

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MINNESOTA, Petitioner v. WAYNE THOMAS CARTER
AND MELVIN JOHNS

CASE NO: 97-1147 C./

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 97-1147, Minnesota v. Wayne
5 Thomas Carter and Melvin Jones.

6 Mr. Backstrom.

7 ORAL ARGUMENT OF JAMES C. BACKSTROM

8 ON BEHALF OF THE PETITIONER

9 MR. BACKSTROM: Mr. Chief Justice, and may it
10 please the Court:

11 The Minnesota supreme court has ruled that a
12 person who is present in another's residence for a brief
13 period of time for the sole purpose of engaging in an
14 unlawful business has a legitimate expectation of privacy
15 in the premises.

16 This decision, if allowed to stand, would
17 reestablish the automatic standing rule of legitimately on
18 the premises projected by this Court 20 years ago in Rakas
19 v. Illinois, and it would allow visitors to vicariously
20 assert the privacy interests of their hosts.

21 Furthermore, the Minnesota supreme court's
22 determination that an officer's nonenhanced observations
23 while standing in a public area outside the curtilage of a
24 residence constitutes an unreasonable search is
25 inconsistent with this Court's prior decisions and will

1 expand the exclusionary rule to the detriment of justice.

2 The defendants here presented no evidence that
3 they were engaged in any intimate activity normally
4 associated with the privacy of a dwelling. They had no
5 ownership or property interest in these premises. They
6 were not overnight guests. They were not regular
7 visitors. They had no ability to control access to these
8 premises.

9 QUESTION: Mr. Backstrom, may I slow you down a
10 minute by asking you a question?

11 What if the State passed a statute -- I remember
12 years ago there was a debate on maybe all defendants
13 should have standing to challenge Fourth Amendment
14 violations, and what if a State passed a statute and said
15 that the defendant shall always have standing to object to
16 an unlawful search or seizure? Do you think such a search
17 would be constitutional?

18 MR. BACKSTROM: Well, Your Honor, I do not
19 believe that it would. I do not believe that the Fourth
20 Amendment -- it was intended to provide protections to
21 everyone.

22 QUESTION: I know the Fourth Amendment was, but
23 could the State pass a statute that gave additional
24 protection to a defendant without violating the Federal
25 Constitution?

1 MR. BACKSTROM: Yes. It is possible, Your
2 Honor. States have independent State constitutions and
3 they could pass different provisions that relate to this,
4 but this particular decision the Minnesota supreme court
5 decided based upon the Fourth Amendment of the Federal
6 Constitution.

7 QUESTION: Do you think standing is always a
8 Federal question?

9 MR. BACKSTROM: Your Honor, I believe it is an
10 important Federal question, and when a decision is based
11 upon the Federal Constitution, as it was in this case,
12 then I think the Federal standard should apply and, as
13 this Court has been very consistent in applying its
14 standards, in essence a totality of the circumstances
15 test, which we would argue is the appropriate analysis to
16 be used in determining whether someone has a significant
17 enough connection to the premises to give them a
18 legitimate expectation of privacy --

19 QUESTION: Well, given the reasoning of Rakas,
20 would it be fair to answer Justice Stevens by saying this
21 isn't a standing question at all, it's a question of the
22 substantive reach of the Fourth Amendment?

23 I had thought that the Chief, then Justice
24 Rehnquist, in writing the opinion in Rakas, went into
25 this, and said this is not a standing question, or am I

1 incorrect?

2 MR. BACKSTROM: Well, Your Honor, I believe
3 Mr. Chief Justice Rehnquist, as he wrote that particular
4 opinion, indicated that the question which was formally
5 referred to as standing is a subjective issue in terms of
6 having to analyze the issues, but there's still -- it's
7 still important that a criminal defendant establish a
8 significant enough connection to a particular premise as
9 to give them an expectation of privacy that society is
10 willing to accept as being reasonable.

11 QUESTION: Yes, but that's a substantive
12 interpretation of the Fourth Amendment. It is not a
13 question of who has rights to raise a violation. There's
14 a slight difference, is there not?

15 I thought that Rakas discussed this.

16 MR. BACKSTROM: But -- Your Honor, I believe
17 Rakas made it very clear that the appropriate test to
18 apply in these particular provisions is one which looks at
19 an individual's first subjective expectation of privacy
20 and then whether that's the type of expectation that
21 society is willing to accept as being reasonable.

22 Here, under these circumstances, we don't
23 believe that brief transient visitors that are in a
24 residence solely for --

25 QUESTION: -- you said brief, which was a few

1 hours, and you said brief time, unlawful purpose. Would
2 it make any difference, in your view of the applicable
3 law, if they had gathered to play a game of poker instead
4 of to put together coke, or whatever they were doing?
5 Would that have made a difference?

6 MR. BACKSTROM: I do not believe it would, Your
7 Honor. When you apply a totality of the circumstances
8 analysis to these types of issues, you have to look at a
9 wide variety of factors such as their ability to control
10 access, the frequency of their visits, how long they
11 stayed on a particular occasion.

12 QUESTION: But you wouldn't know about whether
13 they were there for a lawful purpose before you began this
14 search, so it can't turn on the -- can we take that out of
15 it, whether they're there to play poker or whether they're
16 there to prepare drugs?

17 MR. BACKSTROM: No, I do not believe you can,
18 Your Honor. It's not the -- you know, obviously the
19 police officer's never going to know what the person's
20 connection with the premises is at the time he conducts
21 his observations, but the nature of the conduct that's
22 involved I think is a factor to be considered.

23 It's a factor to be considered as it relates
24 back to their connection of the individual to the premises
25 themselves, but we believe that as it relates back, as it

1 relates to the type of activity that's normally associated
2 with the privacy of a dwelling, then that nature of the --
3 the nature of the activity may be a factor to be
4 considered, but we believe --

5 QUESTION: What you're saying, aren't you, is
6 that whenever there is a need to invoke a Fourth Amendment
7 protection this factor is going to count against the deed?

8 I mean, the only time people raise the Fourth
9 Amendment is when somebody is about to introduce something
10 into evidence in a criminal trial, and I think you're
11 saying that this factor always counts against them when
12 they want to do the very thing that the law allows them to
13 do by filing a suppression motion.

14 MR. BACKSTROM: Well, Your Honor, I believe what
15 I'm saying is the nature of the activity involved is a
16 factor to be considered under a totality test.

17 QUESTION: So I mean, the tendency of what
18 you're saying is that criminals should not have a right to
19 raise Fourth Amendment issues under a totality test. Is
20 that --

21 MR. BACKSTROM: No, that is not what I'm saying,
22 Your Honor.

23 QUESTION: Then tell me how the criminal nature
24 of the activity properly counts if that is not the
25 tendency of what you're arguing.

1 MR. BACKSTROM: Criminal activity is obviously
2 not the type of conduct that's normally associated with
3 the privacy of a dwelling. The fact that the activity is
4 criminal in nature should provide no benefit, is what
5 we're arguing, to the totality analysis, whereas if
6 there's --

7 QUESTION: Oh, I thought you were arguing that
8 it should provide a burden, as it were, in the test.
9 You're not arguing that at all.

10 MR. BACKSTROM: No, we're not, Your Honor.

11 QUESTION: Okay.

12 QUESTION: Was there any testimony at all from
13 the defendant in this case as to how long he had been
14 there? As I recall, the record is simply silent on that,
15 is it not?

16 MR. BACKSTROM: The record is silent, Your
17 Honor. There was no testimony offered by the defendants
18 regarding those issues, and it is the defendant's burden
19 of proof.

