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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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CAPTION: UNITED STATES v.

XAVIER V. PADILLA, ET AL

CASE NO: 92-207

PLACE: Washington, D.C.

DATE: Wednesday, March 24, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
v. : No. 92-207
XAVIER V. PADILLA, ET AL. :
:
-----X

Washington, D.C.
Wednesday, March 24, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:10 a.m.

APPEARANCES:

WILLIAM C. BRYSON, ESQ., Acting Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.
WALTER B. NASH, III, ESQ., Tucson, Arizona; on behalf of
the Respondents.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in 92-207, the United States v. Xavier Padilla.

5 Mr. Bryson.

6 ORAL ARGUMENT OF WILLIAM C. BRYSON

7 ON BEHALF OF THE PETITIONER

8 MR. BRYSON: Mr. Chief Justice and may it please
9 the Court:

10 This case calls on the Court to address the
11 dimension of the so-called Fourth Amendment Rule of
12 Standing as it applies to a drug-smuggling conspiracy.

13 The case comes from the Ninth Circuit on
14 certiorari, and began when there was a stop on the highway
15 between Tucson and Phoenix, Arizona, of a man -- Luis
16 Arciniega -- who was transporting a large quantity of
17 cocaine.

18 The traffic stop has since been found to be an
19 invalid stop, and we haven't challenged that, the validity
20 of the stop in this Court.

21 What happened after the stop was that about --
22 so far as the record reflects, about 5 minutes into the
23 stop Mr. Arciniega consented to the search of the trunk of
24 the car and the officers immediately found 560 pounds of
25 cocaine.

1 Mr. Arciniega then cooperated with the
2 investigation and that led to the arrest of each of the
3 respondents and others, and they were all charged with
4 conspiracy and various substantive counts under the drug
5 control statutes.

6 The district court found first that the stop was
7 invalid and second that each of the respondents had
8 standing to object to the stop of Arciniega's car and the
9 search of the trunk that led to the drugs, and then
10 further found that the rest of the investigation had
11 followed from those discoveries and therefore that the
12 evidence with respect to the defendants had to be
13 suppressed.

14 The court of appeals on the Government's appeal
15 affirmed in major part. The court held with respect to
16 respondent Xavier Padilla and with respect to the two
17 Simpsons that the district court's ruling was correct,
18 relying principally on what we will call the joint venture
19 exception to the standing rule, the joint venture
20 application of the standing principle, and with respect to
21 Maria and George Padilla the court said that a remand was
22 necessary to determine whether they had standing under
23 this exception, and with respect to the remaining
24 respondent the court said that he did not have the
25 standing of this exception.

1 The court's rationale essentially was that
2 because the Simpsons "had an interest in the car and also
3 had a supervisory or control relationship with respect to
4 the conspiracy and the activities of the conspiracy on the
5 day of the stop, that they had standing, and because
6 Xavier Padilla again, like the Simpsons, had a supervisory
7 or control relationship within the conspiracy with respect
8 to the transportation, that he had standing to object to
9 the stop of the car.

10 QUESTION: Mr. Bryson, the Ninth Circuit, as
11 you've described, went off on some notion of standing --

12 MR. BRYSON: That's right.

13 QUESTION: Acquired to address the privacy
14 concerns of the Fourth Amendment by virtue of the joint
15 venture. If we were to think that that was not the proper
16 focus, the briefs in the case address the new argument
17 here that well, in any event, there's standing because of
18 the property --

19 MR. BRYSON: Well, Your Honor, I --

20 QUESTION: At least, the possessory interest.

21 MR. BRYSON: Yes.

22 QUESTION: Now, do we have to deal with that
23 here, or should we?

24 MR. BRYSON: I think you should, and here's why.
25 The Ninth Circuit referred to the expectation of privacy,

1 but they were clearly talking about both privacy and
2 property interests that were affected by the stop.

3 There's discussion throughout the Ninth
4 Circuit's opinion, even though they use the term
5 expectation of privacy, which isn't precisely the right
6 nomenclature, but they use that term to describe what they
7 clearly meant to say was at issue here, which was both the
8 Simpsons' ownership of the car and therefore the effect of
9 both the stop and the ensuing search on the rights, the
10 Fourth Amendment rights in general of the Simpsons, and
11 also the ownership interest.

12 QUESTION: But Mr. Bryson, the question
13 presented in your cert petition says nothing about
14 ownership as a justification.

15 MR. BRYSON: Well, Your Honor, we -- in our cert
16 petition, we address -- we use the language that the court
17 of appeals used. Now, I think it is somewhat imprecise.
18 We probably should have specifically said property and
19 privacy interest.

20 QUESTION: You probably should, but you said
21 nothing about it and you relied entirely on the joint
22 venture rationale in your question.

23 MR. BRYSON: Well, Your Honor --

24 QUESTION: That's the only question you asked.

25 MR. BRYSON: The position taken by the court of

1 appeals was that joint venture, which of course in their
2 view incorporated the interest of the Simpsons in the car
3 and the interest of Xavier Padilla in the cocaine, that
4 that -- the joint venture, including --

5 QUESTION: I know they gave additional reasons,
6 but you didn't challenge one of those reasons.

7 MR. BRYSON: Well, Your Honor, we challenged the
8 judgment of the court of appeals which was premised in its
9 finding that there was an expectation of privacy, as they
10 called it --

11 QUESTION: You think the question directed at
12 one part of the analysis gives you license to just
13 challenge anything about the judgment you want.

14 MR. BRYSON: Your Honor, I think there are two
15 points to be made. First of all, I think that the court
16 of appeals clearly meant to encompass both privacy and
17 property interests. They used the wrong terminology, as
18 this Court has --

19 QUESTION: But you didn't challenge that part of
20 their reasoning, is my point.

21 MR. BRYSON: Well, Your Honor, I think a fair
22 reading of our petition is that we did, and what's more --
23 and there's a second reason.

24 The respondents came back and in defense of the
25 judgment said that there is a reason that this judgment is

1 valid, even if the ground that we challenged it on in the
2 petition should be viewed as being limited to expectation
3 of privacy, and that is that there were property interests
4 at stake here which were affected. That -- if that's an
5 independent ground in support of the judgment, then we're
6 entitled to respond to their claim with respect to
7 an independent --

8 QUESTION: Well, does the Government take the
9 position that the ownership of a car does not give the
10 owner a right to challenge the seizure of the car?

11 MR. BRYSON: Your Honor, we -- the answer is yes
12 and no. We think that the ownership of the car --

13 QUESTION: Yes and no.

14 MR. BRYSON: Yes. The first -- the yes part is
15 that we think the ownership of the car generally gives the
16 owner enough -- a right to object to a seizure of the car
17 which provides the owner --

18 QUESTION: But do you deny that a stop is a
19 seizure?

20 MR. BRYSON: This particular stop was a seizure,
21 but it did not affect the ownership interests --

22 QUESTION: But was it a seizure of the car?

23 MR. BRYSON: It was a seizure of the car. It
24 affected the interests of --

25 QUESTION: But the owner doesn't have standing

1 to challenge it because it didn't hurt him right at the
2 time, is that the point?

