IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Plaintiff-Appellant

vs.

MURPHY TAUʻA, Defendant-Appellee

NO. 23992

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 00-1-0050(2))

JULY 3, 2002

DISSENTING OPINION OF ACOBA, J.,
WITH WHOM RAMIL, J., JOINS

Because I believe that the rule adopted in Rakas v. Illinois, 439 U.S. 128 (1978), and its federal progeny should not be applied as a matter of state constitutional law to instances where a defendant is charged with a possessory crime, I respectfully dissent.[1] In my view, an accused who is in

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[1] I agree with the decision to publish this opinion. In my view, the majority departs from the law previously applied in this jurisdiction with respect to standing in possessory crime cases. An opinion should be published when it includes a departure from existing law. See 4th Cir. R. 36(a) (stating that an opinion will be published if it "establishes, alters, modifies, clarifies, or explains a rule of law within [the Fourth] Circuit"); 5th Cir. R. 47.5.1 (setting forth that an opinion is published if it "alters, or modifies an existing rule of law"); 6th Cir. R. 206(a) (stating that "whether [a decision] . . . alters or modifies an existing rule of law" is one of the criteria "considered by panels in determining whether a decision will be designated for publication in the Federal Reporter"); 7th Cir. R. 53(c)(1) (stating that "[a] published opinion will be filed when the decision . . .

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possession of contraband has automatic standing to challenge the legality of any search and seizure by virtue of the protection afforded a person with respect to his or her "effects" under article I, section 7 of the Hawai‘i Constitution. In merging the standing question into the expectation of privacy test, Rakas, as does the majority, excludes governmental conduct that might otherwise be deemed unconstitutional from judicial safeguards. In other words, the extinction of automatic standing by Rakas diminishes the protection afforded against unreasonable searches and seizures simply by precluding such claims from being raised in the first place. In light of the considerations set forth infra, such an approach is inimical to a reasoned and fair application of our state constitutional protection of a person's effects as against unreasonable searches and seizures. Accordingly, I believe Defendant-Appellee Murphy Tau‘a (Defendant) had standing to raise the unconstitutionality of the search which resulted in the charges against him.

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changes an existing rule of law"); Cal. R. Ct. 976(a) (describing that no opinion of the Court of Appeals of other appellate department shall be published unless it "modifies or criticizes with reasons given, an existing rule" or "resolves or creates an apparent conflict in the law," or fulfills other criteria); Mich. Ct. R. 7.215(A)-(B) (stating that "[a] court opinion must be published if it: . . . (3) alters or modifies an existing rule of law[;] . . . (7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported"); Tenn. Ct. App. R. 11 (explaining that an opinion "shall be published only if, in the determination of the members of [the Court of Appeals], it meets one or more of the following criteria: (1) the opinion establishes a new rule of law or alters or modifies an existing rule"); Wis. Stat. § 809.23(1)(a) (stating that "[w]hile neither controlling nor fully measuring the court's discretion, criteria for publication in the official reports of an opinion of the court include whether the opinion: 1. . . . modifies, clarifies or criticizes an existing rule").

In that regard, it is undisputed that the entry into the van by Ben, the police narcotics dog who alerted to contraband, was without probable cause or a warrant. Legally, Ben was only an extension of his police handler. The contention that Ben entered the open van which had been secured by police of "his own free will" strains credulity but, on its face alone, does not excuse the government's intrusion so as to make the entry legal. There is no excited canine exception to probable cause and warrant requirements under our state constitution.

I.

Following Rakas, the majority holds that, to establish standing to suppress evidence, "a defendant must demonstrate that he or she personally has an expectation of privacy in the place searched, and that his or her expectation is reasonable[.]" Majority opinion at 16 (quoting Minnesota v. Carter, 525 U.S. 83, 88 (1998) (brackets omitted). A synopsis of the federal case law discussing this rule is beneficial.

A.

Prior to Rakas, the United States Supreme Court, in Jones v. United States, 362 U.S. 257 (1960), held that a defendant who is charged with a possessory crime, had standing to challenge a police search. In Jones, federal agents executing a search warrant recovered narcotics and drug paraphernalia "in a bird's nest in an awning just outside a window" of the apartment

where defendant was arrested. Id. at 258-59. The defendant moved to suppress the officers' discovery on the ground that the search warrant had been issued without probable cause. See id. at 258, 259. The government maintained that the defendant did not have standing to challenge the search warrant "because [the defendant] alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an 'invitee or guest.'" Id. at 259.

In rejecting the government's position, the majority first examined Federal Rules of Criminal Procedure (FRCrP) Rule 41(e), which, at that time allowed "a person aggrieved by an unlawful search and seizure" to challenge the search in a motion to suppress.[2] See id. at 260-61. Jones explained that, to be

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[2] At the time of Jones, FRCrP Rule 41(e) read:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed.

The current FRCrP Rule 41(e) is similar. It now reads:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress

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"aggrieved," one "must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice . . . as a consequence of a search or seizure directed at someone else." Id. at 261. While acknowledging that, "[o]rdinarily, . . . it is . . . proper to require [under Rule 41(e)] . . . that [the movant] establish that he [or she] himself [or herself] was the victim of an invasion of privacy[,]" it was discerned that "prosecutions like this one have presented a special problem." Id. The problem noted was that, "[t]o establish 'standing,' Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." Id. at 261. The Court indicated that, "[s]ince narcotics charges like those in the present indictment may be established through proof solely of

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under Rule 12.0

(Emphases added.) The parallel Hawai'i Rule of Penal Procedure (HRPP) Rule 41(e) embodies the same requirements as the federal rule regarding suppression of evidence:

> **(e) Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the court having jurisdiction to try the offense for the return of the property, or to suppress for use as evidence anything so obtained, or both. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial.

(Boldfaced type in original.) (Emphases added.)

possession[,] . . . a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend . . . to convict him [or her]." Id. at 261-62. This approach left defendants in the precarious position of having to choose between their fourth amendment right against unreasonable searches, and fifth amendment right against self incrimination, inasmuch as the defendant had to first admit that he or she possessed the contraband seized in order to challenge a search. See id.

The Court also observed that, "to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." Id. at 263. Finally, noting an apparent unfairness inherent in the traditional standing rule, the Jones court observed that, "[i]t is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." Id. at 263-64.

The Court, thus, held that the defendant was entitled to standing under one of two theories -- he was charged with a possessory offense, and, thus, he should automatically be awarded

standing, or he was legitimately on the premises at the time of the search:

> Two separate lines of thought effectively sustain defendant's standing in this case. (1) The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below.

Id. at 263 (emphases added). The first of these theories was denominated the "automatic standing" rule. Jones concluded that "[t]he possession on the basis of which petitioner is and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e)." Id. at 264.

B.

In Simmons v. United States, 390 U.S. 377 (1968), the Court reviewed the dilemma between conflicting assertions of a defendant's fourth amendment and fifth amendment rights discussed in Jones. In that case, a petitioner, charged with robbery, sought to exclude evidence contained in a suitcase found at the home of a co-conspirator's mother. See id. at 380. In order to establish standing, the petitioner testified at a pre-trial suppression hearing that the clothes in the suitcase belonged to him, and that, although he could not positively identify the suitcase as his, it looked similar to one he owned. See id. The

trial court denied his motion to suppress and admitted his pre-trial testimony against him at trial.

