police regarding the drugs on the ground that this evidence constituted the fruit of an illegal detention and unlawful search. The trial court found that Rawlings lacked standing to contest the search of the purse, and that, in any event, the search was permissible. Rawlings was convicted of trafficking in and possession of controlled sub-

[44] Rakas v. Illinois, 439 U.S. at 137–38.
[45] *Id.*
[46] 401 U.S. 222 (1971).
[47] 420 U.S. 714 (1975).
[48] Miranda v. Arizona, 384 U.S. 436 (1966).
[49] 100 S. Ct. at 1912.
[50] 100 S. Ct. 2556.
[51] *Id.* at 2559.

stances. The Kentucky Court of Appeals affirmed, finding that Rawlings did have standing but that the detention and searches were legitimate.[52] Finally, the Supreme Court of Kentucky, relying on *Rakas v. Illinois*,[53] upheld the conviction on the grounds that Rawlings lacked standing because he had no legitimate expectation of freedom from governmental intrusion into the purse.[54]

In a split decision, the Court affirmed Rawlings' conviction. Five Justices voted to affirm, two Justices, concurring in part, voted to vacate the judgment and to remand to the state court, and two Justices voted to reverse. Justice Rehnquist, writing for the majority, held that the Supreme Court of Kentucky correctly applied *Rakas* in determining that Rawlings had failed to prove that he had a legitimate expectation of privacy in Cox's purse.[55]

The Court rejected Rawlings' contention that, regardless of privacy expectations in the purse, his ownership of the drugs vested him with the right to challenge the legality of the search. While the Court recognized ownership of seized goods as a factor to be considered in deciding whether a defendant had a legitimate expectation of privacy, the Court noted that "*Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment."[56] In reaching its decision, the Court relied upon a number of factors. First, Rawlings had only known Cox for a few days and he had never before sought or received access to her purse. Second, Rawlings did not have any right to exclude other persons from access to the purse. Indeed, a third party had free access to the purse, even on the day of the arrest. Finally, Rawlings did not take precautions to maintain his privacy, and he admitted that he had "no subjective expectation that Cox's purse would remain free from governmental intrusion . . . ."[57]

Justice Blackmun filed a concurring opinion addressing the majority's interpretation of *Rakas*. Justice Blackmun contended that the majority viewed *Rakas* as setting forth a single inquiry of "whether governmental officials violated any legitimate expectation of privacy held by the petitioner."[58] In contrast to the majority, Justice Blackmun construed *Rakas* as establishing two inquiries, both of which must be satisfied in order for a defendant to invoke the exclusionary rule successfully. The first inquiry consisted of whether the search or seizure infringed upon an interest protected by the fourth amendment, and thus focused on whether the defendant had a legitimate expectation of privacy. The second inquiry is whether that search or seizure violated the fourth amendment's probable cause and warrant requirements. This dual inquiry illustrates that one's legitimate expectation of privacy may be invaded and yet the police might have acted legally. In another case, the police may have acted illegally and yet one's privacy might not have been invaded.

Justice Blackmun also argued that *Rawlings*

[52] The opinion of the court of appeals is unreported.

[53] 439 U.S. 128.

[54] Rawlings v. Commonwealth, 581 S.W.2d 348 (Ky. 1979).

[55] 100 S. Ct. at 2556. Rawlings also presented the issues of whether the defendant's admissions were the fruit of an illegal detention and whether the search of the defendant's person was lawful. In order to resolve the admissions question, the Court relied upon Brown v. Illinois, 422 U.S. 590, which enumerated four factors relevant to determining whether a confession is the product of a free will or whether it is the fruit of an illegal arrest. These factors are the *Miranda* warnings, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. Applying the *Brown* test, the majority held that the state had met its burden of showing that Rawlings' admission was an act of free will, unaffected by any illegality in the detention. The police gave *Miranda* warnings to Rawlings moments before he admitted ownership of the drugs. While not much time elapsed between the initiation of the detention and the admission, the Court stressed that the atmosphere during this detention was congenial and that this factor outweighed the short time lapse. Considering intervening circumstances, the Court concluded that the fact that Rawlings' admission was a spontaneous reaction to the discovery of the drugs indicated that the admission was an act of free will. Finally, the Court found that the misconduct of the police was not so flagrant as to require exclusion of the admission.