20 QUESTION: Yes, I would think so, that if he's
21 claiming a violation of the Fourth Amendment he's got to
22 show that it was his rights that were infringed.

23 QUESTION: The States have applied various
24 standards in courts to determine whether there's a Fourth
25 Amendment violation with regard to a visitor in a home

1 and, as I look at the cases, they seem to turn quite often
2 on the extent to which the visitor has control over the
3 premises.

4 A visitor who's been given a key and the right
5 to exclude others would be treated much like the
6 homeowner, but someone with a more casual contact would
7 not.

8 I find the totality of the circumstances test
9 pretty vague. Do you place any reliance on the control
10 test that's used by some of the State courts?

11 MR. BACKSTROM: Yes, Your Honor. I believe that
12 the ability to control access is a factor to be
13 considered, and again, there are -- these different
14 factors may have different weight in the analysis under
15 the totality test, but this Court has used a totality of
16 the circumstances test a long time for purposes of Fourth
17 Amendment analysis, not just in issues relating to
18 standing, but in issues relating to the voluntariness of a
19 search, whether or not there's enough probable cause to
20 obtain a search warrant --

21 QUESTION: Mr. Backstrom, what happened to the
22 occupier, the resident in this case? Was she charged,
23 or --

24 MR. BACKSTROM: Yes, Your Honor, she was charged
25 and convicted as well of the same charges that these two

1 defendants were.

2 QUESTION: Convicted as a result of trial, or a
3 guilty plea, or --

4 MR. BACKSTROM: She was convicted after a trial
5 in this case, Your Honor.

6 QUESTION: Mr. Backstrom, you said a moment ago
7 at the beginning of your argument that the position below
8 was tantamount to the readoption of the automatic standing
9 rule, and I'm wondering if it is.

10 Isn't there a distinction to be drawn between
11 this notion of common enterprise that there would be
12 standing when the stranger, when the guest or invitee is
13 engaged in some kind of a common activity with the owner
14 of the dwelling on the one hand and on the other hand the
15 position of somebody who comes in, let's say, to do casual
16 labor, fix the telephone, the burglar who happens to be in
17 the bedroom when the police arrive?

18 Can't a line be drawn there, and if a line can
19 be drawn, isn't the rule below something short of
20 reestablishing automatic standing?

21 MR. BACKSTROM: Well, we do believe the rule
22 below, Your Honor, would establish the automatic standing
23 legitimately on the premises, because we believe that the
24 near engagement in a common task with a resident or a
25 property possessor is basically tantamount to establishing

1 that. It's nothing more than --

2 QUESTION: What about a line I suggested?

3 There's something -- like all lines, there are going to be
4 times when you're going to have difficulty drawing it, but
5 there is, it seems to me, something intuitively different
6 about three people sitting around a table, in this case
7 packaging cocaine, and on the other hand the individual
8 who comes in to fix the telephone, who really is simply
9 admitted to do a job and is not engaged in a concerted
10 activity with the homeowner. Isn't that a line that could
11 be drawn, and isn't it implicit here?

12 MR. BACKSTROM: I do not believe it is, Your
13 Honor. The two defendants in this case were mere business
14 invitees. They were not residents of this apartment.
15 They were engaged in --

16 QUESTION: Right.

17 MR. BACKSTROM: -- a process. They were just
18 like --

19 QUESTION: The owner of the apartment was
20 engaging in the business activity with them. I think the
21 three of them were engaged in sort of a common enterprise,
22 weren't they?

23 MR. BACKSTROM: Well, as this Court pointed out
24 in Lewis v. United States, Your Honor, when the home is
25 converted for business purposes, that business is entitled

1 to no greater sanctity than if it were carried on in a
2 store, a garage, or a car.

3 This court has addressed similar issues. In
4 that case it was an unlawful business, as it is here,
5 and --

6 QUESTION: Well, are you then saying the reason
7 is that it was business, whereas if it had been a criminal
8 enterprise not for profit, you would admit the
9 distinction, the line that I was suggesting?

10 Is it that the line cannot be drawn, or that you
11 shouldn't draw it in a business case as opposed to a
12 nonbusiness enterprise, or a nonbusiness activity? Which
13 is the reason for your answer?

14 MR. BACKSTROM: Well, Your Honor, I believe what
15 we're arguing here is that the business differential, the
16 business versus a social guest is a line to be drawn, and
17 an important one, but that's not to say that business
18 visitors don't have the rights of privacy --

19 QUESTION: Do you know of many nonprofit
20 criminal enterprises?

21 (Laughter.)

22 MR. BACKSTROM: No, Your Honor.

23 QUESTION: What is the difference, as you see
24 it, between your brief and the Government's brief that
25 supports you here?

1 MR. BACKSTROM: There is no dramatic difference
2 between our two briefs, Your Honor. We would agree that
3 most temporary guests, as the Solicitor has put forth in
4 their brief, would not have a legitimate expectation of
5 privacy in the premises.

6 However, we believe that under certain
7 circumstances a short term guest may have those
8 connections, if they've been a frequent visitor, had
9 ability to control access, and so forth.

10 QUESTION: A poker player that doesn't have the
11 key but comes every week to play the game?

12 MR. BACKSTROM: Well, again, I think that is a
13 factor to be considered, Your Honor, the frequency of
14 visits, what's the nature of their connection --

15 QUESTION: I've given you the case, so what is
16 it? The poker player comes for the game but doesn't have
17 the key, can't get in unless the occupant of the premises
18 opens the door, stays for -- I don't know how long these
19 sessions run -- 2 hours, say.

20 QUESTION: More than that.

21 MR. BACKSTROM: I would -- Your Honor, I
22 would --

23 (Laughter.)

24 MR. BACKSTROM: I would -- I do not believe that
25 person would have a legitimate expectation of privacy in

1 the premises unless there were other factors associated
2 with their connection to that particular residence.

3 QUESTION: Like what?

4 MR. BACKSTROM: Like, they've been frequent
5 visitors, they're frequently -- that they have the
6 ability --

7 QUESTION: You mean if they play five times a
8 week they get standing, if they play once a week they
9 don't?

10 MR. BACKSTROM: Well, there are factors to be
11 considered. There are --

12 QUESTION: Yes, but how about that factor?

13 MR. BACKSTROM: Well, I -- that's perhaps enough
14 additional information that might render their connection
15 with the premises more significant than the first time
16 visitor to a particular premises.

17 QUESTION: I understand the factual difference,
18 but I don't know why it should make a difference.

19 If in each case the individual is invited by the
20 owner to engage -- I guess in this instance I'm sure it's
21 a lawful activity.

22 (Laughter.)

23 QUESTION: Why should it --

24 (Laughter.)

25 QUESTION: Why should it make a difference

1 whether they play once a week, or three or four or five
2 times a week?

3 MR. BACKSTROM: Well, Your Honor, we're just --
4 we're suggesting that under totality of the circumstances
5 test you have to look at all of those factors.

6 QUESTION: I know you're saying I have to look
7 at it, but what I'm saying, why should that distinction be
8 a potential source of difference?

9 MR. BACKSTROM: That distinction by itself may
10 not be, but if you add that to some of the other factors,
11 such as whether they have an ongoing intimate relationship
12 with the person that they're involved in playing this --

13 QUESTION: I play poker once a week. It seems
14 to me I've got a pretty strong personal relationship with
15 somebody.

16 MR. BACKSTROM: Well, that in itself may not be
17 enough to give you a significant enough connection to a
18 residence other than your own for purposes of establishing
19 whether you have an expectation of privacy that society's
20 willing to accept as being reasonable.

