10-1979

Rawlings v. Kentucky

Lewis F. Powell Jr.

W

Hold for U.S. v Salvucci 79-244 (4 granted - as 9 will vote)

PRELIMINARY MEMORANDUM

October 12, 1979 Conference
List 2, Sheet 2

No. 79-5146-CSY — Cert to Ky. S.Ct. (Stephenson; Lukowsky, dissenting)

RAWLINGS

v.

KENTUCKY — State/Criminal — Timely

SUMMARY: Petr urges that the Ky. S.Ct. erred in holding that the automatic standing rule for possessory crimes of Jones v. United States did not survive Rakas v. Illinois.

FACTS: Police officers had an arrest warrant for one Lawrence Marquess. They entered his residence and found five persons, including the petr, in the living room. They searched the residence for Marquess, and in the process smelled the odor

Dany Ellen

of marijuana and observed marijuana seeds in plain view. Marquess was not found. Some of the officers left to secure a search warrant for the premises. Petr and the other four people were detained in the living room and told that they could not leave unless they consented to a search of their person. Two of the people did so, and were permitted to leave. The officers then returned with the search warrant, which did not authorize the search of the individuals on the premises.

Vanessa Cox was seated on the couch next to petr with her purse resting between them. The officers ordered Cox to stand and empty her purse on the table. She did so, and disclosed controlled substances which were in the purse. Petr told the officers that he was the owner of the drugs. A search of Rawlings yielded $4500 and a knife. He was then placed under arrest.

A suppression hearing was held, and the the trial court determined that the drugs and the money were admissible.

HOLDING BELOW: The Ky. S.Ct. held that the search of Cox's purse did not violate petr's legitimate or reasonable expectation of freedom from governmental intrusion. The court appeared to grant that the warrantless search of Cox's purse was in violation of her Fourth Amendment rights. As to petr, however, the court stated that he did not have standing to raise the constitutionality of the search. Petr had attempted to rely on the "automatic standing" concept of Jones v. United States, 362 U.S. 257 (1960), since he had been charged with a

possessory offense. The court believed that Rakas v. Illinois, 439 U.S. 128 (1978), rejected this prong of the Jones theory of automatic standing.

The dissent argued that the detention of Cox, the petr, and the others constituted an illegal arrest. Since but for the illegal detention the agents would never have discovered the evidence, it is "fruit of the poisonous tree" which ought to have been suppressed. The dissent also argued that Rakas did not affect the automatic standing theory of Jones where the defendant is charged with a possessory offense.

CONTENTIONS: Petr advances two contentions. First, repeating his argument before the lower court, he contends that Rakas did not affect the concept of automatic standing as stated in Jones when petr is charged with a possessory offense. Second, following the argument of the dissent, petr contends that the search and seizure of the material in Cox's purse was the product of an illegal arrest, and therefore the evidence should have been suppressed. Petr argues that the forty-five minute detention while some of the officers went for a search warrant constituted an arrest of the people in the residence and was made without probable cause. Thus, any evidence seized is the fruit of the poisonous tree which should be suppressed.

DISCUSSION: The theory behind the automatic standing rule for possessory offenses is a desire to prohibit prosecutorial self-contradiction. The argument runs that the govt should not be able to say that petr possessed the drugs for the purposes

of the statute but did not have sufficient possession of them to challenge the legality of the search.

This Court may eventually have to decide whether this prong of the automatic standing rule has vitality after Rakas. Petr points out that the decision of the Ky court is in conflict with that of the Ninth Circuit in United States v. Mazzelli, 595 F.2d 1157 (CA9 1979). There, the CA9 analyzed Rakas and concluded that "in substance [Rakas] reaffirmed the proposition recognized in Jones that a possessory interest in that which was seized confers standing." It is my understanding, however, that this issue was presented in several cases on the summer lists and cert was denied.

There is a response.

9/29/79 Eggleston op in petn

October 12, 1979

Court .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 79-5146

Submitted ...., 19... Announced ...., 19...

RAWLINGS

vs.

KENTUCKY

Hold for U.S. v Salvucci 79-244 if it is granted - 12/7/79 LFP

After discussion Hold for ~~State~~ U.S. v Salvucci 79-244

79-244

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Burger, Ch. J.	✓		✓										
Brennan, J.	✓												
Stewart, J.													
White, J.			✓										
Marshall, J.	✓												
Blackmun, J.			●	Relist for 79-244 - now F									
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.	✓			for Ybarra				78-5937					

December 7, 1979

Court .....
Argued ....., 19..
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19..

