NOTES

RESOLVING A THREE-WAY CIRCUIT SPLIT: WHY UNAUTHORIZED RENTAL DRIVERS SHOULD BE DENIED FOURTH AMENDMENT STANDING

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INTRODUCTION

Most Americans believe their constitutional rights are consistent throughout the fifty states; in most situations, they are correct. However, there is at least one area of the law where a person's rights vary depending on which federal circuit he or she is in: Fourth Amendment rights involving a rental car. This is surprising, considering the magnitude of the American car rental industry. In 2008, there were approximately 20,000 rental car locations throughout the United States.[1] These outlets rented almost two million cars, and accounted for almost twenty-two billion dollars in yearly revenue.[2] The car rental industry has grown significantly over the past decade because of the increased neighborhood, non-airport market, and the overall increased use of rental cars.[3] People no longer rent cars just as a temporary replacement for an owned car in the repair shop.[4] Rather, people now rent cars for a variety of purposes[5]: families decide to take short weekend trips as opposed to longer multi-week vacations,[6] people are tired of their cars and want the feeling of a new car for a few days,[7] environmentalists try to reduce car ownership, fuel use, and pollution by only using a car when necessary,[8] and some travel for business.[9] With the increased use of rental cars and the large numbers of people traveling long distances with these vehicles,[10] the disparate treatment in the federal courts is troubling.

A rental car driver can be placed into one of two categories: an authorized driver or an unauthorized driver. An authorized rental driver, one whom the rental company allows to drive the vehicle, is treated uniformly throughout the

[1] According to market data for the U.S. car rental market, there were 19,881 rental car locations. *2008 U.S. Car Rental Market: Fleet, Locations, and Revenue*, AUTO RENTAL NEWS, http://www.fleet-central.com/resources/ARNFB09UScarrentalMarket.pdf (last visited April 5, 2009).

[2] In 2008, the average number of rental cars in service was 1,812,690. *Id.* The estimated revenue for the industry was $21.9 billion. *Id.*

[3] Matt Bach, *Car Renters Find Local Deals for "Leisure" Wheels*, FLINT J., Aug. 5, 2007, at E1.

[4] Roger Yu & Chris Woodyard, *Car Rentals Get Closer to Home*, USA TODAY, Jan. 24, 2006, at 8B.

[5] *Id.*

[6] Bach, *supra* note 3.

[7] *See id.*

[8] Bill Donahue, *Cars You Drive for Just a Little While, Then It's Their Turn*, N.Y. TIMES, May 17, 2000, at H10 (explaining car-sharing programs in numerous cities as "short-term car-rental agencies with a public purpose: reducing car ownership and, by extension, fuel use and pollution").

[9] *See* Andrea Siedsma, *Corporate Travelers Drive Business at Small Airports*, SAN DIEGO BUS. J., Aug. 8, 2005, at 3 (explaining that rental car companies have "built business[es] at small airports" to "cater to a growing number of . . . executives who have grown frustrated with . . . larger commercial airports").

[10] *See* Bach, *supra* note 3.

circuits for Fourth Amendment purposes – the driver has standing to challenge the constitutionality of searches of the rental car.[11] The dispute arises when there is a search involving an unauthorized rental driver – a driver who does not have the permission of the rental company.[12] The federal circuits are split three ways over whether such a driver has standing to challenge the constitutionality of the search.[13] The Tenth Circuit has adopted a rule denying unauthorized drivers automatic standing to challenge a search.[14] The Eighth Circuit has adopted the opposite rule.[15] There, an unauthorized driver can meet the standing requirement to challenge a search so long as he or she has the permission of the authorized driver.[16] Finally, the Sixth Circuit has adopted a different standard, requiring judges to balance five independent factors to determine if the unauthorized driver warrants standing to challenge the search.[17] Thus, a driver's Fourth Amendment constitutional rights are treated differently depending on where in the country the driver is, even though the "law" – the text of the Fourth Amendment and the Supreme Court's interpretation of that text – is identical. The Supreme Court has declined to resolve this three-way circuit split. To complicate matters further, some other circuits have adopted positions from sister circuits,[18] while the rest have not yet adopted an approach to the issue.