The petitioner appealed, arguing that admission of his pre-trial standing testimony at trial was reversible error. Relying on Jones, the Court agreed, explaining that the trial court had compelled him to choose between his fourth and fifth amendment rights, inasmuch as "[the petitioner] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." Id. at 394. Finding "it intolerable that one constitutional right should have to be surrendered in order to assert another[,]" the Court held "that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his [or her] testimony may not thereafter be admitted against him [or her] at trial on the issue of guilt unless he [or she] makes no objection." Id.

In Brown v. United States, 411 U.S. 223 (1973), the Court in dicta suggested that Simmons had resolved the defendant's dilemma of having to choose between fourth and fifth amendment rights as it had been posed in Jones:

> The self-incrimination dilemma, so central to the Jones decision, can no longer occur under the prevailing interpretation of the Constitution. Subsequent to Jones, in Simmons v. United States, supra, we held that a prosecutor may not use against a defendant at trial any testimony given by that defendant at a pretrial hearing to establish standing to move to suppress evidence.

Brown, 411 U.S. at 228 (emphasis added). The Brown court, however, explained that "it [was] not necessary . . . [then] to

determine whether . . . Simmons . . . makes Jones' 'automatic' standing unnecessary[,]" id., and chose to "reserve that question for a case where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged.'" Id. (quoting Simmons, 390 U.S. at 390).[3]

C.

The Rakas decision which followed, authored by then-Justice Rehnquist, merged the concept of standing into the fourth amendment. There, police stopped a vehicle believed to be the getaway car used in a robbery. See Rakas, 439 U.S. at 130. After ordering the defendants and two other occupants out of the vehicle, the police searched the car and found rifle shells in a locked glove compartment and a rifle under the front passenger seat. See id. The defendants moved to suppress this evidence but did not assert that they owned either the car or the items seized. See id. In rendering its opinion, the 5-4 majority in effect abrogated the "automatic standing" rule by equating

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[3] Chief Justice Burger, writing for the majority, divined a three-fold test to determine whether a person has standing to challenge a search:

> [T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

Brown, 390 U.S. at 229 (emphasis added). Accordingly, in Chief Justice Burger's view, possession was still an essential component of standing requirements.

standing with whether a defendant's personal fourth amendment rights were violated:

> [H]aving . . . reaffirmed the principle that the "rights assured by the Fourth Amendment are personal rights, which may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure," Simmons [], 390 U.S. [at] 389, the question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim. . . .

Id. at 138-39 (brackets and ellipsis points omitted) (emphasis added). Thus, it was explained that "the question is whether the challenged search and seizure . . . has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Id. at 140.

In that connection, the Court also jettisoned the "legitimately on the premises" standing status referred to in Jones, on the ground that the standard "creates too broad a gauge for measurement of Fourth Amendment rights." Id. at 142. However, the Court discerned in Jones a "legitimate expectation of privacy" test, wherein a person who had such an expectation in the premises searched "could claim the protection of the Fourth Amendment[.]"[4] Id. at 143. Applying this test, the Court noted that the defendants "made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car," where the gun and the shells were found, and that, "[l]ike the trunk of an automobile, these are areas in

[4] The Rakas court also relied on Katz v. United States, 389 U.S. 347 (1967), to determine the "scope of the interest protected by the Fourth Amendment," and to adopt the legitimate expectation of privacy test. Rakas, 439 U.S. at 143.

which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy." Id. at 148-49 (citation omitted). It was thus concluded that "it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by the Fourth and Fourteenth Amendments to the United States Constitution." Id. at 150.

In dissent, Justice White, joined by Justices Brennan, Marshall, and Stevens, expressed concern that the Rakas majority had "declare[d] an 'open season' on automobiles" because, pursuant to Rakas, "[h]owever unlawful stopping and searching a car may be, absent a possessory or ownership interest, no 'mere' passenger may object, regardless of his [or her] relationship to the owner." Id. at 157 (White, J., concurring).

II.

The Jones automatic standing rule was overruled in a majority opinion authored again by Justice Rehnquist in United States v. Salvucci, 448 U.S. 83 (1980). There, the defendants, charged with unlawful possession of stolen mail, claimed automatic standing pursuant to Jones, and sought to suppress the mail, which had been found in an apartment rented by the mother of one of the defendants. See id. at 85. Relying on Rakas, Salvucci reiterated "that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have been in fact violated." Id. at 85.

The majority also confirmed that "[t]he 'dilemma' [between fourth and fifth amendment rights] identified in Jones, that a defendant charged with a possessory offense might only be able to establish his [or her] standing . . . by giving self-incriminating testimony admissible as evidence of his [or her] guilt, was eliminated by our decision in Simmons." Id. at 89. Additionally, addressing the second concern raised in Jones, it said that Rakas "clearly establish[es] that a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction." Id. at 90. However, it left unanswered the Jones assessment that "[i]t is not consonant with the amenities . . . of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." Jones, 362 U.S. at 264.

Justice Marshall responded, in his dissent in Salvucci, that the "automatic standing" rule more appropriately protects defendants from the conflict between asserting their fourth and fifth amendment rights because, despite Simmons, there remained a threat that a defendant's testimony adduced at a pre-trial suppression hearing could either be used as impeachment at trial, or would offer the prosecution insight into the defense trial strategy:

> I cannot agree that Simmons provides complete protection against the "self-incrimination dilemma," Brown, 411 U.S. [at] 228. Respondents contend that the testimony given at the suppression hearing might be held admissible for impeachment purposes and, while acknowledging that that question is not before us in this case, the majority broadly hints that this is so. The use of the testimony for

> impeachment purposes would subject a defendant to precisely the same dilemma, unless he [or she] was prepared to relinquish his [or her] constitutional right to testify in his own defense, and would thereby create a strong deterrent to asserting Fourth Amendment claims. One of the purposes of Jones and Simmons was to remove such obstacles. Moreover, the opportunity for cross-examination at the suppression hearing may enable the prosecutor to elicit incriminating information beyond that offered on direct examination to establish the requisite Fourth Amendment interest. Even if such information could not be introduced at the subsequent trial, it might be helpful to the prosecution in developing its case or deciding its trial strategy. The furnishing of such a tactical advantage to the prosecution should not be the price of asserting a Fourth Amendment claim.

Salvucci, 448 U.S. at 96-97 (Marshall, J., dissenting, joined by Brennan, J.) (some internal citations omitted) (emphases added). The Salvucci majority did not respond to the dissent's concern that, (1) despite Simmons, prosecutors may be able to use pre-trial suppression testimony for impeachment, or (2) from such testimony, prosecutors could gain insight into the defense case.

Finally, Rawlings v. Kentucky, 448 U.S. 98 (1980), again written by then-Justice Rehnquist, decided the same day as Salvucci, viewed Rakas as requiring that a defendant show "that he or she possessed a 'legitimate expectation of privacy' in the area searched" in order to establish a fourth amendment interest sufficient to move for suppression of contraband. Rawlings, 448 U.S. at 104 (emphasis added). There, police officers ordered the occupant of a house subject to a search warrant to empty her purse. See id. at 101. She did so, revealing several drugs. See id. The police then demanded that the defendant identify which of the purse's contents were his. See id. The defendant acknowledged ownership of all of the drugs and was eventually indicted for possession with intent to sell the drugs. See id.

The Rawlings majority concluded that the defendant "bears the burden of proving not only that the search of [the] purse was illegal, but also that he had a legitimate expectation of privacy in the purse," held that he had failed to do so, and sustained admission of the drugs against him. Id. at 104, 105 (citations omitted).

