No.

IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A police officer may not conduct a suspicionless and warrantless search of a car if the driver has a reasonable expectation of privacy in the car—i.e., an expectation of privacy that society accepts as reasonable. Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement?

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INTRODUCTION

This case squarely presents a question under the Fourth Amendment that has sharply divided the federal courts of appeals and likewise the state courts of last resort: Whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.

In February 2014, the Meadowlands, in East Rutherford, New Jersey, was host to Super Bowl 48. Suppose the local police, knowing that thousands of out-of-towners would be drinking and driving that weekend, decided to set up an elaborate network of sobriety checkpoints around town. Under Third Circuit law, the police would have been allowed to conduct full-vehicular searches of *every* rental car driven by an unlisted driver that they stopped that weekend, regardless of whether they had a warrant or any suspicion of a crime. The same is true in the Fourth, Fifth, and Tenth Circuits and two state supreme courts.

Over the ensuing two years, Super Bowls 49 and 50 took place in Glendale, Arizona and San Francisco, California, respectively. There, football fans could rest easy knowing they retained their Fourth Amendment rights against warrantless and suspicionless searches. For unlike the Third Circuit, the Ninth Circuit (like the Eighth and four state courts of last resort) holds that an unlisted driver has a reasonable expectation of privacy in a rental car as long as he has the renter's permission to drive the car.

Then came Super Bowl 51, held in Houston, Texas. There, the governing Fourth Amendment doctrine is woefully inconsistent, for in Texas, as in four other states, the state high court and applicable federal circuit court have reached opposite conclusions on the issue of whether an unlisted driver's expectation of privacy in a rental car is reasonable. Thus, football fans could have challenged warrantless and suspicionless searches of their vehicles there, if they were prosecuted in state court, but not if they were prosecuted in federal court.

Such is the elusive nature of the Fourth Amendment's protection against unreasonable searches under the law today. In the same jurisdiction, a defendant's critical constitutional rights can depend on whether he is ultimately prosecuted in state or federal court. And, putting the state courts aside, an unlisted driver who has the renter's permission to operate a rental car will be deemed to have a reasonable expectation of privacy in the car when he begins his trip in, say, Kansas City, *Missouri*, but as soon as he crosses into Kansas City, *Kansas*, poof!—his vital protection against a warrantless and suspicionless search of his car vanishes. This random patchwork of constitutional protections defies all logic and cries out for this Court's review.

Here, state troopers in Pennsylvania stopped Petitioner Terrence Byrd for a traffic violation while he was driving a car that his girlfriend had rented for him. Without a warrant or probable cause, the troopers searched Byrd's car and found contraband. Byrd moved to suppress the evidence obtained from the search because it violated the Fourth Amendment,

but the district court denied the motion on the ground that Byrd, as a driver not listed on the rental agreement, had no reasonable expectation of privacy in the car. The Third Circuit, while noting the circuit conflict, affirmed on the same basis.

That holding, reflecting the rule in the Third, Fourth, Fifth, and Tenth Circuits and two state high courts, is deeply misguided. In those jurisdictions, the police may conduct a search whenever they discover that an unlisted driver is operating a rental vehicle, even when they have no basis for believing that they will find evidence of a crime in the vehicle. That approach "creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). It also contravenes this Court's teaching that a person who legally obtains "dominion" and "control" over an area, and who may thereby "exclude others" from the area, has a reasonable expectation of privacy in the area. *Rakas v. Illinois*, 439 U.S. 128, 149 (1978). The Eighth and Ninth Circuits, and four state high courts, have correctly taken the opposite view.

The federal courts of appeals and state courts of last resort are openly and intractably divided over the question presented. As a consequence, judicial recognition of drivers' reasonable expectations of privacy in rental cars ultimately depends on the circuit and on the judicial system—state or federal—in which the case arises. This Court has repeatedly recognized a

need for uniform Fourth Amendment doctrine. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2491 (2014); *Thornton v. United States*, 541 U.S. 615, 623 (2004). Without this Court's intervention, the lack of a single, coherent answer to the question presented will continue to sow confusion among the lower courts in an area with serious implications for criminal defendants (not to mention targeted rental drivers who committed no crime) and for the even-handed administration of justice. This case squarely presents that important and recurring question and is an ideal vehicle for resolving the split of authority.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is not officially reported but may be found at 2017 WL 541405. Pet. App. 1a–8a. The district court's ruling on the suppression motion is not officially reported but may be found at 2015 WL 5038455. Pet. App. 9a–18a.

JURISDICTION

The Court of Appeals entered judgment on February 10, 2017. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects,

> against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

State Troopers Search Byrd's Rental Car Without A Warrant Or Probable Cause

On September 17, 2014, Petitioner Terrence Byrd's girlfriend and mother of his children, Latasha Reed, rented a car from Avis in Wayne, New Jersey. Pet. App. 10a; C.A. App. 188-89.[1] The rental agreement specified that only the renter, the renter's spouse, co-employee, or a person who appears at the time of the rental and signs an additional form may operate the vehicle. Pet. App. 3a; C.A. App. 73 (rental agreement). Byrd was not listed on the rental agreement, but Reed gave him permission to drive the car. Pet. App. 3a, 10a, 13a. From the moment the couple left the rental-car facility, Byrd was the only person to drive the vehicle. C.A. App. 194.

Around 6:00 p.m. that day, Byrd was driving the rental car on Interstate 81 in Pennsylvania. Pet. App. 2a, 10a. State Trooper David Long, who was parked in the median monitoring traffic, noticed Byrd's car.

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[1] Pet. App. refers to Petitioner's Appendix included with this petition. C.A. App. refers to the Appendix submitted in the Court of Appeals.

Id. The trooper thought the car was "being driven suspiciously" for three reasons: (1) "the operator of the vehicle was driving with his hands in the 10:00 and 2:00 position," Pet. App. 10a, which is how most of us were taught to drive; (2) "his seat was reclined so that he was not clearly visible through the driver's side window," *id*. (punctuation omitted); and (3) the car was a rental, C.A. App. 88–90. The trooper stopped Byrd for violating a state traffic law requiring drivers to use the right-hand lane whenever possible. Pet. App. 2a; *see* 75 Pa. Cons. Stat. § 3313(d)(1). The trooper asked Byrd for his driver's license and the rental agreement. Pet. App. 3a. Upon producing the rental agreement, Byrd explained that his name was not listed on the agreement because Reed, whom Byrd called his "friend," had rented the car. Pet. App. 10a–11a.

After the trooper asked Byrd to move his car to a safer location, another state trooper arrived and joined Trooper Long in his patrol car. Pet. App. 3a. The troopers conducted a computerized search for Byrd's information, which showed that Byrd had a nonextraditable out-of-state warrant for a nonviolent crime. *Id*.; C.A. App. 98 (testimony of Trooper Long).

The troopers directed Byrd to exit the vehicle. Pet. App. 4a. They asked Byrd whether anything illegal was in the car. *Id*. Byrd replied that he had recently smoked a "blunt." *Id*. The troopers then asked for permission to search the car. But in the same breath, they informed him that his answer did not matter, because his name was not listed on the rental agreement, which deprived him of a reasonable expectation of privacy in the car. *Id*. Byrd offered to retrieve

the "blunt" himself, but the troopers declined the offer. Pet. App. 12a. The government has maintained that Byrd then consented to a search of the car. Pet. App. 4a; Brief in Opposition to Motion to Suppress Evidence at 2, No. 1:14-CR-321 (M.D. Pa. Apr. 28, 2015), ECF No. 31. Byrd denies that he consented. Pet. App. 8a; *see also* Second Brief in Support of Motion to Suppress at 26–29, No. 1:14-CR-321 (M.D. Pa. Aug. 21, 2015), ECF No. 54; Appellant's Brief at 24, No. 16-1509, 2016 WL 3382397 (3d Cir. Jun. 15, 2016). The troopers searched the car and found heroin and a bulletproof vest in the trunk. Pet. App. 4a; C.A. App. 47 (Trooper Long's police report).

The District Court Rules That Byrd May Not Challenge The Search Because He Had No Reasonable Expectation Of Privacy In The Rental Car

Byrd was initially charged in Pennsylvania state court. Those charges were dismissed after a federal grand jury returned a two-count indictment charging Byrd with distribution and possession with the intent to distribute heroin, 21 U.S.C. § 841(a), and possession of body armor by a prohibited person, 18 U.S.C. § 931(a)(1). C.A. App. 27–29.