No. 79-5146

RAWLINGS

vs.

KENTUCKY

Relisted

Grant & set with 244

	HOLD FOR	CERT G	CERT D	CERT N	JURISDICTIONAL STATEMENT NOTED	JURISDICTIONAL STATEMENT DEN	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ARGUE	NOT VOTING
Burger, Ch. J													
Brennan, J.		✓											
Stewart, J		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.	✓												
Powell, J	✓												
Rehnquist, J.	✓												
Stevens, J	✓												

(W & B changed vote)

79-5146 RAWLINGS v. KENTUCKY S/C Hopkins Argued 3/26/80

The second automatic standing case. Then also has a "fruits of" case.

Apile (Petr)

Argues Jones in good law & necessary to preserve 4th Amend rights

Byron asked whether Petr made "fruit of poisonous tree" argument to Ky S/Ct. ~~[illegible]~~ Search warrant for a person was not authority for search of house. Hence search was illegal, & the search of purse was a fruit.

→ Apile makes good argument on facts. Petr's placing her drugs in friend's purse did not abandon her reasonable expectation of privacy.

Fox (asst AG of Ky)
(Good argument)

Affirm 7 to 2

79-5146 Rawlings v. Kentucky Conf. 3/28/80

The Chief Justice Affirm

There may well have been detention illegally; at the m. marijuana was smelled, there was probable cause for arrest & search. Officers did not act on this basis. No leg. expectation of privacy.

Vanessa's may had had standing - but Petr. can't assert her right.

Mr. Justice Brennan Reverse

Mr. Justice Stewart DIG

Each of these courts in Ky had dif. theory. Case is no vehicle - up. P.S. is uncertain as to what we should do

x x x

After discussion, P.S. urged us to dismiss as the case as improvidently granted - having decided the automatic standing rule. Others views not much - feel speedy

Mr. Justice White Affirm + Remand for further proceedings

State concedes it had no right to search lady's purse. But that is not until from Qs. #2 & #4 are not substantial.

Police had warrant to search apt - not the purse.

Record contains no findings as to why Reh was on premises.

Disagree with C.J. as to probable cause. (I don't follow Byron's line of reasoning) Petr has waived Q we need not reach.

Decide only issues that will clarify law

{ could remand only one

Mr. Justice Marshall Reverse

Mr. Justice Blackmun Affirm

Mr. Justice Powell Affirm & Remand

Two questions.

1. Automatic standing. Our decision in Salvucci, 79-244, will control.

2. Arrest. Rawlings & lady friend were probably unlawfully "arrested" while police went for a search warrant. But discovery of LSD probably not a "fruit" of his arrest.

There were alternative circumstances that resulted in Petr's admission of ownership of LSD. He placed it in lady's purse under circumstances suggesting no expectation of privacy: She was casual friend; she had another boy friend"; she wanted to give it back.

Mr. Justice Rehnquist Affirm

Ky. Ct. don't like us. We nevertheless have to accept opn. of S/Ct Ky in the case of this case.

Mr. Justice Stevens Affirm & not Remand

We've decided automatic standing point

Petr. has not shown by ev. that he had any reasonable expectation was of privacy in purse.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: APR 17 1980

Recirculated: _____

1st DRAFT

Reviewed 4/19/80 jmc LFP

SUPREME COURT OF THE UNITED STATES

No. 79-5146

David Rawlings, Petitioner, v. Commonwealth of Kentucky. | On Writ of Certiorari to the Supreme Court of Kentucky.

[April —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner David Rawlings was convicted by the Commonwealth of Kentucky on charges of trafficking in and possession of various controlled substances. Throughout the proceedings below, Rawlings challenged the admissibility of certain evidence and statements on the ground that they were the fruits of an illegal detention and illegal searches. The trial court, the Kentucky Court of Appeals and the Supreme Court of Kentucky all rejected Rawlings' challenges. We granted certiorari and now affirm.

I

In the middle of the afternoon on October 18, 1978 six police officers armed with a warrant for the arrest of one Lawrence Marquess on charges of drug distribution arrived at Marquess' house in Bowling Green, Ky. In the house at the time the police arrived were one of Marquess' housemates, Dennis Sadler, and four visitors, Keith Northern, Linda Bradon, Vanessa Cox and petitioner David Rawlings. While searching unsuccessfully in the house for Marquess, several police officers smelled marijuana smoke and saw marijuana seeds on the mantel in one of the bedrooms. After conferring briefly, Officers Eddie Bailey and John Bruce left to obtain a search warrant. While Bailey and Bruce were gone, the other four officers detained the occupants of the house in the living

room, allowing them to leave only if they consented to a body search. Northern and Boulen did not consent to such a search and were permitted to depart. Saddler, Cox, and petitioner remained seated in the living room.

