In the

Supreme Court of the United States

ELISHA COMBS,

Petitioner,

v. No. 71-517

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.
April 11, 1972

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ELISHA COMES, Petitioner,	:	
v.	:	No. 71-517
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.,

Tuesday, April 11, 1972.

The above-entitled matter came on for argument at 1:48 o'clock, p.m.

BEFORE:

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

APPEARANCES:

JAMES N. PERRY, ESQ., 414 Walnut Street, Cincinnati, Ohio 45202; for the Petitioner.

WILLIAM BRADFORD REYNOLDS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent.

[Note: Mr. Justice Marshall absent; but will participate in the decision.]

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 arguments next in 71-517, Combs against the United States.

Mr. Perry, you may proceed.

ORAL ARGUMENT OF JAMES N. PERRY, ESQ.,

ON BEHALF OF THE PETITIONER

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

We'd like to acknowledge and recognize that Mr. William F. Hopkins would have been here today, but on advice of counsel he was unable to travel to Washington.

The petitioner was charged with an indictment having to do with receiving, possessing, and concealing goods that were stolen in interstate commerce. When the matter came on for trial, there was a pretrial motion to suppress.

The argument was, basically, that the affidavit and the search warrant was defective.

Without the issue of standing having been challenged, the court overruled the pretrial motion to suppress; the matter went to trial; petitioner was found guilty.

When the matter was appealed to the Sixth Circuit Court of Appeals, for the first time, the United States Government raised the issue of standing. The Sixth Circuit Court of Appeals determined that we did not have standing, and they affirmed the trial court.

Now, the argument of the petitioner is relatively straightforward. We feel there's a tension between the Fourth and the Fifth Amendments. We're relying upon Jones, and we're relying upon Simmons. And we're saying that if an indictment has, as one of its elements, possession, the government cannot deny to us standing to attack a search warrant.

Now, the government has argued that -- actually they have two positions, they are argued that Simmons gives the petitioner protection because whatever he says at the pretrial hearing cannot be used against him at the trial in chief. And they also have urged the Court to adopt a theory that a thief can have no expectation of privacy with regard to the goods that he's stolen, and cannot, therefore, bring himself within the Fourth Amendment.

Q Let's assume that a thief hides his goods in a checkroom. He just hides it there. The police hear that he did it, and they simply go to the checkroom operator and say, "We would like to look around here for some goods that we think were stolen." The checkroom operator says, "Come on in." The police go in, and they find the goods.

Now, at that point, is it your position that the police may not seize those goods without a warrant?

MR. PERRY: No, Your Honor, I'd say they had permission to enter the checkroom by the checkroom girl --

Q Well, I know, but they didn't have permission

from anybody to take the goods. And the Fourth Amendment protects those effects.

MR. PERRY: Yes, sir.

Q That's your point, is it not?

MR. PERRY: Yes, sir.

Q Well, now, a court could say, "Well, surely, you have standing to object, in the sense that they're your goods, but there has just been no violation of your Fourth Amendment rights, because the police may seize stolen goods without violating anybody's Fourth Amendment rights."

MR. PERRY: Yes, sir. I would say that the thief at least has standing to make that argument. He may lose.

Q But he loses it?

MR. PERRY: Yes, sir.

Q Now, --

Q How is your case different?

MR. PERRY: In our case the goods were seized on a farm in Hazard, Kentucky, where the goods were stored on the petitioner's father's farm.

Q Was it the relationship that --

MR. PERRY: No, sir.

Q How is the son different from the checkroom that Mr. Justice White postulated?

MR. PERRY: Well, we feel that, to assert that, "yes, this liquor did belong to me, that I did have possession of it"

forces him to admit an element of the crime, which --

Q Well, that doesn't force him to admit anything, if -- if the police got on -- let's assume that the police did not violate your client's Fourth Amendment rights by entering the father's property.

MR. PERRY: Yes, sir.

Q Let's just assume that. And got to the shed, still they hadn't violated his rights, and then they saw the liquor.

MR. PERRY: Oh, it would appear that we do not have a search, Your Honor. If they saw it, did they look for it on the farm?

Q Oh, yes, they saw it in the -- they searched for it and found it. And assuming that there were no violations of the defendant's Fourth Amendment rights until they seized the liquor, until that point at least there was no violation?