Byrd moved to suppress the evidence obtained from the search because the search was supported neither by a warrant nor by any exception to the warrant requirement and therefore violated the Fourth Amendment. C.A. App. 30–36 (motion to suppress). At the suppression hearing, Byrd testified that Reed had given him permission to drive the rental car and that he had exclusive control over the vehicle from the

time Reed gave him the keys. C.A. App. 194. Byrd was therefore the only person in control of the car from around 10:30 a.m. until he was pulled over at approximately 6:30 p.m. C.A. App. 210 (rental agreement completed at 10:26 a.m.); C.A. App. 87 (stop occurred around 6:30 p.m.).

Trooper Long testified on direct examination that Byrd consented to a search of the rental vehicle. C.A. App. 102. But on recross examination, he clarified that what Byrd actually said was that he would retrieve the "blunt" from the car for the officers—a suggestion that the troopers refused—and that the troopers treated this suggestion as Byrd's expression of consent. C.A. App. 174 ("Q. And lastly, you indicated that when you asked [Byrd] for consent, at first he sort of said he would, but then he said, *no*, I'll get [the "blunt"] for you? And after that, you guys said, no, we'll get it? A. He said, I'll get it for you, yes. No one gets back—no one will retrieve any contraband. Q. Right. But after that, he *never gave you consent after that*, did he? A. *No*." (emphases added)). In a supplemental brief, Byrd emphasized that Trooper Long's testimony was equivocal and that the government had not demonstrated that Byrd had consented to the search or that any other exception to the warrant requirement applied. Second Brief in Support of Motion to Suppress at 22–25. The brief urged that the warrantless search was therefore unconstitutional. *Id.*

The district court denied suppression. Applying Third Circuit precedent, the district court ruled that Byrd did not have a reasonable expectation of privacy

in the rental car because he "was merely given permission by Reed to drive the car," "he was not a party to the rental agreement," and "he did not pay for the rental." Pet. App. 13a.

Byrd pled guilty to both charges in the indictment but reserved the right to appeal the denial of his suppression motion. C.A. App. 213–33 (plea agreement). The district court accepted the conditional plea, entered judgment, and sentenced Byrd to ten years in prison. C.A. App. 13–14 (district court's judgment).

The Third Circuit Agrees That Byrd Did Not Have A Reasonable Expectation Of Privacy In The Rental Car

The Third Circuit affirmed. The Court of Appeals stressed that "[a] circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy" when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement. Pet. App. 8a. The court then held that Byrd's case was controlled by the Third Circuit's earlier decision in *United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011). Pet. App. 8a.

In *Kennedy*, the Third Circuit began by observing that unlisted drivers have no "cognizable property interest" in rental vehicles and therefore do not have an "accompanying right to exclude." 638 F.3d at 165. From this observation, the court inferred that "society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company." *Id*. at 167–

68. On this basis, the Third Circuit in *Kennedy* concluded that "the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy." *Id*. at 165.

Citing *Kennedy*, the panel here held that Byrd had no reasonable expectation of privacy in the rental car because he was not listed as an authorized driver on the rental agreement. Pet. App. 8a. And because Byrd lacked a reasonable expectation of privacy, the Third Circuit explained, it did not need to decide whether Byrd had consented to the search. *Id*.

REASONS FOR GRANTING THE WRIT

To claim the protection of the Fourth Amendment, a defendant "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). The federal courts of appeals and the state courts of last resort are openly divided over the question whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed on the rental agreement. That division of authority is deeply entrenched, and the question by now has had more than enough time to percolate. This case squarely presents this important and recurring question and is an ideal vehicle for answering it. This Court should therefore use this case to resolve the conflict.

I. The Question Presented Has Irreconcilably Divided The Courts Of Appeals And State Courts Of Last Resort.

Seven federal circuits and six state courts of last resort have addressed the question presented and have reached two diametrically opposed conclusions—with two circuits and four state high courts on one side and four circuits and two state high courts on the other—plus a Solomonic middle position that one circuit follows. As a result, courts have openly acknowledged the deep fissure between jurisdictions. *See, e.g.*, Pet. App. 8a ("A circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement."); *United States v. Thomas*, 447 F.3d 1191, 1196–97 (9th Cir. 2006) ("Courts have developed at least three approaches to determining when an unauthorized driver of a rental vehicle has standing to challenge a search."); *United States v. Sanford*, 806 F.3d 954, 958 (7th Cir. 2015) ("we note the existence of a circuit split over whether an unauthorized rental-car driver has a legitimate expectation of privacy sufficient to establish standing to challenge a search."); *State v. Nelson*, 807 N.W.2d 769, 779 (Neb. 2011) ("courts have developed [three approaches] to determine when an unauthorized driver of a rental vehicle has standing to challenge a search."). This Court's resolution is now warranted to bring certainty to this confused and consequential area of Fourth Amendment law.

A. The Eighth and Ninth Circuits and four state high courts hold that a driver has a reasonable expectation of privacy in a rental car if he has the renter's permission to drive the car.

The Eighth Circuit holds that the reasonableness of an unlisted driver's expectation of privacy in a rental car depends on whether he can show that the renter gave him permission to operate the car. In *United States v. Muhammad*, the court emphasized that evidence of the renter's permission would establish a sufficiently direct connection between an unlisted driver and the renter to support the unlisted driver's expectation of privacy in the car. 58 F.3d 353, 355 (8th Cir. 1995) (citation omitted). The Eighth Circuit reiterated in *United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998), that "if [the unlisted driver] had [the renter's] permission to use the automobile … [he] would have a privacy interest giving rise to standing" to challenge the vehicle's search.[2]

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[2] Before *Rakas*, this Court analyzed an individual's ability to claim Fourth Amendment protections under the rubric of "standing." In *Rakas*, the Court clarified that the inquiry "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing," 439 U.S. at 140, and that ultimately "[t]he inquiry under either approach is the same," *id.* at 139. Thus, subsequent decisions have asked whether a defendant had a "legitimate expectation of privacy" in the area searched. *Carter*, 525 U.S. at 88. Nonetheless, "standing" continues to be used as a shorthand for having a sufficient interest to challenge a search or seizure. *See, e.g.*, *Arizona v. Johnson*, 555 U.S. 323, 332 (2009) ("A passenger," who is seized by a stop, "has standing to challenge a stop's constitutionality.").

The Ninth Circuit agrees that "[a]n unauthorized driver may have standing to challenge a search if he or she has received permission to use the [rental] car." *Thomas*, 447 F.3d at 1199; *see Lyall v. City of Los Angeles*, 807 F.3d 1178, 1189 (9th Cir. 2015). In support of that conclusion, the Ninth Circuit observed that a renter's consent gives an unlisted driver control of the car as well as the right to exclude unwanted passengers. *Thomas*, 447 F.3d at 1198. This right creates a possessory interest in the car and makes the driver's expectation of privacy reasonable. *Id.* at 1198–99 (citation omitted). The Ninth Circuit has also found support for this holding in analogous cases where defendants maintained their privacy interests despite violating their lease agreements. *Id.* at 1198 (citing *United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2001) (renter had privacy interest in rental car after expiration of rental agreement); *United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001) (expiration of motel room lease period did not terminate privacy interest in room)).

The Nebraska Supreme Court has reached the same conclusions as the Eighth and Ninth Circuits. The court explained that its "cases show the importance of dominion and control and that standing is not limited to property rights or ownership." *Nelson*, 807 N.W.2d at 780. Thus, it declared, "[i]n accordance with the Eighth and Ninth Circuits, we hold that a driver of a rental vehicle may have standing to challenge a detention or search if he or she has demonstrated that he or she has received permission to drive the vehicle from the individual authorized on the rental agreement." *Id.*

Likewise, citing the Eighth Circuit's decision in *Muhammad*, the New Mexico Supreme Court holds that an unlisted driver who can demonstrate that he had the renter's permission to drive a rental car has a reasonable expectation of privacy in the car. *State v. Van Dang*, 120 P.3d 830, 834 (N.M. 2005). In New Mexico, "in a case involving a rental vehicle where the driver is neither the renter nor listed on the rental contract as an authorized driver, the burden is on the driver to present evidence of consent or permission from the lawful owner *or renter* to be in possession of the vehicle in order to establish standing to challenge a search of the vehicle." *Id.* (emphasis added).