Approximately 45 minutes later, Railey and Bruce returned with a warrant authorizing them to search the house. Railey read the warrant to Saddler, Cox, and petitioner, and also read "*Miranda*" warnings from a card he carried in his pocket. At that time, Cox was seated on a couch with petitioner seated to her left. In the space between them was Cox's handbag.

After Railey finished his recitation, he approached petitioner and told him to stand. Officer Don Bivens simultaneously approached Cox and ordered her to empty the contents of her purse onto a coffee table in front of the couch. Among those contents were a jar containing 1,800 tablets of LSD and a number of smaller vials containing benzphetamine, methamphetamine, methyprylon, and pentobarbital, all of which are controlled substances under Kentucky law.

Upon pouring these objects out onto the coffee table, Cox turned to petitioner and told him "to take what was his." App. 82. Petitioner, who was standing in response to Officer Railey's command, immediately claimed ownership of the controlled substances. At that time Railey searched petitioner's person and found $4,500 in cash in petitioner's shirt pocket and a knife in a sheath at petitioner's side. Railey then placed petitioner under formal arrest.

Petitioner was indicted for possession with intent to sell the various controlled substances recovered from Cox's purse. At the suppression hearing he testified that he had flown into Bowling Green about a week before his arrest to look for a job and perhaps to attend the local University. He brought with him at that time the drugs later found in Cox's purse. Initially, petitioner stayed in the house where the arrest took place as the guest of Michael Swank, who shared the house with Marquess and Saddler. While at a party at that house,

he met Cox and spent at least two nights of the next week on a couch at Cox's house.

On the morning of petitioner's arrest, Cox had dropped him off at Swank's house where he waited for her to return from class. At that time, he was carrying the drugs in a green bank bag. When Cox returned to the house to meet him, petitioner dumped the contents of the bank bag into Cox's purse. Although there is dispute over the discussion that took place, petitioner testified that he "asked her if she would carry this for me, and she said, 'yes', . . ." App. 42.[1] Petitioner then left the room to use the bathroom and by the time he returned, discovered that the police had arrived to arrest Marquess.

The trial court denied petitioner's motion to suppress the

---

[1] At petitioner's trial, Vanessa Cox described the transfer of possession quite differently. She testified that, as she and petitioner were getting ready to leave the house, petitioner asked "would you please carry this for me" and surreptitiously dumped the drugs into her purse. According to Cox, she looked into her purse, saw the drugs, and said "would you please take this, I do not want this in my purse." Petitioner allegedly replied "okay, just a minute, I walk," and then went out of the room. At that point, the police entered the house. Tr. 10-15. David Scudder, who was in the next room at the time of the transfer, corroborated Cox's version of the events, testifying that he heard Cox say "I do not want this in my purse" and that he heard petitioner reply "don't worry" or something to that effect. Tr. 100.

Although none of the lower courts specifically found that Cox did not consent to the bailment, the trial court clearly was skeptical about petitioner's version of events:

"The Court finds it unbelievable that just of his own volition, David Rawlings put the white bundle in the purse of Mrs. Cox [at a moment] when the officers knocked on the door. He had been carrying those things around looking [for] a bank slipped work for days, either on his person or in his pocket, and it is unworthy of belief that just immediately before the officers knocked on the door that he put them in the purse of Vanessa Cox. It is far more plausible to believe that he saw the officers pull up out front and then elected to 'pack them off' on Vanessa Cox, believing that search was probable, possible, and imminent [sic]." App. 21.

drugs and the money and to exclude the statements made by petitioner when the police discovered the drugs. According to the trial court, the warrant obtained by the police authorized them to search Cox's purse. Moreover, even if the search of the purse was illegal, the trial court believed that petitioner lacked "standing" to contest that search. Finally, the trial court believed that the search that revealed the money and the knife was permissible "under the exigencies of the situation." App. 21. After a bench trial, petitioner was found guilty of possession with intent to sell LSD and of possession of benzphetamine, methamphetamine, methylphenidate, and pentobarbital.