MR. PERRY: Yes, sir.

Q Would you say that there was any violation to his Fourth Amendment rights in that act of seizing the liquor?

MR. PERRY: Your Honor, I would say that there are no violations of his rights up to that point, yes, sir.

Q And all you're contending for here is to be able to make the argument that he ought to be able to have a chance of saying, "My rights weren't violated"?

MR. PERRY: Your Honor, we feel that in this particular instance, the search warrant was, and I think it's conceded it was, not an adequate warrant. And we want to attack that line.

Q Well, I understand that.

MR. PERRY: Yes, sir.

Q But all you're claiming is the basis for attacking the warrant is the claim of possession and the goods, isn't it? Not any expectation of privacy in the property owned by the defendant's father?

MR. PERRY: We had an expectation of privacy, and that's why we concealed it on this farm; the goods were hot, we're trying to hide it.

Q Well, in this case, were you denied the right to show that you had such an interest in the real property, that the entry of the property violated your client's rights?

MR. PERRY: Your Honor, the issue of standing was not discussed at the trial court level. When we had the pretrial motion to suppress, it was never raised.

In other words, the issue was never discussed. The only thing that was discussed was the sufficiency of the affidavit.

Q Well, so it's never been tried out as to whether or not, if the warrant was no good, that your client's Fourth Amendment rights were violated by entering the property?

MR. PERRY: I believe that's right, yes, Your Honor.

In other words, I'm saying that we feel that if they did not have a valid warrant, they did not have a right to go on this farm and find the liquor.

Q Well, I know that's your claim now.

MR. PERRY: Yes, sir.

Q Well, supposing your client had planted the liquor on some farm of a complete stranger, would that case, from your point of view, be any different than this one?

MR. PERRY: No, Your Honor, our point of view would be that we are entitled to suppress that evidence, even though the liquor that we had stolen was secreted on the farm of a stranger.

Q Suppose he drove out in the country with the truck and had a bulldozer and bulldozed a great big hole in the ground, buried it, and covered it over, and we don't know whose land it is?

MR. PERRY: Yes, sir.

Q Is that expectation of privacy?

MR. PERRY: Yes, sir, because in this instance he hid them, he doesn't want anybody to find them, illustrating his intent to conceal them. He's trying to hide them. He does expect privacy. And, further --

Q Well, what amendment honors and protects that kind of a claim of privacy? That kind of an expectation?

MR. PERRY: Well, we understand that the Fourth Amendment is a personal right, and --

Q Personal right to bury, hide stolen goods on somebody else's land?

MR. PERRY: Well, to be protected in your effects, and your effects are the liquor that you buried.

Q Well, of course they aren't his, by definition.

MR. PERRY: Well, from the concept of property and ownership, the Court's correct. But the man did have possession of them, and he's charged with possession as an element of the crime.

Q But I thought you were arguing a minute ago that your principale contention was violation of the expectation of privacy on the farm. Now, are you also saying that you're claiming a right in the liquor itself, which was violated by a seizure without an appropriate warrant?

MR. PERRY: Yes, Your Honor. Based on the idea that we were charged with possession. The mere fact that we're charged with possession forces us to give up something in order to protect ourselves, so that we can have this evidence suppressed.

Q Well, but the liquor was taken from you before this: you mean give up something in the sense of a concession relating to the merits of the criminal charge?

MR. PERRY: Yes, sir.

Q Well, I thought you said in the cloakroom example that the police could seize the stolen merchandise or the contraband without violating your Fourth Amendment rights?

MR. PERRY: Your Honor, maybe if I had the opportunity, I'd take that back.

Q You think that's fatal?

MR. PERRY: Your Honor, that question is a difficult and close question. I would say that they had an access to the cloakroom, but with regard to the goods that they took, if they're charging us with possession of them, as an element of our crime, then I think that gives us standing. If they were --

Q Well, it may give you standing, but are you going to win your Fourth Amendment argument or not?

MR. PERRY: In that case I would say probably not.

Q Yes.

Q So that you'd have standing to lose the issue, lose the point?

MR. PERRY: Yes, sir.

Now, we have this problem, that when we have a motion to suppress, and we are asked to explain how we acquire our right to suppress these items, whatever we say may be used against us at the trial in chief. But --

Q I thought that Simmons held that whatever you

said could not be used against you.