In dissent, Justice Marshall pointed out that the majority opinion ignored the plain language of the fourth amendment, which encompasses protections against unreasonable searches and seizures of "effects":

> The Fourth Amendment, it seems to me, provides in plain language that if one's security in one's "effects" is disturbed by an unreasonable search and seizure, one has been the victim of a constitutional violation; and so it has always been understood. Therefore the Court's insistence that in order to challenge the legality of the search one must also assert a protected interest in the premises is misplaced.

Id. at 117-18 (Marshall, J., dissenting) (emphasis added). According to Justice Marshall, whereas the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," id. at 117 (emphasis added), a possessory interest in an item, i.e., an "effect," is a sufficient basis for establishing a person's standing to challenge the legality of a search. "The interest in the item seized is quite enough to establish that the defendant's personal Fourth Amendment rights have been invaded by the government's conduct." Id. at 118.[5]

[5] One commentator has theorized that the United States Supreme Court treats fourth amendment rights as "individual" ones but fourth amendment remedies as "collective," resulting in a distortion of the purposes of the

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III.

A.

In State v. Abordo, 61 Haw. 117, 596 P.2d 773 (1979), this court adopted the Rakas rule in a non-possession case:

> [I]n a case such as the one at bar, the proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his [or her] own Fourth Amendment rights were violated by the search and seizure sought to be challenged. Rakas [], 439 U.S. [at] 133-41[.]

Abordo, 61 Haw. at 120-21, 596 P.2d at 775 (emphasis added). In Abordo, the defendant was charged with unauthorized control of a propelled vehicle. See id. at 117, 596 P.2d at 774. The defendant sought to suppress the vehicle identification number (VIN) of the stolen car, which was found when the police entered the unlocked and unattended car. See id. at 119, 596 P.2d at

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[5](...continued)
fourth amendment:

> The fourth amendment was intended both to protect the rights of individuals and to prevent the government from functioning as in a police state. . . .
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> [T]he Court has refused to consider fourth amendment claims of persons unable to show invasions of their personal privacy, even though their legal positions were clearly prejudiced by the government's misconduct. [See, e.g., Rawlings [], [supra]; United States v. Salvucci, [supra.] . . . When the Court speaks of fourth amendment rights, it speaks only of individuals; when it speaks of remedies, it speaks only of society as a collective unit. Clearly the Court is operating under different and inconsistent theories of fourth amendment rights and remedies.
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> The Court should alter this situation by focusing on underlying fourth amendment values. . . . The ultimate question is whether the courts should ever permit the government to benefit from its unlawful activities.

D. Doernberg, "The Right of the People": Reconciling the Collective and Individual Interests under the Fourth Amendment, 58 N.Y.U. L. Rev. 259, 260, 282-83, 294 (1983) (emphases added) (footnotes omitted).

774. The defendant returned to the car and drove it away. See id. After they confirmed that the car was stolen, through a check of the VIN, the police stopped the vehicle. See id.

The State argued that the defendant did not have standing to contest the search. See id. at 120, 596 P.2d at 775. Referring to Rakas, the Abordo court noted that the United States Supreme Court had reasoned that "[r]igorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded." Id. at 121, 596 P.2d at 775-76 (quoting Rakas, 439 U.S. at 139, 99 S.Ct. at 428 (footnote omitted)). According to this court, "[a]nalyzed in this perspective, [the court's] initial inquiry is whether the search and seizure that appellant . . . challenge[d] infringed on any personal interest which the Fourth Amendment was designed to protect." Id. (emphasis added). It was held that, "[a]lthough [the defendant] may have had an actual expectation of privacy with respect to the particular portion of the vehicle searched, . . . such an expectation was not one which society is willing to recognize as legitimate." Id. at 123, 596 P.2d at 777 (citations omitted).

The Abordo court, however, distinguished the case before it from one in which a possessory crime was involved as to which a rule of "automatic standing" would apply:

> Of course, had the appellant in this case been charged with a possessory crime (i.e., a crime for which possession is an essential element), the rule of "automatic standing"

> established in Jones [], 362 U.S. at 261-65, may have been invoked and, under such circumstances, the need for this type of inquiry would be vitiated.

Abordo, 61 Haw. at 121 n.3, 596 P.2d at 776 n.3 (emphases added). Thus, in contradistinction to non-possessory crimes, our jurisdiction retained the "automatic standing" rule in Jones.[6] In that regard, the majority repeatedly states that Defendant failed to satisfy the reasonable expectation of privacy criteria in Rakas. See majority opinion at 14, 17, 27. But Defendant's position is understandable in light of the fact that up until the majority's reversal in this case, Abordo expressly said that possessory crime charges were distinguished from Rakas and subject to an automatic standing rule. Additionally, as Justice Ramil aptly points out in his dissenting opinion with which I joined, this court recently issued State v. Poaipuni, No. 22756, 2002 WL 987839 (Hawai'i May 14, 2002), which supports the automatic standing rule. Poaipuni was charged with a possessory crime based on firearms which were found in a case in a shed in which he had no legitimate expectation of privacy. Id. at *3. Both the majority and dissent assumed that Poaipuni had automatic standing.

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[6] Hawai'i cases subsequent to Abordo that have applied the Rakas rule to the question of standing have not involved charges of criminal possession. See, e.g., State v. Scanlan, 65 Haw. 159, 160-61, 649 P.2d 737, 738 (1982) (robbery); State v. Narvaez, 68 Haw. 569, 573, 722 P.2d 1036, 1038 (1986) (robbery; applying Rakas standing rule to fifth amendment question); State v. Araki, 82 Hawai'i 474, 483, 923 P.2d 891, 900 (1996) (promoting pornography for minors). Thus, the majority's assertion that "this court has generally avoided reliance on Jones," majority opinion at 21, while seemingly correct, does not point out that our appellate courts have not accepted the opportunity to address standing as it relates to possessory crimes, rendering mention of Jones unnecessary in those other cases.

B.

The "automatic standing" rule is to be distinguished from the "legitimate expectation of privacy" test. Under the former, whether a defendant charged with a possessory crime has a legitimate expectation of privacy in an area searched is irrelevant as to whether he or she has standing to challenge a search. Thus, charged possession of an "effect" would be a sufficient basis to raise an unreasonable search and seizure challenge. Justice Marshall distinguished the two rules in his dissent in Rawlings:

> Jones v. United States, supra, is quite plainly premised on the understanding that an interest in the seized property is sufficient to establish that the defendant "himself was the victim of an invasion of privacy." 362 U.S., at 261. The Court observed that the "conventional standing requirement," id., at 262, required the defendant to "claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched," id., at 261. The Court relaxed that rule for defendants charged with possessory offenses because "[t]he same element . . . which has caused the dilemma, *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily required when standing is challenged. Id., at 263 (emphasis supplied). Instead, "[t]he possession on the basis of which petitioner is to be and was convicted suffices to give him standing[,]" id. at 264.

448 U.S. at 116-17 (Marshall, J., dissenting) (ellipsis points in original) (some emphases added). The majority suggests that the doctrine of automatic standing and the concept of the legitimate expectation of privacy cannot coexist. See majority opinion at 22-25. However, Abordo and other case law indicate otherwise. While Abordo applied the legitimate expectation of privacy test, it excepted possessory crime cases as to which the automatic standing doctrine would apply. As the majority acknowledges,

"Montana . . . has . . . adopted the 'automatic standing' rule while utilizing the 'legitimate expectation of privacy' analysis[.]" Majority opinion at 24 (citing State v. Bullock, 901 P.2d 61, 67, 69-70, 75-76 (Mont. 1995)). Contrary to the majority's representation otherwise, so has Washington. Compare State v. Goucher, 881 P.2d 210, 212 (Wash. 1994) (explaining that the Washington test "include[s the] legitimate privacy expectations protected by the Fourth Amendment") with State v. Jones, 45 P.3d 1062, 1065 (Wash. 2001) (applying automatic standing to possessory crime).