Regarding this unlawful search question, Justice Rehnquist found that the search of Rawlings' person was a valid search incident to arrest.

Justice White, joined by Justice Stewart, concurred in part with the majority opinion. They took exception with the Court's disposition of the issue whether the admission was the fruit of an unlawful detention. Justice White argued that the Court should remand to the state court for a determination on the factual issue of whether the admission was an act of free will. The state court did not address this question and considered the facts of the record incomplete. According to Justice White, the Court should therefore remand this question to the state court for further factual determinations.

In dissent, Justice Marshall also argued that the admission was the fruit of the illegal detention and should have been suppressed.

[56] 100 S. Ct. at 2562.

[57] *Id.* at 2561.

[58] *Id.* at 2564–65 (Blackmun, J., concurring).

should be confined to its facts. He emphasized that a property interest, especially the right to exclude others from the property, may often be a "principal determinant in the establishment of a legitimate Fourth Amendment interest."[59] However, Justice Blackmun agreed that Rawlings did not have the right to exclude other persons from access to the purse and that Rawlings' ownership interest in the drugs was insufficient to create a privacy interest in the purse.

Joined in dissent by Justice Brennan, Justice Marshall attacked the Court's holding that an individual cannot invoke the exclusionary rule without showing that an unreasonable search or seizure violated his legitimate expectation of privacy in the area searched.[60] According to Justice Marshall, the majority's position rejected the fundamental principle that an interest in either the place searched or the property seized is sufficient to invoke fourth amendment protections. He cited a number of previous decisions in which the Supreme Court had found an interest in the property seized sufficient to confer standing.[61] Furthermore, he asserted that the majority's reliance upon *Rakas* was misplaced. The only issue resolved in *Rakas* was whether fourth amendment protection derived from a person's right to be on the premises searched, or from his legitimate expectation of privacy in those premises. Since *Rakas* focused only on the place searched, Justice Marshall observed that the *Rakas* defendants did not even assert ownership of the property seized as a ground for claiming a fourth amendment deprivation.

In addition to contending that the majority opinion was unsupported by *Rakas* and contrary to precedent, the dissent declared that *Rawlings* was contrary to the plain language of the fourth amendment which guarantees to the people security "in their persons, houses, papers, and effects, against unreasonable searches and seizures." Justice Marshall reasoned that seizure of a person's property interferes with his security in his effects. Justice Marshall asserted that a person's interest in property seized "is quite enough to establish that the defendant's personal Fourth Amendment rights have been invaded by the government's conduct."[62] Therefore, this person should not also have to show a protected interest in the premises searched. Justice Marshall contended that the Court's sole emphasis on the place searched thus "turned the development of the law of search and seizure on its head."[63] Moreover, Justice Marshall argued that *Katz* did not exclude property interests from fourth amendment protection but rather expanded the "Fourth Amendment by recognizing that privacy interests are protected even if they do not arise from property rights."[64] Since he understood *Rawlings* to define the fourth amendment exclusively in terms of privacy interests in the area searched, Justice Marshall argued that *Rawlings* destroyed the protection of property rights that the fourth amendment was historically meant to afford.

ANALYSIS

Similar to *Salvucci*, *Rawlings* further narrows the scope of the exclusionary rule. Since *Katz v. United States*,[65] the Court has consistently abandoned the notion that interests in property are alone sufficient to confer standing. *Jones* had established that anyone legitimately on the premises searched had standing. *Rakas v. Illinois* rejected this standard as "too broad a gauge for measurement of Fourth Amendment rights."[66] *Salvucci* refused to grant automatic standing to those charged with possessory crimes. Finally, *Rawlings* rejected ownership of the goods seized as a proxy for a fourth amendment interest. Hence, the effect of *Katz* and *Rakas* has been to redefine the fourth amendment in terms of a reasonable or legitimate expectation of privacy. An individual can demonstrate this legitimate expectation of privacy only by showing that he exhibited an actual, or subjective, expectation that society recognizes as reasonable.[67]

The dissent argued that the majority opinion in *Rawlings* is contrary to the fourth amendment because it denies protection to those with a possessory interest in the property seized. Citing the fourth amendment's language which guarantees people the right to be secure in their effects, the dissent

[59] *Id.* at 2565.