MR. PERRY: Yes, sir, that's correct. Now, we're trying to determine if it can be used indirectly, from the standpoint of impeachment, as Harris would suggest.

Or could it be used in this way, let's suppose that we were successful on a motion to suppress, and the tangible evidence could not be used. Now, could the United States Government use other facts that were tainted, or their origin was the basis of our testimony on suppression, and would we then have a Nardone type of question: what was the origin of these facts that they presented? Was it truly independent or was it from our testimony at the pretrial?

Now, the government makes the point that if the man is a thief, with regard to the solen goods he shouldn't have standing.

But in order to determine that issue, do we first have to determine that he's a thief? Which is really what is supposed to be determined at the trial in chief.

We would say that he's entitled to assert standing without having a determination on a pretrial basis whether he's a thief or not.

Q Well, wouldn't you -- aren't there some situations in which, prior to the determination of the ultimate issue, the known possession of stolen property affords basis for probable cause for either an arrest or a warrant?

MR. PERRY: Yes, sir.

Q So that you sometimes do need to make a preliminary and tentative determination before trial?

MR. PERRY: Yes, sir.

That's the probable cause determination.

Q Is there any more than that involved here, the probable cause to believe that he wasn't entitled to possession of this property?

MR. PERRY: Well, except that at the pretrial hearing he might come on and say, "No, I'm not a thief", and then you're going to have an issue whether there was probable cause that he was a thief or he was not; and actually you've got an issue within an issue determination.

Q Was this merchandise -- it was non-taxpaid liquor, is that it?

MR. PERRY: Your Honor, the tax was properly paid. It was legitimate alcohol.

Q So it's a question of it's being stolen?

MR. PERRY: Your Honor, I think there was a question of whether it was stolen and who stole it. As I understand the facts, it was transported in interstate commerce from Ohio to Kentucky. It was properly taxed at the time it was taken.

I guess basically what we're saying, the Court has shown familiarity with our position certainly, we're saying

the United States Government should not be allowed to benefit from lawlessness. That is, if they can go out and break down a door, or with an inadequate warrant go out and search and find something, they should not, through the limitation of Simmons or through the suggestion of the U. S. Attorney be permitted to use that evidence against us.

We don't think this Court should sanction lawlessness in law enforcement. That's all we have now.

Q As I understandit, Mr. Perry, the government has now conceded that the search warrant in this case was defective, in sufficient?

MR. PERRY: Yes, sir.

Q Is that your understanding?

MR. PERRY: Yes, sir.

Q And also since the question of standing is not even raised by the government at the District Court level, you had no opportunity to show your client's relationship with the premises where the liquor was seized?

MR. PERRY: That's correct,Your Honor.

Q Am I correct in that?

MR. PERRY: We'd argue for a waiver of that point, as a matter of fact, by the U. S. Government, for not raising it at the trial court level.

Q It wasn't raised at all?

MR. PERRY: No, sir.

Q Of course, the reason that the government might not have raised it, I suppose, is that they got a favorable ruling on the validity of the search warrant affidavit?

MR. PERRY: Well, Your Honor, at the time they rested on the arguments at the pretrial motion to suppress, they did not know if it was going to be favorable or not.

They were going to -- if they were concerned about it, you'd think they would advance every argument that they had and not reserve one for an after-the-fact use, as it were.

Q You think they could have attacked or supported validity of the warrant both on the sufficiency of the affidavit, and on the absence of standing; that's a two-pronged part of the same argument?

MR. PERRY: Yes, sir.

Your Honor, as a matter of fact, a little bit more on that point: If the affidavit and the search warrant had been adequate under Aguilar and Spinelli, the question of standing probably would not have been raised. Because that affidavit would have included the basis for the informant's information, which was the transportation of the goods by the petitioner to the farm, and the concealing of the goods on the farm.

Q Did the government concede the insufficienty of the warrant before the Court of Appeals, or --

MR. PERRY: Yes, sir.

Q And raised the question of standing for the

first time there?

MR. PERRY: Yes, sir.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Mr. Reynolds.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,

ON BEHALF OF THE RESPONDENT.

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

This case presents the single issue: whether one charged with possession of stolen property should, by virtue of that charge alone, be accorded automatic standing to challenge a search for or seizure of that property.

