No. 16-1371

In the Supreme Court of the United States

TERRENCE BYRD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner had a reasonable expectation of privacy in a rental car when petitioner was not an authorized driver under the rental agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2017 WL 541405. The opinion of the district court (Pet. App. 9a-18a) is not published in the Federal Supplement but is available at 2015 WL 5038455.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2017. The petition for a writ of certiorari was filed on May 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possession of body armor by a

prohibited person, in violation of 18 U.S.C. 931(a)(1). He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-8a.

1. On September 17, 2014, petitioner's girlfriend rented a Ford Fusion from an Avis Budget (Avis) car rental office in New Jersey. Pet. App. 10a. According to Avis's policy, additional drivers may drive a rental car if they are (1) the renter's spouse, (2) the renter's co-employee, or (3) another person who appears in person at the time of the rental and signs an authorized driver form. C.A. App. 73. The rental agreement expressly provides that "permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement." *Ibid.* (capitalization omitted). Petitioner's girlfriend paid for the rental car and was the only person to sign the rental agreement. Pet. App. 10a. Nevertheless, petitioner began driving the car immediately upon leaving the Avis facility. *Ibid.*

Later that evening, a police officer stopped petitioner for a traffic violation. Pet. App. 10a-11a. During the stop, the officer asked petitioner for his driver's license and the rental agreement. *Id.* at 3a. Petitioner produced an interim New York driver's license without a photo and the Avis rental agreement, which did not list him as the renter or an authorized driver. *Ibid.*

When the officer checked petitioner's identification, the computer returned a different name, James Carter. Pet. App. 3a. The officer and a second officer ultimately determined that James Carter was an alias and that petitioner had a lengthy criminal history that included drug and weapons charges. *Id.* at 3a-4a. The officers returned to the rental car and asked petitioner about his alias and whether he had anything illegal in the car.

Id. at 4a. Petitioner replied that he had a "blunt" (meaning marijuana, C.A. App. 101) in the car. Pet. App. 4a. The officers then asked for petitioner's consent to search the vehicle, though they also stated that they did not need his consent because he was not an authorized driver under the rental agreement. *Ibid.* According to the officers, petitioner consented to the search. *Ibid.* As the search began, petitioner also admitted to recently using cocaine. *Id.* at 12a.

The officers searched the car and found body armor and 49 bricks of heroin in the trunk. Pet. App. 4a; C.A. App. 58. After a failed attempt to flee on foot, petitioner was arrested. Pet. App. 12a-13a.

2. A federal grand jury in the United States District Court for the Middle District of Pennsylvania returned an indictment charging petitioner with one count of possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of possession of body armor by a prohibited person, in violation of 18 U.S.C. 931(a)(1). Indictment 1-3.

Petitioner moved to suppress the evidence seized from the rental car on the ground that the search of the car had violated the Fourth Amendment. Pet. App. 9a. After conducting an evidentiary hearing, the district court denied the motion. *Id.* at 18a. It held that petitioner lacked a reasonable expectation of privacy in the rental car because, regardless of whether his girlfriend gave him permission to drive the car, "he was not a party to the rental agreement and he did not pay for the rental." *Id.* at 13a. The court also ruled that the officers complied with the Fourth Amendment in initiating the traffic stop and inquiring about petitioner's identity and potential illegal activity. *Id.* at 14a-18a.

3. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. 1a-8a. Relying on circuit precedent, the court held that petitioner could not object to the search of the rental car because a driver who is not named in the rental agreement has no reasonable expectation of privacy in the rental car. *Id.* at 8a (citing *United States* v. *Kennedy*, 638 F.3d 159, 167-168 (3d Cir. 2011), cert. denied, 565 U.S. 1110 (2012)). Accordingly, the court did not address whether petitioner in fact consented to the search. *Ibid.*[1]

ARGUMENT

Petitioner renews his contention (Pet. 10-34) that he had a reasonable expectation of privacy in the rental car despite the fact that he was an unauthorized driver under the rental agreement. The court of appeals' decision is correct, and it does not implicate any square conflict among the courts of appeals, but instead only a relatively shallow conflict with two state courts. Moreover, this case would be a poor vehicle for resolving the question presented because, even if petitioner could properly bring a Fourth Amendment challenge to the search of the rental car, the challenge would fail. This Court has repeatedly denied review in cases presenting the question whether an unauthorized driver has a reasonable expectation of privacy in a rental car,[2] and it should do the same here.