[60] *Id.* at 2566-69 (Marshall, J., dissenting).

[61] *Id.*; Simmons v. United States, 390 U.S. 377 (showing of ownership or possessory interests was required of a defendant wishing to assert a fourth amendment objection); Jones v. United States, 362 U.S. 257 (possession of the seized property was sufficient to confer standing); United States v. Jeffers, 342 U.S. 48 (1951) (standing to object to a seizure cannot be separated from standing to object to the search).

[62] 100 S. Ct. at 2568 (Marshall, J., dissenting).

[63] *Id.*

[64] *Id.*

[65] 389 U.S. 347 (1967) (person in a phone booth has the protection of the fourth amendment against unreasonable surveillance and recording of his conversations).

[66] 439 U.S. at 142.

[67] 389 U.S. at 361 (Harlan, J., concurring).

contended that this plain language means that ownership of property seized vests a defendant with the right to have illegally obtained evidence excluded. The majority's rejection of this contention seems based upon two viewpoints which differ from the dissent. First, the majority treats the exclusionary rule as a means of deterring police misconduct, not as a compensatory remedy[68] or constitutional right.[69] However, in the dissent's view the exclusionary rule serves as a constitutional remedy. Since the exclusionary rule functions to deter police misconduct and not to redress constitutional deprivations, no defendant has a constitutional right to exclusion under the fourth amendment. Rather, exclusion is a judicially created remedy that the Court utilizes only in those cases when deterrence outweighs the detrimental effects of exclusion. *Rawlings* holds that the exclusionary rule will only be applied when the defendant's legitimate expectation of privacy has been violated. Accordingly, ownership of the drugs did not vest Rawlings with a constitutional right to exclude the evidence.

The second area of disagreement between members of the *Rawlings* Court consists of the majority's application of the privacy test for more than simply determining whether exclusion should be granted. The majority also defined the fourth amendment in terms of privacy interests and found that Rawlings had not suffered any constitutional deprivation by the seizure of his property. While the language of the amendment seems precise, the Court's decisions prior to *Rawlings* have recast fourth amendment guarantees in general terms, broadly defining the amendment as protecting only legitimate expectations of privacy. This new definition constitutes an attempt to effectuate historical purposes of the fourth amendment, which was enacted in response to English search and seizure practices that invaded the privacy of citizens. The principle that "a man's house was his castle"[70] and that it should not be invaded unreasonably was the foundation for the fourth amendment.[71] Therefore, the Court's recent redefining of the fourth amendment apparently seeks to fulfill the original intent of the amendment's framers to protect privacy interests in the place searched. Yet in the process, the Court seems to have ignored the language of the amendment itself. Under the plain language of the amendment, Rawlings did apparently suffer a constitutional deprivation. However, due to the Court's redefinition, he suffered no deprivation since the cutting edge for fourth amendment protections is no longer property interests, but rather is privacy rights.

Justice Marshall correctly noted that *Katz* was not meant to redefine the fourth amendment protections exclusively in terms of privacy interests.[72] He viewed *Katz* as expanding the protections of the amendment beyond property rights to include privacy interests.[73] Indeed, the *Katz* Court explicitly stated that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."[74]

However, cases after *Katz* and dicta in *Katz* itself foreshadowed the redefinition of the fourth amendment exclusively in terms of privacy rights.[75] *Rakas* interpreted *Katz* to say that "the capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[76] While the *Rakas* Court left open the question of whether a defendant who had no privacy interest in the place searched could base a fourth amendment claim upon ownership of the evidence seized,[77] the Court indicated that property interests will generally be sufficient to prove a legitimate expectation of privacy when these interests include the right to exclude others.[78] However, property interests in the premises searched are not always sufficient to establish a legitimate expectation of privacy.[79] A logical corollary to this proposition is that property interests in the items seized are not always sufficient to establish a privacy right although the right to exclude others may be a determining factor. In fact, this conclusion was drawn in some circuit courts after the *Rakas* decision.[80]