Now, in order to put that issue into proper context, let me amplify on the facts provided by Mr. Perry just briefly.

Prior to trial in this case, petitioner moved to suppress the 26 cases of whiskey involved here, that were sazied by the Kentucky State Police, claiming that the underlying affidavit for the search warrant was legally deficient.

The motion was heard by the District Court and denied. And at that time the question of standing was not raised or argued by the parties.

The case then proceeded to trial, where the government's evidence revealed the following:

On July 28, 1969, petitioner telephoned one Janet Ballard and asked whether she knew of anyone who wanted to buy

same whiskey. She said yes, and later that day petitioner delivered approximately 40 cases of whiskey to her home in Newport, Kentucky.

The following evening, Mrs. Ballard called petitioner and told him that she has heard the whiskey was stolen, and asked that he remove it.

He did so, with the help of one James Martin, Mrs. Ballard's brother, and they stored the whiskey in the basement of the home of petitioner's estranged wife, which at that time also contained some 30 or 40 additional cases of whiskey.

Later that same week, Martin received a telephone call from petitioner; he was told that, quote, "the heat was on" and that the whiskey had to be moved.

The two men then went to the house, loaded all the cases of whiskey onto a pickup truck, and transported the whiskey some 200 miles to Hazard, Kentucky. The cases were stored in an old shed on the farm of petitioner's father.

Thereafter, Martin went to the FBI agent assigned to the area and told him of the stolen whiskey. The agent gave the information to the Kentucky State Police, and they obtained and executed a warrant to search the father's farm.

Pursuant thereto, the police seized in the shed the 26 cases of whiskey involved here.

Petitioner, who was not present at the time, was later arrested in his home in Newport, Kentucky. His defense

at trial was based on testimony given by petitioner and members of his family, to the effect that the shed had earlier been rented by James Martin and one Charles Chapman; that it was Martin and Chapman who had stored the whiskey in the shed, and the petitioner had not been on or near his father's farm during the relevant period, and had never had anything to do with the whiskey in question.

Following his conviction, petitioner appealed to the Sixth Circuit Court of Appeals, on the ground that the whiskey had been seized under an invalid search warrant, and that the evidence had therefore been improperly admitted.

The government, recognizing for the first time on appeal that the underlying affidavit for the search warrant was legally deficient, under Aguilar v. Texas, argued only in the Court of Appeals that petitioner lacked standing to raise the Fourth Amendment claim.

Q Because? What was your argument there? Because why?

MR. REYNOLDS: The argument there was based on the fact that the petitioner had no interest in the premises searched or in the property seized. And he was not on the premises or --

Q All you needed to argue was the first.

MR. REYNOLDS: Well, I believe that that's the issue in this case, Your Honor.

Q Well, assume you went on that, that he had to -- that he had no interest in the property, in the real property, what then?

MR. REYNOLDS: Well, then, I believe that there is -- that the issue is whether he could assert an interest in the personal property that was seized.

Q You think there's some doubt about that?

MR. REYNOLDS: Our position is that he should not be able to assert an expectation of privacy in the seized property, because it was stolen property. But that -- our position that the --

Q Well, you seem to think there's a -- do you think there really is some substantial question that if a policeman comes upon, legally comes upon stolen property, he can't seize it?

If it's evidenced -- I mean, if he has reasonable grounds to believe that the property is stolen?

MR. REYNOLDS: Well, Your Honor, I believe --

Q Is that in doubt under our prior cases?

MR. REYNOLDS: I believe that there may be some question under a prior decision of this Court, Jeffers v. United States, where there was language to the effect that contraband property, and we don't perceive any basis for distinction between contraband and stolen property in this respect, contraband, per se, there was language which indicated

that one might have a proprietary interest in contraband sufficient to give him a right of privacy in the property seized.

Q Well, what about historically, regarless of what the scope of the incident to an arrest search is, whether it's very narrow or broad, when you make an arrest and you seize evidence, this evidence or contraband or stolen property, if you find it on the person, is there any question that the police may seize that?

MR. REYNOLDS: No, I think --

Q And that they reasonably may seize it under the Fourth Amendment?

MR. REYNOLDS: I think that's correct.

Q Well, what's the difference here, if the police are legally where they are, why can't they seize property that they recognize as having been stolen? Or at least they have reasonable grounds to think they're stolen?