21 QUESTION: What are we driving towards with
22 these tests? In my own mind, perhaps wrongly, I've used
23 the Spanish expression, mi casa e su casa -- my house is
24 yours -- and insofar as that's the attitude, there's the
25 expectation of privacy, and insofar as it's not, there

1 isn't, and is that what these cases seem to be driving
2 towards?

3 When we invite a weekend guest, that's what we
4 say, my house is yours, but we certainly don't say that
5 with a business visitor normally, and perhaps with a poker
6 player it depends on the nature of the game, but is that
7 what this is driving towards?

8 MR. BACKSTROM: Your Honor, I don't believe it's
9 the intent that's in the mind of the host that's inviting
10 someone in.

11 QUESTION: What is it, if it's not that? That
12 is, I'm not saying who has the intent. I'm saying, do the
13 circumstances suggest that's what's going on, my house is
14 yours.

15 Now, is that what this is aiming at, yes or no?
16 It is or it isn't. If it is, fine. If it's not, what are
17 these tests aiming at.

18 MR. BACKSTROM: Well, Your Honor, I do not
19 believe that the test hinges on the intent of the parties.
20 I believe the test requires an application of society's
21 expectations under a totality analysis.

22 QUESTION: We do need to have something that we
23 can hang our hat on. Wouldn't it be consistent with all
24 of our jurisprudence to say that the expectation of
25 privacy is limited to overnight guests?

1 MR. BACKSTROM: Yes, I believe -- this Court has
2 obviously indicated that in Minnesota v. Olson, and we
3 believe that's the outer standard for purposes of
4 establishing a legitimate expectation of privacy.

5 On the other hand, one certainly has to be
6 legitimately on the premises, and in the area in between
7 you need to analyze the factors --

8 QUESTION: Well, certainly when you say guest it
9 suggests someone who's legitimately on the premises, not
10 there by some sort of subterfuge.

11 MR. BACKSTROM: Yes.

12 QUESTION: Well, it seems to me that what you're
13 suggesting is what we might call a multifactor test, and
14 it may be almost impossible to avoid it, but that the
15 Government tries to reach a higher level of generality and
16 say that there is just no legitimate expectation of
17 privacy by a social or business guest in a home, other
18 than an overnight visitor.

19 I guess that's it, I think there's a difference
20 between the two of you in that respect.

21 Now, maybe on analysis we're going to have to
22 ask the Government, well, how do you know it's not
23 legitimate, and then they'll give us all these factors,
24 and we'll be right where you are.

25 QUESTION: Maybe the line should be business

1 versus social.

2 MR. BACKSTROM: I believe that is an important
3 distinction. It's an important distinction in this case,
4 Your Honor, because that's what we're dealing with here.

5 QUESTION: We're dealing with a business
6 transaction.

7 MR. BACKSTROM: Yes.

8 QUESTION: The apartment occupant was to get a
9 certain amount of the cocaine in exchange for letting them
10 use the premises.

11 MR. BACKSTROM: Absolutely, Your Honor.

12 QUESTION: Although business invitees usually
13 are entitled to a higher standard of care, so -- even in
14 the law of torts, so we would be reversing it, but I think
15 what Justice O'Connor suggests might make a lot of sense
16 insofar as our legitimate expectations of privacy.

17 The refrigerator repairman and so forth are
18 limited in their access to other parts of the premises,
19 and it seems to me that the business-social distinction
20 might be helpful here, as Justice O'Connor suggests.

21 MR. BACKSTROM: I agree, Your Honor, and what
22 we're asking the Court to establish in this case under
23 these facts is that a short-term guest in another person's
24 residence for business purposes does not have a legitimate
25 expectation of privacy.

1 If I have any further time, I'd like to reserve
2 it, Your Honor.

3 QUESTION: Very well, Mr. Backstrom.

4 Mr. Lamken, we'll hear from you.

5 ORAL ARGUMENT OF JEFFREY A. LAMKEN

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONER

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

10 Respondents did not suffer a violation of their
11 Fourth Amendment rights for two reasons. First,
12 respondents' status as mere short-term business visitors
13 did not give them a legitimate expectation of privacy in
14 the home that they were visiting.

15 Second, the police officer's observation of the
16 apartment from the common grassy area outside the window
17 did not constitute a search within the meaning of the
18 Fourth Amendment.

19 QUESTION: How would you answer the question I
20 put to the petitioner's counsel?

21 MR. LAMKEN: I'm sorry, Justice Kennedy.

22 QUESTION: What is the difference between your
23 approach and the State's approach, if any, in your briefs?

24 MR. LAMKEN: I think our approach is similar.
25 Ours simply has a higher level of generality.

1 The questions we ask would be the questions this
2 Court asked in Olson, which is, is this person effectively
3 the functional equivalent of a member of the household,
4 such that they would exercise some element of control,
5 perhaps in the host's absence?

6 Is this person someone who's expected to conduct
7 their intimate or private affairs in the home such that
8 society accords them a privileged sense of privacy there?

9 Does this person fall within a social tradition
10 under which the host would be expected to defer to the
11 visitor's privacy interests?

12 For an overnight guest, those factors all point
13 that this person is functionally a member of that
14 household.

15 QUESTION: Does frequency of visitation enter
16 into that balance?

17 MR. LAMKEN: It would be one thing that a trial
18 court would be justified in looking at, but I don't
19 believe it would be dispositive.

20 QUESTION: Related status between the party,
21 cousin versus friends?

22 MR. LAMKEN: I think that when you have
23 relatives, that might tend to suggest that this person's
24 more likely to be treated as a member of the household.

25 QUESTION: Even if he's not an overnight guest.

1 You're acknowledging that if it's a relative who visits
2 frequently, a cousin who often comes in for an hour to
3 have lunch, that that would make --

4 MR. LAMKEN: No, Your Honor, we would not go
5 that far.

6 QUESTION: You have an absolute rule that if
7 it's not overnight it's not covered, is that it?

8 MR. LAMKEN: No, Your Honor. The cousin who
9 comes in occasionally is a mere short-term social visitor.
10 However, a cousin who has a key and enters on his own, or
11 frequently spent the night, might be the functional --

12 QUESTION: I'm excluding spending the night.
13 This cousin never spends the night. He has a key, and he
14 comes in and has lunch with some frequency, once a week.

15 MR. LAMKEN: Well, Your Honor, if the cousin is
16 treated as a temporary member of the household -- for
17 example, he's free to let himself in or admit others -- I
18 think the cousin might well have a legitimate
19 expectation --

20 QUESTION: What if he's not a cousin. He's a
21 drug dealer, and he comes in -- he's given a key, comes in
22 every week for lunch.

23 MR. LAMKEN: I think the illegality of the
24 conduct is something this Court traditionally sets aside.
25 For example, in Olson the individual was spending the

1 night to evade the police --

2 QUESTION: Right.

3 MR. LAMKEN: -- because he engaged in armed
4 robbery, but the Court didn't look at specifically the
5 illegal --

6 QUESTION: So this would be -- he would have --
7 you're saying he would have the Fourth Amendment privilege
8 as well, just like the cousin.

9 MR. LAMKEN: He's very similar to the defendant
10 in Jones, except for the fact he doesn't spend the night,
11 in that he exercises control over the premises and is
12 treated as a member of the household. Under those
13 circumstances, yes, he would have a legitimate expectation
14 of privacy like any other member of the household.

15 QUESTION: So you do not say he must be an
16 overnight guest.

17 MR. LAMKEN: No. I think the instances in which
18 one is not an overnight guest and would have --

19 QUESTION: And also it could be a commercial
20 arrangement. Suppose it's a babysitter who comes in,
21 never spends the night but always gets paid for his or her
22 watching of the children.