This Note, arguing that all the circuits should adopt a single approach, more specifically the Tenth Circuit approach mentioned above, proceeds in five

[11] *See infra* Part IV.A (describing Fourth Amendment status of non-unauthorized drivers).

[12] Every rental company has a stated policy about drivers other than the person renting the car. *See, e.g.*, Budget.com, Budget Fastbreak Service Terms and Conditions Effective for Reservations Made on or After January 15, 2009, ¶ 9, http://www.budget.com/budgetWeb/html/en/profile/master_printable.html (Jan. 2, 2009) ("A violation of this paragraph, which includes use of the car by an unauthorized driver, will automatically terminate your rental . . . . It is a violation of this paragraph if . . . [y]ou use or permit the car to be used . . . by anyone other than an authorized driver . . . ."); Hertz.com, Additional Driver Not Signed On Contract, https://hertz.custhelp.com (search "Additional Driver Not Signed On Contract"; select "Additional Driver Not Signed On Contract") (last visited Apr. 6, 2009) ("Failure to add someone on the contract could result in the car being impounded if stopped by the police.").

[13] *See infra* Part IV.

[14] *See* United States v. Roper, 918 F.2d 885, 887-88 (10th Cir. 1990); *infra* Part IV.B.1.

[15] *See* United States v. Muhammad, 58 F.3d 353, 355 (8th Cir. 1995) (stating that defendant needed to provide evidence of "consent or permission from the lawful owner/renter").

[16] *See infra* Part IV.C.1.

[17] *See* United States v. Smith, 263 F.3d 571, 586-87 (6th Cir. 2001); *infra* Part IV.D.

[18] The Fourth and Fifth Circuits have explicitly adopted the Tenth Circuit approach. United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994); United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990). The Ninth Circuit has explicitly adopted the Eighth Circuit approach. United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006).

stages. Part I details the development of the Fourth Amendment. It discusses the origin of the Amendment, as well as the development of the exclusionary rule and its recent limitations. Part II focuses on the Fourth Amendment's applicability to automobiles and the automobile's unique place in Fourth Amendment jurisprudence. Part III explains the development of the standing requirement and its integration into the general Fourth Amendment inquiry. Next, Part IV details the three-way circuit split, explaining the differing approaches courts take when determining whether an unauthorized driver has standing. Finally, Part V of this Note criticizes the approaches taken by the Sixth Circuit and the Eighth and Ninth Circuits before urging the adoption of the bright-line rule adopted by the Fourth, Fifth, and Tenth Circuits. This Note explains that the latter approach allows for consistent outcomes in the court system and easy application by police in the field. Moreover, it is consistent with the Fourth Amendment's grant of "[t]he right of the people to be secure . . . against unreasonable searches."[19] After responding to the criticisms of this approach, the Note concludes that this bright-line rule is the proper choice because it is the only current option that helps foster an effective and efficient Fourth Amendment jurisprudence in the car search context.

I. THE FOURTH AMENDMENT

A. *The Origin of the Amendment*

One of the most vital protections against unwarranted governmental intrusion is the Fourth Amendment. The Amendment states:

> 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.[20]

Adopted to prevent the continued use of writs of assistance and general warrants that was pervasive during the Pre-Revolutionary years, the Fourth Amendment's original purpose was to "prevent the use of governmental force to search a man's house, his person, his papers, and his effects; and to prevent their seizure against his will."[21] In order to claim a Fourth Amendment violation, one originally had to show a physical trespass.[22]

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[19] U.S. CONST. amend. IV.