3 MR. BRYSON: Exactly. It did not -- and when I
4 say hurt, what I mean is, it did not affect any of his
5 property interests in the car, because the only thing that
6 was at issue there was the interference with Arciniega's
7 right to continue down the highway.

8 Arciniega was in control of the car. The stop
9 affected control. It didn't affect a proprietary interest
10 in the car, so yes, generally an owner of a car has a
11 right to object to a procedure -- to a seizure, but in
12 this case this kind of procedure did not implicate the
13 owner --

14 QUESTION: Suppose the Government had loaned --
15 suppose the car had been loaned for a week, and the
16 Government seized it and then kept it for only 6 days,
17 couldn't you say the same thing?

18 MR. BRYSON: Well, if it had been loaned for a
19 week -- suppose it's a rental car, to make it --

20 QUESTION: Right.

21 MR. BRYSON: And the rental agreement was that
22 after 7 days it should be returned, and in fact the car
23 was returned on the seventh day -- the Government had held
24 it for 6 days in between -- we would say that the effect
25 on the person who rented the car, the renter of the car,

1 the rental company, was that their property interests in
2 the car were not affected.

3 Now, this case involves much less, of course,
4 than a 6-day seizure, but the principle is the same. The
5 principle is that the interests of the owners in getting
6 their car back and in being able to enjoy the use of the
7 car during the time that they intended to use it, which
8 was when it came back, was not affected.

9 Keep in mind that this was -- that the Simpsons
10 gave this car to Arciniega for a couple of days.

11 QUESTION: What about their privacy interest in
12 the car? I mean, what if they had confidential
13 information in the glove compartment and they're willing
14 to trust Mr. Padilla with that, but they're not
15 particularly willing to trust the Government with it?

16 MR. BRYSON: Well, if there's a privacy
17 interest, then the privacy interest is -- and they have
18 retained a privacy interest in the car, then they may well
19 have a basis for objecting to the search of the car but
20 not to the seizure.

21 QUESTION: But possession and privacy go
22 together. I mean, the possessory interest is a substitute
23 for privacy. It's the main way by which privacy is
24 protected in goods.

25 MR. BRYSON: Your Honor, where, as in this case,

1 all that happens is that you hold the goods and you don't
2 conduct a search at all -- in this case there was a
3 consent search, which waived, in effect, the privacy
4 interests of the Simpsons in the trunk, whatever those
5 might have been, but if all that would happen in this case
6 is that there had been a stop, and let's say Arciniega had
7 made a confession which implicated the Simpsons, then no
8 privacy interest in the car would have been implicated.
9 The car wouldn't have been held.

10 But what really is at issue with respect to the
11 Simpsons is, they have given over control, the use of the
12 car, for a period of several days to this man, and that
13 man's personal right to control the car which has been
14 ceded to him by the Simpsons is what was affected by the
15 stop, plus his personal right as an individual to travel
16 on the highway without being interfered with. There is no
17 interference with the ultimate -- let's called a remainder
18 interest, or whatever you want to call it, in the property
19 of the Simpsons.

20 Now, they may have a separate privacy interest
21 which may be implicated, but if, as we submit, they have a
22 privacy interest, say in the trunk, and the district court
23 found that they did, that privacy interest could be in
24 effect waived by Arciniega's consenting to a search of the
25 trunk, which we think it's manifestly the case that he had

1 a right to --

2 QUESTION: Well, Mr. Bryson, don't our cases
3 generally in the Fourth Amendment area say that the
4 privacy interest is protected against seizures and the
5 property -- the privacy is to protect against searches,
6 and the privacy interest is -- the property interest is to
7 protect it against seizures?

8 MR. BRYSON: Yes, that's right, and here, we --
9 there was a seizure which affected the property interest
10 of, control of the car of Arciniega, temporary possessory
11 interest, but he doesn't -- he's not a defendant, so he
12 would have standing to object, but the privacy concerns
13 which are with regard to the search of the trunk of the
14 car are at minimum waived by Arciniega's agreement to
15 allow the search of the trunk.

16 QUESTION: Well, Mr. Bryson, I thought that the
17 respondents say that there wasn't consent here. Was that
18 issue dealt with below?

19 MR. BRYSON: No. No, Your Honor, the district
20 court did not --

21 QUESTION: So we're not in a position --

22 MR. BRYSON: No.

23 QUESTION: To answer that.

24 MR. BRYSON: That's right. The only thing --

25 QUESTION: I mean, you would acknowledge that

1 based on the district court's finding that the Simpsons
2 had a privacy interest in the trunk, and the question of
3 consent is open.

4 MR. BRYSON: I think the question of consent is
5 open, Your Honor. They may -- if this case is remanded
6 they may say that there was an invalid consent, and if
7 they both have continuing privacy interest in the trunk,
8 and we had an invalid consent, then we would have a
9 problem, because then --

10 QUESTION: Well, then do you say that we have to
11 remand in this case? Is that the best result you can hope
12 for?

13 MR. BRYSON: Well, I think that you're going to
14 have to remand -- assuming we win the major submission in
15 the case, you will have to remand for a disposition of the
16 remaining claims and ultimately for trial, and I think --
17 there has not been a final disposition by the court of
18 appeals, for example, of the consent issue, and there's a
19 finding by --

20 QUESTION: What difference does it make if -- to
21 the Simpsons' interest if Mr. Arciniega's consent is valid
22 or not?

23 MR. BRYSON: This is this difference, I think:
24 if the Simpsons did not retain any privacy interest, even
25 a joint privacy interest with Arciniega in the trunk of

1 the car -- let's -- suppose this had been a search of the
2 front seat, where the officer had stopped Arciniega and
3 just looked in the front seat and there was all the
4 cocaine, we would argue, and we would be right, that the
5 Simpsons just had no continuing privacy interest in the
6 front seat of the car.

7 So in that setting it wouldn't matter whether
8 Arciniega's consent was obtained voluntarily or
9 involuntarily, since the Simpsons would have no continuing
10 privacy rights, but the argument that the Simpsons made
11 below, and the argument that was accepted by the district
12 court, was that they continued to have a privacy interest
13 in the trunk.

14 Now --

15 QUESTION: Well, do you think --

16 MR. BRYSON: If that's true --

17 QUESTION: Go ahead.

18 MR. BRYSON: We don't think that's right, but we
19 do have a district court finding to that effect.

20 Now, if that's true, then the way we get the
21 evidence introduced is by showing that the consent was
22 valid on the part of Arciniega. Arciniega in effect did
23 what the Matlock case indicates could be done in this
24 situation.