23 MR. LAMKEN: No, I don't believe a babysitter
24 would have a legitimate expectation of privacy.

25 QUESTION: Oh, you don't.

1 MR. LAMKEN: Although there is some element of
2 control in the fact that the babysitter stands in the
3 shoes of the parents, it's a very limited element, and the
4 babysitter is not a functional equivalent to a member of
5 the household. The babysitter's not free to enter or
6 leave as she pleases, not free to admit others.

7 QUESTION: But the drug dealer who comes once a
8 week, because he has a key and has lunch there, is?

9 MR. LAMKEN: If the --

10 QUESTION: I'll go with the babysitter over the
11 drug dealer.

12 (Laughter.)

13 MR. LAMKEN: I think, Justice Scalia, the
14 instinct is to set aside the illegal nature of the
15 conduct. If the drug dealer has control of the apartment,
16 admits himself, is free to admit others, he's functionally
17 equivalent to a member of the household, and even though
18 he is a drug dealer.

19 On the other hand, the babysitter is not free to
20 admit others, is not a member of the household.

21 It's a closer case, however, Your Honor, than
22 what we have here. What we have here are mere short-term
23 business invitees, and mere short-term business invitees,
24 unlike --

25 QUESTION: Now, if a Peeping Tom looked through

1 the window at a babysitter, would she have any -- could
2 she be classified as a victim in terms of victim impact
3 statements and all the rest? Would she be a victim of the
4 offense?

5 MR. LAMKEN: Assuming there was a Peeping Tom
6 offense it's possible, although it's interesting to note
7 that if you look at the Minnesota statute here the purpose
8 of peeping in the room must be to interfere with the
9 privacy of a member of the household, which strongly
10 suggests --

11 QUESTION: So she would not be a victim of the
12 Peeping Tom's offense, in your view?

13 MR. LAMKEN: Not under the Minnesota statute,
14 no.

15 QUESTION: A rather strange --

16 MR. LAMKEN: And it's interesting to note,
17 because that suggests that to the extent State statutes
18 are relevant, that the Minnesota -- the State of Minnesota
19 has determined that the expectation of privacy belongs to
20 members of the household, or their functional equivalents,
21 and not to mere short-term social or business --

22 QUESTION: Mr. --

23 QUESTION: Your functional equivalent test is
24 not in your brief, is it?

25 MR. LAMKEN: Pardon?

1 QUESTION: Is -- did --

2 MR. LAMKEN: Those precise terms are not, but I
3 believe that those are the factors, the three factors we
4 identified for Minnesota v. Olson, what they are driving
5 at.

6 QUESTION: Which is sort of the way the Fourth
7 Amendment reads, too, isn't it?

8 MR. LAMKEN: Yes. It says --

9 QUESTION: To have people be secure in their
10 homes, not in somebody else's home.

11 MR. LAMKEN: Exactly. There is a possessive --

12 QUESTION: In their houses, but --

13 MR. LAMKEN: Precisely. There's a possessive
14 there.

15 QUESTION: But we've gotten beyond that,
16 haven't we?

17 MR. LAMKEN: The Court has moved away from
18 traditional notions of property law and looks at shared
19 social understandings, as indicated in Katz, but there is
20 definitely a possessive in the text of the Fourth
21 Amendment.

22 QUESTION: Mr. Lamken, now I'm not sure we're
23 going to get to the second question, but if we did, do you
24 support the notion that a police officer can go to a
25 residence with a closed venetian blind and stoop down to

1 peer between the cracks, 8 inches from the crack, and
2 that's perfectly legitimate, that's okay?

3 MR. LAMKEN: If the officer does not cross onto
4 the curtilage, and I think it's important to note the
5 nature of the area in front of the window in this case.

6 If you look at joint appendix I-3, it is -- has
7 the nature of an open field.

8 QUESTION: As long -- your position is that as
9 long as it's a sidewalk in front of the apartment building
10 that anyone can use, then they can squat down, peer
11 through the tiniest crack that obviously the homeowner has
12 hoped to exclude prying eyes from. That's okay.

13 MR. LAMKEN: Yes, Your Honor. This Court has
14 established that police officer observation from open
15 fields and public areas is not a search within the meaning
16 of Fourth Amendment --

17 QUESTION: But isn't it rather different to
18 contemplate a police officer walking by, no curtains
19 drawn, and you can see in the open window and see what you
20 see? Isn't that different in quality and nature from the
21 person who, faced with a closed blind, scrunches down to
22 peer through the crack?

23 MR. LAMKEN: Your Honor, I don't believe that
24 the open fields doctrine or the public place doctrine is
25 subject to fine-tuning based on whether the officer is

1 tall and happens to squat down, is short, stands on tip-
2 toe, stares for a minute or an hour.

3 Those things that are exposed to the open fields
4 and public places for view are open to view, and viewing
5 them does not constitute a search.

6 QUESTION: I guess if you're so careless as to
7 leave a -- that's what I found extraordinary about this
8 case. Apparently they left -- the blind wasn't closed
9 properly. There was a gap in it.

10 MR. LAMKEN: Yes. The record indicates there
11 were a gap in the blind --

12 QUESTION: And they were standing there are the
13 table handing out the white powder. I don't think that's
14 a reasonable expectation of privacy. If you don't pull
15 your blinds down --

16 QUESTION: Well, there wasn't --

17 QUESTION: -- you don't have a reasonable
18 expectation.

19 QUESTION: Does the record tell us that it was
20 that they were careless in the way they closed the blinds,
21 or that she was a tenant in the building, that they did
22 the best they could with the blind that they had?

23 MR. LAMKEN: I think the best reading of the
24 record, if you look at, I believe it's G-32 and 48 and 49
25 of the joint appendix, is that some of the lathes had not

1 turned. The officer specifically testified that at least
2 one or two of them were part open. I'm saying that part
3 of them was open, yes, and those are quotes from the
4 record.

5 So I think the best reading of the record is
6 that parts hadn't turned, but we don't have a dispositive
7 finding.

8 QUESTION: If the informer had violated the
9 Peeping Tom statute -- leave the police officer out of
10 it -- the employer who scrunches down, as Justice O'Connor
11 just described it, peers through that crack, would that
12 have been a violation of the Peeping Tom statute?

13 MR. LAMKEN: Your Honor, I'm not sure that it
14 would, but I also am sure that it would not matter,
15 because State law cannot convert a public place or an open
16 field into a private location from which viewing is a
17 search.

18 QUESTION: Mr. Lamken, your argument assumes
19 that we accept the conclusion by the -- I guess it was the
20 intermediate appeals court, or the trial court in
21 Minnesota that the officer was not within the curtilage.

22 As I understand it, the supreme court of
23 Minnesota did not deal with that issue, is that correct?

24 MR. LAMKEN: Yes. The Minnesota supreme court
25 assumed for the sake of argument that the officer did not

1 cross into the curtilage.

2 QUESTION: Isn't there something passing strange
3 about the conclusion that the officer was not within the
4 curtilage?

5 As I understand the facts, although you speak of
6 common areas and areas open to the public, the officer had
7 gone up next to the building between -- in effect between
8 the building and the shrubbery -- and was standing there,
9 and I would suppose that if we were dealing with the usual
10 one-family house we would say, well, of course that's
11 within the curtilage. Why don't we say it in the case of
12 an apartment building?

13 MR. LAMKEN: Justice Souter, I'm going to ask
14 you to turn to joint appendix I-3 to answer that question.
15 The area immediately in front of the window is -- I-3.
16 It's towards the back.