[68] *See* Elkins v. United States, 364 U.S. 206 (1960).
[69] Stone v. Powell, 428 U.S. at 486.
[70] Weeks v. United States, 232 U.S. at 390.
[71] *Id.*
[72] 100 S. Ct. at 2568 (Marshall, J., dissenting).
[73] *Id.*
[74] Katz v. United States, 389 U.S. at 350.
[75] United States v. Payner, 100 S. Ct. at 2443.
[76] Rakas v. Illinois, 439 U.S. at 143.
[77] *Id.* at 142 n.11.
[78] *Id.* at 143 n.12.
[79] *Id.*
[80] United States v. Rios, 611 F.2d 1335, 1344 (10th Cir. 1979) ("The focus is on the individual's legitimate expectations of privacy in the area or the item subject to search and seizure"); United States v. Dall, 608 F.2d 910, 914 (1st Cir. 1979) ("Ownership alone is not enough to establish a reasonable and legitimate expectation of privacy").

In *Katz* itself, the Court recognized that there are situations in which a person has a strong ownership interest, yet is not entitled to invoke the fourth amendment's protection since he did not have a legitimate expectation of privacy. The Court stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[81] In *Rawlings*, the defendant admitted that he had no subjective expectation of privacy in the purse. Furthermore, the Court found that he did not act to preserve any privacy in the purse since it was accessible to at least one third party. Thus, Rawlings failed to establish the *Katz* twofold requirement of both a subjective and an objective expectation of privacy. The majority also noted that if Rawlings had placed his drugs in plain view he could not have claimed a legitimate expectation of privacy.[82] Therefore, similar reasoning suggests that Rawlings had forfeited his fourth amendment protections by placing the drugs in an area where he did not have a privacy interest.

Rawlings appears to preclude a defendant from ever invoking the exclusionary rule where the defendant's property is located in a place in which the defendant has no privacy interest. If the factual situation in *Rawlings* had been such that Rawlings had a subjective expectation of privacy in Cox's purse and the right to exclude others from access to it, then he probably would have had the legitimate expectation of privacy necessary to trigger fourth amendment protection. However, the crucial factor in establishing such protection rights would be the privacy interest in the place searched, not ownership of the goods seized.

While under *Rawlings* mere ownership of the goods seized is not alone sufficient to confer fourth amendment standing, there is still the possibility that a defendant might achieve standing on the basis of a privacy interest in the evidence seized with no privacy interest in the place searched. For example, privacy interests in the evidence seized might confer standing when the government illegally searches the office of an attorney and seizes records pertaining to a particular client. Under *Rawlings* and *Rakas*, the attorney would have standing to challenge this search and seizure since a person certainly has a legitimate expectation of privacy in his office and personal records. The question arises whether the client would have standing if the government sought to use these records in a criminal prosecution against the client. Considering the nature of the attorney-client privilege,[83] the client would have a reasonable expectation of privacy in the records seized even though he would not have a privacy interest in the area searched. In the situation described, the client would have a subjective expectation of privacy in the disclosures he made to his attorney and society has recognized this expectation as reasonable. Hence, the government's conduct appears to violate the client's own legitimate expectation of privacy and he should have the right to invoke the exclusionary rule. In this way, the defendant could possibly prove standing without having to show a privacy interest in the actual place searched.

United States v. Payner

As in *Salvucci* and *Rawlings*, the defendant in *United States v. Payner*[84] lacked standing to invoke the exclusionary rule. However, *Payner* presented the additional issue of whether the supervisory power of federal courts authorizes the suppression of illegally obtained evidence where the defendant lacks standing but proves that the government acted intentionally to violate another's fourth amendment rights.