Texas's Court of Criminal Appeals is on the same page. It has analogized the renter of a car to the car's owner and, on that basis, has held that when a renter gives permission to an unlisted person to drive a car, the renter confers on the driver a reasonable expectation of privacy in the car. *Parker v. State*, 182 S.W.3d 923, 927 (Tex. Crim. App. 2006). On facts almost identical to this case, the court explained that "society would recognize as reasonable [the defendant's] expectation of privacy in the use of his girlfriend's rental car with her permission even though he was not listed as an authorized driver on the rental agreement." *Id.* And, relying substantially on *Parker*, Oklahoma's highest criminal appellate court has reached the same conclusion. *State v. Bass*, 300 P.3d 1193, 1196 (Okla. Crim. App. 2013).

These courts—two federal courts of appeals and four state courts of last resort—have concluded that the terms of a rental agreement are not determinative of which expectations of privacy society is prepared to

accept as reasonable. In each of these jurisdictions, Byrd would have been allowed to challenge the unjustified search of his car based on the uncontroverted evidence that he had his girlfriend's permission to use the car.

B. The Third, Fourth, Fifth, and Tenth Circuits and two state high courts hold that an unlisted driver does not have a reasonable expectation of privacy in a rental car.

Diametrically opposed to the above six courts are another six. The rule the Third Circuit followed here is representative of this camp in holding that a driver not listed on a rental agreement has no "right to exclude" because he has "no cognizable property interest in the rental vehicle." *Kennedy*, 638 F.3d at 165. Accordingly, in the Third Circuit's view, as its decision in this case reflects, an unlisted driver generally has no reasonable expectation of privacy in a rental car. *Id.* at 167–68; Pet. App. 8a.

The Fourth Circuit has reached the same conclusion, grounding its analysis on the lack of a direct relationship between the unlisted driver and the rental company. *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994). In *Wellons*, the Fourth Circuit held that an unlisted driver of a rental car "had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights." *Id.* at 119. The court emphasized that, although the defendant "may well have had [the renter's] permission to drive the automobile, he did

not have the permission of Hertz Corporation, the owner of the automobile." *Id*. at 119 n.2.

The Fifth Circuit's analysis is much the same. That court has held that an unlisted driver lacked a reasonable expectation of privacy in a rental car because the "express terms of the rental agreement" prohibited unauthorized drivers. *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990); *accord United States v. Seeley*, 331 F.3d 471, 472 (5th Cir. 2003).[3]

Similarly, the rule in the Tenth Circuit is that an unlisted driver does not have a reasonable expectation of privacy in a rental car because he does not have the rental company's permission to operate the car. *United States v. Obregon*, 748 F.2d 1371, 1374–75 (10th Cir. 1984). The Tenth Circuit relied among other things on the district court's finding in that case that "Defendant made no showing that any arrangement had been made with the rental car company that would have allowed him to drive the car legitimately." *Id*. at 1374; *see also United States v. Roper*, 918 F.2d 885, 887 (10th Cir. 1990) (following

[3] In *United States v. Kye Soo Lee*, the Fifth Circuit held that a driver had a reasonable expectation of privacy in a rental vehicle because he had the renter's permission to drive it. 898 F.2d 1034, 1038 (5th Cir. 1990). Shortly after that decision, however, the Fifth Circuit decided *United States v. Boruff*, which reached the opposite conclusion. 909 F.2d at 117. The Fifth Circuit has since distinguished *Kye Soo Lee* on the ground that it did not mention whether the terms of the rental agreement prohibited use by unlisted drivers and has made clear that *Boruff* controls. *Seeley*, 331 F.3d at 472 n.1. Here, as in *Seeley*, the terms of the rental agreement purported to prohibit unlisted drivers. C.A. App. 73–74; *see also Seeley*, 331 F.3d at 472.

Obregon); *United States v. Edwards*, 632 F.3d 633, 641 (10th Cir. 2001) (same).

At least two state courts of last resort see things this way, too. Like the Third Circuit, the Montana Supreme Court holds that an unlisted driver of a rental car does not have a right to exclude others and therefore "does not have a reasonable expectation of privacy" in the car. *State v. Hill*, 94 P.3d 752, 758 (Mont. 2004). As the Montana Supreme Court has reiterated, "in [*Hill*] … we held that an unauthorized driver of a rental car does not have a reasonable expectation of privacy in the contents of the car." *State v. Clark*, 198 P.3d 809, 816 (Mont. 2008).

The Arkansas Supreme Court follows a similar approach. That court holds that a renter's permission to a third person to drive a car is "not effective [if] the [rental] contract did not allow for other drivers to use the vehicle." *Wilson v. State*, 2014 Ark. 8, 9 (2014).[4]

Despite his exclusive control over the rental car and Reed's permission for him to use it, these jurisdictions would not deem Byrd to have a reasonable expectation of privacy in the rental car and therefore would not permit him to challenge the troopers' search, in direct conflict with the rule in the Eighth

[4] The Wyoming Supreme Court, citing *Wellons*, *Boruff*, and *Obregon,* has also noted that "an unauthorized operator of a rental car generally … lacks standing." *Hembree v. State*, 143 P.3d 905, 909 (Wyo. 2006). But that decision was ultimately about the propriety of searches of containers held within a rental car, so we have not included it for purposes of setting out the underlying conflict.

and Ninth Circuits and the state courts in Nebraska, New Mexico, Texas, and Oklahoma.

C. The Sixth Circuit applies a totality of the circumstances test to determine whether an unlisted driver has a reasonable expectation of privacy in a rental car.

There is also a third approach to the question presented. The Sixth Circuit applies a "totality of the circumstances" test to decide whether an unlisted driver has a reasonable expectation of privacy in a rental car. *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001). "In considering the reasonableness of asserted privacy expectations," that court has stated, "no single factor invariably will be determinative." *Id.* (citing *Rakas*, 439 U.S. at 152 (Powell, J., concurring)). The court there examined, among other factors, whether the unlisted driver had a driver's license, whether he had permission to use the car, and the nature of his relationship to the renter. *Id.* Because the unlisted driver had a license and permission from the renter, who was his wife, the court concluded that he had standing to challenge the search.[5]

Had Byrd been pulled over just across the Pennsylvania state line, in Ohio, he almost certainly would have been allowed to contest the search, as he had a

[5] Outside of the rental context, the First Circuit has applied a "totality of the circumstances" approach to determine whether a driver who borrowed a car from the owner's boyfriend had a reasonable expectation of privacy in the car. *See United States v. Sanchez*, 943 F.2d 110, 113–14 (1st Cir. 1991).

driver's license, permission to drive the car, and a familial connection to the renter. C.A. App. 188 (Reed is the mother of Byrd's children).

II. The Question Presented Is Important And Recurring, And The Division Of Authority Is Deeply Entrenched.

A. The question presented is important.

Resolution of the question presented is critical for two reasons.

First, car rentals are pervasive and growing, affecting millions of drivers. In 2016, traditional rental-car companies had over 2.3 million cars in their inventory, Auto Rental News, *2016 U.S. Car Rental Market*, http://tinyurl.com/loeucnj, up from 1.8 million in 2008, Auto Rental News, *2008 U.S. Car Market*, http://tinyurl.com/k5xzn49. In 2015 alone, there were over 115 million car rentals in the United States. Canadean, Car Rental in the US to 2020: Databook, 24 (Published August, 2016, Reference Code: TT1972DB). And car-sharing services, like Zipcar, that allow drivers to rent cars by the hour are becoming increasingly popular. Neal E. Boudette, *Car-Sharing, Social Trends Portend Challenge for Auto Sales*, Wall St. J., Feb. 3, 2014, http://tinyurl.com/l3xrvsy (noting threefold increase in carsharing membership between 2008 and 2014). As short-term car rental becomes an increasingly attractive alternative to car ownership, the frequency of police stops involving an unlisted driver will only increase. It also bears emphasis, as this case illustrates, that some police even

target rental cars for stops and warrantless searches. C.A. App. 88–90.[6]

Second, the split has created an unworkable rift both *between* jurisdictions and *within* jurisdictions. The division of authority subjects interstate drivers to arbitrary fluctuations in their Fourth Amendment rights. Under the law as it currently stands, the Fourth Amendment's protections are elusive. An unlisted driver who has the renter's permission to drive a rental car will be deemed to have a reasonable expectation of privacy in the car if he begins his trip in Kansas City, *Missouri*. *See Best*, 135 F.3d at 1225. But as soon as he crosses into Kansas City, *Kansas*, his vital protection against a warrantless and suspicionless search of his car vanishes. *See Roper*, 918 F.2d at 887–88. The intercircuit conflict here is untenable in light of this Court's admonition that the "search and seizure protections of the Fourth Amendment" should not "vary from place to place and from time to time." *Whren v. United States*, 517 U.S. 806, 815 (1996).