25 QUESTION: Well, my suggestion is that even if

1 the consent is invalid as to Arciniega, the Simpsons get
2 no benefit from that.

3 MR. BRYSON: They don't if they did not retain a
4 privacy interest in the trunk of the car. On the other
5 hand, if they did --

6 QUESTION: Okay, now tell me about how we go
7 about determining whether they retain a privacy interest
8 in the right of the car. Do we have to look at the terms
9 of the bailment --

10 MR. BRYSON: Well, Your Honor, I think you have
11 to look at --

12 QUESTION: Or at the criminal enterprise, as the
13 Ninth Circuit suggested?

14 MR. BRYSON: You would have to look at such
15 things as the terms of the bailment, you would have to
16 look at whether in the view of --

17 QUESTION: Well, how is the officer to know this
18 when he makes his stop?

19 MR. BRYSON: Well, the officer is not going to
20 know it, and typically the officer will be in a position
21 of having apparent authority to go into the trunk, so even
22 if the person who's driving the car --

23 QUESTION: The driver would have.

24 MR. BRYSON: Doesn't have actual authority, he
25 may have apparent authority.

1 But the key here is that if there is a retained
2 privacy interest in the trunk, and the officers coerce the
3 individual into giving up his right to go into the trunk
4 and force -- in effect, they do the same thing as if they
5 had simply said, out of the way, we're going to jimmy up
6 the trunk and they open it with a crowbar, then they have
7 violated privacy interests on the part of the Simpsons.

8 Now --

9 QUESTION: Well, I don't understand how an
10 officer is supposed to know whether someone else has
11 retained privacy interests in the trunk. Do you just take
12 your chances when you open a trunk with someone's consent?

13 MR. BRYSON: If he had -- if he's in a situation
14 where it's reasonable for the officer to assume that
15 somebody who's driving a car has authority to consent to
16 the search of the trunk, then the officer's acted
17 reasonably if he obtains the consent in a valid fashion.

18 QUESTION: Is it reasonable for officers to do
19 that if they know someone else owns the car?

20 MR. BRYSON: Typically it will be, yes, because
21 they will assume that somebody who is driving a car and is
22 in the middle of the highway has authority to go into the
23 trunk, particularly if he's been given the keys, as was
24 the case here.

25 Arciniega had the key to the trunk --

1 QUESTION: Well then, why don't you win? Why do
2 we have to remand?

3 MR. BRYSON: Well, we think we do win if this
4 Court wants to make a finding with respect to the validity
5 of the consent. It can do it, but I -- that is typically
6 the kind of thing that I would think would be made by the
7 district court in the first instance. We're not saying
8 that you can't reach that issue, but I'm suggesting --

9 QUESTION: Well, I'm confused as to how we
10 determine if someone -- some third-person owner has some
11 retained privacy interest in the trunk.

12 MR. BRYSON: Well --

13 QUESTION: It seems to me there's a question of
14 whether or not an officer acts reasonably, and whether
15 this is a legitimate interest that we're prepared to
16 recognize or not.

17 MR. BRYSON: Well, if the officer --

18 QUESTION: Some third -- we can assume that most
19 cars riding around out there have third persons' property
20 interest in them. I don't think that prevents the police
21 from stopping the car --

22 MR. BRYSON: Not --

23 QUESTION: And asking to search it.

24 MR. BRYSON: Not at all, if the police get a
25 valid consent from the person that's driving.

1 The only point I'm making, and I'm not making it
2 very clearly, I'm afraid, but the only point is that if
3 the officers go up there and beat a consent out of
4 Arciniega, that's not reasonable police conduct, and they
5 are therefore not entitled to the benefit of the search,
6 which may affect what turns out to be somebody else's
7 privacy interest in the trunk.

8 On the other hand --

9 QUESTION: But conceding that point --

10 MR. BRYSON: Yes.

11 QUESTION: Why were you getting into the
12 question of the authority of the driver of the car to
13 consent to the opening of the trunk?

14 MR. BRYSON: Well, only because the --

15 QUESTION: I mean, the officer, as Justice
16 Kennedy said, has to operate on reasonable assumptions.
17 He can't get a whole chain of title to the car when
18 he's --

19 MR. BRYSON: Exactly. That's why apparent
20 authority is the question with respect to the officer's
21 perception of Arciniega's right to open the trunk.

22 If the officer looks at this man who's driving
23 down the highway and says, anybody in this situation I'm
24 going to assume has authority to go into the trunk, that's
25 a reasonable conclusion, and that's why we think we win on

1 the validity of the consent.

2 That's why we think that if this case goes back
3 to the district court we will prevail on the question of
4 whether this was a valid consent, because as this Court
5 said in Illinois v. Rodriguez, the question of
6 reasonableness under the Fourth Amendment is the apparent
7 authority of the consenting party to consent --

8 QUESTION: Well, Mr. Bryson, I thought the major
9 point you wanted to have us decide was whether or not this
10 joint enterprise --

11 MR. BRYSON: Yes.

12 QUESTION: Notion is a valid one to give
13 standing, and to decide that, I would think we could
14 just -- we would say, just forget about the ownership of
15 the car. We'd say, suppose Padilla owned the car.
16 Suppose Padilla owned the car and the same thing
17 happened -- he consented to go in -- and the court of
18 appeals would have come out exactly the same way.

19 They would have said, because they were all
20 coconspirators, they all have an interest in the
21 transportation of cocaine and that car, they have standing
22 to object.

23 MR. BRYSON: That's what the court of appeals
24 would have said, that's right.

25 QUESTION: Yes, well --

1 MR. BRYSON: That's --

2 QUESTION: That's -- is that the major point you
3 want us to decide?

4 MR. BRYSON: That is the principal issue in the
5 case.

6 QUESTION: And the ownership of the car
7 certainly -- perhaps we don't need to -- if you want to
8 hassle about it, maybe -- maybe we could avoid even
9 deciding the question you want, because you should lose on
10 another ground --

11 MR. BRYSON: Well --

12 QUESTION: Which is --

13 MR. BRYSON: If we --

14 QUESTION: But --

15 MR. BRYSON: You're absolutely right, if we lose
16 on the joint venture theory of standing, then you don't
17 have to reach the ownership of the car or anything to do
18 with the car.

19 If you hold, as the Ninth Circuit held in this
20 case and has held elsewhere, that all you need is a sort
21 of supervisory and control role in the conspiracy --

22 QUESTION: So it wouldn't make any difference
23 who owned the car.

24 MR. BRYSON: That's exactly right, it wouldn't
25 make any difference.

1 What I'm arguing is, if you reject that broad
2 argument, and we hope you do, then you have to address, we
3 think you should address, the questions that are raised
4 by --

5 QUESTION: Well, yes, but what if you -- if we
6 say that -- if you lose on that major question, why, the
7 case is over.