Norman Casper, a private investigator retained by the Internal Revenue Service, devised a scheme to gain access to the records of a Bahamian bank. This plan was approved by Richard Jaffe, a special agent of the IRS. Casper became acquainted with the vice-president of the bank, Michael Wolstencraft, and introduced him to Sybol Kennedy, Casper's employee. On January 15, 1973, while Kennedy and Wolstencraft went out to dinner, Casper entered Kennedy's apartment and took Wolstencraft's briefcase. Casper delivered the briefcase to Jaffe, who supervised the copying of documents contained in it. The briefcase was returned to the apartment before Kennedy and Wolstencraft returned. Documents copied that night led to the discovery of a 1972 loan agreement in which the defendant, Jack Payner, pledged funds in a Bahamian bank account as security for a loan. On the basis of this agreement, Payner was indicted on a charge of falsifying his 1972 federal income tax return. The indictment alleged that Payner had

[81] 389 U.S. at 351–52.

[82] 100 S. Ct. at 2562.

[83] United States v. Pipkins, 528 F.2d 559, 562 (5th Cir. 1976), *cert. denied*, 426 U.S. 952 (1976). "The attorney-client privilege prohibits the disclosure of the substance of communications made in confidence by a client to his attorney for the purpose of obtaining legal advice." *Id.*

[84] 100 S. Ct. 2439.

knowingly failed to report a foreign bank account when filing his return.

The district court found Payner guilty as charged. However, the court suppressed evidence of the loan agreement finding that it was the fruit of a flagrantly illegal search. Although the district court found that Payner had no standing under the fourth amendment to invoke the exclusionary rule,[85] it suppressed the documentary evidence on the basis of the due process clause of the fifth amendment and the inherent supervisory power of the federal courts.[86] The district court reasoned that the government's illegal conduct undertaken with knowing and purposeful "*bad faith hostility*" to fundamental constitutional rights required exclusion.[87] The district court then set aside Payner's conviction for lack of sufficient evidence.[88]

In a *per curiam* order, the Sixth Circuit affirmed, holding that the district court properly exercised its supervisory powers to suppress the evidence.[89] The Supreme Court reversed.

Justice Powell delivered the Court's six-to-three decision. The Court held that evidence can be excluded under the fourth amendment only if police violated the defendant's own fourth amendment rights. Such a violation can occur only when the illegal search or seizure has invaded a defendant's own legitimate expectation of privacy rather than that of a third party. The Court found that Payner had no legitimate privacy interest in Wolstencraft's briefcase or bank documents[90] and that he therefore lacked standing under the fourth amendment to challenge the legality of the search.

With regard to the district court's use of the federal supervisory power[91] to suppress the bank documents, the Court held that:

> the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices.[92]

Justice Powell believed that the scope of the exclusionary rule must be restricted in this way so as not to unduly impair the ability of courts to ascertain the truth in criminal prosecutions.[93] Since the Court viewed the societal costs of the suppression of reliable, probative evidence as unnecessarily high, the Court refused to extend the supervisory power of federal courts so as to allow indiscriminate application of the exclusionary rule.[94]

Chief Justice Burger filed a short concurring opinion. He agreed that Payner could not invoke the exclusionary rule, but believed that, under the separation of powers, federal courts have no general supervisory power over actions of the executive branch.[95] Hence, the Chief Justice implied that that only the executive branch was empowered to consider and correct the IRS agents' unlawful conduct.

Justice Marshall was joined in dissent by Justices Brennan and Blackmun. The dissent emphasized the district court's finding that the government agents had intentionally manipulated the standing requirements of the fourth amendment and that they had acted with purposeful and bad faith hostility toward fundamental constitutional rights.[96] Relying upon the exclusionary rule's dual rationale of deterrence of illegal police conduct and preservation of judicial integrity, Justice Marshall argued that supervisory powers should be utilized to exclude evidence obtained through intentionally illegal conduct in order to prevent the court from becoming an accomplice to intentional misconduct.[97]

The majority recognized and disputed the arguments of the dissent. The majority noted that

[85] United States v. Payner, 434 F. Supp. 113, 126 (N.D. Ohio 1977).

[86] *Id.* at 129, 134–35.

[87] *Id.* at 129 (emphasis in original).

[88] *See* 100 S. Ct. at 2443 n.2. "The unusual sequence of rulings was a byproduct of the consolidated hearing conducted by the District Court .... Respondent does not challenge these procedures." *Id.*

[89] United States v. Payner, 590 F.2d 206 (6th Cir. 1979).