[20] *Id.*

[21] Olmstead v. United States, 277 U.S. 438, 463 (1928). Various commentators have discussed the historical underpinnings of the Fourth Amendment. *See* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 1602-1791, at 1103-81 (1990) (providing an overview of colonial responses to writs of assistance and general warrants); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 560-71 (1999); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical*

In 1967, the Court's decision in *Katz v. United States*[23] created a broader view of the Fourth Amendment. In *Katz*, the petitioner was charged with transmitting betting information by telephone from Los Angeles to Miami and Boston.[24] FBI agents overheard the petitioner's end of a conversation that occurred inside a public telephone booth by attaching an electronic bugging device to the outside of the telephone booth.[25] The petitioner was convicted, and the Ninth Circuit affirmed the conviction because the recordings did not violate the Fourth Amendment.[26] The Supreme Court reversed the decision, explaining that the previously accepted trespass doctrine had "been so eroded by . . . subsequent decisions" and was thus "no longer . . . controlling."[27] Justice Stewart, writing for the Court, adopted a new standard – one focused on privacy – to exclude from evidence a wiretapped conversation even though no physical trespass had occurred.[28] According to Stewart, "the Fourth Amendment protects people, not places" and "what [a person] seeks to preserve as private . . . may be constitutionally protected."[29] This protection even covers "area[s] accessible to the public."[30] Justice Harlan, in concurrence, further explained *Katz*'s privacy approach as a two-step inquiry that includes both subjective and objective components.[31] First, "a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[32] Though the reach of Fourth Amendment protections has subsequently been limited, Harlan's two-part test is still the standard

Review, 77 B.U. L. REV. 925, 939-50 (1997) (discussing the shift from general search warrants to specific warrants in colonial America).

[22] *See Olmstead*, 227 U.S. at 464 (permitting wiretapping under the Fourth Amendment because law enforcement inserted recording devices without trespassing upon any property of the defendants); *see also* Goldman v. United States, 316 U.S. 129, 135 (1942) (holding the use of a detectaphone by government officials to hear conversations taking place in an adjacent room was not a violation of the Fourth Amendment because, as in *Olmstead*, there was no physical trespass).

[23] 389 U.S. 347, 359 (1967).

[24] *Id.* at 348.

[25] *Id.*

[26] *Id.* at 348-49.

[27] *Id.* at 353.

[28] *See id.* at 351-52 ("But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

[29] *Id.* at 351-52.

[30] *Id.* at 351.

[31] *Id.* at 361 (Harlan, J., concurring) (developing requirement from precedent).

[32] *Id.* at 361.

formulation for the purposes of Fourth Amendment privacy and for evaluating Fourth Amendment claims.[33]

B. *The Exclusionary Rule*

While the Fourth Amendment explicitly forbids unreasonable searches and seizures and requires warrants to be issued only on probable cause, it is silent regarding the consequences of a violation.[34] Neither the legislative history nor the congressional debates over the text of the amendment suggest Congress had a specific view on how a Fourth Amendment violation should be treated.[35]

The Supreme Court first described the remedy for federal courts in *Weeks v. United States*.[36] In *Weeks*, the defendant argued that government officers unlawfully entered a home and seized books, letters, papers, money, deeds, and other documents that incriminated the defendant.[37] The defendant requested the return of his property, but the court ordered the district attorney to return only materials "not pertinent" to the case.[38] The trial court admitted some of the challenged papers into evidence, and the defendant was convicted.[39] The Supreme Court held the evidence must be excluded because "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution."[40]

This adopted remedy is known as the exclusionary rule, which states that evidence obtained in violation of the Fourth Amendment must be suppressed in a subsequent trial.[41] This rule, however, originally only applied to "the Federal Government and its agencies" and not the "individual misconduct" of government officials.[42] States were not required to exclude evidence obtained in violation of the Fourth Amendment because the understanding was that the

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[33] *See, e.g.*, Minnesota v. Olsen, 495 U.S. 91, 97 (1990) (recognizing the Fourth Amendment standing for an overnight guest because he had "an expectation of privacy in the home that society is prepared to recognize as reasonable").