8 MR. BRYSON: Exactly. We're -- if you rule that
9 the Ninth Circuit's joint venture exception, if we'll call
10 it -- we'll call it that, is correct, and that all you
11 need is to have supervisory control --

12 QUESTION: So your -- the case is over, and you
13 lose.

14 MR. BRYSON: We lose, and you don't have to --

15 QUESTION: But if you win on that point, the
16 case isn't over at all.

17 MR. BRYSON: Exactly.

18 QUESTION: Now, Mr. Simpson --

19 QUESTION: Except for that --

20 QUESTION: Go ahead.

21 QUESTION: Oh, I'm sorry.

22 QUESTION: If you win on that point, though, you
23 have won as to the Padillas.

24 MR. BRYSON: We have won as to the Padillas
25 except for --

1 QUESTION: And arguably, since you didn't raise
2 the question as to the others, maybe we should dismiss
3 that part of the case as improperly granted.

4 MR. BRYSON: Well --

5 QUESTION: Your primary argument as to the
6 Simpsons goes to this whole ownership question, which is
7 entirely different from what I thought we were granting
8 when we granted this case.

9 MR. BRYSON: Your Honor --

10 QUESTION: And even your argument in your brief
11 doesn't even talk about standing. It talks about whether
12 there should be suppression, which is a distinct issue
13 whether you win on the merits.

14 MR. BRYSON: Well, Your Honor, the merits, and
15 the Court's opinion in Rakas makes the point -- and we do
16 use the term, standing, but technically the Court has said
17 in Rakas that standing really is just a proxy for talking
18 about the merits of whether a particular individual has
19 had a Fourth Amendment violation of his personal rights,
20 and so it really is a question of whether there's a
21 violation of the particular defendant's rights.

22 QUESTION: Mr. --

23 QUESTION: May I go back just a second to your
24 hypotheticals? You went by part of it so fast.

25 You said that if there was a stop and the owners

1 had standing to object to the stop and the stop's illegal,
2 that if the cocaine were sitting in the front seat where
3 it became -- it was in plain view after the stop --

4 MR. BRYSON: Yes.

5 QUESTION: It would be clearly -- there would
6 clearly be no standing, if I understood you correctly.

7 MR. BRYSON: There would be no argument that the
8 Simpsons retained a privacy interest. Setting aside the
9 possessory interest --

10 QUESTION: No, because they -- because it came
11 into plain view as a result of what you've conceded was an
12 illegal stop.

13 MR. BRYSON: It came into plain view, that's
14 true, but there's no continuing privacy interest --

15 QUESTION: Well, but would you say that they
16 have no standing to object to the seizure of the cocaine
17 after their car was illegally stopped and therefore it
18 became visible, is that your position?

19 MR. BRYSON: Well, if they were driving they
20 would have standing.

21 QUESTION: No, no, they're not driving.

22 MR. BRYSON: But if they're not driving,
23 absolutely, that's our position, Your Honor. Our position
24 is that if they leave cocaine in the front seat of a car,
25 then the only Fourth Amendment event that occurs that

1 amounts to anything is the stop of the car, and our
2 position throughout has been the stop of the car does not
3 violate the Simpsons' rights. They are back in Douglas,
4 or whatever, waiting to get their car back 2 days hence.

5 QUESTION: And their cocaine.

6 MR. BRYSON: Well, they want the money.

7 QUESTION: They want the money.

8 MR. BRYSON: They don't want the cocaine.

9 (Laughter.)

10 QUESTION: I think you --

11 QUESTION: Mr. Bryson, let me go back, if I may,
12 to your argument that the Simpsons do not have any
13 property right that was infringed, and your argument, as I
14 understand it, is that if the Simpsons have consented, or
15 the owner has consented to another person's having
16 possession and the stop occurs during the period of that
17 consented possession, that there is no property interest
18 that the Simpsons or that the owners can assert.

19 But it seems to me that is simply identifying
20 all ownership interests with simply possession at the
21 time, and the fact is the Simpsons have not, in any way
22 that I can see, given away their right to control as
23 owners of the car who will have that possession, and they,
24 in effect have said you the driver can have it.

25 They certainly have not said the United States

1 Government can interfere with it, and so I don't see why
2 the mere fact that a third party has possession with the
3 owner's consent precludes the owner, in effect, from
4 asserting a different ownership right. That is to say,
5 the power to decide who in fact will have access to that
6 car, and who will be able to stop it.

7 MR. BRYSON: Well, I think that the owner could
8 decide that if presented with the question -- if Arciniega
9 were to call back on the phone, car phone or something, to
10 the Simpsons and say, should I let these officers take
11 this car --

12 QUESTION: Well, why does he have to do that?
13 The only thing we know is that the Simpsons let Arciniega
14 have it.

15 MR. BRYSON: That's right --

16 QUESTION: There's no implication there that
17 they are consenting to or giving permission to anyone else
18 to perform any act which interferes with the automobile.

19 MR. BRYSON: Well, but they let him have it for
20 a couple of days, and our point is that when there is an
21 interference with his exercise of control, which is what
22 they have ceded. They've not ceded --

23 QUESTION: Well, no, they haven't ceded all
24 exercise of control. They've ceded the control of the car
25 to him to the extent that it's necessary for him to

1 control -- to have control to drive the car, but they
2 haven't ceded anything else.

3 MR. BRYSON: Well, they have, we think, ceded
4 the right to, for example, stop the car at some point on
5 the highway and get some lunch, they've ceded --

6 QUESTION: Sure, because that's a normal
7 incident of the possession which they have given to him,
8 but they haven't, certainly, ceded anything to a third
9 party, which is what we're concerned with here.

10 MR. BRYSON: Well, the only thing that
11 Arciniega -- the only way in which Arciniega -- Arciniega
12 was affected. The only way the Simpsons was affected --
13 as far as they were concerned, no event occurred that
14 affected their continuing enjoyment of the use of the
15 property --

16 QUESTION: Simply -- the only -- it did not
17 affect their possession at the moment because they did not
18 have possession. That is the only thing you can say.

19 MR. BRYSON: Well, that's true, but what our
20 point is is that their right, their property right in the
21 car that they have given to somebody else is limited, we
22 think, to the --

23 QUESTION: Well, Mr. Bryson, what if the car
24 had -- what if Arciniega had stolen the car and was
25 carrying drugs in it. Now, could the -- and it had drugs

1 in the trunk that Arciniega didn't put there, the owner
2 did.

