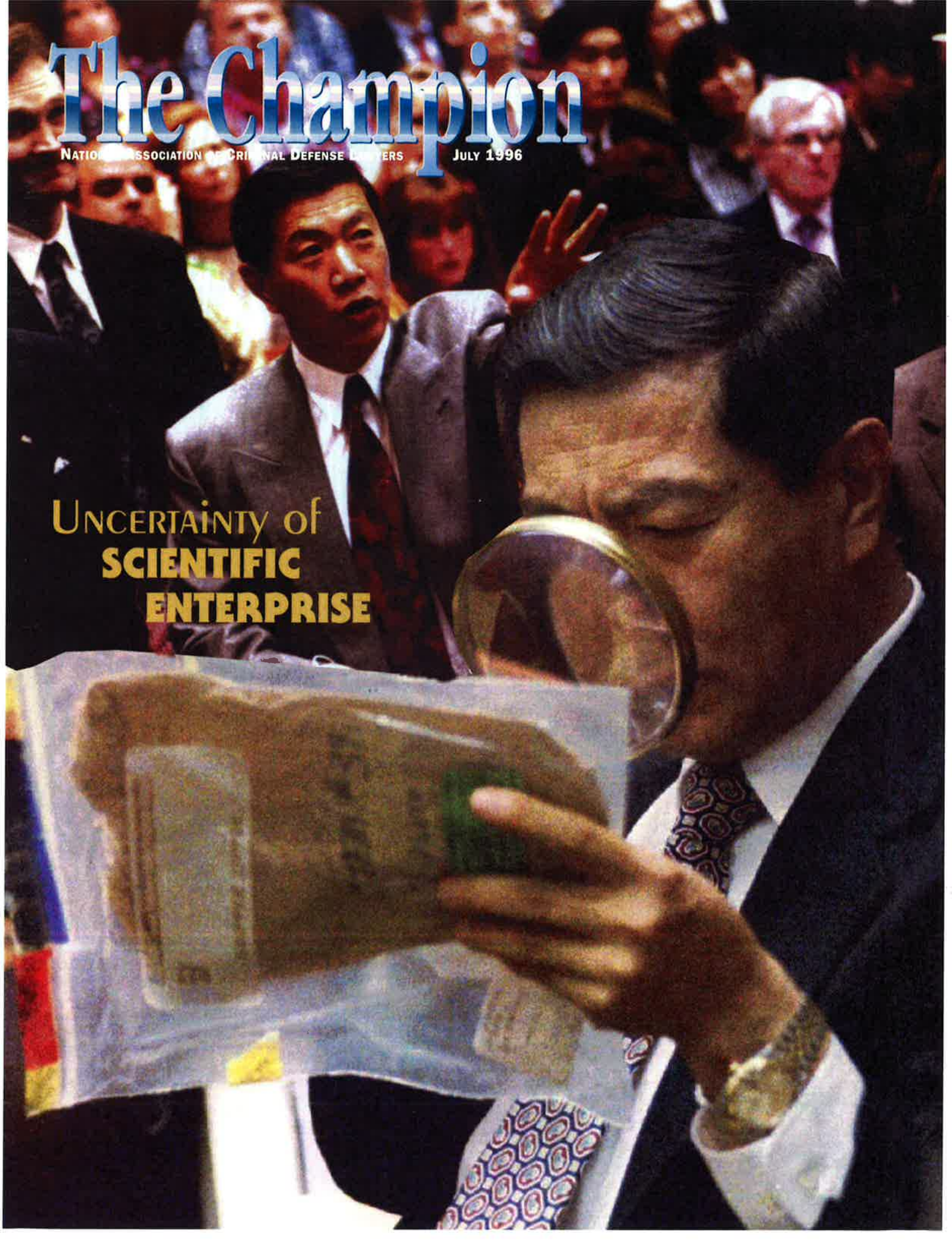
The Champion

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS JULY 1996



UNCERTAINTY of SCIENTIFIC ENTERPRISE

FOURTH AMENDMENT FORUM

By Howard M. Srebnick and Scott A. Srebnick

None of Your Business: Standing to Contest Searches of Corporate Premises

A patently unreasonable search at a business premises. The search warrant is overbroad. The agents exceed the scope of the warrant. They flagrantly disregard the limitations of the warrant. No good faith.

Who has standing to object to this unlawful search? The owner(s), you might suppose. But what if the owner is a corporation, not a person? Who, aside from a corporation (that cannot be jailed), can assert a reasonable expectation of privacy in a business premises? No standing, no suppression.