[34] As Leonard Levy explained, "Congress made no provision for the liability, civil or criminal, of federal officers who violated the amendment." LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 246 (1988).

[35] Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1371 (1983).

[36] 232 U.S. 383, 398 (1914).

[37] *Id.* at 387.

[38] *Id.* at 388.

[39] *Id.* at 387-89.

[40] *Id.* at 393.

[41] United States v. Calandra, 414 U.S. 338, 347 (1974) ("Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.").

[42] *Weeks*, 232 U.S. at 398.

Fourth Amendment, like the rest of the Bill of Rights, applied only to the federal government and not to the states.[43] The Court reiterated this limitation to the exclusionary rule over a strong dissent thirty-five years later in *Wolf v. Colorado*.[44] During Wolf's trial for a state offense, the trial court admitted evidence undisputedly obtained in violation of the Fourth Amendment.[45] The Supreme Court upheld the conviction, holding that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[46] The Court emphasized it was not overruling *Weeks*, and *Weeks* still applied to the federal government.[47] In the Court's view, it was up to individual states to determine the admissibility of evidence obtained through searches that violated the Fourth Amendment.[48] Moreover, the Court noted that even the jurisdictions that rejected the *Weeks* doctrine had "not left the right to privacy without other means of protection."[49]

The Court's decision not to impose an exclusionary rule on the states was short-lived. In *Mapp v. Ohio*,[50] the Supreme Court announced it was overruling *Wolf*.[51] After observing that California and other states'

[43] *See* Barron v. Mayor of Baltimore, 32 U.S. 243, 250 (1833) ("[The Bill of Rights] contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.").

[44] 338 U.S. 25, 26 (1949) ("The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration."). In dissent, Justice Murphy, joined by Justice Rutledge, condemned the Court's decision not to bind the states with *Weeks*'s holding. *Id.* at 41 (Murphy, J., dissenting) ("It is disheartening to find so much that is right in an opinion which seems to me so fundamentally wrong. . . . It is difficult for me to understand how the Court can go this far and yet be unwilling to make the step which can give some meaning to the pronouncements it utters. . . . For there is but one alternative to the rule of exclusion. That is no sanction at all.").

[45] *Id.* at 25-26 (majority opinion).

[46] *Id.* at 33.

[47] *See id.* (referring to prosecutions in a "State court for a State crime" as not requiring exclusion of evidence where an unreasonable search and seizure occurred).

[48] *Id.* at 31 (declining to "condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective").

[49] *Id.* at 30. These other remedies included, but were not limited to, private actions against the police and internal discipline of the police officers. *Id.* at 30-32 & nn.1-2 (surveying treatment of improper searches by jurisdictions that rejected *Weeks*, and referencing the opinion of Judge Cardozo in *People v. Defore*, 150 N.E. 585, 586-89 (N.Y. 1926)).

[50] 367 U.S. 643 (1961).

[51] *Id.* at 653 ("[T]he factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* Exclusionary rule . . . could not, in any analysis, now be deemed controlling.").

experiences with alternate remedies had been "worthless and futile,"[52] the Court held "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."[53] The Court reasoned that by "extending the substantive protections of due process to all constitutionally unreasonable searches – state or federal – it was logically and constitutionally necessary that the exclusion doctrine . . . be also insisted upon as an essential ingredient of the right."[54] "To hold otherwise," the Court reasoned, would be "to grant the right but in reality to withhold its privilege and enjoyment."[55] Though the Court imposed the exclusionary rule on the states, it subsequently held that exclusion of unconstitutionally obtained evidence is *not* a constitutional right, but rather a "judicially created remedy" designed to protect a person's Fourth Amendment rights through deterrence.[56]

C. *Limitations on the Exclusionary Rule*

Following its adoption in *Weeks*, and even more so since its applicability to the states in *Mapp*, the exclusionary rule has been controversial. The Court thus incorporated analyses of the social costs of the exclusionary rule into its Fourth Amendment jurisprudence.[57] Recently, the Court stated that exclusion "has always been [the Court's] last resort, not [its] first impulse."[58] In *United States v. Leon*,[59] for example, the Court created a good faith exception to the

[52] *Id.* at 652.

