

I Object!

– James Eckert, Esq.

Standing

There is a running dispute concerning what it means to have Standing to contest a search. Some prosecutors think that it means the defendant enters a conditional plea of guilty, then takes his chances at the probable cause hearing. Others think that it means the defendant enters a conditional plea of guilty, then loses the probable cause hearing.

The real truth about Standing is that you have to prove your client has it. No one need mention it until the hearing is over. In fact, the prosecution can raise standing for the first time on appeal, and if the defendant has not proven that he has standing to contest the search, he is out of luck even if police probable cause testimony is "I had a hunch that guy was doing something bad, and I'm glad he was. I was 0 for 10 that morning."

A defendant has standing to contest a search if he has "a legitimate expectation of privacy" in the area searched (*People v Burton*, 6 NY3d 584 [2006]). Contrary to prosecutorial belief, an expectation of privacy can be legitimate even if contraband or evidence of criminality is found. It is also perfectly legitimate for the defense to rely on the People's proof, rather than make specific factual statements of their own. However, the defense must establish that he has a basis to contest the complained-of police activity - that he has Standing - in order to justify a hearing or prevail at a hearing.

In *Burton*, the Court of Appeals held that the defendant was not required to admit that he possessed cocaine to establish standing to contest the search of his pocket, which the police had claimed led to the seizure of cocaine. It sufficed that the defendant cited police assertion that the cocaine was found in his pocket. In most cases, if the People's proof would be sufficient to tie the defendant to the evidence sufficiently to go forward with the case, it will also be sufficient to tie the defendant to the evidence sufficiently to establish Standing. But not always, and the defense's motion papers need to be sufficient to establish Standing. You have to point to what it is you are basing your claim on, and the allegations need to be specific enough to justify a finding that your client has Standing. The People (or the court, *sua sponte*) can raise Standing at any time. So no matter how little discussion there is of the issue, the burden is always on the defense, and we must always consider standing in every search and seizure case.