Sting Operation

In a high profile sting case in Miami, in which the defense has moved to suppress the search of several business premises, the government is arguing that the court should deny the motion on the ground that no individual has standing to object to the search of a business premises.

The defendants are a husband and wife, owners of all or substantial percentage of shares in closely held corporations that operate restaurants in South Florida. Over the course of 18 months, undercover agents and a confidential informant met with the defendants trying to sting them for money-laundering. The ruse: the undercovers and informant allegedly posed as prospective investors interested in purchasing the restaurants. They allegedly offered $17 million to the defendants for the businesses. Alas, the (fictitious) millions were allegedly represented to be the proceeds of illegal activity, narcotics, of course. The temptation proved too alluring, and the defendants allegedly acquiesced to the proposed transaction. Eighteen months after the trap was set, the Drug Enforcement Administration obtained search warrants for several premises. The agents carted off box-loads of papers and records and turned them over to the criminal division of the Internal Revenue Service. The money-laundering charges came first, tax counts followed.

The defendants have moved to suppress all of the evidence seized as fruits of unreasonable searches. The government has responded by arguing that the defendants lack standing to contest the search of the restaurants or the business. In the government's view, "where the documents seized were the normal corporate records not personally prepared by the defendant and not taken from his personal office, desk, or files, the defendant cannot challenge a search because he would not have a reasonable expectation of privacy in such materials." *See United States v. Britt*, 508 F.2d 1052, 1055 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

> When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity.

Lagow v. United States, 159 F.2d 245, 246 (2d Cir. 1946), *cert. denied*, 331 U.S. 858 (1947).

Establishing Standing

By its terms, the Fourth Amendment protects "persons, houses, papers, and effects" against unreasonable searches by the government. Although the only *places* identified in the amendment are "houses," the courts have construed the amendment more broadly, consistent with its intent, to encompass other areas such as workplaces and offices, inasmuch as the privacy of such areas is "based upon societal expectations that have deep roots in the history of the Amendment." *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987) (quoting *Oliver v. United States*, 466 U.S. 170, 178 at n.8 (1984)).

The test to determine if a person may contest an illegal search — of a home, an office, or any other location in which humankind can be found to persevere — is whether that person "has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *accord United States v. Rackley*, 742 F.2d 1266, 1270 (11th Cir. 1984). A legitimate expectation of privacy is an expectation actually and subjectively held by the defendant and one which society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). While this issue must be addressed within the purview of substantive Fourth Amendment law, the "[l]egitimation of expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143 n.12. As noted by the Supreme Court in *Rakas*, "one who owns or lawfully possesses or controls property will in all like-

HOWARD M. SREBNICK *practices criminal defense with the law firm of Roy Black, P.A., in Miami, Florida. He teaches advanced criminal evidence at the University of Miami School of Law.*

SCOTT A. SREBNICK *practices criminal defense in Miami Florida, where he is of counsel to the law office Albert J. Krieger, P.A.*

lihood have a legitimate expectation of privacy by virtue of his right to exclude." *Id.* The Eleventh Circuit has approved the following definition of a possessory interest sufficient to confer standing:

> [W]here the premises searched is the dwelling or is owned *or rented by,* or is in the possession of the accused, he has standing to attack the search. As employed in this connection we understand 'possession' to have reference to *an unrestricted right of occupancy or custody and control* of the premises as distinguished from occasional presence on the premises as a mere guest or invitee.

United States v. Bachner, 706 F.2d 1121, 1126 n.6 (11th Cir. 1983) (quoting *State v. Levenson*, 151 So.2d 283, 285 (Fla. 1963) (emphasis added)).

In determining whether a person's expectation of privacy in the place searched is legitimate, the courts are to consider the "totality of the circumstances" surrounding the case. *United States v. Baron-Mantilla*, 743 F.2d 868, 870 (11th Cir. 1984). Each case is to be decided on its own merits, on a case-by-case basis. *See O'Connor v. Ortega*, 480 U.S. at 718. Although there are no brightline standards for such cases, and the facts of the reported decisions arise in nearly unlimited permutations, the focus of analysis invariably turns on two ultimate factors: whether the person contesting the search enjoyed unrestricted access to the place searched, and whether that person had the authority to exclude others from that area. *See, e.g., Baron-Mantilla*, 743 F.2d at 870. This is in keeping with our traditional understanding of the rights attaching to private property, since inherent to the concept of "private" property is the right to the use and enjoyment of the property and "the right to exclude others." *Bachner*, 706 F.2d at 1126 n.6 (11th Cir. 1983) (quoting W. Blackstone, *Commentaries*, Book 1, ch. 1).