[53] *Id.* at 655.

[54] *Id.* at 655-56.

[55] *Id.* at 656.

[56] United States v. Calandra, 414 U.S. 338, 348 (1974).

[57] *See* Stone v. Powell, 428 U.S. 465, 494 (1976) (holding a state prisoner who was afforded a full and fair opportunity to litigate a Fourth Amendment claim may not obtain federal habeas corpus relief on the ground that unlawfully obtained evidence had been introduced at trial); *Calandra*, 414 U.S. at 350-52 (declining to extend the exclusionary rule to grand jury proceedings).

[58] Hudson v. Michigan, 547 U.S. 586, 591 (2006). In *Hudson*, the Court held that where the police executed a valid warrant but violated the knock-and-announce requirement, exclusion was inappropriate. *Id.* at 594 ("Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."). According to Justice Scalia, speaking for the majority, "the knock-and-announce rule protects human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Id.* Because this interest was *unrelated* to the seizure of evidence, the Court felt the exclusionary rule was "inapplicable" when officers fail to obey the Fourth Amendment's knock-and-announce requirement. *Id.* at 594-95. For a further discussion on the knock-and-announce requirement, see *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995), which holds that the knock-and-announce principle is woven into the Fourth Amendment's reasonableness inquiry.

[59] 468 U.S. 897 (1984).

exclusionary rule.[60] Under this exception, evidence obtained in violation of the Fourth Amendment can still be admitted at trial if the officer obtained the evidence in reliance on a search warrant he believed to be valid, even if the magistrate's determination of probable cause is later invalidated.[61] Justice White justified this exception on three grounds: first, exclusion was intended to deter police and not punish judges;[62] second, there was no evidence judges intentionally ignore the Fourth Amendment;[63] and third, exclusion would not have any deterrent effect on judges.[64]

The Court further expanded this good faith exception to cover more than judicial error in *Herring v. United States*.[65] In *Herring*, the Court held that the exclusionary rule did not apply in the case of a *police* recordkeeping error.[66] Following a search incident to arrest, which revealed an illegally possessed pistol in the defendant's car and methamphetamine on his person, a warrant clerk discovered that the outstanding arrest warrant should have been recalled, but was not due to law enforcement negligence.[67] The Court ruled the evidence was admissible even though the Fourth Amendment was violated, reasoning that the violation "does not necessarily mean that the exclusionary rule applies" and that the rule "is not an individual right" as "the benefits of deterrence must outweigh the costs."[68] The Court further held that in order "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[69] Determining that the evidence was admissible because exclusion would not sufficiently deter the negligent police mistakes found in the case, the Court stated that a criminal should not "go free because the constable has blundered."[70] As the exceptions to the exclusionary rule continue to mount, the rule's force and effect are further and further weakened.

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[60] *Id.* at 926 (creating a good faith exception to the exclusionary rule where the "officers' reliance on the magistrate's determination of probable cause was objectively reasonable").

[61] *Id.* at 922.

[62] *Id.* at 916.

[63] *Id.*

[64] *Id.* (referring to this as the "most important" basis for not applying exclusion to judges).

[65] 129 S. Ct. 695, 704 (2009) (stating that a criminal should not benefit because law enforcement is negligent).

[66] *Id.* (admitting evidence because "when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard . . . any marginal deterrence does not 'pay its way'" (citing *Leon*, 468 U.S. at 907-08)).

[67] *Id.* at 698-99.

[68] *Id.* at 700.

[69] *Id.* at 702.