Worse still, in at least five states, the rules in the *same* place, at the *same* time are conflicting. In Texas, Oklahoma, and New Mexico, an unlisted driver, with the renter's consent to drive a rental car, has a rea-

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[6] In one notorious example, Maryland state police stopped Judge Robert Wilkins (then a public defender) and his family while they were returning from a funeral in a rental car. Robert L. Wilkins et al., *Addressing Declining Rights in an Era of Declining Crime*, 9 J.L. & Pol'y 215, 232–35 (2001). The officers unsuccessfully sought consent and then searched the car anyway because, in their view, "there were many problems with rental cars and drugs on the highway." *Id.* at 234.

sonable expectation of privacy in the car, if he is prosecuted in *state* court, but not if he is prosecuted in *federal* court. *Compare Parker*, 182 S.W.3d at 927; *Bass*, 300 P.3d at 1196; *Van Dang*, 120 P.3d at 834–35 *with Seeley*, 331 F.3d at 472; *Roper*, 918 F.2d at 887–88. The same is true in Arkansas and Montana, except the state and federal courts' positions are reversed. *Compare Best*, 135 F.3d at 1225; *Thomas*, 447 F.3d at 1198–99 *with Wilson*, 2014 Ark. at 9; *Clark*, 198 P.3d at 816.

How is an officer stopping a rental car in these jurisdictions to know whether he can conduct a search? Follow the law of the jurisdiction that hired him? Follow the less intrusive rule—or the most permissive? Predict whether the driver is more likely to be guilty of a state crime or a federal one? In the latter scenario, what is an officer to do about the substantial overlap between state and federal enforcement of certain crimes, particularly drug and weapons crimes? Byrd himself was initially charged in state court and later charged in federal court. *See supra* at 7.

B. The question presented is recurring.

The question presented arises with great frequency. Beyond the decisions described above, numerous lower state court, federal district court, and unpublished federal circuit court decisions have grappled with the issue and continue to do so. Some of these decisions follow the position adopted by the

Eighth and Ninth Circuits;[7] others reflect the rule in the Third, Fourth, Fifth, and Tenth Circuits;[8] and still

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[7] *See, e.g.*, *United States v. Pinex*, 129 F. Supp. 3d 982, 990 (D. Mont. 2015); *United States v. King*, 560 F. Supp. 2d. 906, 914 (N.D. Cal. 2008); *United States v. Virden*, 417 F. Supp. 2d 1360, 1368 n.8 (M.D. Ga. 2006); *United States v. Rios*, No. 05-40005-02-SAC, 2005 U.S. Dist. LEXIS 31992, at *18–19 (D. Kan. Dec. 2, 2005); *United States v. Little*, 945 F. Supp. 79, 83 (S.D.N.Y. 1996); *State v. Wasbotten*, 372 P.3d 1016, 1018 (Ariz. Ct. App. 2016); *People v. Ruffin*, 734 N.E.2d 507, 512–13 (Ill. App. Ct. 2000); *State v. Webber*, No. 90,899, 2005 WL 283585, at *3–4 (Kan. Ct. App. Feb. 4, 2005); *Commonwealth v. Artis-Bryan*, No. 1225 CR 2012, 2013 Pa. Dist. & Cnty. Dec. LEXIS 521, at *9–10 (Pa. Ct. C.P. Monroe Aug. 13, 2013).

[8] *See, e.g.*, *United States v. Mebrtatu*, 543 F. Appx. 137, 139–40 (3d Cir. 2013); *United States v. Norman*, 465 F. Appx. 110, 115–16 (3d Cir. 2012); *United States v. Luster*, 324 F. Appx. 224, 225 (4th Cir. 2009); *United States v. Mincey*, 321 F. Appx. 233, 239–41 (4th Cir. 2008); *United States v. Wenqiang Bian*, No. 16-20026-CR-WILLIAM/SIMONTON, 2016 WL 2342631, at *7 (S.D. Fla. Apr. 29, 2016); *United States v. Woodley*, No. 13-113, 2015 WL 5136173, at *4–5 (W.D. Pa. Sept. 1, 2015); *United States v. Mobley*, No. 3:14cr122, 2014 WL 6791425, at *7 n.22 (E.D. Va. Nov. 25, 2014); *United States v. Van Praagh*, No. 1: (S3) 14 Cr. 189 (PAC), 2014 WL 4954162, at *3, 7 (S.D.N.Y. Oct. 1, 2014); *United States v. Akinola*, Crim. Action No. 11.310(JLL), 2013 WL 1103702, at *8–9 (D.N.J. Mar. 15, 2013); *United States v. McCoy*, No. 2:12-CR-218 TS, 2013 WL 3289124, at *2 (D. Utah Jun. 27, 2013); *United States v. Goode*, Criminal Nos. 11-204-1, 11-204-2, 11-204-3, 2011 WL 6302553, at *3 (E.D. Pa., Dec. 16, 2011); *United States v. Sutmiller*, No. CR-11-171-C, 2011 WL 2636542, at *2–3 (W.D. Okla. Jul. 6, 2011); *United States v. Vaughns*, 202 F. Supp. 2d 572, 576 (E.D. Tex. 2001); *United States v. Taddeo*, 724 F. Supp. 81, 84–85 (W.D.N.Y. 1989); *State v. Josey*, No. H14HCR040584348, 2005 WL 1754677, at *5 (Conn. Super. Ct. May 24, 2005); *Colin v. State*, 646 A.2d 1095,

others are aligned with the Sixth Circuit's analysis.[9] Some address the question without endorsing a particular approach.[10] And these decisions likely represent only a small fraction of the instances in which police have conducted warrantless and suspicionless searches of rental cars on the theory that the driver had no reasonable expectation of privacy in the vehicle, as cases usually do not get to court unless the police uncover evidence of a crime.

C. The division of authority is deeply entrenched.

There is no need at this point for additional percolation in the lower courts. The division of authority is now firmly entrenched.

The three camps outlined above present completely different ways of thinking about the problem. On one side of the split, courts hold that a renter's

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1099–1100 (Md. Ct. Spec. App. 1994); *State v. Toolen*, 945 S.W.2d 629, 632 (Mo. Ct. App. 1997).

[9] *See, e.g.*, *United States v. Delille*, No. 2:15-cr-88, 2016 WL 236464, at *8–9 (D. Vt. Jan. 19, 2016); *United States v. Hermiz*, 42 F. Supp. 3d 856, 864–65 (E.D. Mich. 2014); *United States v. Warren*, 39 F. Supp. 3d 930, 933–34 (E.D. Mich. 2014); *United States v. Resa*, 552 F. Supp. 2d 720, 730 (E.D. Tenn. 2008); *State v. Cutler*, 159 P.3d 909, 912–13 (Idaho Ct. App. 2007).

[10] *See, e.g.*, *United States v. Alexis*, 169 F. Supp. 3d 1303, 1310 (S.D. Fla 2016); *United States v. Dennis*, No. 06-650-01, 2007 WL 2173394, at *3, 6 (E.D. Pa. Jul. 27, 2007); *Cooper v. State*, 162 So. 3d 15, 18 (Fla. Dist. Ct. App. 2014); *Commonwealth v. Jones*, 874 A.2d 108, 120 (Pa. Super. Ct. 2005).

permission gives an unlisted driver a reasonable expectation of privacy in the car, either due to the unlisted driver's possession of the car, *Thomas*, 447 F.3d at 1199, or based on an analogy to an owner's consent to use the car, *Parker*, 182 S.W.3d at 927. On another side of the divide, courts have ruled that a reasonable expectation of privacy in a rental car requires an unbroken chain of authorization that can be traced to the holder of the vehicle's legal title. *Kennedy*, 638 F.3d at 165; *Wellons*, 32 F.3d at 119 n.2. On the third side, the Sixth Circuit believes each case must be evaluated on the totality of the circumstances. *Smith*, 263 F.3d at 586. This disagreement is fundamental and will not dissipate. As noted, courts now openly acknowledge the split of authority. *See, e.g.,* Pet. App. 8a; *Thomas*, 447 F.3d at 1196–97; *Sanford*, 806 F.3d at 958; *Nelson*, 807 N.W.2d at 779; *supra* at 11. And recent decisions have added no new analysis. Instead, they have merely canvassed the opposing camps and chosen a side. *See, e.g.*, *Van Praagh*, 2014 WL 4954162, at *7; *Nelson*, 807 N.W.2d at 778–80.