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[1] The court of appeals also held that the traffic stop itself complied with the Fourth Amendment. Pet. App. 5a-8a. Petitioner does not challenge that holding.

[2] See *Goode* v. *United States*, 134 S. Ct. 2291 (2014) (No. 13-8577); *Kennedy* v. *United States*, 565 U.S. 1110 (2012) (No. 10-11094); *Luster* v. *United States*, 558 U.S. 1077 (2009) (No. 09-5734); *Mincey* v. *United States*, 558 U.S. 945 (2009) (No. 08-1482).

1. a. An individual's ability to "claim the protection of the Fourth Amendment depends * * * upon whether" he "has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978).[3] A court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure "invaded [the defendant's] legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980); see also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).

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; *i.e.*, one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas*, 439 U.S. at 144 n.12); see, *e.g.*, *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990). Although legitimate expectations of privacy "need not be based on a common-law interest in real or personal property," the Court "has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment." *Rakas*, 439 U.S. at 144 n.12. Indeed, in two recent cases, the Court has relied on property concepts to hold that the government conduct at issue constituted a search under

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[3] Although the Court has analyzed questions concerning an individual's ability to claim Fourth Amendment protections under the rubric of "standing," the Court stated in *Rakas* that "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." 439 U.S. at 140.

the Fourth Amendment. See *Florida* v. *Jardines*, 133 S. Ct. 1409, 1413-1418 (2013) (drug sniff around curtilage of home was an unlawful trespass); *United States* v. *Jones*, 565 U.S. 400, 404-405, 411-412 (2012) (installation of a GPS tracking device on a vehicle was an unlawful physical intrusion into the vehicle).

In this case, the court of appeals correctly held that petitioner did not have a legitimate expectation of privacy in the rental car because he was an unauthorized driver under the rental agreement. As the owner of the car, Avis could authorize others to drive the car. Persons authorized to use a car by its lawful owner generally acquire an expectation of privacy in the car. See, *e.g.*, *United States* v. *Miller*, 821 F.2d 546, 548-549 (11th Cir. 1987). That is because authorized users of a car have lawful possession and may legitimately expect that—within the scope of authority granted to them by the car's owner—they can exclude others from the car. See *Rakas*, 439 U.S. at 144 n.12 ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others]."); *United States* v. *Walker*, 237 F.3d 845, 849 (7th Cir. 2001) ("A person listed as an approved driver on a rental agreement has an objective expectation of privacy in the vehicle due to his possessory and property interest in the vehicle.").

Petitioner, by contrast, did not lawfully possess the rental car because Avis did not authorize him to drive it. The consent of petitioner's girlfriend could not validly authorize petitioner to drive the car because the rental agreement did not grant her the power to let others drive the vehicle. See C.A. App. 73. In fact, the contract expressly advised that "permitting an unauthorized driver to operate the vehicle is a violation of the

rental agreement." *Ibid.* (capitalization omitted). Because petitioner's girlfriend lacked the authority to allow persons not mentioned in the rental agreement to drive the car, petitioner could not reasonably expect to be entitled to control the car and exclude others from it. As such, despite any subjective expectations on his part, petitioner had no expectation of privacy in the car that "society is prepared to recognize as 'reasonable.'" *Rakas*, 439 U.S. at 144 n.12 (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

b. Petitioner's counterarguments are mistaken. Petitioner contends (Pet. 27, 33) that a driver who has the renter's permission to drive a vehicle also has the "authority" to exclude others, but he provides no support for that contention. Here, the contract between Avis and petitioner's girlfriend gave her the authority to drive the car, but it expressly stated that the contract would be void if she allowed another person to drive the car. C.A. App. 73. Petitioner's girlfriend thus had no legal authority to allow petitioner to drive the car or to empower him to exclude others from the car. To the contrary, as an Avis representative testified, if Avis discovers that the renter of an Avis vehicle has loaned the vehicle to an unauthorized person, then the contract is void and Avis "would recover the vehicle." *Id.* at 207.