[70] *Id.* at 704 (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.)).

II. THE AUTOMOBILE EXCEPTION

Since its introduction into society, the automobile has received special treatment under the Fourth Amendment. The first Supreme Court case to apply the Fourth Amendment to an automobile was *Carroll v. United States*.[71] In *Carroll*, government officers suspected the defendants of transporting liquor in violation of the National Prohibition Act.[72] Without a warrant, the officers stopped and searched the defendants' vehicle.[73] The officers cut into the vehicle's upholstery and found sixty-eight bottles of whiskey and gin hidden inside the seats.[74] The defendants subsequently challenged the trial court's admission of the evidence, which was obtained without a search warrant.[75] Affirming the convictions, the Court recognized the longstanding common law tradition of differentiating a "dwelling house" and other similar, stationary places – where a search warrant was necessary – from a "movable vessel" – where a search warrant was impractical.[76] Because a car is a "movable vessel" the Court reasoned, a search warrant is not mandatory when searching the vehicle. Rather, the Court created a two-part inquiry, where first, obtaining a warrant must be impracticable.[77] Second, there must be probable cause that the vehicle contains contraband.[78] Even though *Katz* redefined and expanded Fourth Amendment protections,[79] the Supreme Court has reaffirmed the automobile exception.[80]

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[71] 267 U.S. 132, 149 (1925).

[72] *Id.* at 134-36.

[73] *Id.* at 136.

[74] *Id.*

[75] *Id.* at 134.

[76] *Id.* at 151-53 ("[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.").

[77] *Id.* at 156 (stating that "where reasonably practicable," a warrant is necessary). This requirement was subsequently dropped from the automobile exception. *See* Brinegar v. United States, 338 U.S. 160, 164 (1949) (describing the *Carroll* decision as holding "a valid search of a vehicle moving on a public highway may be had without a warrant, but only if probable cause for the search exists"); John Michael Harlow, California v. Acevedo*: The Ominous March of a Loyal Foot Soldier*, 52 LA. L. REV. 1205, 1217 (1992) ("[T]he [*Brinegar*] Court ignored the requirement that the circumstances for getting a warrant must be impracticable.").

[78] *Carroll*, 267 U.S. 132, 156 (1925) (declaring that an officer without a warrant "acts unlawfully and at his peril unless he can show the court probable cause").

[79] *See supra* notes 23-33 and accompanying text.

[80] *See* South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (citing *Carroll* while explaining the "well-settled" distinction between automobiles and homes). Although the

In the years following *Carroll*, two distinct and seemingly contradictory doctrines emerged for situations involving the search and seizure of closed objects located *inside* an automobile. Where officers had probable cause to stop and search for a container located in a moving vehicle but no warrant, a warrantless search of the safe and secured container was prohibited.[81] On the other hand, where officers had probable cause to search the entire vehicle, a warrantless search of the automobile could include all closed containers inside the car.[82] As Justice Scalia artfully explained in *California v. Acevedo*,[83] these two doctrines created an anomaly:

> [I]t is anomalous for a briefcase to be protected by the "general requirement" of a prior warrant when it is being carried along the street, but for that same briefcase to become unprotected as soon as it is carried into an automobile. On the other hand . . . it would be anomalous for a locked compartment in an automobile to be unprotected by the "general requirement" of a prior warrant, but for an unlocked briefcase within the automobile to be protected.[84]

The contradictory and anomalous situation described by Justice Scalia was resolved in *Acevedo*, where the Court announced "one rule to govern all automobile searches."[85] Under *Acevedo* – the current law regarding the automobile exception – "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."[86] Applying *Terry v. Ohio*[87] to the automobile context,

case involved an inventory search and does not deal with an automobile exception case, the Court recognized *Carroll*'s inherent mobility rationale, while also professing a second rationale for the automobile exception – the diminished expectation of privacy in automobiles due to "pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *Id.* at 368; *see also* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves . . . as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.").