Moreover, the majority's statement that, "[q]uite simply, '[a] criminal defendant always has standing to challenge the admission of evidence introduced by the state[,]'" majority opinion at 18 n.19 (quoting State v. Tanner, 745 P.2d 757, 759 (Or. 1987)), is contradicted by its own holding. "Standing" is defined as "a position from which one may assert or enforce legal rights and duties." Webster's Collegiate Dictionary 1146 (10th ed. 1993). Thus, for example, a criminal defendant only has standing where he or she may challenge the constitutionality of a search. See State v. Bruns, 796 A.2d 226, 229 (N.J. 2002) ("Generally speaking, [standing] requires a court to inquire whether defendant has interests that are substantial enough to qualify him as a person aggrieved by the allegedly unlawful search and seizure.") The majority has held that Defendant has no such standing. Indeed, the appellate courts of this state have previously determined in some instances that defendants do

not have standing to challenge a search. See State v. Araki, 82 Hawai‘i 474, 484, 923 P.2d 891, 901 (1996) ("[W]e hold that Araki lacks standing to challenge the seizure of the search warrant evidence."); State v. Mahone, 67 Haw. 644, 648, 701 P.2d 171, 175 (1985) ("One has no standing to complain of a search of property he [or she] has voluntarily abandoned." (Citation omitted.)).

IV.

A.

I believe the rule of automatic standing is preferable in cases of possessory crimes. I would adopt the underlying rationale of Justice Marshall's dissent in Rawlings under our parallel unreasonable search and seizure prohibition in article 1, section 7 of the Hawai‘i Constitution on independent state grounds.[7] Because the plain language of that section protects "effects"[8] from unreasonable searches, an individual who was allegedly in possession of contraband is entitled to automatic

[7] Article I, section 7 of the Hawai‘i Constitution, in relevant part states that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated[.]"

[8] The United States Supreme Court has explained that "[t]he Framers [of the United States Constitution] would have understood the term 'effects' to be limited to personal, rather than real, property." Oliver v. United States, 466 U.S. 170, 177 n.7 (1984). With this definition in mind, the Sixth Circuit characterized property as "personal property since they are movable" and determined that "[a]s such they fall within the definition of effects in Oliver and are therefore expressly afforded protection by the fourth amendment." Allinder v. Ohio, 808 F.2d 1180, 1186 (6th Cir. 1987) (emphasis added) (footnote omitted). I would adopt the same definition of "effects," for purposes of article I, section 7 of the Hawai‘i Constitution, as "movable personal property."

standing for the purpose of challenging the search or seizure involved.[9]

Article I, section 7 of the Hawai‘i Constitution affords the people of this state greater protection than does the fourth amendment of the United States Constitution. See State v. Tanaka, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985) ("In our view, article I, § 7 of the Hawai‘i Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights."). That provision of the Hawai‘i Constitution expressly grants the people of our state protection in their "effects," as it does in their persons, houses, and papers, against unreasonable searches and seizures. It would render the text nugatory if the assertion of that right was abrogated, contrary to the "plain meaning" of article I, section 7. See State v. Alston, 440 A.2d 1311, 1319 (N.J. 1981).

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[9] Adaptations of the automatic standing rule have been adopted in other states. For example, Pennsylvania has indicated that, if a defendant meets any one of four factors, he or she will be eligible for automatic standing:

> [A] defendant must allege one of the following "personal" interests in order to establish standing: (1) his [or her] presence on the premises at the time of the search and seizure; (2) a possessory interest in the evidence improperly seized; (3) that the offense charged include as an element of the prosecution's case, the element of possession at the time of the contested search and seizure; or (4) a proprietary or possessory interest in the searched premises.

Commonwealth v. Peterkin, 513 A.2d 373, 378 (Pa. 1986) (citation omitted), cert. denied, 479 U.S. 1070 (1987). Alternatively, the Vermont Supreme Court has stated that "a defendant need only assert a possessory, proprietary, or participatory interest in the item seized or the area searched to establish standing to assert [a search or seizure] challenge." State v. Wood, 536 A.2d 902, 908 (Vt. 1987) (citations omitted). Meanwhile, Washington has instituted a more narrow test than Pennsylvania and Vermont. See Jones, 45 P.3d at 1064 ("To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure." (Citation omitted.)).

The right to be free from unreasonable searches and seizures in their effects "defines a right [of our people] dependent on a possessory interest in such effects[.]" State v. Wood, 536 A.2d 902, 908 (Vt. 1987). Thus, the charge that Defendant possessed such items, i.e., they were his effects, implicates the constitutional protection with respect to such objects. Consequently, possession itself is enmeshed in the protection afforded effects. It follows that such charged conduct logically must confer with it the right to assert the protection granted in connection with a person's effects. By virtue of one's possession, the items became subject to the constitutional reach of article I, section 7.

Whereas the right involving effects arises as a result of the charged possession, possession in and of itself should "suffice[] to give [Defendant] standing," Rawlings, 448 U.S. at 117 (Marshall, J., dissenting) (internal quotation marks and citation omitted), to raise that right. Thus, in asserting the right, there is no necessity that Defendant demonstrate "an interest in the premises searched or the property seized [as would] ordinarily [otherwise be] required." Jones, 362 U.S. at 263. In the instant case, Defendant would thus have standing under our constitution to challenge the admissibility of objects he was charged with possessing because those items fall within the protection afforded his "effects."

Additionally, the automatic standing rationale in Jones easily conforms to our own HRPP Rule 41(e). Like FRCrP Rule

41(e), HRPP Rule 41(e) states that "[a] person aggrieved by an unlawful search and seizure may move the court . . . to suppress for use as evidence anything so obtained[.]" As Jones stated, "possession on the basis of which petitioner is and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e)." Id. at 264 (emphasis added). A person subject to conviction for possession of evidence obtained in a search that would otherwise be illegal would be "aggrieved." Thus, under HRPP Rule 41(e), alleged possession of an item should be sufficient to grant a person standing to challenge an unlawful search.

B.

The majority posits examples as to "absurd results" stemming from an automatic standing rule. Majority opinion at 25. None of these, however, are remotely apropos. One "who leaves evidence in a place readily accessible to the public[,]" majority opinion at 25, could not claim the protection against unreasonable searches since exploration of public areas are not "searches" under article I, section 7 of the constitution. See State v. Wallace, 80 Hawai‘i 382, 394, 910 P.2d 695, 707 (1996) ("As a general matter, a 'search' implies that there is an exploration for an item or that the item is hidden." (Brackets, internal quotation marks, and citation omitted.)). Similarly, "a thief of an automobile" need not "assert the constitutional rights of the true owner of the automobile as a predicate for

suppression of the evidence seized therein," majority opinion at 26, inasmuch as the right to do so inheres in the "effects" concerned. Finally, one "who deposits illegal contraband on a neighbor's porch," majority opinion at 26, has abandoned the item and is not in possession of it. These examples beg the question. They assume the application of the expectation of privacy test, the proposition that is in dispute in the first place.

C.