The Kentucky Court of Appeals affirmed. Disagreeing with the trial court, the appellate court held that petitioner did have "standing" to dispute the legality of the search of Cox's purse but that the detention of the five persons present in the house and the subsequent searches were legitimate because the police had probable cause to arrest all five people in the house when they smelled the marihuana smoke and saw the marihuana seeds.

The Supreme Court of Kentucky in turn affirmed, but again on a somewhat different rationale. See *Rawlings* v. *Commonwealth*, 581 S. W. 2d 348 (Ky. 1979). According to the Supreme Court, petitioner had no "standing" because he had no "legitimate or reasonable expectation of freedom from governmental intrusion" into Cox's purse. *Id.*, at 350, citing *Rakas* v. *Illinois*, 439 U. S. 128 (1978). Moreover, according to the Supreme Court, the search uncovering the money in petitioner's pocket, which search followed petitioner's admission that he owned the drugs in Cox's purse, was justifiable as incident to a lawful arrest based on probable cause.

II

In this Court, petitioner challenges three aspects of the judgment below. First, he claims that he did have a reasonable expectation of privacy in Cox's purse so as to allow him

to challenge the legality of the search of that purse.[2] Second, petitioner argues that his admission of ownership was the fruit of an illegal detention that began when the police refused to let the occupants of the house leave unless they consented to a search. Third, petitioner contends that the search uncovering money and the knife was itself illegal.

A

In holding that petitioner could not challenge the legality of the search of Cox's purse, the Supreme Court of Kentucky looked primarily to our then-recent decision in *Rakas* v. *Illinois*, *supra*, where we eliminated a separate inquiry into a defendant's "standing" to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant's claim that he or she possessed a "legitimate expectation of privacy" in the area searched. See *Katz* v. *United States*, 389 U. S. 347 (1967). In the present case, the Supreme Court of Kentucky looked to the "totality of the circumstances," including petitioner's own admission at the suppression hearing that he did not believe that Cox's purse would be free from governmental intrusion,[3] and held that that

[2] Petitioner also claims that he is entitled to "automatic standing" to contest the legality of the search that uncovered the drugs. See *Jones* v. *United States*, 362 U. S. 257 (1960). Our decision today in *United States* v. *Salvucci*, No. 79-244, disposes of this contention adversely to him.

[3] Under cross-looking by his own counsel, petitioner testified as follows:

"Q. Did you feel at Veronica's [sic] Cox's purse would be free from the intrusion of the officers as you set there? What you put the pills in her purse, if you felt that they would be free from governmental intrusion?

"A. No sir." App. 48.

The trial court also credited this statement, noting immediately:

"You know what, I believe this boy tells the truth. You are scared to bring him in here before the Court, and be said, no, I wore a lady's. He said no, I don't understand that." And I don't blame him for not understanding that. That's the first time I've ever seen anybody taking

petitioner "[had] not made a sufficient showing that his legitimate or reasonable expectations of privacy were violated" by the search of the purse. 581 S. W. 2d, at 350.

We believe that the record in this case supports that conclusion. Petitioner, of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse. See *Rakas* v. *Illinois*, *supra*, at 131, n. 1; *Simmons* v. *United States*, 390 U. S. 377, 389-390 (1968). At the time petitioner dumped thousands of dollars worth of illegal drugs into Cox's purse, he had known her for only a few days. According to Cox's uncontested testimony, petitioner had never sought or received access to her purse prior to that sudden bailment. Contrast *Jones* v. *United States*, 362 U. S. 257, 259 (1960). Nor did petitioner have any right to exclude other persons from access to Cox's purse. See *Rakas* v. *Illinois*, *supra*, at 149. In fact, Cox testified that Bob Stallons, a longtime acquaintance and frequent companion of Cox's, had free access to her purse and on the very morning of the arrest had rummaged through its contents in search of a hair brush. Moreover, even assuming that petitioner's version of the bailment is correct and that Cox did consent to the transfer of possession,[7] the precipitous nature of the transaction hardly supports a reasonable inference that petitioner took normal precautions to maintain his privacy. Contrast *United States* v. *Chadwick*, 433 U. S. 1, 11 (1977); *Katz* v. *United States*, *supra*, at 352. In addition to all the foregoing facts, the record also contains a frank admission by petitioner that he had no subjective expectation that Cox's purse would remain free from governmental intrusion, an admission credited by both the

---

brought up before this Court, and I have been here for quite a few years as an attorney or judge.

"Now, no question but what the law fully understood what was meant by that. Now, that's in the Court's mind. If you want to go ahead, you can do so." *Ibid.*

[7] But see n. 2, *supra*.

trial court and the Supreme Court of Kentucky. See n. 3, *supra*, and accompanying text.