17 If you look, it's an open grassy area leading
18 straight up to the window, and it was across that open
19 grassy area that the officer walked. There's nothing
20 obscuring the --

21 QUESTION: Yes, but he wasn't -- as I understand
22 it, he wasn't seeing within the crack of the blinds as he
23 crossed the lawn. I thought as the briefs described the
24 facts he didn't get to see inside until he had positioned
25 himself between a shrub and the wall of the building.

1 MR. LAMKEN: I see that I'm out of time. May I
2 answer the question, Mr. Chief Justice?

3 QUESTION: I beg your pardon?

4 MR. LAMKEN: May I answer the question? I'm out
5 of time.

6 QUESTION: Yes. Yes. I was just looking at the
7 exhibit.

8 MR. LAMKEN: The record reflects that he stood
9 only 12 to 18 inches away from the window.

10 QUESTION: Was he between the shrubs and the
11 building or not?

12 MR. LAMKEN: No. He was on the left-hand side
13 of the window, if I read the record correctly, Your Honor.

14 QUESTION: But was the shrub --

15 MR. LAMKEN: The shrub did not obscure his view,
16 and he approached the building without crossing the
17 shrubs, although that wouldn't make a difference.

18 QUESTION: Thank you, Mr. Lamken.

19 Mr. Colbert, we'll hear from you.

20 ORAL ARGUMENT OF BRADFORD COLBERT

21 ON BEHALF OF THE RESPONDENTS

22 QUESTION: Mr. Colbert, as long as we're on the
23 exhibits, and trying to ascertain the facts, look at I-9

24 MR. COLBERT: Right.

25 QUESTION: -- which was Exhibit 39, which is the

1 close-up of the blind in question. Does that represent
2 how it was on the occasion at issue?

3 MR. COLBERT: Actually, that was a matter of
4 much discussion during the hearing, is that they did not
5 admit that that's how the blinds were.

6 QUESTION: What was the finding of the --

7 MR. COLBERT: There has been no findings
8 regarding that --

9 QUESTION: So we don't know in what condition --

10 MR. COLBERT: That's correct, Your Honor.

11 QUESTION: Do you understand Justice O'Connor's
12 question to relate to the window to the immediate left of
13 the door and to the right of the bike, or to the double
14 windows that are to the left of the bike and under the
15 balcony?

16 MR. COLBERT: If you'll look at Exhibit I-2 --

17 QUESTION: I-2?

18 MR. COLBERT: I-2 -- excuse me, Exhibit 9 on
19 page I-2 of the joint appendix, you can see -- I think
20 this represents, if you look at the bottom of the
21 building, there's a little window there, and then there's
22 a bicycle. What the officer looked into was the next set
23 of windows.

24 QUESTION: The windows that are under the
25 balcony.

1 MR. COLBERT: Exactly right, Your Honor, under
2 the balcony behind the bushes. The bushes are
3 approximately 3 to 4 feet away, which answers Justice
4 Souter's question, yes, he had to get between the bushes
5 and the window.

6 QUESTION: Why? Why is that? I mean, I thought
7 you had a fairly good case until I looked at two exhibits.

8 Once I looked at Exhibit 10 which is the same as
9 Exhibit 9, I take it, it is just taken from a different
10 angle, and then I looked at Exhibit 8 -- and I'm asking
11 you this. I'm not -- I'm going to sound more definite
12 than I am -- I thought, well, this is just a basement
13 apartment.

14 I mean -- I lived in a basement apartment once.
15 Our kitchen's still sort of underwater -- and when I'm
16 there, I know that if you don't pull the blinds the right
17 way, everybody can walk in and look, so when I'm in the
18 kitchen when I used to live in that basement apartment, I
19 assumed I had to pull the blinds.

20 Now, it's true that in my -- on my basement
21 apartment was about 2 feet away from the sidewalk, but I
22 thought people used to wander by.

23 Now, I look at this, it looks about the same to
24 me, particularly is a bicycle behind these bushes. What
25 bushes did he -- he didn't have to climb over any bush,

1 just walk there, and it sounds as if bicycles go back and
2 forth, they said.

3 So why wouldn't you expect, if you live in that
4 apartment, that somebody might walk by, and you'd better
5 pull the blinds the right way because if you pull them the
6 wrong way anybody can see in.

7 MR. COLBERT: I think the bushes will protect
8 you from looking into these windows.

9 QUESTION: How do they in Exhibit 10 protect me?
10 Suppose I start here on the left, and I simply walk over
11 one window, two windows, three windows, there I am. I
12 never went to any bushes.

13 I mean, I grant you I could go through the
14 bushes, or I might not go through the bushes.

15 MR. COLBERT: But in this case these officers
16 went over the bushes, which is what the Minnesota supreme
17 court found, crawled over the bushes to get to these
18 windows, and so I think it's clear that these bushes were
19 protected -- were put there so you would not walk by these
20 windows.

21 QUESTION: Well, if you look at Exhibit 12, I-
22 5, there's no obstruction by the bushes at all. I mean,
23 anybody could walk right up.

24 MR. COLBERT: The lawn is a big lawn in front,
25 but these bushes are protecting this particular window,

1 and I think --

2 QUESTION: Well, not in Exhibit 12 they're not.

3 MR. COLBERT: Right, and I think the angle
4 depends on it, if you're looking at --

5 QUESTION: So if you walked up from that side,
6 from the place where that photo was taken, there's no bush
7 in between.

8 MR. COLBERT: That's correct. That's correct,
9 Your Honor.

10 QUESTION: Why did the officer -- just -- why
11 did he crawl over this bush? I mean, why would he do it?
12 I mean, the bicycle's right there between the path and the
13 wall. Why did he crawl over a bush? Why didn't he just
14 walk?

15 MR. COLBERT: It's not clear to me, and this
16 picture was not taken -- because this was obviously taken
17 during the day, and the search itself took place at night,
18 and the other part of it --

19 QUESTION: One other question. The blinds. Was
20 it a venetian blind, or one of those bamboo blinds that
21 just unrolls.

22 (Laughter.)

23 MR. COLBERT: They're horizontal --

24 QUESTION: What?

25 MR. COLBERT: They're horizontal leveler blinds,

1 and they're the plastic type, and --

2 QUESTION: Plastic venetian-style --

3 MR. COLBERT: Yes.

4 QUESTION: -- blinds?

5 MR. COLBERT: Yes, and if you're familiar with
6 them, as they get old, there tends to be gaps in them, but
7 if you look at some of the pictures you can see that you
8 cannot see in those blinds unless you are 12 inches away.
9 It's not a matter of -- as Your Honor was pointing out, of
10 simply walking by.

11 You have to be very close to look in there, and
12 the officer didn't simply look in there. He looked in
13 there for a period of 15 minutes. He was constantly
14 changing his position so he could see, and look in there,
15 so it's a completely different story than if he had been
16 walking by --

17 QUESTION: Do you say that any enhancement of
18 the officer's ability to observe is invalid? For
19 instance, the officer who, in order to see in a yard, gets
20 a ladder and gets up on it to look in, puts the ladder on
21 the sidewalk and looks over the top?

22 MR. COLBERT: I think --

23 QUESTION: Is that okay?

24 MR. COLBERT: No, Your Honor.

25 QUESTION: No.

1 MR. COLBERT: I think the standard should be if
2 it's not a place the public --

3 QUESTION: Well, maybe that's what you think it
4 should be. What do you think in fact the courts have
5 held?

6 MR. COLBERT: I think the courts have held that
7 if the officer is not in a position where the public
8 expects him to be. I think that's what this decision in
9 Florida v. Riley held.