[81] Arkansas v. Sanders, 442 U.S. 753, 763, 766 (1979).

[82] United States v. Ross, 456 U.S. 798, 823 (1982) ("[A]n individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband.").

[83] 500 U.S. 565 (1991).

[84] *Id.* at 581 (Scalia, J., concurring).

[85] *Id.* at 580.

[86] *Id.*

[87] 392 U.S. 1, 30 (1968) (granting police officers the authority to briefly stop a person and detain him for questioning if the officer is able to establish reasonable suspicion that "criminal activity may be afoot," a standard less than probable cause). In a *Terry* stop, the officer has the ability to frisk the person for weapons absent probable cause so long as the officer can "point to specific and articulable facts" leading him to believe his safety is in

the Court held that police may require a driver to exit the vehicle during a routine traffic stop.[88] This rule is based on the general assumption that an occupant of a vehicle poses a greater risk to an officer while seated in the vehicle than standing outside of it.[89] Building on this officer safety rationale, the Court also reasoned that incident to an arrest, an officer may constitutionally search the passenger compartment of an automobile even without the requisite probable cause.[90] However, because this risk is greatly diminished once an occupant is arrested, handcuffed, and placed in the back of a police cruiser, the Court recently limited searches of automobiles incident to arrest to situations where the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[91]

Passengers in a vehicle are treated no differently than the driver. When law enforcement stops a car, even for a minor traffic violation, all occupants, including the passengers, are considered detained.[92] The police may search all items in the passenger compartment[93] – even those belonging to the passenger.[94] Moreover, officers may legally order a passenger, like a driver, out of the vehicle.[95] Once removed from the car, the police may conduct a pat-frisk of the passenger to ensure that the passenger is not armed and dangerous, so long as the police have reasonable suspicion.[96] It is irrelevant that the entire

jeopardy. *Id.* at 21, 30 (allowing officers to "conduct a carefully limited search of the outer clothing" of suspects).

[88] Pennsylvania v. Mimms, 434 U.S. 106, 109-11 (1977).

[89] *Id.* at 110 ("We think it too plain for argument that the State's proffered justification – the safety of the officer – is both legitimate and weighty. . . . [W]e have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile."); *see also* United States v. Robinson, 414 U.S. 218, 234 n.5 (1973) (noting that a significant percentage of police officer murders occur while the officer makes a routine traffic stop).

[90] New York v. Belton, 453 U.S. 454, 457, 460 (1981). For a general discussion on the constitutionality of searches incident to arrest, see *Chimel v. California*, 395 U.S. 752 (1969).

[91] Arizona v. Gant, 129 S. Ct. 1710, 1718-19 (2009).

[92] Brendlin v. California, 551 U.S. 249, 263 (2007) (holding a passenger, like a driver, is seized "from the moment [the car stopped by police comes] to a halt on the side of the road").

[93] The passenger compartment is the interior of an automobile, including "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment" the area, but "does not encompass the trunk." *Belton*, 453 U.S. at 460-61 n.4 (1981).

[94] Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (holding police with probable cause to search a car may inspect a passenger's belongings, in this case a purse, found in the car when the belonging is "capable of concealing the object of the search").

[95] Maryland v. Wilson, 519 U.S. 408, 415 (1997).

[96] Arizona v. Johnson, 129 S. Ct. 781, 788 (2009) ("[The officer] was not constitutionally required to give [the passenger] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get

encounter began with probable cause related to the driver, and not the passenger.