3 Now, could the owner complain there? Would the
4 owner have standing if there were an illegal traffic stop?

5 MR. BRYSON: If there were a traffic stop, I
6 don't think so, no, because the owner --

7 QUESTION: An illegal stop.

8 MR. BRYSON: An illegal traffic stop. No,
9 because the owner, again -- the owner's property --

10 QUESTION: The owner hasn't consented to
11 anything.

12 MR. BRYSON: No, the owner in that case hasn't
13 consented to anything, but also a 5-minute stop doesn't
14 constitute a meaningful interference with the owner's
15 possessory rights. There is already --

16 QUESTION: Does it have to be possessory rights?
17 There's no seizure unless my possessory rights -- so if I
18 lease property to someone, the Government can walk in and
19 seize that property and no right of mine has been
20 affected? There's been no seizure of property as far as
21 I'm concerned.

22 MR. BRYSON: Well, if you lease the property to
23 somebody for 5 days and the Government comes in --

24 QUESTION: 5 years. The Government comes in and
25 takes it and says, I'm sorry, I know you leased it to X,

1 but we're going to take it over -- you know, it's a
2 problem for X, it's no problem for you -- and I say, but I
3 didn't lease it to the United States, I leased it to X,
4 get out of here, is what I would say. You haven't seized
5 my property.

6 MR. BRYSON: Well, you -- there has been a
7 seizure of property, but your rights are not affected.

8 QUESTION: My -- but my right to property
9 includes the right to exclude. Doesn't it include the
10 right to exclude?

11 MR. BRYSON: Well, but you have, we think,
12 waived in effect, unless you've put some kind of specific
13 prohibition against any --

14 QUESTION: If I choose not to exclude one
15 person, I waive the right to exclude the rest of the
16 world.

17 MR. BRYSON: At least in a case like this, when
18 Arciniega, so far as the record reflects, has not given
19 any --

20 QUESTION: Because you say so, in a case like
21 this, but I don't know why a case like this is different
22 from any other case.

23 MR. BRYSON: If there is a -- you could have a
24 prohibition against some further disposition.

25 QUESTION: Mr. Bryson, I see the white light's

1 on. I'd certainly like to hear about the Ninth Circuit's
2 theory. It seems to me that once you say that it depends
3 upon the terms of the bail that was given, that the Ninth
4 Circuit's theory begins to have some plausibility. Why is
5 that not so?

6 MR. BRYSON: Well, the reason it's not so, Your
7 Honor is because the Ninth Circuit in our view focused on
8 the wrong thing. They focused on the role of the
9 defendants in the commission of the crime. They should
10 have focused on whether the defendant's particular Fourth
11 Amendment interests were violated.

12 QUESTION: Suppose the two are interrelated?

13 MR. BRYSON: Well, we don't think -- well, if
14 they're interrelated, we focus on the way in which the
15 Fourth Amendment right was affected.

16 In a case like this, what the Ninth Circuit is
17 saying in effect is that Mr. Big, whether it's the head of
18 the whole conspiracy who's back in Mexico who's saying, I
19 want those drugs to get to Los Angeles and I want the
20 money back, has standing just as much as any other
21 defendant in this case.

22 Because the Ninth Circuit, under the Ninth
23 Circuit's theory if you have supervisory authority and
24 control over the transaction as a whole, it doesn't matter
25 whether somebody invades your property or somebody

1 conducts a search of premises in which you have an
2 expectation of privacy.

3 If you have neither of those -- you have neither
4 possessory or ownership interests in the property nor
5 privacy interests, you still have standing under the Ninth
6 Circuit's theory because you have control of the
7 transaction.

8 QUESTION: Well, I know, but the Ninth Circuit
9 says because you have control and you have a joint
10 enterprise, you have a joint interest in the
11 transportation of that cocaine by that car.

12 MR. BRYSON: Well, that's what they said, and --
13

14 QUESTION: Well, I know.

15 MR. BRYSON: Of course, you could say that with
16 respect to the -- to Mr. Big, back in Mexico.

17 QUESTION: And that's the issue of whether
18 they're right on that.

19 MR. BRYSON: Well, we think they're clearly
20 not --

21 QUESTION: And they would
22 still -- as I said before, I think I said if Padilla owned
23 the car, but assume the driver of the car owned the car,
24 gave consent, the Ninth Circuit would have come out
25 exactly the same way, because the members of the joint
enterprise have an interest in the car and an interest in

1 the cocaine.

2 MR. BRYSON: Well, they concluded that that
3 interest was based on their criminal joint venture, but
4 that would be applicable to everyone down to and including
5 the principal --

6 QUESTION: I know. I know.

7 MR. BRYSON: In the enterprise, and we think
8 that just departs by leagues from this Court's focus.

9 QUESTION: Yes, well, that's the issue. That's
10 the major issue.

11 MR. BRYSON: That's the major issue, yes.

12 I'd like -- thank you.

13 QUESTION: Thank you, Mr. Bryson.

14 Mr. Nash, we'll hear from you.

15 ORAL ARGUMENT OF WALTER B. NASH, III

16 ON BEHALF OF THE RESPONDENTS

17 MR. NASH: Thank you, Mr. Chief Justice, and may
18 it please the Court:

19 I think it is important at the outset to
20 recognize that this is not a search case, but a seizure
21 case. District Judge Billby's ruling in this case was
22 limited to the invalid initial seizure of the car. He
23 never reached the merits of the search questions, except
24 insofar as to find that they were tainted by that invalid
25 initial seizure of the car, but the merits of the consent,

1 the merits of the trunk search and all of the other
2 activities that occurred after the invalid seizure, are
3 not at issue here, they were not at issue in the Ninth
4 Circuit --

5 QUESTION: Well, how does a policeman know that
6 he's either searching or seizing when he stops to question
7 a suspect who's driving an automobile?

8 MR. NASH: He always --

9 QUESTION: There's obviously been a detention of
10 the property. Does that automatically mean there's a
11 seizure?

12 MR. NASH: Yes, sir. Under prior decisions of
13 this Court, and Delaware v. Prouse is perhaps the most
14 cited one, the stopping of a vehicle even for merely
15 checking a driver's license and registration is most
16 definitely a seizure of the automobile, its driver, and
17 all of the contents.

18 QUESTION: Well, you say the district judge just
19 focused on the illegal stop of the car and that everything
20 else was illegal after that. The question is, who has the
21 right to question the illegal stop?

22 MR. NASH: Exactly. That is the --

23 QUESTION: Well, that's the question, so --

24 MR. NASH: That's the issue. That's the issue
25 before the Court.

1 QUESTION: And if no one else except the driver
2 had standing to challenge the stop, your clients should
3 lose the case.

4 MR. NASH: Under that hypothetical, that's
5 correct.

6 QUESTION: Right.

7 MR. NASH: But both Mr. Padilla and Mr. and Mrs.
8 Simpson had a possessory or property right in both the car
9 and its contents.

10 QUESTION: Well, suppose the stop were lawful?

11 MR. NASH: If the initial stop were lawful --

12 QUESTION: And so then --

13 MR. NASH: Then the issue as to the seizure of
14 the car would not be subject to further argument. The
15 issue would then turn to --

16 QUESTION: Well, then it's not just a question
17 of seizure.

18 MR. NASH: Well, the way the question is
19 postured to this Court, it is, because the only issue that
20 was ruled on in the district court and in the Ninth
21 Circuit was the seizure of the car, not the consent, not
22 the other things, except insofar as they were tainted.