Only this Court can decide which of these conflicting views is correct. "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459–60 (1981). This Court's intervention is therefore necessary to provide much-needed guidance to lower courts, law enforcement officers, and interstate travelers.

III. This Case Is An Ideal Vehicle For Answering The Question Presented And Resolving The Conflict.

This case presents a perfect opportunity for this Court to determine whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed on the rental agreement. Here, unlike earlier cases raising the same issue, that question is directly presented and outcome-determinative.

Although federal and state courts regularly address cases involving similar facts—and although the issue will likely arise with increasing frequency as car rentals and carsharing become more prevalent—the question presented is often shielded from this Court's review, because it is not outcome-determinative. One reason for that is that the police sometimes call the rental company to request the company's permission to search or impound the vehicle. *See Mincey*, 321 F. Appx. at 236 & n.2 (rental company gave officers consent to search the car), *cert. denied*, 558 U.S. 945 (2009) (No. 08-1482); *Kennedy*, 638 F.3d at 161–62, 168 (rental company gave police consent to impound the car), *cert. denied*, 565 U.S. 1110 (2012) (No. 10-11094); *People v. Bower*, 685 N.E.2d 393, 395 (Ill. App. Ct. 1997) (same), *cert. denied*, 524 U.S. 905 (1998) (No. 97-1720); *see also Luster*, 324 F. Appx. at 225, 226 (impoundment and inventory search), *cert. denied*, 558 U.S. 1077 (2009) (No. 09-5734). While the defendant in such cases may nonetheless be permitted to challenge the search, the challenge will often confront the government's additional argument that the police obtained valid consent from the car's legal owner. *See*

Woodley, 2015 WL 5136173, at *4–5; *Hill*, 94 P.3d at 758–59.

Here, by contrast, the troopers did not call the rental company to seek authorization for the search. Instead, the sole justification for the search was Byrd's asserted consent, which he disputed both in the district court and in the Court of Appeals. And the Third Circuit's only basis for rejecting that challenge was that Byrd lacked a reasonable expectation of privacy in the rental car because he was not listed in the rental agreement.[11]

In addition, in many instances it will be unclear from the record whether the defendant actually had the renter's permission to drive the car. *See, e.g.*, *Thomas*, 447 F.3d at 1199 (rejecting Fourth Amendment challenge because the defendant "failed to show that he received [the renter's] permission to use the car"); *Van Dang*, 120 P.3d at 834–35 (same). But here the district court specifically found, and the government has not disputed, that Reed gave Byrd permission to drive it. Pet. App. 13a. The reasonable-expectation-of-privacy question was thus controlling and dispositive of the Court of Appeals' analysis.

[11] The government has not argued, and no court has found, that the troopers had probable cause to search Byrd's car, let alone that they had probable cause to search the trunk.

IV. The Third Circuit Erred In Holding That An Unlisted Driver Cannot Have A Reasonable Expectation Of Privacy In A Rental Car.

The Third Circuit's holding here means that the police may search a rental vehicle virtually any time it is operated by an unlisted driver, without any particular suspicion of criminal activity and without a court-issued warrant. That approach "implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345. The Third Circuit's holding is fundamentally misguided and should not be allowed to stand.

Under the proper analysis, an unlisted driver has standing to challenge the search of a rental car so long as he has the renter's permission to operate the car. No one would infer from the fact that a driver is not listed on a rental agreement that he has thereby offered his belongings up for "public inspection." *California v. Greenwood*, 486 U.S. 35, 41 (1988). Instead, a driver who has the renter's permission to drive a rental car exercises "dominion" and "control" over the car and has the authority to "exclude others," whether or not he is listed on the rental agreement. *Rakas*, 439 U.S. at 149. And the driver's control and authority to exclude others give him an expectation of privacy in the car that society accepts as reasonable.

A. The decision below disregards expectations of privacy that society accepts as reasonable.

The decision below relies exclusively on the Third Circuit's previous decision in *Kennedy*, 638 F.3d 159. In that case, the court opined that an unlisted driver of a rental car has "no cognizable *property* interest" in the car or an "accompanying right to exclude" because he does not have the owner's permission to operate the car. *Id.* at 165 (emphasis added). On this basis, the Court of Appeals concluded that "society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company." *Id.* at 167–68.

This reasoning does not withstand scrutiny. The terms contained in standard form contracts are not useful proxies for society's "widely shared social expectations" of privacy. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). Indeed, a commercial actor's efforts to encourage or discourage certain conduct have nothing to do with the expectations of privacy that society is prepared to accept as reasonable.

Suppose, for example, that an apartment lease generally permits subleasing but prohibits subleasing to anyone with pets—perhaps to prevent cosmetic damage to the apartment's interior. For an owner wishing to protect her property, such a lease condition is perhaps reasonable. But it is also manifestly irrelevant to society's expectations of privacy. No court anywhere would believe that the police may conduct a warrantless and suspicionless search of an apartment

simply because the subtenant has a Yorkshire terrier. And that is true even though the property owner may have *expressly forbidden* any subtenants who own pets—and therefore has the right to evict the subtenant. Likewise, when Dad hands Junior the keys to his car, the kid has an expectation of privacy no matter whether Dad owns the car or has a long-term lease that prohibits drivers under 21.

The same is true with respect to a lease's duration. A hotel guest does not forfeit her privacy interest if she sleeps through her alarm and fails to check out on time. *See Dorais*, 241 F.3d at 1129 ("[T]he mere expiration of the rental period … does not automatically end a lessee's expectations of privacy [in a motel room]."); *United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986) (guest's reasonable expectation of privacy extended past check-out time). Nor does a renter lose a reasonable expectation of privacy in a rental car the moment that the rental agreement expires. *Henderson*, 241 F.3d at 647 (reasonable expectation of privacy survived expiration of car lease); *United States v. Cooper*, 133 F.3d 1394, 1400–02 (11th Cir. 1998) (same). In each of these contexts, the reasonable expectation of privacy persists—despite the owner's right to evict—just as it persists when a home renter overstays his lease term (or fails to pay rent on time) and therefore can be evicted at the landlord's option.

As in each of these contexts, the contractual requirement that rental-car drivers be listed in the rental documents is unrelated to social norms concerning who has a reasonable expectation of privacy and when. Instead, that term is the product of rental-

car companies' desire to protect their capital investment in their vehicles, minimize their insurance premiums, and collect additional-driver fees.

And, as in the hypothetical scenario involving the apartment lease, making the verbiage of rental contracts dispositive of the Fourth Amendment inquiry would yield absurd results. Car-rental contracts often purport to extinguish a driver's right to operate the car upon *any* breach of the contract's terms, *see, e.g.*, *State v. $129,970.00*, 161 P.3d 816, 821 (Mont. 2007) (rental contract allowed owner to "repossess the car anytime it is ... being used to violate … the terms of [the rental] agreement"), including infractions as minor as refueling the vehicle with the wrong kind of gas or not wearing a seatbelt. *See United States v. Walton*, 763 F.3d 655, 665 (7th Cir. 2014) (noting these examples as conduct that would make a rental agreement voidable). Yet because "[s]ociety is willing to recognize a privacy interest in a car even if the driver does not mind her P's and Q's at all times," *id.*, no one seriously thinks that a renter loses her reasonable expectation of privacy merely by violating any of these boilerplate provisions.

A proper inquiry into the actual norms of rental-car use would show that rental cars driven by unlisted drivers are commonplace and that society accepts as reasonable an unlisted driver's expectation of privacy in the car. There are many entirely quotidian reasons that a driver may not be listed on a rental agreement. The driver's flight might have arrived later than the renter's, so he was not present at the time of the rental at the airport; he might not have anticipated his need to drive; he might be old enough to drive, but

not old enough to rent a car; he might not own a credit card; or he might be too broke to afford the additional-driver fee. And the potential reasons that an unlisted driver may subsequently need to get behind the wheel of a rental car are equally numerous and equally ordinary. The driver might need to fill in for a renter who is sick or fatigued; he might be more comfortable than the renter driving at night or in heavy rain; he might drive while the renter maps the route; or he might serve as the designated driver after his colleague has had one cocktail too many.