Other jurisdictions have adopted Justice Marshall's view that a constitutional prohibition against unreasonable searches and seizures of a person's effects confers automatic standing in possessory crime cases. The New Jersey Supreme Court has held that defendants charged with possessory crimes must be afforded automatic standing consistent with the plain language of its constitution and in light of the policies underlying the law of searches and seizures:

> Moreover, we are concerned that the results thus attained [by applying Rakas] will not infrequently run contrary to a fundamental principle rooted in Article I, paragraph 7 of the New Jersey Constitution. That paragraph protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Hence, a person's ownership of or possessory interest in personal property seized by law enforcement officials is quite sufficient to confer standing to claim that personal Fourth Amendment privacy rights have been violated. See Rawlings [], 448 U.S. [at] 116-19 (Marshall, J., dissenting). We find the reasoning of Justice Marshall in his dissent in Rawlings, that the constitutional protection against unreasonable searches and seizures extends to people's "effects" as well as to their "persons" and "houses," more faithful to the authoritative precedents and policies underlying the law of searches and seizures, and more consonant with our own interpretation of the plain meaning of Article I, paragraph 7 of our State Constitution. See State v. Ercolano, 397 A.2d 1062 [(N.J. 1979)].

Alston, 440 A.2d at 1319 (emphasis omitted) (emphases added)

(footnote omitted). The Vermont Supreme Court held that the same rationale applies to the Vermont Constitution's protection from unreasonable searches:

> Article Eleven itself establishes the scope of the protected right, and defines who may invoke its protection. The right of the people "to hold themselves, their houses, papers, and possessions, free from search or seizure," defines a right dependent on a possessory interest, with equal recognition accorded to the item seized and the area intruded upon. By delineating the right as a possessory interest, Article Eleven premises the protected right upon an objectively defined relationship between a person and the item seized or place searched, as opposed to a subjective evaluation of the legitimacy of the person's expectation of privacy in the area searched.

Wood, 536 A.2d at 908 (citations omitted) (emphasis added); see also Commonwealth v. Sell, 470 A.2d 457, 468 (Pa. 1983) ("We decline to undermine the clear language of Article I, section 8 [which guarantees '[t]he people shall be secure in their . . . possessions from unreasonable searches and seizures,'] by making the Fourth Amendment's amorphous 'legitimate expectation of privacy' standard a part of our state guarantee against unreasonable searches and seizures."); State v. Settle, 447 A.2d 1284, 1285, 1286 (N.H. 1982) (explaining that part I, article 19 of the New Hampshire Constitution states, in part, that "[e]very subject hath a right to be secure from all unreasonable searches . . . of . . . all his [or her] possessions," and holding that "the language of [the New Hampshire C]onstitution requires that 'automatic standing' be afforded to all persons . . . who are charged with crimes in which possession of any article or thing is an element" (emphasis omitted)).

Commentators have likewise reasoned that such plain language warrants the application of automatic standing in cases

of possessory crimes. See D.A. Macdonald, Jr., Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course, 63 Temp. L. Rev. 559, 584 (1990) [hereinafter Standing to Challenge] ("Not only does the Court's current standard defeat the purpose of the fourth amendment, but . . . [b]y eliminating standing based on a defendant's possessory interest in the item seized, the Court's reading affords protection only against searches of persons and places, and reads the word 'effects' out of the amendment." (Citation omitted.)); G.G. Ashdown, The Fourth Amendment and the "Legitimate Expectation of Privacy", 34 Vand. L. Rev 1289, 1325 (1981) [hereinafter The Fourth Amendment] ("The Court's view of property interests under the fourth amendment is difficult to accept primarily because the language of the fourth amendment directly covers these interests. The amendment expressly speaks to . . . 'effects;' therefore, this constitutional provision is activated whenever an individual's property is seized, irrespective of any privacy interest." (Emphasis added.)).

V.

I agree with Justice Marshall that the rule outlined in Rakas still forces defendants to choose between their right against unreasonable searches and seizures and their right against self-incrimination at trial despite Simmons. See discussion infra. Additionally, Justice Marshall's warning -- that compelling defendants to testify at suppression hearings in

order to assert their right against unreasonable searches and seizures provides the prosecution insight into the defense trial strategy -- also remains valid.[10] Similarly, it is "not consonant with the amenities . . . of the administration of criminal justice," Jones, 362 U.S. at 264, to require defendants charged with possessory crimes to testify regarding their possessory interest before allowing them to assert a constitutional challenge to a search.[11] Thus, if a defendant is

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[10] Indeed, in the instant case, under the majority's analysis, Defendant would have had to acknowledge an interest in either the vehicle or the items seized before being allowed to successfully challenge the search as illegal. See majority opinion at 18-19. Compelling Defendant to meet such a burden would have provided the prosecution the opportunity to discern Defendant's strategy at trial, whether or not Defendant in fact chose to testify at trial. For example, had Defendant testified at the suppression hearing that the gray nylon bag which contained the paraphernalia was his, the prosecution, even if unable to use that specific testimony against Defendant at trial, could have examined its own witnesses regarding whether they had ever seen Defendant with the bag. The prosecution could even have conducted further investigation to locate other witnesses who could vouch that the bag was Defendant's. Such testimony at the suppression hearing in essence points the prosecution to the elements of the charges, either through investigation or examination at trial. As Justice Marshall stated, "the furnishing of such a tactical advantage to the prosecution should not be at the price of asserting a Fourth Amendment claim." Salvucci, 448 U.S. at 97 (Marshall, J., dissenting).

[11] Jurisdictions have held that automatic standing results in the effective administration of justice and in fair play. According to the New Jersey Supreme Court, the automatic standing rule more comprehensively protects people's rights to be free from unreasonable searches and seizures:

> Mindful of our responsibility for making rules affecting the administration of criminal justice in the courts of this State, we find the Supreme Court's grounds for abandoning the Jones rule of standing unpersuasive. Rather, we believe that
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> > the automatic standing rule is a salutary one which protects the rights of defendants and eliminates the wasteful requirement of making a preliminary showing of standing in pretrial proceedings involving possessory offenses, where the charge itself alleges an interest sufficient to support a Fourth Amendment claim.
>
> Salvucci, supra, 448 U.S. at 97 (Marshall, J., dissenting).

Alston, 440 A.2d at 1320 (brackets omitted) (emphasis added). See also Settle, 447 A.2d at 1286, 1287 (explaining that "the automatic standing rule . . . offers several benefits to the sound administration of criminal

(continued...)

charged with a possessory crime, justice would require he or she should be able to challenge any improper manner or method by which such evidence was obtained.

A.

Neither the United States Supreme Court nor the Hawai‘i Supreme Court has resolved the question of whether or not a defendant's statements made in the course of a suppression hearing may be used against him or her as impeachment at trial.[12] Whereas this possibility exists, the dilemma for an accused remains as to whether to assert his or her right against unreasonable searches or his or her right against self incrimination.

I note that our appellate courts are allowed to consider transcripts from both the suppression hearing and the trial when faced with the task of reviewing a decision on a motion to suppress. See State v. Uddipa, 3 Haw. App. 415, 416-17, 651 P.2d 507, 509 (1982) ("'In determining whether a trial court erred in admitting evidence claimed to have been illegally seized, an appellate court will usually not limit itself to the testimony received on the pretrial motion to suppress, but will

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[11](...continued)
justice," including the "practical premise that -- for the benefit of law enforcement, the trial courts, and the trial bar -- that class of persons who may assert rights against unlawful searches and seizures should be clearly defined").