Petitioner responds (Pet. 32-34) that such reasoning places an undue emphasis on property concepts. But, as explained above (pp. 5-6, *supra*), property interests remain relevant (although not dispositive) in determining whether a defendant has a reasonable expectation of privacy entitled to protection under the Fourth Amendment. Although individuals may sometimes demonstrate a reasonable expectation of privacy without a

possessory interest (Pet. 32), they must exercise "legitimate[]" authority over the relevant premises or effects. *Rakas*, 439 U.S. at 143 n.12. The mere contention (Pet. 33-34) that petitioner's operation of the rental car was not criminal does not affirmatively establish his legitimate authority over the vehicle, particularly in light of the contract expressly stating otherwise.

Petitioner further argues (Pet. 28-29) that an unauthorized driver's expectation of privacy in a vehicle is similar to the privacy rights of subtenants who violate certain terms of their rental agreements (such as prohibitions on pets), or hotel guests who overstay their visits. But the analogy is inapt because individuals have a lesser expectation of privacy in vehicles than in homes. See *Rakas*, 439 U.S. at 148; *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). Thus, even if a tenant or guest retains some expectation of privacy in a residence or hotel room, despite having violated a specific contractual term, it does not follow that an unauthorized driver of a rental car has an equivalent expectation of privacy in that rental car. In addition, the risk of damage to property or to third parties from an unauthorized driver of a rental car is far more significant than the minor real-property violations petitioner hypothesizes. Rental car companies require information about the identities of all drivers in order to reduce the risk of damage to the vehicle or to third parties by persons without a valid driver's license, young or unskilled drivers, and drivers with poor driving habits or records. Under those circumstances, society does not recognize as reasonable and legitimate a practice by which the driver of a rental car colludes with another person to conceal from the rental company the identity of an unauthorized driver.

See *United States* v. *Kennedy*, 638 F.3d 159, 167-168 (3d Cir. 2011), cert. denied, 565 U.S. 1110 (2012).

2. a. Contrary to petitioner's contention (Pet. 12-18), no square conflict exists among the courts of appeals. The decision below is consistent with decisions from the Fourth, Fifth, and Tenth Circuits, all of which have concluded that an unauthorized driver of a rental car lacks a legitimate expectation of privacy in the car, even when the renter purports to give him permission to drive it. See, *e.g.*, *United States* v. *Wellons*, 32 F.3d 117, 119 (4th Cir. 1994), cert. denied, 513 U.S. 1157 (1995); *United States* v. *Seeley*, 331 F.3d 471, 472 & n.1 (5th Cir. 2003) (per curiam); *United States* v. *Boruff*, 909 F.2d 111, 117 (5th Cir. 1990), cert. denied, 499 U.S. 975 (1991); *United States* v. *Roper*, 918 F.2d 885, 886-888 (10th Cir. 1990); *United States* v. *Obregon*, 748 F.2d 1371, 1374-1375 (10th Cir. 1984). The Arkansas and Montana Supreme Courts have taken the same view. See *Wilson* v. *State*, 2014 Ark. 8, 9 (2014); *State* v. *Clark*, 198 P.3d 809, 816 (Mont. 2008). In addition, the Second Circuit has held that an unauthorized and *unlicensed* driver of a rental car may not contest a search of the rental car. *United States* v. *Lyle*, 856 F.3d 191, 201-202 (2017).