The average person would be surprised to learn that, in the Third Circuit and other like-minded jurisdictions, the police are free to conduct a warrantless and suspicionless vehicle search in *any* of these scenarios. When you place your effects in the trunk of a car and get behind the steering wheel, you think your effects are safe from prying eyes and the intrusions of others. You don't authorize strangers to rummage through your belongings. And you certainly don't think you're inviting the police to conduct a search without a warrant and without any suspicion of a crime. All of that is true whether or not you are listed on the rental car agreement.

The Constitution's protections do not turn on compliance with fine print in boilerplate agreements. The scope of the Fourth Amendment should therefore not be pinned to the vagaries of commercial contract formation.

B. The decision below contravenes this Court's teaching that a reasonable expectation of privacy does not require a property right in the area searched.

The Third Circuit's analysis also goes awry by requiring a challenger to have a *property* right in the area searched in order to have a right to exclude. That approach contravenes this Court's instruction that "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control" in this area, and "[e]xpectations of privacy protected by the Fourth Amendment … need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." *Rakas*, 439 U.S. at 143 & n.12. Indeed, this Court has held that a person who "*possesses*" or "*controls*" property has a right to exclude and therefore has a reasonable expectation of privacy on that basis. *Id.* (emphasis added).

In *Rakas*, this Court held that several passengers, who had "*neither* a property *nor* a possessory interest in the automobile," did not have a reasonable expectation of privacy in a car and therefore could not challenge a search of the car. *Id.* at 148–49 (emphases added). The Court distinguished that setting from cases involving defendants with possessory interests in the area searched. *Id.* Social guests in a home, for example, have no *property* interest in the area searched but nonetheless have reasonable expectations of privacy because they *control* the area and may exclude most others. *Id.* at 149 (citing *Jones v. United States*, 362 U.S. 257 (1960)). Likewise, callers in pub-

lic phone booths have reasonable expectations of privacy with respect to the content of their conversations, despite the fact they neither lease nor own the booths. *Id*. (citing *Katz v. United States*, 389 U.S. 347 (1967)); *see also Thomas*, 447 F.3d at 1198 ("a defendant who lacks an ownership interest may still have standing to challenge a search, upon a showing of 'joint control' or 'common authority' over the property searched."). And this is true even though the premises' owner maintains a right to exclude that is *superior* to the challenger's. *See Rakas*, 439 U.S. at 149 ("Except with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it.").

An unlisted driver has a reasonable expectation of privacy in the car for the same reasons, even though he has no contractual right to drive or property right in the car. *Cf. Rakas*, 439 U.S. at 154 (Powell, J., concurring) (distinguishing "between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an automobile"). Just as the overnight guest in *Jones* "had permission to use the apartment," "had a key to the apartment," and "kept possessions in [it,]" *Rakas*, 439 U.S. at 149, Byrd had the renter's permission to drive, kept possessions in the car, and exercised exclusive dominion and control over it as soon as he left the rental company's facility. C.A. App. 194 (Reed turned the car over to Byrd immediately after leaving the rental-car facility).

Moreover, Byrd's possession of the rental car was "lawful"—i.e., not "wrongful"—as this Court has used those terms. *Rakas* explained its use of those terms

by reference to *criminal* offenses, not mere breaches of private agreements. *See* 439 U.S. at 141 n.9 (noting that "wrongful" presence at the scene of a search, such as a person driving a stolen car, would not enable a defendant to object to a search); *id.* at 143 n.12 (noting that a burglar's presence at a house is "wrongful" (so not "lawful") and would therefore not confer standing to challenge a search of the house). Byrd's possession of the rental car was therefore not "wrongful" in the relevant sense because, as the courts have explained, operating a rental car without the rental company's permission does not by itself constitute a crime. *E.g.*, *Smith*, 263 F.3d at 587; *Cooper*, 133 F.3d at 1402; *United States v. Riazco*, 91 F.3d 752, 754 (5th Cir. 1996).

In overly focusing its analysis on the absence of a "property" right, the Third Circuit's approach thus undermines important constitutional protections and misapprehends this Court's precedents. The Court should grant the petition and hold that a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 16-1509

UNITED STATES OF AMERICA
v.
TERRENCE BYRD,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. No. 1-14-cr-00321-001)
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit L.A.R.
34.1(a)
December 6, 2016

Before: FISHER*, KRAUSE and MELLOY**,
Circuit Judges.
(Filed: February 10, 2017)
OPINION***

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* Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

** Honorable Michael J. Melloy, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

*** This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

MELLOY, *Circuit Judge*.

Terrence Byrd entered a conditional guilty plea to charges of possessing heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and possessing body armor as a prohibited person in violation of 18 U.S.C. § 931(a)(1). He reserved the right to appeal several suppression rulings. He now appeals, arguing: (1) the initial traffic stop was pretextual and the District Court clearly erred in accepting the officer's testimony describing a traffic violation; (2) officers impermissibly extended the stop; and (3) the District Court erred by holding Byrd lacked standing to challenge the vehicle search. We affirm the judgment of the District Court.

I.

Byrd was driving a rental car on a four-lane divided highway near Harrisburg, Pennsylvania. A state police officer parked in the median recognized Byrd's car as a rental and noticed the driver's seat was reclined to an unusual degree such that the driver was not clearly visible. The officer followed Byrd and eventually pulled Byrd over. The officer claimed he observed Byrd violate a state law requiring drivers to limit use of the left-hand lane to passing maneuvers. 75 Pa. Con. Stat. § 3313(d)(1)(i)-(ii).[1] According to the officer, Byrd passed two trucks

[1] The code section at issue provides:

(d) Driving in right lane.—

(1) Except as provided in paragraph (2) and unless otherwise posted, upon all limited access highways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the

with room to move into the right lane between the trucks, but he failed to do so, remaining instead in the left lane for the extended passing procedure.

When the officer approached Byrd's stopped car and asked for Byrd's license and the rental agreement, Byrd appeared nervous and conspicuously avoided opening a center console even though Byrd had difficulty locating the requested documents. Eventually, Byrd produced an interim New York driver's license that did not include a photo. Byrd also produced the rental agreement. The rental agreement did not list Byrd as the renter or as a permissive driver.

The officer recognized the vehicles were stopped at an unsafe location and asked Byrd to move his car. Byrd complied. When the officer checked Byrd's license number, date of birth, and name, the computer returned the name James Carter. A second officer then arrived, and the officers continued to attempt to sort out the identification information. In doing so, they discovered an outstanding New Jersey warrant that indicated New Jersey did not request other jurisdictions to arrest Byrd for extradition. The officers determined James Carter was an alias, and also discovered Byrd's criminal history included drug,

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> right-hand lanes when available for traffic except when any of the following conditions exist:
>
> (i) When overtaking and passing another vehicle proceeding in the same direction.
>
> (ii) When traveling at a speed greater than the traffic flow.

75 Pa. Cons. Stat. § 3313(d)(1)(i)-(ii).

weapon, and assault charges. The officers requested their dispatching center to contact New Jersey officials to confirm New Jersey did not wish Pennsylvania to arrest Byrd for extradition. When attempting to clarify Byrd's identity, aliases, and criminal history, the officers experienced connection difficulties with their computer.

The officers then returned to Byrd's vehicle, asked him to exit the car, and asked him about the warrant and his alias. They also asked if he had anything illegal in the car. Byrd appeared nervous and said he had a "blunt" in the vehicle. The officers then asked Byrd for permission to search the vehicle, but stated they did not need his consent because he was not listed on the rental agreement. The officers assert that Byrd gave his consent. They subsequently found heroin and body armor in the trunk of the car and arrested Byrd.

In the District Court, Byrd moved to suppress the evidence resulting from the stop and the search, challenging the initial stop, the extension of the stop, and the search. Evidence submitted at a hearing included a dash-cam video and audio recording that began while the first officer was following Byrd's car. The video included thirty seconds prior to the officer's activation of his lights and extended through the entire stop. Audio captured discussions between the two officers attempting to identify Byrd, determining whether to act upon the New Jersey warrant, and determining whether a search could be justified. The video and audio, together, illustrate the timing of the various tasks involved with the stop. For example, Byrd stopped his car at the second location as per the

officer's request approximately nine minutes into the video. And, the officers returned to Byrd's car and asked him to exit the car approximately thirty-nine minutes into the video. At the hearing, the first officer testified it was standard practice to check with out-of-state officials to confirm whether they want the Pennsylvania officers to make an arrest even if a warrant indicates no out-of-state arrest is requested.