Petitioner contends nevertheless that, because he claimed ownership of the drugs in Cox's purse, he should be entitled to challenge the search regardless of his expectation of privacy. We disagree. While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that "arcane" concepts of property law ought to control the ability to claim the protections of the Fourth Amendment. See 439 U. S., at 149-150, n. 17. Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy. Prior to *Rakas*, petitioner might have been given "standing" to challenge a "search" that netted those drugs but probably would have lost his claim on the merits. After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner.

In sum, we find no reason to overturn the lower court's conclusion that petitioner had no legitimate expectation of privacy in Cox's purse at the time of the search.

B

We turn, then, to petitioner's contention that the occupants of the house were illegally detained by the police and that his admission as to ownership of the drugs was a fruit of that illegal detention. Somewhat surprisingly, none of the courts below confronted this issue squarely, even though it would seem to be presented under any analysis of this case except that adopted by the Kentucky Court of Appeals, which concluded that the police officers were entitled to arrest the five occupants of the house as soon as they smelled marihuana smoke and saw the marihuana seeds.

We can assume both that this issue was properly presented in the Kentucky courts and that the police violated the Fourth

and Fourteenth Amendments by detaining petitioner and his companions in the house while they obtained a search warrant for the premises. Even given such a constitutional violation, however, exclusion of petitioner's admissions would not be necessary unless his statements were the result of his illegal detention. As we noted in *Brown* v. *Illinois*, 422 U. S. 590, 603 (1975), where we rejected a "but for" approach to the admissibility of such statements, "persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality." In *Brown* we also set forth the standard for determining whether such statements were tainted by antecedent illegality:

> "The question whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive. . . . The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution." 422 U. S., at 603–604 (footnotes and citations omitted). *See also Dunaway* v. *New York*, 442 U. S. 200, 218 (1979).

As already noted, the lower courts did not undertake the inquiry suggested by *Brown*. Nevertheless, as in *Brown* itself, we believe that "the trial resulted in a record of amply sufficient detail and depth from which the determination may be made." 422 U. S., at 604.

First, we observe that petitioner received *Miranda* warnings only moments before he made his incriminating statements, a consideration *Brown* treated as important, although not dis-

positive, in determining whether the statements at issue were obtained by exploitation of an illegal detention.

Second, *Brown* calls our attention to the "temporal proximity of the arrest and the confession[.]" In this case petitioner and his companions were detained for a period of approximately forty-five minutes. Although under the strictest of custodial conditions such a short lapse of time might not suffice to purge the initial taint, we believe it necessary to examine the precise conditions under which the occupants of the house were detained. By all accounts, the three people who chose not to consent to a body search in order to leave sat quietly in the living room or, at least initially, moved freely about the first floor of the house. Upon being informed that he would be detained until Officers Bailey and Brane returned with a search warrant, Dennis Saddler "just went on in and got a cup of coffee and sat down and started waiting" for the officers to return. Tr. 109. When asked by petitioner's counsel whether there was "any show of force or violence by you or Dave or anybody else," Saddler explained:

> "A. Oh, no. One person tried to sick my four and a half month old dog on one of the others. (laughing).
>
> "Q. You're saying that in a joking manner?
>
> "A. Yeah. He just wagged his tail.
>
> "Q. And other than that, that's the most violent thing you proposed toward these police officers; is that correct?
>
> "A. Yes sir. I would they were more or less courteous to us and were trying to be—we offered them coffee or a drink of water or whatever they wanted." Tr. 113.

According to Saddler, petitioner's first reaction when the officers told him that he would be detained pending issuance of a search warrant was to "[g]et up and put an effort on. . . ." Tr. 110. As even the dissenting judge in the Court of Appeals noted "[A]ll witnesses for both sides of this litigation agreed to

the congenial atmosphere existing during the forty-five minute interval[.]" App. 73 (Lester, J., dissenting). We think that these circumstances outweigh the relatively short period of time that elapsed between the initiation of the detention and petitioner's admissions.