MR. REYNOLDS: Well, that's the position we take. And we believe that they can do that.

Q Well, except, as I understand it, you now concede that they were not legally where they were, that they were there by reason of an invalid, insufficient search warrant.

MR. REYNOLDS: That is correct, Your Honor.

Q And again on the premise that they were not legally where they were there.

MR. REYNOLDS: That's correct.

Q And the question is whether or not this person has the standing to raise that illegality.

MR. REYNOLDS: To object to that, so that I understood --

Q Yes, but don't you concede from what you suggest ought to be done in this case that he has, that he will win this case if he can show he has a sufficient interest in the real property?

Q Yes.

MR. REYNOLDS: I believe that's correct.

Q Well, do you concede standing to claim that there was an invasion of his Fourth Amendment rights by entering the real property?

Q Right.

MR. REYNOLDS: That's correct, Your Honor.

I think --

Q But you certainly -- but there's as -- do you think you must also show, or do anything about the personal property that was seized? Let's assume you win on the -- on remand, assume this case were remanded and you won, and were able -- and it was shown that he has no interest in the real property, such as to make this entry an invasion of his Fourth Amendment rights.

MR. REYNOLDS: Right.

Q Is the case over then, or not?

MR. REYNOLDS: We -- yes -- well, the question of the suppression is -- if he has no interest in the premises?

Q Yes.

MR. REYNOLDS: Then he would not have any standing to raise a Fourth Amendment claim.

Q About the entry to the property?

MR. REYNOLDS: That's correct.

Q Now, how about the Fourth Amendment supposedly protects against seizures of effects?

MR. REYNOLDS: To the extent that -- well, our position is that they are not his effects, he has no right to assert a Fourth Amendment claim as to effects that are stolen.

Q Well, let's assume that if, instead of whiskey, stolen whiskey, it was heroin, which did belong to him; that he had bought and paid for, and in that sense they belong to him, they did belong to him?

MR. REYNOLDS: Our position would be the same with respect to heroin, --

Q Well, it doesn't have to be, does it?

MR. REYNOLDS: -- as it is to stolen property.

Q It doesn't have to be. You're talking here about stolen property.

MR. REYNOLDS: In this case we're talking about stolen property.

Q And I suggest that, although you don't see a distinction between contraband and stolen goods, that there might be one?

Q There may be, in terms as to what you argue in your case, in your brief, because youare saying it doesn't belong to him?

Q Right.

MR. REYNOLDS: Well, that's --

Q Exactly.

MR. REYNOLDS: All right.

Q Now, how about if you -- what about if you're legally in a place and you see some evidence of a crime, that unquestionably belonged to the defendant?

MR. REYNOLDS: The evidence unquestionably belongs to the defendant?

Q Let's assume you're searching a house with the consent of the owner.

MR. REYNOLDS: I think that the defendant would then have a right of privacy in the effect it unquestionably belonged to him, which would --

Q It would mean that you couldn't seize it? If there was -- if it was evidence of a crime?

MR. REYNOLDS: I -- the question, I believe, is whether he would have standing to object to the seizure. I believe we could seize --

Q Well, of course, but could he win?

MR. REYNOLDS: That turns on whether it was a reasonable or unreasonable seizure; and I believe that falls into the question of whether it was in plain view or whether it was in the permissible scope of the search at the time and questions of that nature. But as to standing, our position could be that he would have standing to object to the seizure, because it was an effect that did belong to him.

Q Well, as I understood --

MR. REYNOLDS: The resolution of that --

Q -- Mr. Justice White's question -- maybe I got a different structure from what you did -- I understood him to pose to you a case where the owner of the establishment had consented to the entry and the search, and then the officer went in and saw sawed-off shotguns, hand grenades, machine guns, on their face, something he could observe. Now, is that the way you understood his question?

MR. REYNOLDS: Well, I believe that on those facts that he would have standing --

Q Standing to complain before the material was admitted in evidence? Could there be any question about its admissibility?

MR. REYNOLDS: Oh, no, I think that the admissibility -- it would clearly -- he would not be in a position to suppress the evidence. But I believe that that's a different question

as to whether -- than the question whether he has standing.