23 There has been no hearing on the merits of that
24 consent, about the trunk search, or the other issues.
25 District Judge Billby was very clear in saying, I will not

1 reach those things because the issue of the invalid
2 initial seizure is a case-dispositive ruling.

3 Under Soldal, the interest that needs to be --

4 QUESTION: But it seems to me, first things
5 first, because you've conceded that if the stop were
6 lawful and the consent were lawful, then there would be no
7 question of seizure --

8 MR. NASH: Under that --

9 QUESTION: So I question the district court's
10 and the Ninth Circuit's approach.

11 MR. NASH: Well, we always have to begin with
12 the first level of intrusion, and the first level of
13 intrusion is almost always the stopping of the vehicle or
14 the person.

15 If, indeed, that level of intrusion is deemed to
16 be valid, we then turn to the other intrusions -- the
17 search, a subsequent seizure if, indeed, there's one after
18 the car's first stop.

19 QUESTION: If you're right about that, Mr. Nash,
20 why did the Ninth Circuit reverse as to Strubbe?

21 I mean, they decided the case finally as to him,
22 didn't they?

23 MR. NASH: Because what the Ninth Circuit said
24 was Mr. Strubbe had not claimed and could never show any
25 possessory interest in either the contraband or in the

1 vehicle, nor could he show, or did he attempt to show, any
2 right to privacy.

3 What the Ninth Circuit has said -- and I would
4 take issue with Government's counsel's characterization of
5 the joint venture rule, which I don't think you should
6 reach in this case, but --

7 QUESTION: Well, the way --

8 MR. NASH: The rule is not mere membership in a
9 joint venture, ipso facto, confers standing on a litigant.
10 What it says, simply, is that a court will quite properly
11 analyze the relationships of the parties to each other to
12 the property seized or the property or place that was
13 searched.

14 QUESTION: That isn't what the court of appeals
15 said in its opinion, as I read it. It apparently has a
16 well-developed doctrine of joint venture in a criminal
17 undertaking, and it referred to joint venture, and it
18 cited previous cases, so I think it's very difficult to
19 say that the Ninth Circuit didn't decide the case on that
20 ground.

21 Perhaps it should have decided it on another
22 ground, and perhaps the two are interrelated, but the
23 Ninth Circuit opinion just abounds with the words, joint
24 venture.

25 MR. NASH: It does, and let me suggest to the

1 Court two reasons why it does, and first of all, it is
2 clear that the Ninth Circuit does not go off solely on an
3 expectation of privacy. The decision is also replete with
4 citations to the possessory interest and property rights
5 of Mr. and Mrs. Simpson and Mr. Padilla, not only in the
6 car, but also in the contraband, in the contents of the
7 car.

8 The Ninth Circuit does talk about right to
9 privacy for two reasons. Number 1, in the appeal in the
10 Ninth Circuit, the only issue raised by the Government in
11 that case was the right to privacy. They never challenged
12 the possessory interest of the property right allegations
13 in the district court.

14 Point number 2 is, I think it is fair to say
15 that the Ninth Circuit, perhaps like the Seventh Circuit
16 before Soldal, improperly blended a right-to-privacy
17 analysis and the consideration of a seizure. In Jacobsen,
18 this Court recognized that the issue of seizure turns on
19 property rights, not right to privacy, and that was made
20 even more clear by Justice White's recent opinion in
21 Soldal.

22 A right-to-privacy analysis simply has no place
23 in a seizure case. It applies in a search case.

24 QUESTION: Mr. Nash, the question presented in
25 the Government's petition for certiorari plainly raises

1 the joint venture issue and nothing else, as far as I'm
2 concerned --

3 MR. NASH: That's correct.

4 QUESTION: Whether membership in a joint venture
5 to transport drugs gives coconspirators a legitimate
6 expectation of privacy.

7 Your opposition to the petition for certiorari
8 confronts that joint venture theory head on. I do not
9 read it as saying there's no joint venture issue in this
10 case.

11 MR. NASH: It does two things. Number 1, the
12 briefs of counsel do very definitely say this is a
13 seizure, and under Soldal, which was decided just days --

14 QUESTION: I'm not talking about the briefs of
15 counsel. I'm talking about your opposition. Did you make
16 the argument in your opposition to the petition for
17 certiorari that you're now making, namely that the
18 question presented is not in this case?

19 MR. NASH: Mr. Padilla's opposition did not
20 squarely raise it. Mr. Simpson's did raise -- his pro se
21 opposition did in fact raise the issue of property rights
22 as being different from a right to privacy.

23 However --

24 QUESTION: I think you can answer this question
25 yes or no. Did anybody raise the issue that the question

1 presented is not in the case? Not that there's another
2 issue in the case, but that this issue is not in the case,
3 which is what you're now telling is.

4 MR. NASH: Mr. Simpson did in his opposition.

5 QUESTION: Where did he do that?

6 MR. NASH: His counsel has indicated to me that
7 it's found at page 10 of his pro se opposition to the
8 petition for writ of certiorari.

9 Also, I would suggest to you, Justice Scalia,
10 that if the Seventh Circuit was mistaken and confused in
11 its proper application of whether or not right-to-privacy
12 analysis applied in the seizure case, which it was, and
13 the decision there that was clarified by this Court in
14 Soldal, if they were mistaken, then both the Ninth Circuit
15 and perhaps counsel that were involved in the application
16 of that test could also have been mistaken.

17 QUESTION: Would you show me where on page 10?
18 I have page 10, and I don't see anything that says the
19 issue is not in the case. Maybe I have the wrong page 10,
20 but I don't see it.

21 I mean, it's an important issue.

22 MR. NASH: I'm looking at --

23 QUESTION: I thought that's what we were going
24 to talk about today, and you tell --

25 MR. NASH: I'm looking at page 10.

1 QUESTION: Yes.

2 MR. NASH: Page 10, which starts -- the
3 paragraph beginning at line 24, "In addition to
4 erroneously overlooking the important difference between
5 privacy interest and possessory interest," and it goes on
6 to cite Jacobsen and talk about that.

7 QUESTION: Yes.

8 MR. NASH: That is the square issue that we're
9 talking about.

10 QUESTION: No, no. The issue I'm talking about
11 is a contention which you have made, not that there is an
12 additional issue, but that this issue is not in the case,
13 that the issue on which we granted certiorari is not in
14 the case. That's what you've told us. You've said that
15 issue is not here.

16 MR. NASH: If this is a seizure case --

17 QUESTION: Would you show me where that appears
18 in anybody's brief, or otherwise say, as far as you know,
19 it does not appear in anybody's opposition?