[90] 100 S. Ct. at 2444. In support of this finding, the Court cited United States v. Miller, 425 U.S. 435 (1976), which held that a depositor has no expectation of privacy and no fourth amendment interest in copies of checks and deposit slips held by his bank.

[91] The Court has supervisory power over federal law enforcement agencies, Rea v. United States, 350 U.S. 214 (1956), and over the proceedings of federal courts, Mesarosh v. United States, 352 U.S. 1 (1956). According to *Mesarosh*, the Court should use its supervisory powers in federal criminal cases "to see that the waters of justice are not polluted." *Id.* at 14.

[92] 100 S. Ct. at 2446.

[93] *Id.*

[94] *Id.* at 2447.

[95] *Id.* (Burger, J., concurring).

[96] *Id.* at 2450 (Marshall, J., dissenting).

[97] In support of this proposition, Justice Marshall cited Elkins v. United States, 364 U.S. 206; Mallory v. United States, 354 U.S. 449 (1957); Mesarosh v. United States, 352 U.S. 1; Upshaw v. United States, 335 U.S. 410 (1948); and McNabb v. United States, 318 U.S. 332 (1943).

the cases relied upon by the dissent were not controlling because all of them involved a situation in which the defendant's own rights were violated by the illegality.[98] In addition, Justice Powell suggested that deterrence of police illegality and protection of judicial integrity constituted the rationale for both the exclusionary rule and the supervisory power.[99] However, Justice Powell further argued that deterrence did not constitute a sufficiently strong interest in *Payner* to require exclusion since the illegal conduct did not violate Payner's rights. Consequently, society's interest in prosecuting the guilty outweighed both the interest in deterrence and the interest in judicial integrity. Since this conclusion of the majority apparently equated the exclusionary rule with the supervisory power, Justice Marshall accused the majority of rendering the supervisory powers superfluous.[100] However, Justice Powell responded that *Payner* did not limit the traditional scope of the supervisory power, but rather only refused to extend it.[101]

ANALYSIS

Consistent with its recent trend of narrowing the scope of the exclusionary rule, the *Payner* Court refused to allow exercise of the supervisory power to exclude illegally obtained evidence even in a case where the trier of fact found that the government had engaged in illegal conduct intentionally and with bad faith hostility toward a person's constitutional rights. Payner suffered no fourth amendment deprivation because he had no personal privacy right in the seized briefcase and documents. Since he was thus not entitled to the exclusionary rule's protections, the only issue was whether the evidence should be excluded through the use of the federal court's supervisory powers.

The *Payner* Court appears to equate the supervisory powers with the exclusionary rule for purposes of considering the admissibility of illegally obtained evidence. Both are based upon policies of deterrence of police misconduct and preservation of judicial integrity.[102] However, the Court's treatment of these two policies is problematic. The Court's application of the supervisory powers fails to give adequate consideration to the goal of preserving judicial integrity. The negative impact on the integrity of the judicial process is much greater when illegally seized evidence is admitted where the defendant proves that the governmental misconduct was intentional rather than simply accidental. Therefore, unlike *Salvucci* and *Rawlings*, *Payner* is a more compelling case for exclusion based upon judicial integrity since Payner proved bad faith hostility on the part of the government. In the *Payner* situation, admission of the evidence gives the appearance that the judiciary condones the illegality. As Justice Marshall argued, the Court has previously stressed "the need to use supervisory powers to prevent the federal courts from becoming accomplices to such misconduct."[103] Hence, in *Payner* and other cases where government officials acted in bad faith hostility to constitutional rights, courts should have the power to exclude illegally obtained evidence.