Q Well, standing as to personal property really is kind of an almost chronological or circuitous, isn't it -- standing in connection with real property and expectation of privacy in premises may make good sense; but standing in connection with personal property, it seems to me from the question, then just boils down to almost six of one or half a dozen of the other.

MR. REYNOLDS: Well, I think there is an overlap, it's interrelated. But I believe that there -- it could be that a person has standing to object to a seizure of what is lawfully his personal effects, and yet, because the seizure is reasonable, not be able to suppress it.

Q Whereas if the personal effects were something that had been stolen by him, he wouldn't even have standing to object, although the seizure might be unreasonable?

MR. REYNOLDS: That's our position, yes.

Q Because they were not his personal effects, they belonged to somebody else; right?

MR. REYNOLDS: That's correct, Your Honor. That's our basis position.

Q Because, as I say again, as I understand your position here, at least, you conceded that this was an unreasonable search?

MR. REYNOLDS: This was an unreasonable search; we do.

Q This search violated the Fourth Amendment.

MR. REYNOLDS: Somebody's Fourth Amendment legitimate expectation of privacy, yes.

Now, the problem that -- the reason that we have such a problem with respect to standing is because of the decision of this Court in Jones v. United States, where it was held that one who is charged with a possessory crime, in this case possession of stolen property, automatically has standing to contest or challenge the search-and-seizure.

And we believe that the dual rationale of the Jones decision has been undermined significantly by the subsequent decision in this Court in Simmons, and that it should be reexamined by this Court. And to the extent that it would confer automatic standing to one charged with a possessory crime of stolen property, it should be abandoned.

The reason given, one of the reasons given by the Court to sustain the automatic standing rule; it was essentially that the defendant, in order to establish standing to suppress evidence, might well have virtually to admit his guilt of the possessory offense charged. And his virtual admission could then, at that time, be used against him at the trial.

And this prospect, or dilemma, as it was referred to in Jones, was viewed by the Court as a deterrent on some defendants who would otherwise have come forward to vindicate their Fourth Amendment claims. And it was thus considered,

the Court said, to weaken the efficacy of the exclusionary rule, as a sanction for unlawful police behavior.

No longer, however, does there seem to be areal prospect of later direct use at trial, of testimony given earlier in support of a suppression motion.

In Simmons v. United States, at 390 U.S., decided several years after Jones, this Court held the testimony given by a defendant in support of his motion to suppress under the Fourth Amendment may not thereafter be admitted against him at trial, on the issue of guilt, unless he makes no objection.

Now, this use restriction rule of Simmons essentially removes the dilemma that was confronting defendants at the time that Jones was decided, and thereby eliminate one of the two reasons given by the Court in Jones for fashioning an automatic standing rule.

As to the other reason, which was that the government would have the benefit of the rule -- that the automatic standing rule was fashioned so that the government would not have the benefit of contradictory position,as a basis for conviction, that's also undermined by Simmons. Because that rationale was based on the argument that if a defendant was sufficiently deterred from asserting his Fourth Amendment right, so that he remained silent, choosing not to acknowledge any interest in the premises searched or the property seized,

that the government would then have the advantage of a position on the question of the admissibility of evidence that was seemingly inconsistent with its proof of lawful possession at trial.

However, now that the factor that once deterred, defendants, from moving to suppress has been removed by Simmons, the use restriction rule of Simmons, it seems unlikely that the defendant will choose to forego pressing their Fourth Amendment claim.

Perhaps even more to the point, if one is charged, who is charged with possession moves to suppress, on grounds of illegal search or seizure, we do not believe that the goverment is required, as we understand the fundamental inquiry for purposes of standing under the Fourth Amendment, to maintain a position inconsistent with or contradictory to his position at trial.

In this case petitioner's conviction flows from proof of his knowing possession of the stolen whiskey before and at the time of the search. Yet the admissibility into evidence of the fruits of that search, on the ground that petitioner lacks standing, is perfectly consistent, we think, with the theory that petitioner had constructive possession of the whiskey at all relevant times.

His standing depends upon some showing of an intrusion of privacy of his own person, his own house, his

papers or his own effects, or an intrusion on premises in which he personally had a legitimate expectation of privacy.

In the absence of such a showing, the evidence is admissible without regard to whether petitioner might claim, which he never has done in this case, that he possessed the stolen whiskey.