Where both factors are present — where the person contesting the search had unrestricted access to the area searched and the right to exclude others — the courts uniformly find standing to contest the search. *See e.g. United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir. Unit A 1981) (house guest had standing since he had unencumbered access and authority to exclude others). In applying this analysis to searches of the work-place, courts have held that a person can have standing to contest the search of an office, even if he is not its sole occupant and others may have a superior claim to control of the office. *Mancusi v. DeForte*, 392 U.S. 364 (1968) (union official had standing to contest seizure of union documents from office even though he shared office with two others and union higher-ups could have consented to search over his protests); *United States v. Mancini*, 8 F.3d 104, 109-10 (1st Cir. 1993) (mayor had standing to contest search of city archives housed in same building as official's office); *United States v. Brien*, 617 F.2d 299, 306 (1st Cir. 1980) (corporate employees had expectation of privacy in records seized from areas of corporate office other than their own work stations).

Furthermore, where there is a sufficient nexus between the area searched and a defendant's private office, that defendant has standing to contest a search of areas outside his or her office, including both common areas open to other workers, *see, e.g., United States v. Leary*, 846 F.2d 592, 595-97 (10th Cir. 1988), and the offices of other workers with whom the defendant works closely. *See, e.g., United States v. Conley*, 813 F. Supp. 372, 377-78 (W.D. Pa.) (where five persons worked closely together in a small office suite, each had standing to contest the search of all of the work stations), *rev'd on other grounds*, 4 F.3d 1200 (3d Cir. 1993); *cf. United States v. Delgado*, 903 F.2d 1495, 1502 (11th Cir. 1990) (suggesting that a person would have a reasonable expectation of privacy in a warehouse if he had private space in the warehouse from which he could exclude others or a possessory interest in the building). Finally, even if a person does not have standing in the place searched, he may challenge an illegal search if he has a reasonable expectation of privacy in personal papers that are seized. *Delgado*, 903 F.2d at 1502.

Lagow v. United States, 159 F.2d 245 (2d Cir. 1946), the case upon which the government has principally relied to challenge standing, was decided 22 years before *Mancusi v. DeForte*, 392 U.S. 364 (1968). In *Mancusi*, the Supreme Court held that a union official had standing to challenge the seizure of union books and records from an office that he shared with others. In *United States v. Britt*, 508 F.2d 1052, 1055 (5th Cir. 1975), the other case cited by the government, the warrant was executed in response to complaints about the fraudulent activities of the corporation, not the corporate officer. Because of that circumstance, the Fifth Circuit concluded that the president who was subsequently indicted was not a "person aggrieved" by the unlawful search. Thus, when the targets of the search are the individuals, not the corporate entities, the individuals are in a better position to assert their standing to contest the search. *Cf. United States v. Mohney*, 949 F.2d 1397, 1403-04 (6th Cir. 1991) (holding that defendant did not have standing to contest the searches of a business premises where the "search [] was not directed at him personally. . . . Nor were the searches targeted at `getting' Mohney.").

The key to establishing standing is proving that the defendant "owned or leased the [premises] *or otherwise has an unrestricted right of occupancy or custody or control of said [premises].*" *See United States v. Bachner*, 706 F.2d 1121 (11th Cir. 1983) (remanding for an evidentiary hearing on whether defendant had standing to contest search of an aircraft). Thus, the inquiry focuses on the extent of the defendant's interest in the corporations that do business at the searched premises. Is it a closely held corporation? Is the defendant an officer of the corporation? Is the defendant a signatory on the lease to the premises? Does the defendant have a key to the premises? Does the defendant have the authority to exclude others from the premises? Where is the defendant's private office or work station (where he maintains a desk, supplies, and personal belongings) relative to the places searched? How often does the defendant work there? Does the defendant receive personal correspondence there? Did the defendant take steps to assure that no one would have access to his belongings (papers, files, etc.) without his prior authorization?

In all events, the question is whether the defendant's "actions demonstrate an expectation of privacy [that the court deems] objectively reasonable," regardless of whether the premises is owned by the defendant, a corporation, or the government itself. *See United States v. Mancini*, 8 F.3d 104, 109-10 (1st Cir. 1993) (mayor had standing to contest search of city archives housed in same building as official's office); *see also O'Connor v. Ortega*, 480 U.S. 709, 716 (1987) (public employee had reasonable expectation of privacy in his government office). A direct ownership interest in the premises is not the gravamen of the expectation of privacy, to be sure, because the Fourth Amendment protects "people, not places." If you have a reasonable expectation of privacy in a public phone booth, *Katz v. United States*, 389 U.S. 347 (1967), then surely you have standing to contest the search of your place of business, even if you must pierce the corporate veil to suppress the evidence. ■