10 QUESTION: He puts the ladder on the public
11 sidewalk.

12 MR. COLBERT: It doesn't matter. If the
13 public -- he's not in a position where the public expects
14 him to be.

15 QUESTION: Well, what if he walks across a large
16 field that's owned by a farmer and looks inside the barn.
17 We've held that's okay.

18 MR. COLBERT: That's correct.

19 QUESTION: Is the public expected to do that?

20 MR. COLBERT: That's correct, Your Honor. I
21 think one of the big differences there is the idea that
22 it's a house, not a barn, and this Court has clearly
23 emphasized the difference in privacy between looking into
24 a barn and looking into a house.

25 QUESTION: If he had walked across that field

1 and looked into the house, although still beyond the
2 curtilage of the house, would that have been banned?

3 MR. COLBERT: If the officer had walked across
4 open fields and looked into a house, I think that would be
5 a violation of the Fourth Amendment.

6 QUESTION: Really? I don't think so.

7 QUESTION: Well --

8 QUESTION: What case stands for that
9 proposition?

10 MR. COLBERT: The -- Florida v. Riley discusses
11 looking into curtilage, and in Florida v. Riley this Court
12 discusses looking -- not looking into the house.

13 QUESTION: Are you saying that Florida v. Riley
14 stands for the proposition that you just cited?

15 MR. COLBERT: It follows from Florida v. Riley.
16 Distinguishing between looking into curtilage and looking
17 into a house. The cases that have discussed when officers
18 have looked into different areas, they emphasize that this
19 is not looking into a home, so I think they follow --

20 QUESTION: What about the use of night vision
21 glasses? Is it okay, as long as you don't train them on
22 the house?

23 MR. COLBERT: Yes, Your Honor. I think that --
24 excuse me -- this Court has --

25 QUESTION: In your view?

1 MR. COLBERT: Yes. This Court has clearly
2 emphasized the protection to be provided by the home.

3 QUESTION: What about --

4 QUESTION: Suppose the blind were one-third of
5 the way up instead of being closed. In other words, from
6 what you've just said I gather you would include even when
7 the blind is up so you don't have to go through
8 contortions to see what's going on. That would still be
9 an unlawful search.

10 MR. COLBERT: This courts have held that you
11 have to exhibit a subjective expectation of privacy. If
12 the blinds are a third up, I don't think -- I -- then you
13 would have not exhibited a subjective --

14 QUESTION: At what point do you?

15 MR. COLBERT: In this case, where defendants
16 closed the blinds as much as they could, that's -- they
17 clearly evidenced a subjective expectation of privacy.

18 QUESTION: What if you closed them as much as
19 you could and when you closed them as much as you could
20 they were a third of the way up?

21 MR. COLBERT: Then your expectation of privacy
22 would not be reasonable.

23 QUESTION: So just doing it as much as you could
24 is not -- is not the touchstone.

25 MR. COLBERT: That's correct, Your Honor.

1 QUESTION: Okay. So what you're really saying is
2 here, they weren't that much open.

3 MR. COLBERT: That's correct, Your Honor.

4 QUESTION: Okay.

5 QUESTION: If my colleagues are ready to leave
6 the bushes and the blinds, I was curious, at what level of
7 generality do you say we should evaluate the question of
8 whether there's a legitimate claim of privacy? Are you
9 suggesting -- you're not suggesting that we repudiate
10 Rakas, or are you?

11 MR. COLBERT: No, Your Honor. This is not a
12 case where --

13 QUESTION: Are we propelled necessarily into a
14 multifactor case no matter what we do?

15 MR. COLBERT: I think so, Your Honor. The -- in
16 this case the defendants were invited guests in a home.
17 In Rakas, they emphasized the lessened expectation of
18 privacy in a car. The fact that they were in a home
19 increases the expectation of privacy.

20 They also took measures to protect their
21 privacy, which is another important factor in
22 consideration.

23 QUESTION: Well, do you think the pizza delivery
24 man has an expectation of privacy when he walks in to put
25 the pizza on the table?

1 MR. COLBERT: In that case, Your Honor, the
2 police have --

3 QUESTION: Invited in.

4 MR. COLBERT: Yes, Your Honor. In that case,
5 the pizza man first of all probably would not have taken
6 steps to preserve their privacy, so no, in that case the
7 pizza man would not have an expectation of privacy, even
8 though he would have been legitimately on the premises.

9 QUESTION: Excuse me. It's necessary that he
10 have taken steps to -- so if I'm an overnight guest and I
11 haven't taken any steps, I just said, you know, thank you
12 for having me, the blinds are down already, I haven't done
13 anything, my host has locked the door, my host has put the
14 blinds down, and I'm just there, I haven't really done
15 anything to preserve my privacy, I don't have an
16 expectation of privacy?

17 MR. COLBERT: No, Your Honor. I think what the
18 host does also includes you -- what the host does is very
19 important, because what evolves --

20 QUESTION: Well, with the pizza man the host
21 has -- you know, the pizza man comes in, he says lock the
22 door behind you, you know, this is a dangerous
23 neighborhood, and he has all the blinds down -- he always
24 keeps them down because he's right next to the street,
25 just like this. He's worried about people looking in.

1 QUESTION: Most pizza men don't get past the
2 front door.

3 (Laughter.)

4 QUESTION: This is Justice O'Connor's pizza man.
5 He's not my pizza man.

6 (Laughter.)

7 QUESTION: What do you say to the suggestion of
8 great significance in the business or profit-making versus
9 purely social distinction here?

10 MR. COLBERT: There is no distinction. One of
11 the reasons I say that is because when the Fourth
12 Amendment was brought about there was no distinction
13 between your business and home. Your business was in your
14 home, and the fact that there was some business going on
15 in your home should not make your home not a home.

16 In these days, we're using our homes more for
17 businesses. We're telecommuting from home. To lose your
18 privacy because some business is transacted in your home
19 just doesn't -- doesn't follow from history, and it isn't
20 the way it should be headed.

21 QUESTION: It isn't a question of whether you
22 lose your privacy. It's a question of whether the people
23 who come to your home for business acquire your
24 residential privacy when they come there, not for
25 residence but for business. Why should they be treated

1 differently than people who come to your business to do
2 business?

3 MR. COLBERT: In this case because invitees were
4 with the resident of the apartment. In some places it may
5 not be that way, but in this case what makes a difference
6 is that they were working with the resident of the
7 apartment. They were engaged in a common task with the
8 resident of the apartment.

9 QUESTION: What in your opinion should the
10 police officer have done? I mean, he's standing on the
11 street, I take it, and somebody comes up to him and he
12 says, you know, I was just looking in through this
13 basement window, or the first floor window, and there are
14 some people there who are cutting heroin in the kitchen,
15 and I saw them.

16 Now, what's a police officer supposed to do? Is
17 he --

18 QUESTION: He should have arrested this guy as a
19 Peeping Tom.

20 (Laughter.)

21 MR. COLBERT: I think that's answered by this
22 Court's decision in Arizona v. Hicks. He should have done
23 more investigation.

24 QUESTION: That's what he did.

25 MR. COLBERT: But without violating the

1 Minnesota statute, without violating the privacy. He
2 could have tried to determine if -- some way to determine
3 the informant's veracity.

4 QUESTION: I mean, look, the person walks up to
5 you, say you're the policeman. He says, you know, I was
6 just walking by this place, and there are some people
7 downstairs, and they're cutting drugs. I just saw them.
8 All right. Now -- now, what exactly would you do at that
9 moment? You're the perfect policeman.