Third, *Brown* suggests that we inquire whether any circumstances intervened between the initial detention and the challenged statements. Here, where petitioner's admissions were apparently spontaneous reactions to the discovery of his drugs in Cox's purse, we have little doubt that this factor weighs heavily in favor of a finding that petitioner acted "of free will unaffected by the initial illegality." 422 U. S., at 603. Nor need we speculate as to petitioner's motivations in admitting ownership of the drugs since he explained them later to Lawrence Marquess and Dennis Saddler. Under examination by petitioner's counsel, Marquess testified as follows:

> "Q. Mr. Marquess, when you were talking to David Rawlings in the jail, and he told you that the things were dumped out on the table and that he admitted they were his, did he tell you why he did that?
>
> "A. Well, he said Vanessa [Cox] was freaking out, you know, or something.
>
> "Q. Did he tell you that he did that to protect her or words to that effect?
>
> "A. Well, now, I mean he said he was going to take what was his. I mean, he wasn't going to try to pin that on her." Tr. 130.

Saddler offered additional insight into petitioner's motivations:

> "Q. Did Dave Rawlings make any statements to you in jail about any of these substances?
>
> "A. Yes, sir.
>
> "Q. And would you tell the Court what statements he made?

"A. Well, his main concern was whether or not Vanessa Cox was going to say anything, and he just kept talking and harping on that, and I don't know how many times he mentioned it, you know, 'I hope she doesn't break' or hope she doesn't talk. And I saw her walking on the sidewalk through the windows and got a little upset about that because we all thought she turned State's evidence." Tr. 103.

Fourth, *Brown* mandates consideration of "the purpose and flagrancy of the official misconduct[.]" 422 U. S., at 604. The officers who detained petitioner and his companions uniformly testified that they took those measures to avoid the asportation or destruction of the marihuana they thought was present in the house and that they believed that a warrant authorizing them to search the house would also authorize them to search the five occupants of the house. While the legality of temporarily detaining a person at the scene of suspected drug activity to secure a search warrant may be an open question,[7] and while the officer's belief about the scope of the warrant they obtained may well have been erroneous under our recent decision in *Ybarra* v. *Illinois*, — U. S. —, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), the conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's statements. Contrast *Brown* v. *Illinois*, *supra*, at 605.

Finally, while *Brown* requires that the voluntariness of the

---

[7] "The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975). Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas*, — U. S. —, —, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357, 361-362 (1979).

statement be established as a threshold requirement, petitioner has not argued here or in any other court that his admission to ownership of the drugs was anything other than voluntary. Thus, examining the totality of circumstances present in this case, we believe that the Commonwealth of Kentucky has carried its burden of showing that petitioner's statements were acts of free will unaffected by any illegality in the initial detention.

C

Petitioner also contends that the search of his person that uncovered the money and the knife was illegal. Like the Supreme Court of Kentucky, we have no difficulty upholding this search as incident to petitioner's formal arrest. Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa. See *Bailey v. United States*, — U. S. App. D. C. —, 389 F. 2d 305, 308 (1967); *United States v. Brown*, — U. S. App. D. C. —, 464 F. 2d 940, 950 (1972). See also *Cupp v. Murphy*, 412 U. S. 291 (1973); *United States v. Gorman*, 355 F. 2d 151, 160 (CA2 1965) (dictum), cert. denied, 384 U. S. 1024 (1966).*

III

Having found no error in the lower courts' refusal to suppress the evidence challenged by petitioner, we believe that the judgment of the Supreme Court of Kentucky should be, and the same hereby is,

Affirmed.

---

* The scope of the search of petitioner's person was, of course, not necessary to support probable cause to arrest petitioner.

April 21, 1990

No. 89-6146 Rawlings v. Commonwealth of Kentucky

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

LFP/lab

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 22, 1980

Re: 79-5146 - Rawlings v. Kentucky

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 28, 1980

Re: 79-5146 - Rawlings v. Kentucky

Dear Bill,

I join Parts I and IIA of your opinion. Believing, however, that the fruits inquiry you undertake in Part IIB should not be done here in the first instance, I would vacate the judgment and remand for that purpose.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 30, 1980

Re: No. 79-5146, Rawlings v. Kentucky

Dear Bill,

My preference in this factually confusing case would have been to dismiss the writ as improvidently granted, once the so-called "automatic standing" doctrine had been eradicated in the Salvucci case. If this view is not to prevail, and the case is to be dealt with on its merits, I agree with Byron as to Part IIB of your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 1, 1980

Re: No. 79-5146 Rawlings v. Kentucky

Dear Byron:

I am just about to leave to be a "judge" in the University of Tennessee moot court competition, and have not had an opportunity to respond to either your letter of April 28 or Potter's letter of April 30 regarding Part II B of the opinion in this case. I hope to circulate a memorandum to the Conference on the matter upon my return the beginning of next week.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 5, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-5146 Rawlings v. Kentucky

By memorandum circulated before my departure for the University of Tennessee Moot Court last week, I promised a memorandum responding to those of Potter and Byron relating to my presently circulating draft in this case. Lewis and John have joined it, and the remaining members of the Court other than Potter and Byron have not yet indicated by letter what they propose to do. John has advised me by telephone that while he is quite content to remain as a "join", he would likewise be agreeable to seeing something worked out along the lines proposed by Byron with respect to Part IIB of my presently circulating opinion.