The decision below is also consistent with decisions from the First and Sixth Circuits. The Sixth Circuit, like the court of appeals in this case, applies the "general rule" that "an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle," and also recognizes that extraordinary circumstances can make an individual not specifically listed on a rental agreement "the de facto renter." *United States* v. *Smith*, 263 F.3d 571, 586-587 (2001)

(emphasis omitted); see *Kennedy*, 638 F.3d at 165 (stating "a general rule" but also noting an "extraordinary circumstances" exception). In *Smith*, the court explained that the "truly unique" facts of the case made Smith "unlike any of the drivers in any of [the other] cases": Smith "personally had a business relationship with the rental company," reserved the car in his name, and provided the credit card that paid for the rental, and, although his wife ultimately picked up the car, she did so using the reservation number given to Smith. 263 F.3d at 586. In the Sixth Circuit's view, those facts made Smith the "de facto renter." *Id.* at 587 (emphasis omitted).

The First Circuit in *United States* v. *Sanchez*, 943 F.2d 110 (1991), similarly left open the possibility that unusual facts could support a reasonable expectation of privacy by an unauthorized renter of a vehicle. But *Sanchez* refused to recognize the driver's claimed privacy interest where "at best [he] was operating the vehicle with the authority of a person who himself had been given the authority to operate the vehicle by somebody else," *id.* at 113 (citation omitted), and had failed to demonstrate "a more intimate relationship with the car's owner or a history of regular use of the [car]—from which a presumption of permission [from the owner] could be drawn," *id.* at 114. Petitioner does not contend that his case involves any unusual facts that might lead either the First or Sixth Circuit to conclude that he had a legitimate privacy interest in the rental car.[4]

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[4] *United States* v. *Cooper*, 133 F.3d 1394 (11th Cir. 1998), concerned an authorized driver who continued to drive the car after the rental contract had expired. *Id.* at 1397, 1400. Because that person had personally rented the car and was listed as the authorized driver on the contract, and because the company previously had

Petitioner contends (Pet. 12-13) that Eighth and Ninth Circuit decisions support his position, but the decisions he cites do not reflect a division of authority warranting this Court's review. In *United States* v. *Thomas*, 447 F.3d 1191 (2006), the Ninth Circuit rejected the defendant's claim that, although he was not an authorized driver under the rental agreement, he possessed a privacy interest allowing him to challenge the search of a rental car. *Id.* at 1199. The court held that Thomas had no reasonable expectation of privacy in the car because he failed even "to show that he received [the renter's] permission to use the car." *Ibid.* Although the court purported to reject the view that an individual can never challenge a search of a rental car if he is not an authorized driver under the rental agreement, *id.* at 1198, the court was not presented with facts that required it to determine whether such a challenge should be permitted. See *id*. at 1199 ("An unauthorized driver *may* have standing to challenge a search if he or she has received permission to use the car.") (emphasis added). And in the 11 years since it decided *Thomas*, the Ninth Circuit has not incorporated those statements into a holding permitting an unauthorized driver to challenge the search of a rental car.[5]

Petitioner's reliance (Pet. 12) on the Eighth Circuit fares no better. In *United States* v. *Muhammad*, 58 F.3d

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been lenient with respect to overdue rentals, *ibid.*, the court of appeals concluded that he was in a "materially different" position than an unauthorized driver. *Id.* at 1400.

[5] Petitioner also cites (Pet. 13) *Lyall* v. *City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), but that case concerned a Fourth Amendment claim by event organizers who had received permission to use a warehouse from the person leasing the space, see *id.* at 1181-1182, not a claim by an unauthorized driver of a rental car.

353 (1995), the defendant "presented absolutely no evidence that he had been granted permission to drive the car." *Id.* at 355. The court of appeals thus rejected his claim of a legitimate expectation of privacy. *Ibid.* The court noted that the parties agreed that "the defendant must present at least some evidence of consent or permission from the lawful owner/renter to give rise to an objectively reasonable expectation of privacy," *ibid.*, but in the absence of any such evidence, the court had no occasion to announce any holding on the showing that would support such an expectation. Later, in *United States* v. *Best*, 135 F.3d 1223 (1998), the Eighth Circuit remanded a case in which the "district court [had] not rule[d] on the standing issue," citing *Muhammad* in dicta stating that "[i]f Thomas [the renter] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing." *Id.* at 1225. That remand does not definitively resolve the nature of the relationship required to establish such a privacy interest.