It would thus be no need for the government to dispute such a claim on a motion to suppress.

In sum, we do not believe that it is the fundamental purpose of the Fourth Amendment to protect individual privacy, or the dual rationale of Jones v. United States, when read in light of this Court's subsequent decision in Simmons, warrants an application of the automatic standing rule to one charged with lawless possession, when the sole basis for his Fourth Amendment claim is the seizure of stolen property in which he has no legitimate proprietary interest, and with respect to which he can have no reasonable expectation of privacy.

Q Mr. Reynolds, what's your argument in response to Mr. Perry's contention that the government should have raised the lack of standing point, as well as the sufficiency of the search warrant on the suppression proceedings in the District Court?

MR.REYNOLDS: Well, Your Honor, I don't believe I have an answer as to why they did not raise the standing point.

The government failed to raise it; it raised it for the first time in the Court of Appeals. No objection was made by petitioner at that time.

Q Was the standing point argued orally in the Court of Appeals, or in the briefs, at any rate?

MR. REYNOLDS: It was argued in the brief, and it was argued on petition for rehearing. The Court of Appeals decided the question on the standing issue alone, and at no time in the Court of Appeals was an objection made to the fact that the standing issue had not been raised in the District Court.

When the case came here on petition for certiorari, there was no objection to that -- to the fact that it had not been raised below. The petition addressed itself solely to the point that we're discussing here, going to the standing. In the merits brief, there was also no objection raised on that point, on petitioner's merits brief. Again addressing itself solely to the standing question.

Now, in Jones v. United States, the same one we've been discussing, 362, this Court had a similar situation before it, and said that the question was properly before it in these circumstances, and that they could decide the issue.

Q Well, I think you --

MR. REYNOLDS: Our --

Q Pragmatically, perhaps your answer to my

brother Rehnquist's question is that you concede, at least in your brief, that even if you prevail wholly in this case it should be remanded to the District Court --

MR. REYNOLDS: I was going to -- I was about to mention that. Yes, Your Honor.

Q With directions to that court to canvass the question of what this petitioner's interest was in the premises that were searched?

MR. REYNOLDS: That's correct. I believe that the case, if we prevail, we believe the case should be remanded to the District Court for an opportunity to determine the interest, whether there was a sufficient interest in the premises.

Q Well, if you prevail, I suggest that perhaps the other side -- if this happens, why, the other side is prevailing, in the sense that the judgment below is going to be vacated, isn't it?

MR. REYNOLDS: I believe that's correct, Your Honor. The --

Q Because he's the petitioner.

MR. REYNOLDS: And he is the petitioner.

If our argument is accepted, --

Q You ask that the judgment below be reversed. Looking at page 42 of your brief.

MR. REYNOLDS: Yes, that's correct, Your Honor.

Q If it's vacated, it's reversed.

MR. REYNOLDS: I believe that if the case is remanded for the purposes of a hearing, it would have to be reversed and vacated.

Q Because there was never any opportunity for such an investigation in the District Court?

Q There's never been a factual examination of this --

MR. REYNOLDS: The fact finder has never yet heard the standing.

Q And, I take it, was the father convicted with this defendant?

MR. REYNOLDS: The father was convicted in a --

Q In a separate trial?

Q It was the brother that was not convicted?

MR. REYNOLDS: The brother was not convicted.

Q Was it a separate trial?

MR. REYNOLDS: In the same trial.

Q In the same trial. Was there a conspiracy alleged?

MR. REYNOLDS: No, there was no conspiracy alleged.

Q Is there any --

MR. REYNOLDS: It was a joint -- there was no conspiracy.

Q Would there -- is there any precedent for a

limited remand in a case like this, for an evidentiary hearing on this particular point, without a reversal of the entire judgment of conviction?

MR. REYNOLDS: I believe there could be a remand for the -- to hear the evidence on the suppression hearing, without before doing that, vacating the judgment of --

Q Isn't that what you recommend? Or does that --

MR. REYNOLDS: Yes, Your Honor, that would be it.

Q You don't recommend setting aside the conviction?

MR. REYNOLDS: No, no, just the --

Q You mean vacate the judgment? Which one do you vacate?

MR. REYNOLDS: The Court of Appeals judgment.

Q It should be reversed; that's what you say on page 46.