If my recollection and Conference notes serve me, Harry reminded us at the time we voted after argument on this case that there had been some who thought it should have been held for United States v. Salvucci, No. 79-244, in which I do presently have a Court for an opinion that overrules the "automatic standing" principle enunciated in Jones v. United States, 362 U.S. 257 (1960). I think there is little doubt that had we decided to hold this case for Salvucci, I would have certainly recommended a denial of certiorari if I had prepared the hold memorandum. As Byron points out in his letter, factual questions are generally better left to the lower courts, and as Potter points out this case is to a degree "factually confusing."

Although I think WHR's alternative argument is unpersuasive, I agree with him that if his opinion cannot command a Court, the better course would be a DIG.

WJB S

But this case is significantly different from Salvucci, both because it comes from a state court rather than a federal court, and because petitioner did not rest solely on the "automatic standing" rule of Jones, supra, but went on to claim that he did have a reasonable expectation of privacy in Cox's purse, that his admission of ownership was the fruit of an illegal detention, and that the search uncovering the money and knife was itself illegal. See Rawlings v Kentucky, 2d draft recirculated April 22nd, pages 4-5. Thus there is not the unfairness that there would have been in Salvucci had we simply reversed the judgment of the Court of Appeals without indicating that the defendant should be allowed to make the sort of claims that petitioner here makes, since in Salvucci the Court of Appeals had relied exclusively, as had petitioner, on the "automatic standing" rule. Because our opinion will overrule a case that the defendant in Salvucci had every right to rely on at the time, he should be permitted to show why his own expectations of privacy were defeated by the challenged search.

The second and related difficulty which I see in failing to either affirm or reverse outright in Rawlings is that Salvucci was an appeal by the federal government from a motion to suppress, and therefore a new hearing on a motion to suppress may be held by the District Court without giving the defendant the benefit of the "automatic standing" rule. No double jeopardy question will arise. In Rawlings, however, we are dealing with an obviously final judgment of the highest court of the State of Kentucky; we have jurisdiction under 28 U.S.C. § 1257 to review that judgment only where a federal question has been drawn in issue, and by our grant of certiorari in this case we have at least tentatively indicated that we believe there is a federal constitutional question in the case. The Conference voted after argument to affirm that judgment, although at least Potter indicated that he would be quite willing to dismiss the writ of certiorari as improvidently granted.

Having granted certiorari to review the judgment of the highest court of a state, I think we are obligated to "fish or cut bait" on the federal claims made by petitioner unless some principled way can be found to avoid doing so. In other words, we can't simply buck the question of attenuation discussed in Part IIB of my opinion back to the Kentucky courts. Before doing so, it seems to me that we would have to decide at least two threshhold questions fairly raised by the opinions below and by the briefs in this Court. First, the Kentucky Court of Appeals held that the police officers had probable cause to arrest all the occupants of the house at the time they decided to secure a search warrant. If this is the case, then the

subsequent detention, and indeed the searches themselves, were legitimate. The Supreme Court of Kentucky did not consider this approach, but I believe we would be obligated to dispose of it before remanding.

Should we hold that there was no probable cause to arrest petitioner and his companions at the time the police decided to obtain a search warrant, I believe that we still would have to decide whether the detention of petitioner and his companions pending issuance of the search warrant was illegal. The Supreme Court of Kentucky implicitly resolved this question against petitioner when it decided to "disregard as irrelevant the detention during the period in which the officers were procuring a search warrant." App. 79. I would be the first to agree that the briefing on this important issue was less than adequate -- a factor not uncommon in Kentucky cases. Nevertheless, because the Supreme Court of Kentucky implicitly found the detention to be legal, I see no way of "vacating and remanding for consideration of possible attenuation" without confronting that issue squarely. We have a good deal more latitude in the manner in which we treat judgments of lower federal courts (as in Salvucci) than we do in treating the judgments of the highest courts of a state (I think it was either Brandeis or Cardozo who insisted that if a state court judgment was reversed, the mandate must always contain the language "for proceedings not inconsistent with this opinion").