In view of the courts' rejection of the defendants' claims in *Muhammad* and *Thomas*, and the remand in *Best*, neither the Eighth Circuit nor the Ninth Circuit can be said to have resolved the issue in this case in a defendant's favor. Those decisions therefore do not reflect a square conflict on the question presented that would warrant this Court's review.

b. Petitioner also contends that four state courts have held that an unauthorized driver of a rental car has standing to challenge a search of that car if he had permission from an authorized driver to drive the car. Pet. 13-14 (citing *State* v. *Nelson*, 807 N.W.2d 769, 778-779 (Neb. 2011); *State* v. *Van Dang*, 120 P.3d 830, 834-835 (N.M. 2005); *State* v. *Bass*, 300 P.3d 1193, 1196 (Okla.

Crim. App. 2013); *Parker* v. *State*, 182 S.W.3d 923, 925-927 (Tex. Crim. App. 2006)). Petitioner's reliance on *Van Dang* and *Parker* is misplaced.

Neither *Van Dang* nor *Parker* establishes that the courts in the relevant states would reach a result different from the result below on the facts of this case. In *Van Dang*, the New Mexico Supreme Court remarked that the unlisted driver of a rental car can have standing if he presents evidence that he had the listed driver's permission to drive the car, but its actual holding was that the defendant lacked standing because he did not show that he had such permission. See 120 P.3d at 834-835. And in *Parker*, the Texas Court of Criminal Appeals held that courts should "consider[] the circumstances surrounding the use of the vehicle," 182 S.W.3d at 927, which will necessarily differ from case to case. In describing the relevant circumstances that supported standing in that case, the court noted that "nothing in the record * * * indicates that [the defendant] knew about the terms of the car rental agreement or that he knew the agreement did not list him as an authorized driver." *Ibid.* In this case, by contrast, petitioner admitted that he took possession of the rental agreement, C.A. App. 190, which clearly did not list his name, *id.* at 193.

Particularly in the absence of a clear divide among the federal courts of appeals, the relatively shallow division of authorities indicated by the other two state-court decisions does not warrant this Court's review.

3. In any event, this would not be a suitable vehicle for addressing the question presented, because even if petitioner could challenge the search in this case, his challenge would fail.

a. First, petitioner's Fourth Amendment claim would fail because he consented to the search of the rental car. See *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). The district court, in its recitation of the facts, specifically noted that petitioner "consented to the search," Pet. App. 12a, and the record fully supports that determination. At the suppression hearing, the officer who searched the car testified that petitioner gave his express consent. C.A. App. 102. A video recording of the stop appeared consistent with the officer's testimony. See Gov't C.A. Br. 41 n.11. And petitioner did not testify at the hearing about whether he gave the officers consent. See C.A. App. 187-191. Although the court of appeals declined to address this alternative ground for denying petitioner's motion to suppress, Pet. App. 8a, it would provide a strong basis for upholding the search on remand.

b. Second, even if petitioner had standing to object to the search and even if he had not validly consented, there was probable cause to search the car without a warrant. Police officers may search a vehicle without a warrant so long as they have probable cause that would support a warrant. See *United States* v. *Ross*, 456 U.S. 798, 829-830 (1982). Here, petitioner's admission that he had a "blunt"—meaning marijuana, see C.A. App. 101; see also Pet. 6-7—somewhere in the car alone established "probable cause to believe that contraband [wa]s concealed somewhere within" the vehicle. *Ross*, 456 U.S. at 800. Further, the police also knew that petitioner was subject to an outstanding warrant; he had a lengthy record of drug and weapons charges; he behaved nervously during the stop; and he admitted to recently using cocaine. Pet. App. 3a-4a, 11a-12a; C.A. App. 57-58. That information strengthened the officers' cause to believe

that the car (including the trunk) contained drugs. Although the district court's standing decision pretermitted any discussion of probable cause, see Pet. 26 n.11, the officers' clear probable cause to search the car would provide yet another justification for the search, in the event of a remand. For that reason as well, further review is unwarranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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