MR. REYNOLDS: The Court of Appeals.

Q Yes.

MR. REYNOLDS: But --

Q And what does that do to the judgment of the District Court?

MR. REYNOLDS: We would think that the judgment of the District Court could remain in effect until such time as you had the hearing.

Q Until you've determined the very narrow question that you suggest a remand on?

MR. REYNOLDS: Oh the suppression.

Q Well, what we're talking about, I gather, is that you send it back and if the district judge finds that there's no merit, no standing, then he reinstates the judgment of conviction without more; isn't that it?

MR. REYNOLDS: That's correct, Your Honor.

Q Well, that's a Shotwell or --

Q Jackson v. Denno hearing.

Q It's been done in all the lineup cases, has it?

MR. REYNOLDS: Right.

Q Are we indulging in semantics in the difference between a reversal and vacation of the judgment?

Sounds to me as though we might be. When you ask for a reversal.

MR. REYNOLDS: Well, I --

Q I wonder whether you really mean a vacation.

MR. REYNOLDS: Perhaps vacation might have been a better choice of words.

Q Mr. Reynolds, may I come back to a point you touched on, but I'm not entirely clear about. Would it be necessary in this case for the government to allege possession? Would not there have been a crime committed if the government had alleged that the whiskey was stolen and transported in interstate commerce?

MR. REYNOLDS: Well, he -- in this case, the defendant

was charged with receiving, possession, and concealing tax-paid whiskey that had been stolen from interstate shipment, knowing it to be stolen.

Q Suppose you had a case where the man charged with stealing it and transporting it in interstate commerce had no reason to be sure that he had it in his possession at the time? Would that make any difference? I take it your position is that possession itself, even constructively, makes no difference?

MR. REYNOLDS: That's correct, Your Honor. We don't believe that the element of possession should have a bearing on the question of the Fourth Amendment -- on the Fourth Amendment question.

Q With respect to stolen goods?

MR. REYNOLDS: With respect to stolen goods.

Q But you do state, as I understand it, and I wondered, I had the same question in my mind as that expressed by Mr. Justice Powell, apparently you do state that possession is an element of the offense to be proved, under this indictment?

MR. REYNOLDS: At the trial, yes, it is.

Q Yes.

MR. REYNOLDS: It is an element of the offense --

Q Not just --

MR. REYNOLDS: -- under this indictment.

Q -- not just the theft or the concealment, causing it to be concealed, he has to have had, himself, possession, actual or constructive?

MR. REYNOLDS: To --

Q To be guilty under the indictment?

MR. REYNOLDS: To be guilty under this indictment.

Q Right.

MR. REYNOLDS: That's correct.

That's it.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Perry, do you have anything further?

REBUTTAL ARGUMENT OF JAMES N. PERRY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PERRY: Nothing further, Your Honor --

Q Could I ask a question, Mr. Chief Justice?

Let's assume that all that comes out of this case, I have no idea what will come out of it, is that the judgment below is either reversed or vacated, and it is ordered that there would be a new hearing, with you having the right to object to this evidence on the ground that you had an interest in the real property; if you did --

MR. PERRY: Yes, sir.

Q And then you would get a new trial, if you established sufficient interest in the premises to make this entry illegal as to your client?

MR. PERRY: Yes, sir.

Q Pending that hearing, what would be your thought, that the judgment of conviction be temporarily set aside and then reinstated if you lose in the hearing, or would you prefer that the hearing go forward without vacating the conviction, and if you win, however, the hearing, the conviction would be vacated and you'd have a new trial? It may, you know, be two or three months, it may -- I don't know how long it would take. But which would you think would be --

MR. PERRY: Your Honor, I'm unable to say right now. I don't know --

Q He's in a federal prison?

MR. PERRY: Your Honor, this man is out --

Q On what, bail?

MR. PERRY: -- on an appeal bond.

Q Oh, he's on an appeal bond?

MR. PERRY: Yes, sir.

Q So it really wouldn't make much difference --

MR. PERRY: No, sir.

Q -- in terms of good time or credit on the sentence or anything?

MR. PERRY: No, sir.

Q Oh, I'm sorry.

MR. PERRY: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Perry.

Thank you, genetlemen.

The case is submitted.

[Whereupon, at 2:30 o'clock, p.m., the case was submitted.]

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