20 MR. NASH: To say that, in the opposition of Mr.
21 Simpson to the petition for writ of certiorari, that the
22 Government overlooks the difference between a seizure
23 which doesn't involve a right to privacy, that is the
24 issue. That is the point that we are raising. Further --
25

1 QUESTION: That's a quite different point.
2 You're saying there's an additional issue here. There's a
3 difference between the joint venture issue and the
4 possession issue.

5 MR. NASH: Yes.

6 QUESTION: We understand that.

7 MR. NASH: Yes.

8 QUESTION: But that's not the point you were
9 making. You were making the point that the joint venture
10 issue is not in the case. Now, do you still make that
11 point?

12 MR. NASH: What I am saying is that --

13 QUESTION: If you could answer that yes or no,
14 Mr. Nash.

15 MR. NASH: Yes, sir, it is in the case.

16 QUESTION: Okay, it is in the case.

17 MR. NASH: It's raised in the case. It ought
18 not to be, that is my argument.

19 If this is in fact a seizure case, then under
20 Soldal a right-to-privacy analysis does not apply, and the
21 question that the Government sought certiorari on is what
22 role, if any, should a joint venture standing issue play
23 in determining right to privacy?

24 Under Soldal and under Jacobsen,, if this is a
25 seizure case, right-to-privacy analysis doesn't apply.

1 We are claiming a possessory interest or
2 proprietary interest in both the car and the contraband
3 under two separate theories. Number 1 -- excuse me, under
4 two separate theories, one of which is car, and one is the
5 contents.

6 The Government's claim in this Court is that an
7 absent owner can never properly claim a possessory
8 interest in an automobile, and that simply has not been
9 the law in this Court or in any other.

10 QUESTION: Assume we agree with the Government
11 that this joint enterprise theory doesn't give standing to
12 the members of the conspiracy without more? Then you
13 would still suggest to us that we should affirm on another
14 ground.

15 MR. NASH: Yes, sir.

16 QUESTION: Namely -- but if we agree with the
17 Government on that, it seems to -- on their submission
18 about the joint enterprise, it seems to me the only people
19 who might have standing to complain would be the
20 Simpsons --

21 MR. NASH: No, sir.

22 QUESTION: Who own the car.

23 MR. NASH: No, sir, because that overlooks the
24 interest in a possessory right to the contraband.

25 Further, Mr. Padilla at the district court level

1 claimed a bailment-type interest as well in the vehicle,
2 so the issue of ownership of the car strictly pivots
3 around Mr. and Mrs. Simpson, but in the district court
4 Mr. Padilla claimed a bailment interest in the car. It
5 was he to whom the car was entrusted to transport the
6 cocaine on the next leg of its journey.

7 QUESTION: Well, let's assume that the driver of
8 the car owned the car, and let's assume that the consent
9 was valid to open the trunk.

10 Now, the possessory right to that cocaine isn't
11 going to help them very much, because it's just a plain
12 view seizure, then.

13 MR. NASH: That's correct.

14 QUESTION: And --

15 MR. NASH: If under that hypothetical, which is
16 not this case, you would be correct.

17 QUESTION: Well, that would be this case if we
18 say that the Simpsons don't have -- just because of their
19 ownership don't have standing to object at all.

20 MR. NASH: Under that hypothetical, that would
21 be correct.

22 QUESTION: Right.

23 MR. NASH: But the Simpsons are clearly the
24 owner of the car. In your hypothetical the owner of the
25 car was driving it. Mr. and Mrs. Simpson clearly have the

1 ability and the standing to challenge the invalidity of
2 the initial seizure of that car.

3 QUESTION: Well --

4 MR. NASH: Just --

5 QUESTION: If we don't agree with that, why the
6 seizure of the cocaine is not challengeable.

7 MR. NASH: And assuming the validity of the
8 consent, which is an issue that has to get, perhaps, sent
9 back to the district court.

10 QUESTION: Suppose that Arciniega was going
11 90 miles an hour, and he was stopped -- a valid stop,
12 correct?

13 MR. NASH: Yes, sir.

14 QUESTION: And the police said, may we search
15 the trunk of your car, and he said, yes. Is that a valid
16 search?

17 MR. NASH: If we assume also the validity of the
18 consent, yes, it is.

19 QUESTION: And at that point, isn't the case
20 over and the Simpsons lose?

21 MR. NASH: Yes. If we assume --

22 QUESTION: Why, then, isn't this a search case?

23 MR. NASH: Because this case, number 1, involves
24 a search that is, by the Government's own tacit admission
25 by not challenging it on appeal, invalid. The district

1 judge found that there is absolutely no objective,
2 articulable fact to support the stop. That is the first
3 difference.

4 QUESTION: What standing do the Simpsons have to
5 raise the violations of Arciniega's rights --

6 MR. NASH: Because it was --

7 QUESTION: When he's been invalidly stopped?

8 MR. NASH: Because it was their car, sir, and
9 they also had a possessory interest in the contraband.

10 Clearly, if one has a possessory interest in a
11 vehicle, even though one happens to be absent at the time
12 of the stop, you are not deprived of your ability to
13 contest the Fourth Amendment violation.

14 QUESTION: Don't our cases say that you can't
15 have a legitimate possessory interest in contraband?

16 MR. NASH: They do not for standing purposes.
17 They do for forfeiture, or for other seizure purposes for
18 purposes of forfeiture, but not in standing. That
19 argument has been squarely rejected by this Court every
20 time it's been raised.

21 QUESTION: Which of our cases is that?

22 MR. NASH: Trupiano was one of the ones that's
23 cited in the briefs. It says it makes no difference if
24 the object seized is contraband or not, there is still a
25 proper Fourth Amendment interest.

1 QUESTION: Trupiano was largely overruled by
2 Rabinowitz.

3 MR. NASH: But not squarely on that point.
4 There is no case that the Government has cited to this
5 Court that says in a search and seizure context that one
6 loses standing to raise a possessory interest or right to
7 privacy simply because contraband is involved.

8 QUESTION: Do you have any case stronger than
9 what remains of Trupiano to support your position? You
10 say the Government has nothing to support its position.

11 MR. NASH: Jeffers also says the same thing.

12 QUESTION: Jeffers, okay.

13 QUESTION: Of course, you have a more difficult
14 problem, don't you, than simply -- at least on behalf of
15 the Simpsons -- than simply asserting what you described
16 as a possessory interest, because you've got to -- they
17 would have to base their claim there on constructive
18 possession.

19 They did not, in fact, have possession of the
20 drugs, and it's -- I would have thought that the theory on
21 which you get constructive possession, one element of
22 which is the right to control the dominion over something,
23 the right to dispose of it, is essentially a theory of
24 property or ownership, and they do not have any ownership
25 in contraband.