The District Court determined that Byrd, as the sole occupant of a rented car, had no expectation of privacy because he was not listed on the rental agreement. The District Court also found the first officer credible and accepted the officer's characterization of Byrd's passing maneuver as sufficient to justify the initial stop. Finally, the District Court held the officers developed additional reasonable suspicion of other criminal activity during the stop and all of the officers' inquiries were related to the initial stop or the newly developed suspicion.

II.

We review de novo the legal question of whether a search or seizure is reasonable under the Fourth Amendment. *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006). We review for clear error the District Court's underlying factual determinations. *Id*. at 395.

The Fourth Amendment permits a traffic stop based on reasonable suspicion that a traffic violation has occurred regardless of the officer's subjective motivations for making the stop. *Id*. at 397 ("[T]he … reasonable suspicion standard applies to

routine traffic stops."); *United States v. Mosley*, 454 F.3d 249, 252 (3d Cir. 2006) ("[T]he Supreme Court established a bright-line rule that any technical violation of a traffic code legitimizes a stop, even if the stop is merely pretext for an investigation of some other crime."). Byrd argues it was clear error for the District Court to accept the officer's testimony that Byrd violated the left-lane statute. To support his argument, Byrd characterizes the dash-cam video as disproving the officer's assertion that Byrd had sufficient time and room to return to the right lane after passing the first truck and before passing the second truck. Byrd also attacks the officer's interpretation of the Pennsylvania statute, arguing that forcing drivers to repeatedly change lanes will lead to "highway chaos."

We reject Byrd's argument. The video shows Byrd in the left lane approaching and passing the second truck, but it does not show how long Byrd was in that lane or how much distance or space existed between trucks. Because the video does not disprove the officer's assertion, we find no basis to disturb the District Court's factual determination. Further, we reject Byrd's policy-based statutory-interpretation argument. The officer was required to possess reasonable suspicion of a traffic violation, not an understanding of the law akin to that of a seasoned jurist. *See Delfin-Colina*, 464 F.3d at 399. And, although the traffic violation at issue seemingly was minor, a stop based on the perceived violation passes constitutional muster.

Regarding the duration of the stop, officers conducting a traffic stop must act with reasonable

diligence in carrying out permissible tasks related to the purpose for the stop. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) ("it [is] appropriate to examine whether the police diligently pursued [the] investigation" (alterations in original) (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985))). Confirming the identity of the driver of a rental vehicle, sorting out aliases, and asking a driver to move to a more safe location are all permissible tasks. *See, e.g., id.* at 1615 ("[A]n officer's mission includes ordinary inquiries incident to [the traffic] stop …. [S]uch inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." (citation omitted)). An officer does not lack diligence merely because these tasks are slightly delayed by computer issues or because a driver's use of an alias and lack of photo identification complicate the identification process. Here, the several explanations set forth by the District Court are well supported and demonstrate that the officers acted with reasonable diligence in conducting the stop.

Further, "[o]nce a valid traffic stop is initiated, 'an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation.'" *United States v. Lewis*, 672 F.3d 232, 237 (3d Cir. 2012) (quoting *United States v. Givan*, 320 F.3d 452, 458 (3d Cir. 2003)). The first officer's observation of Byrd's nervous avoidance of the center console coupled with Byrd's non-photographic identification, his use of an alias, and the absence of

his name on the rental agreement gave rise to additional suspicion of other criminal activity. Moreover, we have little trouble concluding that, upon discovering a valid outstanding warrant from another state, an officer may extend a stop to inquire as to whether that other state wants the driver arrested for extradition. *Cf. Utah v. Strieff*, 136 S. Ct. 2056, 2061-62 (2016) (noting that the discovery of a valid, outstanding warrant is an intervening development that breaks the causal chain between an illegal stop and the subsequent discovery of incriminating evidence). While the duration of the stop in this case may have been long, it was not constitutionally unreasonable.

Finally, Byrd argues he did not consent to the vehicle search. A circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement. *See United States v. Kennedy*, 638 F.3d 159, 165-67 (3d Cir. 2011) (collecting cases). The Third Circuit has spoken as to this issue, however, and determined such a person has no expectation of privacy and therefore no standing to challenge a search of the vehicle. *See id.* at 167-68 ("We therefore hold that society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company."). As such, we need not address Byrd's arguments concerning his lack of consent for the search.

We will affirm the judgment of the District Court.

APPENDIX B

FILED 08/26/15

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs. NO. 1:14-CR-321

TERRENCE BYRD,

Defendant.

MEMORANDUM

I. Introduction

We are considering a motion to suppress filed by Defendant Terrence Byrd. (Doc. 28). Byrd was indicted on December 17, 2014, for distribution and possession with intent to distribute heroin, and possession of body armor. (Doc. 1). In his motion, Byrd challenges the validity of an automobile search and asks that we suppress the fruits of said search. For the following reasons, we will deny the motion.

II. Background

On September 17, 2014, at approximately 2:30 p.m.,[1] Terrence Byrd's girlfriend,[2] Latasha Reed, rented a grey Ford Fusion from the Avis Budget car rental facility in Wayne, NJ. (Govt's Ex. 1). Per the rental company's policy, all additional drivers must be identified in the contract and must present their license for verification. (Doc. 47 at 4-5). Reed paid for the rental and was the only individual who signed the rental agreement. (*Id.).* Nevertheless, Byrd began driving the car immediately upon leaving the rental facility. (Doc. 43 at 112).

Later that day, around 6:00 p.m., Pennsylvania State Police Trooper David Long was monitoring traffic along Interstate 81 in Harrisburg when he noticed a grey rental vehicle being driven suspiciously. (Doc. 43 at 10). Byrd, the operator of the vehicle, was driving with his hands in the 10:00 and 2:00 position, and his seat was reclined so that he was not clearly visible through the driver's side window.[3] (*Id.* at 11). Although these are not violations of the Motor Vehicle Code, Trooper Long's suspicion was aroused, so he pulled out from his stationary location

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[1] The exact time of the car rental is disputed. The timestamp on the rental contract is 10:26 a.m., but Byrd testified that the vehicle was not picked up until the afternoon.

[2] The exact nature of Byrd and Reed's relationship is also disputed. The parties agree that Reed is the mother of "most" of Byrd's children. (Doc. 43 at 110; Doc. 51 at 4). At one point, Byrd referred to her as a "friend," (Doc. 43 at 16), but later claimed that they were engaged. (Doc. 43 at 110).

[3] The trooper referred to this as driving behind "the B pillar." (Doc. 43 at 10).

and began to follow the vehicle. (*Id.* at 12). After witnessing Byrd drive in the left lane for some time without overtaking any vehicles in the right lane (a so-called "left lane violation"),[4] Trooper Long initiated a traffic stop. (*Id.* at 12-13). When Long approached the vehicle, he noticed that Byrd was the only occupant and that he was extremely nervous. (*Id*. at 15). Long asked to see a copy of the rental agreement and Byrd's driver's license. Byrd explained that he did not have his license because he had washed it, and provided an interim license that did not have a photo identification. (Doc. 43 at 16). After searching for a short time, Byrd also produced the rental agreement, and explained that his "friend" had rented the vehicle. (*Id*.). When Long returned to his own vehicle, he noted that the sun was causing an unsafe glare on their location, so he asked Byrd to move the traffic stop to a different location. (*Id*. at 18). Once in the new location, Long ran Byrd's name, date of birth, and license number through his computer, but received results for an individual named James Carter. (*Id.* at 18). At this time, Long's partner, Trooper Martin, arrived and the two of them began to sort out Byrd's identity. They discovered that Byrd was wanted on an active warrant in New Jersey for a parole violation. (*Id*. at 20). The troopers placed a call to determine whether New Jersey would extradite for the parole violation. (*Id*.). They also checked Byrd's criminal history, which revealed prior charges for weapons and drug violations, and assault. (Doc. 43 at 21). After approximately 35 minutes, the troopers confirmed that "James Carter" was an alias, that Terrence Byrd

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[4] This is a violation of 75 Pa C.S § 3313(d)(1).

was the defendant's true name, and that New Jersey would not extradite for the warrant. (*Id.* at 22).