[12] The United States Supreme Court has held that the fruit of an unlawful search may be used to impeach a defendant's trial testimony, rendered in response to proper cross-examination, even where the evidence does not directly contradict his or her testimony on direct examination. See United States v. Havens, 446 U.S. 620, 628 (1980).

also consider pertinent testimony given at trial.'" (Quoting 3 C. Wright, Federal Practice and Procedure: Criminal 2d § 678, at 805 (1982).) (Other citations omitted.))); State v. Crowder, 1 Haw. App. 60, 66, 613 P.2d 909, 914 (1980) ("In passing on the validity of the arrest, we have considered the testimony contained in the record of the pretrial hearing on the motion to suppress and the trial itself." (Citations omitted.)); cf. State v. Villeza, 72 Haw. 327, 331, 817 P.2d 1054, 1056 (1991) ("[W]e are required to examine the entire record and make an independent determination of the ultimate issue of voluntariness [of a defendant's statement to the police]." (Citing State v. Kaahanui, 69 Haw. 473, 747 P.2d 1276 (1987).) (Other citations omitted.))). Therefore, even if it is improper for the prosecution to introduce a defendant's testimony from a suppression hearing, defendants would continue to face a version of the dilemma Jones sought to avoid.

B.

Other jurisdictions also recognize that, in the absence of automatic standing, defendants are put to the unacceptable choice between their fourth and fifth amendment rights. In Commonwealth v. Amendola, 550 N.E.2d 121 (Mass. 1990), the court explained that, despite Simmons, the possibility of impeachment deters assertion of rights against unreasonable searches:

> We think that the principal concerns of the Jones Court remain valid today, despite the current Supreme Court's shift in thinking. The Commonwealth, in order to prove possession, aims to show that the defendant was the driver of the Pontiac and was in possession of the contraband. But

> in arguing against standing, the Commonwealth claims that the defendant had no connection with the Pontiac and was not in possession of the contraband. The Commonwealth may not have it both ways. Furthermore, it would be naive to credit, without any reservations, the defendant's dissociation from the Pontiac. The defendant was faced with the very dilemma discussed by the Jones Court. There is too great a risk that the defendant, in order to escape conviction, was willing to perjure himself by disclaiming any connection with the Pontiac. In addition, Simmons, supra, did not resolve the self-incrimination dilemma. "The use of the testimony for impeachment purposes would subject a defendant to precisely the same dilemma, unless he [or she] was prepared to relinquish his [or her] constitutional right to testify in his [or her] own defense, and would thereby create a strong deterrent to asserting Fourth Amendment claims." Salvucci, 448 U.S. at 96 (Marshall, J., dissenting).

Id. at 125-26 (emphases added). See also, Sell, 470 A.2d at 468 ("After examining the Jones Court's governmental-contradiction rationale for conferring 'automatic standing,' . . . we found the reasoning 'compelling[.]'" (Citing Commonwealth v. Knowles, 327 A.2d 19, 22 (1974)); State v. Simpson, 622 P.2d 1199, 1206 (Wash. 1980) (explaining that "Simmons, as interpreted by the court in Salvucci, does not provide sufficient protection against the self-incrimination dilemma," in part because, in Washington, "prior statements made by a defendant are admissible at trial for purposes of impeachment" (citations omitted); hence, "without automatic standing, a defendant will ordinarily be deterred from asserting a possessory interest in illegally seized evidence because of the risk that statement made at the suppression hearing will later be used to incriminate him[,] albeit under the guise of impeachment"). Absent an automatic standing rule applicable to possessory crimes, a defendant may still be placed

in the intolerable position of choosing between his or her fourth amendment and fifth amendment rights.[13]

VI.

As mentioned, Justice White, in his dissent in Rakas, pointed out that the majority had declared "open season" on passengers, offering police officers a reason, absent probable cause, to stop and search cars carrying passengers:

> The Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he [or she] happens to own or have a possessory interest in it. Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy -- not property -- the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts. Insofar as passengers are concerned, the Court's opinion today declares an "open season" on automobiles. However unlawful stopping and searching a car may be, absent a possessory or ownership interest, no "mere" passenger may object, regardless of his [or her] relationship to the owner.

Rakas, 493 U.S. at 156-57 (White, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) (Emphasis added); see also Simpson, 622 P.2d at 1206 ("The inability to assert [a privacy interest in cases where a defendant is charged with possession of

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[13] The majority posits that "[a]lthough Simmons did not specifically address whether a defendant's testimony given at a suppression hearing may be used for impeachment purposes at trial," majority opinion at 27, "[i]t is an entirely different proposition to give defendant protection against exposure of his lying at trial by denying the use of his suppression motion testimony." Id. (quoting People v. Smith, 360 N.W.2d 841, 847 (Mich. 1984)). The majority misapprehends the nature of the issue, that is, pursuing one constitutional right at the expense of the other. In a related context, this court has confirmed a defendant's right against self-incrimination over the collateral effect on the "truth" at trial. See State v. Santiago, 53 Haw. 254, 266, 492 P.2d 657, 664 (1971) ("We hold that unless these protective measures are taken [i.e., the reading of Miranda rights], statements made by the accused may not be used either as direct evidence in the prosecutor's case in chief or to impeach the defendant's credibility during rebuttal or cross-examination.").

the item seized] threatens all of Washington's citizens, since no other means of deterring illegal searches and seizures is readily available."); Ashdown, The Fourth Amendment, supra, at 1319 ("Presumably, then, [after Rakas,] police can now stop and search a vehicle without probable cause at will, and the passengers cannot complain because their fourth amendment rights have not been invaded."). The New Jersey Supreme Court, concurring with the foregoing passage in the Rakas dissent, explained that the majority holding undermined the deterrent purpose of the exclusionary rule:

> If indeed this is the invitation extended to law enforcement officials by Rakas and its progeny, then it would obviously be destructive of the time-honored principle that the primary purpose of the exclusionary rule is deterrence -- "to compel respect for the constitutional guaranty (against unreasonable searches and seizures) in the only effectively available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). See Mapp v. Ohio, 367 U.S. 643, 656 (1961).

Alston, 440 A.2d at 1318 n.8 (emphasis added); see also Macdonald, Standing to Challenge, supra at 586-87 ("Since the purpose of the exclusionary rule is to deter police misconduct, not to remedy violations of an individual's fourth amendment rights, it is irrelevant whose fourth amendment rights were violated." (Citation omitted.)); Ashdown, The Fourth Amendment, supra at 1294 ("It seems clear that the refusal to apply the [exclusionary] rule in cases of particular fourth amendment transgressions will produce no incremental deterrence of unlawful police conduct, and inconsistent application of the rule arguably could diminish whatever deterrent value does exist.").

Furthermore, by removing any disincentive to intrude upon passengers' rights, the Rakas rule allows for the prosecution to use otherwise tainted evidence in court, a proposition this court has rejected. See State v. Pattioay, 78 Hawai'i 455, 468, 896 P.2d 911, 924 (1995) ("The purpose of the exclusionary rule . . . is primarily to deter illegal police conduct and secondarily to recognize that the courts of this State have the inherent supervisory power over criminal prosecutions to ensure that evidence illegally obtained by government officials or their agents is not utilized in the administration of criminal justice through the courts." (Citing State v. Santiago, 53 Haw. 254, 264, 492 P.2d 657, 663 (1971); Hawai'i Revised Statutes § 602-4 (1985).); cf. State v. Edwards, 96 Hawai'i 224, 237, 30 P.3d 238, 251-52 (2001) (explaining that the "limited scope of the exclusionary rule" includes violations of "constitutional dimensions" (internal quotation marks and citation omitted); State v. Bowe, 77 Hawai'i 51, 59, 881 P.2d 538, 546 (1994) ("[W]e hold that admitting coerced confessions, regardless of the source of the coercion, is fundamentally unfair.").