Refusal to exclude the evidence in cases such as *Payner* also defeats the goal of deterring governmental misconduct. First, *Payner* illustrates that the Court's construction of the exclusionary rule allows the government purposefully to violate a person's constitutional rights in order to obtain evidence against a third party. Thus, the deterrent effect of the exclusionary rule is incomplete. In intentional misconduct cases, allowing exclusion of evidence under the supervisory powers would substantially deter such lawless governmental conduct and would help prevent circumvention of the exclusionary rule. Second, without the exclusion of such evidence, governmental officials who intentionally violate a person's rights often will not be chastised for their misconduct unless that individual is prosecuted. *Payner* illustrates this problem since the governmental officials were not penalized for their illegal actions, but rather benefited from them. Finally, those individuals whose fourth amendment rights were violated and who are not then prosecuted are provided little if any relief under our present system because of the difficulty of proving damages.[104] Hence, many innocent citizens are not compensated for their constitutional injuries.

Many have argued that an alternative to the exclusionary rule should be developed so that the values of deterrence, truth finding, relief, and integrity can be better effected. Some observers suggest that a civil remedy, more effective than our present tort system, be developed in order to provide better remedies for fourth amendment violations.[105] Others suggest that the legislature create

[98] 100 S. Ct. at 2446-47.
[99] *Id.*
[100] *Id.* at 2453 (Marshall, J., dissenting).
[101] *Id.* at 2447 n.8.
[102] *Id.*
[103] *Id.* at 2451 (Marshall, J., dissenting).
[104] *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 718 (1970).
[105] *Id.*

a statutory civil remedy providing for monetary compensation and for discipline of offending government officials through the judiciary, aided by an independent review board.[106] While problems of implementation would inevitably plague such proposals, they do offer a reasonable alternative to the present system. Though the Court appears strongly attached to the exclusionary rule at present, the recent changes in the rule, the consistent split of opinion within the Court, and the trend of narrowing the scope of the rule all indicate a dissatisfaction with the present system of dealing with evidence obtained by illegal search and seizure. Careful consideration should be given to the suggestions that this evidence should be admitted at trial while utilizing civil remedies and disciplinary hearings to pursue the goals of deterrence of police misconduct and preservation of judicial integrity.

Conclusion

In *Salvucci*, *Rawlings*, and *Payner*, the majority of the Court treats the exclusionary rule not as a compensatory remedy[107] or constitutional right[108] but rather as a judicial device to deter police misconduct. On the other hand, Justices Marshall and Brennan in dissent attempt to use the exclusionary rule as a constitutional remedy. However, the Constitution nowhere prevents the use of reliable, illegally obtained evidence. The fourth amendment only sets out the right of people to be secure from unreasonable searches and seizures. The means by which this right is to be effectuated is left for the courts or legislature to determine. The Court has decided to use the exclusionary rule to deter the police from violating fourth amendment rights. However, exclusion of evidence for deterrence purposes creates an inherent conflict with the interest in admitting to trial all relevant, reliable evidence. The Court has chosen to resolve this dilemma by balancing deterrence against the interest in prosecution of the guilty.

The decisions of this past term reflect a revitalized concern for truth-finding and prosecution of the guilty and a judicial determination that the goal of deterrence is sufficiently fulfilled by suppressing only evidence obtained in violation of the defendant's own fourth amendment rights. Therefore, the effect of the *Salvucci*, *Rawlings*, and *Payner* decisions is to narrow the scope of the exclusionary rule. *Salvucci* abolished automatic standing in possessory cases. *Rawlings* rejected the notion that mere ownership interests in evidence seized was sufficient to establish a fourth amendment interest. Finally, *Payner* reaffirmed that a defendant is entitled to exclusion only if the search and seizure violated his own fourth amendment rights. Even in a case of flagrantly illegal conduct by the government, lower federal courts cannot exclude the evidence under their supervisory powers unless the defendant's own privacy rights were violated. The overall result of these decisions is that a court may only exclude evidence under the fourth amendment if it finds that the defendant's own constitutional rights were violated by an unlawful search or seizure. Moreover, a defendant's own constitutional rights are violated only when his own legitimate expectation of privacy is unreasonably invaded by the challenged conduct.[109]

Rebecca J. Lauer

[106] S. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence 71–84 (1977).

[107] *See* Elkins v. United States, 364 U.S. 206.

[108] Stone v. Powell, 428 U.S. at 486.

[109] United States v. Payner, 100 S. Ct. at 2444.