The troopers returned to Byrd and asked him to step out of the car. (Doc. 43 at 22). By this time, Byrd was extremely nervous, "not able to stand still[,] … [and was] dancing back and forth, pacing back and forth …." (*Id.* at 23). The troopers asked Byrd about the warrant and the alias, and explained the reason for the delay. They also asked if there was anything illegal in the car, and asked to see Byrd's tongue. (*Id.*). Byrd showed the troopers his tongue and stated that he had smoked a "blunt"[5] in the vehicle. (Doc. 34-9 at 8). The troopers asked for permission to search the car, but told Byrd that because the car was a rental and Byrd's name was not on the agreement they did not need his permission to search. (Doc. 43 at 82). At first, Byrd offered to get the blunt himself, which the troopers refused. Eventually, Byrd consented to the search. (*Id.* at 24). While Long was searching the car, Byrd admitted to Martin that he had recently used cocaine. Shortly thereafter, Trooper Swope, an off-duty Pennsylvania State Trooper, stopped to see if Long and Martin needed back-up. When the troopers opened the car's trunk they found a bulletproof vest. (*Id.* at 25). Martin then told Byrd that he was going to detain him, at which point Byrd began to run. Trooper Swope took Byrd

[5] Defendant claims for the first time in his brief that the "blunt" he was referring to was a "Philly Blunt cigar" and that the troopers misunderstood him to mean that he had smoked a marijuana cigarette. (Doc. 54 at 23). However, neither the troopers nor Defendant testified to this fact at the suppression hearing.

into custody after a short chase. Byrd then admitted that there was heroin in the car. (*Id*. at 26).

III. Discussion

A. Standing to Contest the Search

The Third Circuit has clearly instructed that, generally, unauthorized drivers of rental vehicles lack standing to challenge a search thereof. *See United States v. Kennedy*, 638 F.3d 159, 165 (3d Cir. 2011) ("[A]s a general rule, the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy."). This general rule can be overcome by "extraordinary circumstances," such as where the unauthorized driver is "also the husband of the woman who had rented the car four days earlier and had … 'personally contacted the rental car company … and reserved the vehicle in his name, using his own credit card, which was billed for the rental.'" *Id.* at 167 (quoting *United States v. Smith*, 263 F.3d 571 (6th Cir. 2001)). In *Kennedy*, the Third Circuit explained, none of these additional factors were present; the defendant was simply granted permission to use the car by the renter, and therefore, he had no expectation of privacy in the car. *Id.* at 168. The instant situation is identical to that presented in *Kennedy*. Byrd was merely given permission by Reed to drive the car–he was not a party to the rental agreement and he did not pay for the rental. Byrd's assertions that he "had an

expectation of privacy … [because] [a]ny other finding[ ] ignores the real world reality that people of limited means cannot afford to add the extra driver to the contract …" and that "[a]n expectation of privacy should not be dependent on a defendant's pocket book …[,]" are both unavailing and inaccurate under established Fourth Amendment jurisprudence. Because Byrd had no expectation of privacy in the vehicle, and thus no standing to challenge the search, his motion will be denied.

B. The Traffic Stop

Even if we could find that extraordinary circumstances exist to bestow an expectation of privacy upon Byrd, we nevertheless find that the traffic stop and ensuing search were lawful. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches are *per se* unreasonable unless an exception to the warrant requirement applies. *Horton v. California*, 496 U.S. 128, 133 (1990). One such exception is the *Terry* stop. Under *Terry*, an officer may conduct "a brief investigatory stop when he or she has a reasonable articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "'[I]n a traffic-stop setting, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a particular vehicular violation.'" *United States v. Kennedy*, No. 13-240, 2014 U.S. Dist. LEXIS 159802, at *24 (3d Cir. Nov. 13, 2014) (quoting *Arizona v.*

Johnson, 555 U.S. 323, 327 (2009)). If a police officer observes an individual commit a traffic violation, he or she is permitted to stop that vehicle. *See United States v. Bonner*, 363 F.3d 213, 216 (3d Cir. 2004) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1997) ("A police officer who observed a violation of state traffic laws may lawfully stop the car committing the violation.")).

Byrd argues that Trooper Long stopped him because he was driving with his seat reclined and his hands in the 10:00 and 2:00 positions on the wheel. (Doc. 29 at 3). Byrd contends that because neither of these things constitute a traffic violation, the stop and resulting search was illegal. However, Long testified during the preliminary hearing, and again at the suppression hearing, that he stopped Byrd because he was driving in the left lane without overtaking any vehicles in the right lane, a violation of 75 Pa. C.S. § 3313(d). (Doc. 43 at 13). Because Long personally witnessed the violation, he had cause to initiate the traffic stop. Accordingly, the stop itself was lawful.[6]

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[6] The majority of Defendant's 30-page supplemental brief (Doc. 54)—which the court authorized so that the parties could address the issue of standing—was dedicated to Defendant's claim that he should not have been stopped for the left lane violation in the first place. Defendant insists that he was not impeding traffic and that the video from the trooper's dash camera clearly demonstrates this fact. However, Trooper Long testified repeatedly at the suppression hearing that the violation that formed the basis of the stop was not captured on the video. (Doc. 43 at 42, 44-45). We will credit the trooper's testimony.

C. The Search

"Upon making a lawful traffic stop of a vehicle, police officers are granted the authority 'to detain the automobile and its occupants pending an inquiry into a vehicular violation.'" *Kennedy*, *supra* at *26 (quoting *Johnson*, 555 U.S. at 327). In particular, officers have the discretion to: "(1) order the driver and passengers to get out of the vehicle; or (2) remain in the vehicle while the officers investigate the violation." *Bonner*, 363 F.3d at 216. "Once a valid traffic stop is initiated, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of the inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation." *United States v. Lewis*, 672 F.3d 232, 237 (3d Cir. 2012).

To determine whether the post-stop search is lawful, we employ a two-part analysis. First, we examine whether the officer was "aware of specific and articulable facts which gave rise to reasonable suspicion under the totality of the circumstances[.]" *Kennedy*, *supra* at *28 (citing *United States v. Davis*, 430 F.3d 345, 353 (6th Cir. 2005)). Reasonable suspicion "can be established with information that is different in quantity or content than that required for probable cause." *United States v. Ramos*, 443 F.3d 304, 308 (3d Cir. 2006). According to the Third Circuit:

> Reasonable suspicion, while not rigidly defined, may be the result of the following factors: "specialized

> knowledge and investigative inferences," "personal observation of suspicious behavior," information from sources that prove to be reliable, and information from sources that—while unknown to the police—prove by the accuracy and intimacy of the information provided to be reliable at least as to the details contained within that tip.

United States v. Brown, 448 F.3d 239, 247 (3d Cir. 2006). In particular, "the Court must defer to the 'officer's knowledge of the nature and nuances of the type of criminal activity the officer has observed.'" *Kennedy*, *supra* at *29 (quoting *United States v. Robertson*, 305 F.3d 164, 166 (3d Cir. 2002)).

Second, we determine whether "the degree of intrusion [was] reasonably related in scope to the situation at hand given [the officer's] suspicions and surrounding circumstances[.]" *Id.* at *28. To do this, we look to the totality of the circumstances surrounding the stop. *See id.* at *29-30. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez v. United States*, 135 S. Ct 1609, 1615 (2015). "An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something

other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration." *Arizona v. Johnson*, 555 U.S. 323, 325 (2009).

In this case, when Long approached Byrd's vehicle, he noted that Byrd was "visibly nervous[,]" "shaking[,]" and had a difficult time obtaining his identification. (Doc. 29-1 at 5). Byrd could not produce a government-issued photo ID, and was driving a vehicle rented in someone else's name. In addition to an active arrest warrant, Byrd had a criminal history involving drugs and weapons, and had used an alias in the past. All of these factors together constitute reasonable suspicion that Byrd was engaging in some type of criminal activity. Long's brief questions regarding whether there was anything illegal in the car—which took approximately two minutes out of the entire 50-minute encounter—did not "measurably extend" the stop. His inquiries were reasonably related in scope to the situation at hand. Accordingly, the stop and resulting search were lawful.

IV. Conclusion

For the reasons above, Defendant's motion will be denied. We will issue an appropriate order.

/s/ William W. Caldwell
William W. Caldwell
Unites States District Judge