Thus, applying the legitimate expectation of privacy standard to possessory cases as a requirement of standing contravenes the purposes of the exclusionary rule. In the instant case, for example, there was no basis for ordering the passengers out of the vehicle to conduct a narcotics dog sniff. Upon seizing contraband and the passengers' effects, the police

could lawfully arrest the passengers for possession under Rakas and the majority holding, and the passengers would be unable to object to the order out, detention, and resulting search as unconstitutional.

VII.

Defendant was charged with several possession crimes. Because the objects he was charged with possessing constituted moveable personal property, the objects were "effects" within the meaning of article I, section 7 of the Hawai‘i Constitution. See supra note 8. The plain language of that provision protecting Defendant's right against unreasonable searches and seizures with respect to those effects, Defendant must logically have standing to assert such a right. Having determined that "automatic standing" in possessory crimes applies under our constitution and, under the facts, that Defendant would thus have had standing to object to the search in the instant case, I believe that, applying search and seizure law, the court was correct in suppressing the evidence.

VIII.

The concern of Justice White and the other concurring justices in Rakas, that Rakas effected an "'open season' on automobiles," particularly automobile passengers, is exemplified in the instant case. As mentioned, the officers did not have a legal basis to order the passengers out of the vehicle or to

detain them and the vehicle. When they stopped the truck, the police had, at that point, only an arrest warrant for Yamashita and a search warrant for Yamashita's person. They did not have any warrants for the vehicle at that time, or for any of its occupants, other than Yamashita. A warrantless search of the truck would only be justified by an exception to the warrant requirement. See State v. Russo, 67 Haw. 126, 137, 681 P.2d 553, 561 (1984) ("'[S]earches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.'" (Quoting Katz v. United States, 389 U.S. 347, 357 (1967)). No such exception existed and the prosecution does not contend there was any.

IX.

A.

Officer Gannon and Ben were in the parking lot when Yamashita drove the truck into the lot. Once the police had removed the occupants from the vehicle, "Officer Callinan requested that [Officer Gannon] utilize canine Ben to conduct a screening." Officer Gannon, Ben's handler, explained that Ben was brought to the truck while the door remained open and that Ben entered the vehicle without police command. The officer contended that he could not control Ben and that Ben, of "his own free will," jumped through the truck's open door and "alert[ed]" in the vehicle on the contraband. Officer Gannon admitted his

own entry into the vehicle would have been illegal. A search warrant for the vehicle was obtained based on Ben's alert within the vehicle.[14]

B.

Aside from the information Ben signaled to the police, all that the search warrant contained was that (1) a confidential informant "told [the police]" "on the week of December 26, 1999 that Aaron YAMASHITA possessed about one . . . pound of Crystal Methamphetamine"; and (2) that the confidential informant "then

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[14] Officer Gannon's affidavit in support of the search warrant contained the following information relating to Ben:

> 8. That on December 28, 1999, at approximately 4:55 P.M. I was assigned by Sergeant D. MATSUURA of the Maui Police Departments [sic] Canine Division, to assist Officer Michael CALLINAN and other assisting Vice Officers and to conduct a narcotics screening with my canine "BEN" on the vehicle (MCR 718) utilized by the target of this investigation, at the Maui Market Place, fronting McDonalds on Ohekani Street, Kahului, Maui, HI;
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> 9. That on December 28, 1999, at approximately 4:55 P.M. Affiant met with the primary investigator Officer Michael CALLINAN of the Maui Police Department Vice Narcotics Unit who apprised me of the following information and requested that vehicle MCR 718 be screened by a narcotics detection canine;
>
> . . . .
>
> 12. That at approximately 5:03 P.M., Affiant utilized the Maui Police Department's Narcotic Detection Canine "BEN" in screening the red Ford XLT Pickup truck bearing Hawaii license plate number MCR 718 and that Affiant observed the Narcotics Detection Canine "BEN" alert between the back seat and the center console within the vehicle, indicating the presence of an odor of an unknown illegal controlled substance within, that the drivers [sic] side door was halfway opened prior to my arrival and that Canine "BEN" entered the vehicle on his own free will[.]

(Emphases added.)

received instructions by Aaron YAMASHITA to meet at the Eagle HARDWARE within the Maui Market Place on December 28, 1999 at around 4:30 P.M." "'All data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath.'" State v. Navas, 81 Hawai'i 29, 34, 911 P.2d 1101, 1106 (App. 1995) (quoting United States v. Anderson, 453 F.2d 174, 175 (9th Cir. 1971)) (brackets omitted). Because, without Ben's alert, there would be no probable cause to support the issuance of the search warrant of the truck itself, the legal significance of the alert is determinative of the suppression order.

X.

Hawai'i case law has generally held that dog sniffs do not constitute searches. In State v. Groves, 65 Haw. 104, 649 P.2d 366 (1982), this court upheld the validity of a dog-sniff of a suspect's luggage after an odor of marijuana was detected, by humans, emanating from the luggage. It was reasoned that "the . . . legally sound approach is represented by . . . the premise that there can be no reasonable expectation of privacy in the airspace surrounding a person's luggage." Id. at 112, 649 P.2d at 371-72 (citations omitted.)

The Groves court, however, explained that dog-sniffs can, in certain circumstances, constitute a search:

> While we today hold that the use of narcotics-sniffing dogs does not, in and of itself, constitute an illegal search, this decision is not to be read as a carte blanche

> sanctioning of all uses of these dogs. There may be situations in which the use of these dogs will be deemed unreasonable. . . .
>
> Accordingly, the legality of the use of narcotics-sniffing dogs will depend on the circumstances of the particular case. This court will not condone the use of these dogs in general exploratory searches or for the indiscriminate dragnet-type searches. See United States v. Beale, [674 F.2d 1327,] 1136[] n.20 (9th Cir. 1982); United States v. Klein, 626 F.2d 22, 27 (7th Cir. 1980); United States v. Bronstein, [521 F.2d 459,] 465 [(2nd Cir.), cert. denied, 424 U.S. 918 (1975)] (Mansfield, J., concurring).

Groves, 65 Haw. at 113-14, 649 P.2d at 372-73 (citation omitted) (emphasis added).[15]

Other jurisdictions have similarly concluded that dog sniffs can constitute a search. See, e.g., United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985) (holding that canine sniff at door to dwelling constitutes a search); State v. Ortiz, 600 N.W.2d 805, 820 (Neb. 1999) (holding that canine sniff at door to dwelling constitutes a search); Commonwealth v. Rogers, 741 A.2d 813, 818 (Pa. Super. Ct. 1999) ("[O]ur Supreme Court has determined that the use of trained dogs to sniff for the presence of drugs does constitute a search under Article 1 § 8 of the Pennsylvania Constitution." (Citation omitted.)); State v. Dearman, 962 P.2d 850, 853 (Wash. Ct. App. 1998) ("The trial

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[15] Subsequent to Groves, this court applied, in State v. Snitkin, 67 Haw. 168, 681 P.2d 980 (1984), a balancing test to determine whether a dog sniff is reasonable. In Snitkin, the police utilized a narcotics dog to sniff packages contained in a private delivery service's office, knowing that the office was commonly used as a conduit for drugs. See id. at 169, 681 P.2d at 982. After the narcotics dog alerted on a package, the police obtained a search warrant for the package, opened it, found contraband therein, re-closed it, and waited for the defendant to pick up the package before arresting him. See id. at 170, 681 P.2d at 982. The court noted that "[the narcotics dog]'s actions were not public, did not involve human confrontation, and were carried out with much less discretion than could be accomplished by human officers. The packages were not detained." Id. at 173, 681 P.2d 984 (footnote omitted). In the instant case, however, the dog sniff was conducted in public, with Defendant present, and the vehicle and its contents were detained. The dog in the instant case alerted only after a warrantless intrusion into the truck that the officers themselves could not have accomplished. See discussion infra.

court . . . correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.").