The short of the matter is that while I do not believe that I voted to grant in this case, I think that now that we have heard it orally argued and have discussed it at Conference, the treatment of the issues in Part IIB is analytically sound and I would prefer to stay with it if the opinion can command five votes. If it does not, I would seriously consider the possibility of dismissing the case as having been improvidently granted, since it is obviously very fact-bound, the record and opinions of the courts below are not sharply focused, and therefore the opinion will not have a great deal of weight as precedent. But I do think, Byron, that to "vacate and remand" for a further development of the facts of the case would be tantamount to a reversal of the Supreme Court of Kentucky, which is certainly contrary to the Conference vote, and would necessarily imply that the Kentucky courts had, in our view, decided some question of constitutional law incorrectly. Although I am eighth in seniority, I can remember no case in which we have granted certiorari to review the judgment of the highest court of a state and concluded by vacating and remanding the judgment because we thought that court might have made a mistake on a question of constitutional law, depending on a series of facts that are not clearly set forth in the record.

This is not a Krivda situation, since petitioner is making federal constitutional claims that the Kentucky courts have rejected. I think it is the burden of petitioner -- in this case, defendant Rawlings -- to show that the Supreme Court of Kentucky wrongly decided a federal constitutional question, and not merely that if the Kentucky courts had heard more witnesses, or made more findings of fact, we might draw that conclusion.

In summary, if two members of the Court in addition to Lewis and John join the opinion, my first preference is to keep it the way it is. If there were five members of the Court whose first preference was to dismiss the case as improvidently granted, I would seriously consider becoming a sixth. If a majority of the Court favor Byron's approach in preference to either of these other two, I think the case should be reassigned by the Chief Justice and I would expect to dissent along the lines which I have stated in this memorandum.

Sincerely,

wkr

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1980

Re: 79-5146 - Rawlings v. Kentucky

Dear Bill:

I can join you "as is" or in a DIG.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 6, 1980

Re: 79-5146 - Rawlings v. Kentucky

Dear Bill,

In brief response to your letter of May 5, I note that your circulating draft indicates--and I agree in this respect--that the fruits question with regard to the drugs was presented in the state courts. I also agree that the Supreme Court of Kentucky did not address that question. With respect to the money seized from Rawlings, however, the Supreme Court did say that it would "disregard as irrelevant the detention during the period in which the officers were procuring a search warrant" and that "the sequence of the search of the purse and Rawlings' admission of ownership of the drugs is not clearly established in the record." It then immediately concluded that "Clearly, after Rawlings admitted ownership of the drugs, the officers were entitled to arrest and search the person, or search and then arrest." App. 79

In proceeding in this manner, the Supreme Court of Kentucky plainly failed properly to dispose of a federal issue with respect to the seizure of the drugs; and I would not deem it improper to remand for the purpose of addressing the question under the correct legal standard that we would identify. Also, the above remarks of the Kentucky court strongly suggest that we should not attempt to decide a factual issue on a record that the state court itself apparently thought inadequate for that purpose.

Nor are we obliged to deal with the question of whether there was probable cause to arrest prior to the departure to secure a warrant, a question the Supreme Court of Kentucky found unnecessary to resolve in view of its disposition of the case.

Hence, I continue to prefer to vacate the judgment and remand. If this is inconsistent with my Conference vote, I owe enlightenment to your circulating draft.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 12, 1980

Re: No. 79-5146 - Rawlings v. Kentucky

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 13, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-5146 Rawlings v. Kentucky

Now that I have four votes in addition to my own for my proposed circulating opinion for the Court in this case, I naturally abandon any disposition to dismiss it as improvidently granted.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 20, 1980

Re: No. 79-5146, Rawlings v. Kentucky

Dear Byron,

Please add my name to your separate opinion in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Join DIG 5/16/80	Join TH 6/16/80	agree with BRe 4/30/80 ~~Add TS to~~ BRe's separate opinion 6/20/80	Join Parts I & II 4/28/80 Concur in Part 1st Draft 5/20/80	2nd Draft 5/21/80	Signed dissent 6/16/80 1st Joint Draft 6/18/80 2nd Draft 6/20/80	Join WJB 5/12/80 1st Draft Con/Dis 5/12/80	Join WHR 4/21/80	3/21/80 1st Draft 4/17/80 2nd Draft 5/22/80	Join WHR 4/22/80

79-5146 Rawlings v. Kentucky