1 MR. NASH: But they could have a possessory
2 interest in it.

3 QUESTION: No, but that begs the question. They
4 don't have a possessory interest in the sense of having
5 present possession. The only possessory interest they can
6 have is a constructive possessory interest, and if a
7 constructive possessory interest implies title or
8 ownership, which in fact is precluded in contraband, it
9 may be that as to contraband the only kind of possessory
10 interest that can give standing is a present possessory
11 interest as opposed to a constructive one, which is what
12 the Simpsons have here.

13 MR. NASH: But possession does not require
14 ownership, it merely requires a measure of control and
15 intent to control.

16 QUESTION: Well, and what's -- where do you get
17 the power to control something which you do not have in
18 your physical possession if you do not, in fact, own it?

19 MR. NASH: By merely possessing it.

20 QUESTION: But they're not -- no, but that begs
21 the question. That's just circular. You admit that they
22 don't have any present physical possession, right?

23 MR. NASH: Yes, sir.

24 QUESTION: Okay. They have what we
25 traditionally refer to as constructive possession, if

1 anything, right?

2 MR. NASH: Yes, sir.

3 QUESTION: Isn't it an element of constructive
4 possession that you must have a -- some sort of right to
5 exercise dominion and control, even though it is not in
6 your presence?

7 MR. NASH: Yes, sir.

8 QUESTION: And do we not usually find that right
9 to exercise dominion control in title or property to the
10 goods or to the object in question?

11 MR. NASH: It can be found from title. It is
12 not necessarily limited --

13 QUESTION: Where else do you get it?

14 MR. NASH: You can get it from someone bailing
15 it to you. You can get it from a temporary bailment
16 interest. It does not require any type of ownership, and
17 I would --

18 QUESTION: Well, it seems to me that that just
19 pushes the difficulty further off, because the bailor
20 doesn't have any possession at that point --

21 MR. NASH: Well, the bailor --

22 QUESTION: And if the bailor's only possession
23 is constructive, then you've got the same problem with the
24 bailor that you have if you deal with people in the
25 Simpsons' position right now. It just kind of adds

1 another layer of constructive possession to the analysis.

2 MR. NASH: If this Court chooses to find that
3 one can never, as a matter of law, have a possessory
4 interest in contraband, then your hypothetical is correct.

5 QUESTION: All we have to find, it seems to me,
6 is that you may not have title or ownership in contraband,
7 and I thought that's where we were at the present time.

8 MR. NASH: Well, one can possess something, my
9 argument is, without necessary owning it.

10 QUESTION: Well, I agree with you.

11 MR. NASH: The Government urges that an absentee
12 owner can never claim any type of proper possessory
13 interest, and with regard to the vehicle and with the
14 contraband, once we assume the correctness of my position
15 on the possession versus ownership issue, it's simply not
16 valid.

17 In Jacobsen, this Court found that an individual
18 had a cognizable Fourth Amendment interest that was
19 affected by a seizure even though they clearly were not
20 present at the time the package was seized.

21 In Place, the same kind of situation arose. The
22 precise seizure in Place that was the subject of this
23 Court's inquiry occurred at a time when Mr. Place had been
24 allowed to leave the airport, was not present, and was not
25 involved in any of those activities.

1 QUESTION: In both of those cases, one was
2 Federal Express, the other an airline. It was open and
3 obviously clear that this was a bailment.

4 MR. NASH: That's clear, and that's --

5 QUESTION: But --

6 MR. NASH: That is exactly this case, with even
7 more control exerted over the bailee by the bailor than
8 was found in the Federal Express example.

9 QUESTION: So are you saying that any time the
10 police stop an automobile and find that it's registered to
11 a different owner that there can be no consent given by
12 the driver?

13 MR. NASH: Absolutely not, sir. We are not
14 saying that Mr. Arciniega's consent, assuming, number 1
15 the validity of the initial seizure of the car, and number
16 2 assuming the, on its merits, if you will, validity of
17 the consent, is not binding on anyone else.

18 It would be. It would be binding on everyone
19 else who claimed an ownership or possessory interest in
20 the car, but the vice of your hypothetical is that it
21 assumes two facts that are not in this case, one a finding
22 of validity of the initial seizure, number 2, some type of
23 ruling on the merits in favor of the Government in the
24 issue of consent, neither of which exist in this case.

25 But clearly, if we assume those two things, the

1 person who is driving the car, who is properly empowered
2 to drive it, can issue a consent under this Court's prior
3 decisions that is binding on anyone else. That is not at
4 issue here.

5 The point that I was making that the prior case
6 law of this Court clearly establishes that one may be
7 absent and still have the right to complain about a
8 seizure. The issue of absence clearly more appropriately
9 affects the issue of right to privacy. Simply put, if I
10 have an interest in property and someone trespasses on
11 that property, whether or not I know about it or I am
12 present, I still have an interest that has been offended,
13 an interest that would give me a right to complain about
14 that, and it is no different when one considers standing.

15 The Government makes much to do in the written
16 briefs filed in this case concerning the issue of minimal
17 intrusion versus more than minimal intrusion.
18 Traditionally, this Court has analyzed the issue of
19 minimal intrusion versus more than minimal intrusion as to
20 the level of finding that the Government has to make, the
21 kind of showing they have to make to justify the initial
22 seizure.

23 If it is merely a minimal intrusion and
24 counterplayed against a strong prevailing Governmental
25 interest, then the kind of showing the Government has to

1 make is merely reasonable suspicion. If it is more than a
2 minimal intrusion, probable cause is required.

3 What the Government seeks to do here is
4 bootstrap that argument to the next level, and what they
5 seek to do is say that in the case of a minimal intrusion
6 no articulable objective facts need be shown, not even
7 reasonable suspicion. That really is the thrust of their
8 argument here.

9 It is important to recognize that in this case
10 the record is very clear and unequivocal that there was no
11 fact, no specific articulable fact, that could support the
12 initial detention of the car in this case, so the
13 Government wants to take the minimal cases to the next
14 level, which, I would submit, is simply not justified on
15 the facts of this case or any prior precedent in this
16 Court.

17 If we look at the issue of whether or not this
18 is a case limited to a seizure, then the joint venture
19 rule as it determines one's right to privacy has no place
20 in the analysis, and what the Ninth Circuit may have done
21 is the same thing that the Seventh Circuit did in Soldal.
22 It has improperly considered one's right to privacy in
23 determining the propriety of a seizure rather than a
24 search.

25 This case is a seizure case, and hopefully

1 Soldal, as it did in the Seventh Circuit, will clear up
2 this issue and provide guidance to counsel and courts that
3 the proper measure of inquiry is not right to privacy but
4 is, instead, property rights. This is a seizure case.

5 If the Court has no other questions, I thank the
6 Court.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nash.
8 The case is submitted.

9 (Whereupon, at 11:02 a.m., the case in the above-
10 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: No. 92-207

United States, Petitioner v. Xavier V. Padilla, et al

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)