In State v. Haley, 41 P.3d 666 (Colo. 2001), a case similar to the instant one, an officer stopped a car for a traffic violation. The officer eventually decided not to issue a ticket for the violation, and told the driver that he was free to leave, but then immediately asked him if there was any contraband in the car. The driver offered to allow the officer's dog to sniff the luggage the car contained. The officer asked for consent to a dog sniff of the car, but the driver refused, pulling only the luggage from the trunk of the car. The dog did not alert on the luggage. The officer then took the dog to the vehicle, despite the driver's refusal, and the dog alerted to places around the car. A ruckus ensued and the driver and the car's passengers were arrested for possession of drugs. The Colorado Supreme Court held that the dog sniff was an unreasonable search, particularly because it was utilized after the purpose of the stop was effectuated:

> Based upon our precedent under the Colorado Constitution, we conclude that a dog sniff search of a person's automobile in connection with a traffic stop that is prolonged beyond its purpose to conduct a drug investigation intrudes upon a reasonable expectation of privacy and constitutes a search and seizure requiring reasonable suspicion of criminal activity.

Id. at 672 (emphases added).

The Kansas Court of Appeals, faced with a similar set of facts, determined that a police dog's entry into a car's passenger compartment constituted an unreasonable search. In

State v. Freel, 32 P.3d 1219 (Kan. App. 2001), a car driven by a man suspected of possessing narcotics was stopped by the police, following a tip from a confidential informant. Upon removing the defendant from the car, an officer walked a narcotics dog around the exterior of the car. The dog jumped into the car and alerted on the floorboard, where the police did not find any drugs.[16] Eventually, drugs were found behind a sun visor. The defendant admitted that the dog's sniff of the exterior was not a search. He contended, however, that the dog's entry into the car was unreasonable. The defendant there argued that the police "facilitated the dog's entry into the car." Id. at 1225. The Kansas Court of Appeals, in holding that the contraband should have been suppressed, explained that the dog's entry into the car constituted an unreasonable search:

> [P]lacing a dog inside the trunk or passenger compartment of a vehicle is an invasive search requiring probable cause. Just as an officer could not enter the passenger compartment or trunk of a vehicle to conduct a search without probable cause, neither can a dog be placed inside a vehicle on less than this standard. United States v. Thomas, 787 F. Supp. 663, 684 (E.D. Texas 1992).

Freel, 32 P.3d at 1225 (emphasis added).

XI.

A.

As in the foregoing cases, the use of the narcotics dog here constituted an unreasonable search. Officer Gannon's statement that Ben "entered the vehicle on his own free will"

[16] The officer maintained that he did not prompt the dog's entry into the car, but a videotape of the search revealed otherwise. See Freel, 32 P.3d at 1222.

amounts to a contention that the contraband was not discovered because of government intrusion. However, as the court in effect found,[17] it strains credulity to believe, as the majority apparently does, that by happenstance the door of the vehicle was left open at the time the canine "screening" took place. Therefore, it was not clearly erroneous for the court to infer as it did, in light of any contrary explanation from the prosecution in the record, that the door was left open to allow the dog to enter or to sniff the interior of the vehicle, because neither the police nor the dog could properly enter its interior.[18]

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[17] In its oral ruling, the court stated, "[I]t's the court's view that [Officer Gannon] knew that the dog would not be permitted in the car, and when you walk by with a loose leash, there is a chance the dog could jump in, and that's exactly what happened. . . . And I think that it's incumbent upon the State to make sure that these kinds of accidents don't happen[.]" As an appellate court, we defer to the court's assessment of credibility. Plainly, the court had the opportunity to judge credibility and, doing so, exhibited skepticism about Officer Gannon's explanation for the open door. While the court couched its findings in circumspectual language, the express import of its order, suppressing the evidence, manifests the court's disbelief of Officer Gannon's explanation for allowing Ben to leap into the vehicle.

[18] In its written order, the court found, inter alia:

> 3. The scene was completely secured by the time the dog screen was ordered, but the door to the truck was open.
>
> 4. It was apparent from the testimony of [O]fficer Gannon that he was aware that the dog was not permitted to enter the vehicle as that would have amounted to an illegal search.
>
> 5. The only evidence on the record is that the dog alerted after he entered the truck.
>
> 6. A fair inference is that the dog got into the truck because it had been transported from place to place by car, and the police officer did not control the dog jumping in.
>
> 7. The police closing the door to the truck prior to the dog sniff would have prevented this whole thing from happening.
>
> 8. There was no reason given that there was any necessity

(continued...)

B.

There can be no doubt that Ben's entry into the vehicle was illegal. A narcotics dog cannot be considered other than as an extension of the officer. Trained to obey on command, subject to his direction, and brought to the scene by him, it cannot be deemed other than as under the control of the police officer. In the context of search and seizure law, then, a canine cannot have a legal significance independent from that of the police. The dog is an extension of their corporality, acting at their behest. In this context, a dog is used in the discharge of their duties and is not independent or separate from them; in the best of sense a dog is a "friend," and thus, no less, but, like them, to be viewed as akin to a fellow officer. As previously said, there is no excited canine exception to the probable cause and warrant requirements under our constitution.

As in Freel and Haley, there was an unreasonable search here. At the time of the so-called canine narcotics "screening," there was no probable cause to search the vehicle. Officer Gannon and Ben could not legally enter the vehicle without a

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[18](...continued)

that door [sic] of the vehicle be open.

(Emphases added.) On appeal, the prosecution challenges only findings 5, 6, and 7. As mentioned infra, my analysis of the instant case renders the task of addressing the challenges to the findings unnecessary. I note, however, that there was more than sufficient evidence to support finding 5 and to draw the inference in findings 6 and 7. First, Officer Gannon's affidavit in support of the search warrant plainly stated that the police had used Ben to conduct a "screening" of the truck and that Ben "alert[ed] between the back seat and the center console within the vehicle[.]" (Emphasis added.) Moreover, Officer Gannon testified at the hearing on the motion to suppress that he and Ben screened the exterior of the truck when "Ben made entry through [the open truck door] and immediately alerted to the base of the passenger side seat." He conceded that he was not able to say what would have happened had the door been shut.

warrant. Thus, in entering the vehicle, Ben, who was only an extension of his handler, in fact entered illegally. In the absence of any probable cause, Ben engaged in an exploratory search of a general nature. Under the circumstances, Ben's alert constituted an unreasonable search. See Groves, 65 Haw. at 114, 649 P.2d at 373. Because the use of the canine sniff in the instant case constituted a warrantless search without probable cause, it could not be utilized as a basis for the search warrant. As stated supra, the remainder of the search warrant is insufficient to render the subsequent search of the vehicle legal and the fruits of the search were properly suppressed.

XII.

In light of the foregoing conclusion, it is unnecessary, except as to finding 5, see supra note 18, to address the prosecution's contention that certain of the court's findings of fact were erroneous or the prosecution's contention that the court erroneously suppressed Defendant's statements, made after the search.[19]

For the foregoing reasons, I respectfully dissent.

[19] In light of my belief that the court properly suppressed the fruits of the unlawful search, the charges against Defendant would necessarily be dismissed with prejudice, and, as such, the question of the admissibility of his statements made to police is moot.