10 MR. COLBERT: I could ask how he knew this
11 information.

12 QUESTION: He says, I saw it in the window. I
13 was walking by -- just what he told him.

14 MR. COLBERT: And then he could have staked out
15 the apartment, which is what they did after the officer
16 looked into the apartment.

17 They could stake out the apartment to see -- and
18 if these people had left the apartment, the informant told
19 them there was a car, so there would be some basis to
20 determine the veracity of the informer's information.

21 This Court has held a number of times that
22 simply anonymous tips do not -- are not sufficient --

23 QUESTION: But you're saying the police have to
24 replicate -- see everything that the informant saw in
25 order to verify his tip, and that means the tip doesn't

1 count for anything.

2 MR. COLBERT: That's not true, and -- well, I
3 think it's -- an example would be if the informant guessed
4 at the apartment. So under the circumstances the officer,
5 if this is not a search the officer could have looked into
6 every single window of the apartment to determine which
7 apartment the informant was talking about.

8 That's the problem with calling this not a
9 search, because there is no limit upon what the officer
10 could have done. The officer could have looked at every
11 single apartment to see if this was indeed the drug-
12 dealing apartment. Everyone's privacy in that apartment
13 building would have been invaded by the officer. This
14 Court has drawn a firm line --

15 QUESTION: Well, you're saying even though the
16 blinds were up in all these apartments, privacy was
17 invaded by an officer looking in the window?

18 MR. COLBERT: I'm saying, if this Court
19 determines that this is not a search, the officer could
20 have walked within 12 inches of every apartment here and
21 looked through closed blinds to determine what was going
22 on in that apartment, whether -- whatever intimate
23 activities of the home --

24 QUESTION: But the blinds weren't completely
25 closed.

1 MR. COLBERT: They were closed. There was a gap
2 in the blinds, but they were closed.

3 The State has attempted to defeat the
4 defendant's standing by claiming that the criminal
5 activity somehow defeats the idea of standing.

6 QUESTION: Mr. Lamken, Justice Kennedy asked Mr.
7 Backstrom while he was arguing whether under Rakas this
8 isn't really a question of substantive Fourth Amendment
9 law rather than "standing." What's your answer to that?

10 MR. COLBERT: It's a two-step analysis. It's
11 substantive Fourth Amendment.

12 QUESTION: So really we don't have to talk about
13 standing, isn't that right? What we have to talk about is
14 whether your client's Fourth Amendment rights were
15 violated by what happened here.

16 MR. COLBERT: That's correct.

17 QUESTION: So we're not talking really about
18 standing.

19 MR. COLBERT: That's correct, Your Honor. After
20 Rakas this Court does not discuss that any more. They have
21 said that he has no expectation of privacy because of the
22 criminal activity going on in his house.

23 QUESTION: I think we've backed away from that,
24 making it depend on illegality or not of the activity
25 inside, but police officers, as Justice Breyer indicated,

1 have to have some kind of clear lines to follow, and so
2 totality of the circumstances doesn't work very well.

3 What is your position on what is a good,
4 legitimate conduct for the police officer who wants to
5 respect the Fourth Amendment? Where do you draw the line?

6 MR. COLBERT: The bottom line is, when looking
7 into a home, any kind of intrusion into a home, unless
8 there are exigent circumstances there should be a warrant,
9 especially when you have to go through the contortions
10 that this officer had to go through to intrude upon the
11 privacy of the home, so that is this Court's bottom line,
12 and that is what is at the core of the Fourth Amendment.

13 QUESTION: So what about -- does it make any
14 difference whether it's somebody who's there as a
15 temporary business guest, social guest, or -- what you
16 just described doesn't make any difference. It doesn't
17 make any difference -- you just say that home, warrant,
18 unless what?

19 MR. COLBERT: Unless there are exigent
20 circumstances, that an intrusion, any intrusion to the
21 home should be accompanied by a warrant.

22 QUESTION: And anyone could -- anyone in the
23 home could claim that protection?

24 MR. COLBERT: There is -- there has to be a
25 number of factors that need to be considered, and the

1 factors in this case would show that he had an expectation
2 of privacy in the home.

3 The defendants had an expectation of privacy
4 because they were invited guests into the home, and that
5 they demonstrated an expectation of privacy when the
6 blinds were closed, and that they were engaged.

7 And finally --

8 QUESTION: Is that the crucial issue, whether he
9 had an expectation of privacy, or is it rather whether it
10 is the sort of an expectation that society is prepared to
11 recognize as reasonable? I mean, it seems to me you
12 always have an expectation of privacy when you come into
13 somebody's home. Even the pizza man who walks in, you
14 know, he doesn't expect anybody to be peeping in the
15 blinds.

16 If you're in somebody's home, you expect it to
17 be private, don't you?

18 MR. COLBERT: That's correct.

19 QUESTION: No matter what capacity you're there
20 in.

21 MR. COLBERT: That's correct, Your Honor.

22 QUESTION: So really what we're getting at is
23 not whether there's an expectation of privacy, but whether
24 it is the sort of an expectation of privacy that society
25 is willing to recognize as reasonable, which leaves it up

1 to us, I guess, as to what expectations we are willing to
2 recognize as reasonable.

3 MR. COLBERT: That's correct, Your Honor.

4 QUESTION: And you suggest that any social guest
5 has that expectation.

6 MR. COLBERT: When they're across the threshold
7 of the household, that is a factor. And I think it's
8 also --

9 QUESTION: Excuse me, when you say it's a
10 factor. I don't --

11 MR. COLBERT: It's not necessarily sufficient.
12 In this case, one important factor is that they were
13 present at the time of the search.

14 QUESTION: I'm curious, Justice O'Connor
15 suggested with considerable force, it seems to me, that we
16 might draw the line between a business invitee and a
17 social guest, and you talk about social guests in your red
18 brief. It's not clear to me that these were social
19 guests. There's nothing in the record to indicate that,
20 is there, other than the fact that they were using the
21 kitchen to chop the cocaine, but --

22 MR. COLBERT: There is some indication that --

23 QUESTION: It seems to me these were -- this was
24 a strictly business transaction. There's nothing to even
25 show that they were previously acquainted. They might

1 have been introduced by intermediaries.

2 MR. COLBERT: There is some indication in that
3 one of the defendants had slippers on at the time the
4 officers looked into the window. There's an affidavit in
5 the record indicating that Mr. Carter had a key to the
6 apartment.

7 QUESTION: Would you repeat that?

8 MR. COLBERT: There is an affidavit in the
9 record indicating that Mr. Carter, one of the defendants,
10 had a key to the apartment. The officer indicated they
11 heard them discussing, talking. He couldn't say what he
12 heard them talking, so -- and the fact that they were
13 there for more than 2 hours indicates that this may have
14 been more than a business invitee.

15 Another important factor --

16 QUESTION: What burden is that? I mean, again,
17 if you're asserting the Fourth Amendment privilege it's up
18 to you to establish that they were more than that, not up
19 to the State to prove that they weren't.

20 MR. COLBERT: That's correct.

21 QUESTION: And all you have to go on is one of
22 them was wearing slippers. Do we know that he didn't
23 always wear slippers?

24 QUESTION: Maybe he had a sore foot.

25 QUESTION: He might have had a sore foot.

1 MR. COLBERT: That's a factor, and consider the
2 Court would consider that. There should not be a
3 distinction, as I said before, between business invitees
4 and social invitees.

5 You invite someone into your house, whatever
6 their status, and that goes back to when the Fourth
7 Amendment was enacted. There are differences between the
8 business and the home, there just were no differences, so
9 to make that distinction would be contrary to history of
10 the Fourth Amendment.

