

# I Object!

– James Eckert, Esq.

## Standing, Automatic

There's more to standing than just who has to allege what. There are also serious issues surrounding "automatic standing", what does it mean, who gets it, why doesn't everyone get it since the whole idea is that the challenged search came up with evidence closely enough associated with the defendant that the police want to use against him?

The tension in standing issues is this: the prosecution wants the defendant to have to admit possession of the contraband - or evidence of criminality - in order to challenge the search at all. The defense wants to avoid admissions but still challenge the search. In circumstances where the prosecutor was using a presumption to establish dominion and control, there is an argument that to the extent that the presumption is operable, it works both ways, and so the use of a presumption ought to establish, so argued the defense, "automatic standing". As with everything which is automatic, this eventually broke down and was replaced by "digital standing", but only in California and parts of Massachusetts.

In New York and elsewhere, The United States Supreme Court has held two relevant things and one interesting one. First, the constitution protects privacy, not possession, so allegations that you had a sufficient possessory interest to get you convicted aren't sufficient to establish a sufficient privacy interest to get you standing (*Rakas v. Illinois*, 439 US 128 [1979]). Second, that the testimony of a defendant at a suppression hearing cannot be used at his trial *on direct*, so the theory is that there is no reason for him not to establish actual "it's my stuff" standing (*Simmons v. United States*, 390 US 377 [1968]). Third, the interesting thing, the Court decided defendants needed to lose more.

To make things look fair, and to sow confusion among their enemies, the Supreme Court did not eliminate automatic standing in its entirety. If the defendant is charged with possession based **solely** upon a statutory presumption, he has automatic standing; see PL 220.25(1&2); 265.15 (1, 2 & 3)(*People v. Millan*, 69 NY2d 514 [1987]).

For example: your client is in a friend's apartment with a half dozen other people. It's dark, and just as his eyes get used to the poor lighting, BAM! The police burst in to execute a search warrant. Since every search warrant contains a "go ahead and arrest anyone in the vicinity" clause, he gets arrested. Does he have "automatic standing"? Maybe! In fact, he might have automatic standing to contest a search of the apartment as to one item found in there, and not as to another found in the same search of the same apartment by the same cops. In *People v. Tejada* (81 NY2d 861 [1993]) the defendant had "automatic standing" to contest drugs found in room in which he was found (when People proceeded upon "room presumption") **but** had no standing to suppress gun found in same room where People proceeded upon constructive possession theory. Go figure!