11 QUESTION: You need a stronger argument, it
12 seems to me. I think you're going to have a hard time
13 establishing --

14 QUESTION: Is there any indication -- I mean,
15 I -- if we go back to a man's home is his castle, that's
16 the saying at that time, right, and so we say of those
17 expectations of privacy that we want to protect, we want
18 to protect that person's privacy, the one who owns the
19 home and lives there. That's his castle.

20 But why do we want to protect the privacy of the
21 pizza man who happens to be delivering the pizza to the
22 kitchen, any more than we want to protect the pizza man
23 when he's in his cart on the street, or when he's walking
24 door to door?

25 There's no doubt we want to protect the privacy

1 of the owner of the house, and perhaps his guests, to whom
2 he has given -- now I get a little lost. That's where I
3 need the help. Why is it that we want to protect that
4 expectation of privacy in Smith's house where it's not
5 Smith we're protecting, when it's Jones, the pizza man,
6 who's come inside?

7 MR. COLBERT: For two reasons.

8 QUESTION: Yes.

9 MR. COLBERT: First, as the host, I want to
10 share my privacy with my guests. If I invite people over
11 for a dinner party, be it for 2 hours, I want to share my
12 privacy with them. I -- my -- if someone were to intrude
13 upon my house while I'm having a dinner party, it would
14 not just be offensive to me, it would be offensive to the
15 people I invited over, so I don't think it -- it's not
16 necessary that it be an overnight to be -- to share the
17 privacy.

18 As a guest, I want to have an expectation of
19 privacy when I go to someone's house. It's different than
20 meeting someone in a park. If you plan to meet someone in
21 a park, there is no expectation of privacy. If someone
22 were to invite me into my house, that carries with it a
23 certain expectation of privacy.

24 QUESTION: I just can't imagine why the Avon
25 lady should expect something different when she sits down

1 at the dining table to show the products and the catalogue
2 than when she's out on the front step, or at some
3 commercial establishment. I just don't understand why
4 that should change. This is a commercial transaction.
5 There's no expectation of privacy when the Avon lady comes
6 in.

7 MR. COLBERT: She -- if they've evidenced no
8 subjective expectation of privacy, but if I'm coming over
9 to discuss life insurance, or some other business activity
10 that may be an intimate activity, that's a different
11 matter. In that case you might want to close the blinds.
12 You might want to have privacy.

13 And that's why it's important in this case that
14 the defendants exhibited an expectation of privacy. It
15 wasn't -- they tried to shield their privacy from
16 everyone.

17 QUESTION: Mr. Colbert, I was just glancing
18 through the opinion of the supreme court of Minnesota, and
19 I don't find any mention in there of the fact that there
20 was an affidavit somewhere that said one of the defendants
21 had a key. Have I missed something in the supreme court's
22 opinion?

23 MR. COLBERT: Correct, it was not in the supreme
24 court opinion. It's a part of the district court record,
25 and it's attached to the appendix. I'm not sure exactly

1 what part of the appendix.

2 QUESTION: It was not relied on, then, by the
3 supreme court of Minnesota?

4 MR. COLBERT: No, Your Honor.

5 QUESTION: Mr. Colbert --

6 QUESTION: Mr. Colbert, I am thinking of another
7 reason. You haven't given it yet, and it may not be
8 sound, but I'd be interested in your thoughts on it, and
9 maybe Mr. Backstrom could comment when he gets back up.

10 One reason you might want to afford the guests
11 the standing to contest here is not merely because -- and
12 as a reason for finding that reasonable, is not merely
13 because the host wants to share the host's privacy, but
14 because the host wants to preserve the host's own privacy.

15 And it's quite true that the host in this
16 situation will have standing to contest the search, or the
17 intrusion if there is one, but the breach of privacy, if
18 there has been one, will have been complete, whether the
19 host can contest it later or not, and it might very well
20 be that we would want to give standing to the guest in
21 order to avoid, as it were, tempting the police to come in
22 and make searches which will necessarily violate the
23 privacy of the owner.

24 Is that a sound reason? You haven't given it,
25 and maybe there's a reason for not getting into that.

1 MR. COLBERT: That is a sound reason, Your
2 Honor, and it's, I think because they're working together
3 makes it even more sound.

4 QUESTION: Well, if that's a sound reason, then
5 you pick up the pizza delivery man and the Avon lady --
6 you pick up everybody.

7 QUESTION: Does that take you back to automatic
8 standing of Jones?

9 MR. COLBERT: No, it doesn't, and I go back to
10 the issue of having exhibited a subjective expectation of
11 privacy.

12 There may be some circumstances where you invite
13 the pizza man in, where it's important that you have some
14 private interaction --

15 QUESTION: Why is that important? If your
16 object is what Justice Souter says, to reinforce the
17 privacy expectations of the owner, you ought to let
18 anybody reinforce it, the pizza man, the Avon lady -- who
19 cares whether they have an expectation of privacy. You're
20 interested in the homeowner, and you want to vindicate his
21 expectation. On that theory you should let everybody
22 raise it.

23 QUESTION: Let me test it with another example.
24 Under your view, would the person who's been in the house
25 often enough to get some expectation of privacy, but never

1 visits any part of the house except the living room, have
2 standing to object to a search of the basement or the
3 attic?

4 MR. COLBERT: No, Your Honor. This is -- in
5 this case, the officers intruded upon the defendants'
6 privacy because when they looked in the window they saw
7 the defendants. That's what makes their privacy interest
8 at stake.

9 Thank you.

10 QUESTION: Thank you, Mr. Colbert.

11 Mr. Backstrom, you have 1 minute remaining.

12 REBUTTAL ARGUMENT OF JAMES C. BACKSTROM

13 ON BEHALF OF THE PETITIONER

14 MR. BACKSTROM: Thank you, Your Honor.

15 Just quickly to clarify a few facts, in
16 reference to the key, that was an affidavit submitted by
17 an attorney after the trial court record was closed. We
18 do not believe it is part of the record in this case, and
19 it was not considered as such by the Minnesota supreme
20 court.

21 The slippers worn by Mr. Johns were on his feet
22 at the time he was arrested outside of the apartment, so
23 that does not indicate any connection to the premises.

24 QUESTION: What do you mean, he'd worn them
25 out -- he was walking outside the apartment, so he might

1 have arrived in slippers?

2 MR. BACKSTROM: Yes. We believe -- the record's
3 not clear on that, but he had them -- he had those
4 slippers on when he was arrested in his car outside of the
5 apartment.

6 In reference to Justice Souter's question, we do
7 not believe the -- there would be any tempting of the
8 police in reference to these issues, because the police
9 will never know who has an expectation of privacy in the
10 premises. Their conduct relates --

11 QUESTION: Well, they will know, as they did
12 here, whether there are persons other than the homeowner.

13 QUESTION: Going back to the facts for a minute,
14 is it your view we should accept the facts as stated in
15 the Minnesota supreme court's opinion?

16 MR. BACKSTROM: Yes, we believe you should, Your
17 Honor.

18 And in reference -- finally, in reference to the
19 question that Justice Breyer had regarding the officers'
20 viewing through the window, he never crossed the bushes,
21 and it's clear if you look at G-44 to 45 in the record.

22 Thank you, Your Honor.

23 CHIEF JUSTICE REHNQUIST: Thank you,
24 Mr. Backstrom. The case is submitted.

25 (Whereupon, at 11:00 a.m., the case in the

1 above-entitled matter was submitted.)

2 CERTIFICATION

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