III. STANDING

A. *Background*

During the 1950s, lower courts began creating standing requirements that limited those who could assert a Fourth Amendment right, and therefore, have evidence against them excluded.[97] To establish standing to challenge the legality of a search as the basis for suppressing evidence, federal appellate courts originally "required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."[98] The Court extended standing in *Jones v. United States*[99] to those who were "legitimately on [the] premises where a search occurs."[100] In *Alderman v. United States*,[101] however, the Court rejected an independent constitutional right to exclude relevant and probative evidence seized from third parties in violation of the Fourth Amendment.[102] The Court again explicitly denied third-party standing in *United States v. Salvucci*[103]

behind her."); *see also* Knowles v. Iowa, 525 U.S. 113, 117-18 (1998) (explaining in dicta that officers conducting routine traffic stops may perform a pat-down of a driver *and any passengers* based on reasonable suspicion they are dangerous).

[97] *See, e.g.*, Wilson v. United States, 218 F.2d 754, 756 (10th Cir. 1955) (explaining the motion to suppress was properly denied because "[t]he law is well settled that the protection of the Fourth Amendment to the Constitution against unreasonable search and seizure is personal to the one asserting it, and one who claims no proprietary or possessory interest in that which has been seized as a result of a search may not object to its introduction in evidence"); Jeffers v. United States, 187 F.2d 498, 500 (D.C. Cir. 1950) (suppressing evidence on other grounds, yet stating that an "accused does not have standing to prevent the admission of evidence obtained by an unlawful search and seizure which did not infringe his own personal rights protected by the Amendment"), *aff'd*, 342 U.S. 48 (1951).

[98] Jones v. United States, 362 U.S. 257, 261 (1960).

[99] *Id.*

[100] *Id.* at 267. The *Jones* Court also stated that "possession on the basis of which petitioner is to be and was convicted suffices to give him standing." *Id.* at 264. This statement, granting standing simply because a person was arrested for possession, has been interpreted as the "automatic standing rule." United States v. Salvucci, 448 U.S. 83, 84-85 (1980). The rule was explicitly overruled. *Id.* at 85.

[101] 394 U.S. 165 (1969).

[102] *Id.* at 174 ("[T]here is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion."). Thus, evidence may be suppressed against one defendant but constitutionally admitted against a coconspirator or a codefendant. *Id.* at 172 ("Coconspirators and codefendants have been accorded no special standing.").

[103] 448 U.S. 83 (1980).

when then-Justice Rehnquist stated that defendants "may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."[104]

B. Rakas v. Illinois

The Court issued its seminal standing doctrine decision, *Rakas v. Illinois*,[105] in 1978. In *Rakas*, the police stopped and searched an automobile they believed to be the getaway car in a recent robbery.[106] Police discovered a sawed-off rifle under the front passenger seat and a box of shells in the glove compartment.[107] Because the defendant passengers denied owning the rifle, the shells, or the automobile, the trial judge concluded they did not have standing, and thus could not challenge the constitutionality of the search.[108] Then Justice Rehnquist, writing for the Court, affirmed the convictions, but took the opportunity to redefine standing, stating that the "standing requirement . . . is more properly subsumed under substantive Fourth Amendment doctrine."[109] In other words, the majority believed courts should not make standing a separate question, but rather incorporate the "intertwined concept of standing" into the general Fourth Amendment analysis.[110]

Finding the *Jones* "legitimately on premises" standard too broad, and applicable only to the facts of that case, Justice Rehnquist explained that *Jones* really stood for the "unremarkable proposition" that a person has a Fourth Amendment right in places other than his own home.[111] The proper inquiry when determining standing, according to the Court, was the standard for privacy announced in *Katz* – whether a defendant had a legitimate expectation of privacy in the "invaded place."[112] In the thirty years since *Rakas*, the Supreme Court has yet to reexamine "the issue of standing in the context of automobile searches."[113]

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[104] *Id.* at 85.

[105] 439 U.S. 128, 148 (1978).

[106] *Id.* at 130.

[107] *Id.*

[108] *Id.* at 130-31.

[109] *Id.* at 139. The Court, however, still acknowledged the importance of the defendants' lack of ownership of both the automobile and the rifle. *Id.* at 140 (mentioning that defendants "were passengers in a car which they neither owned nor leased").

[110] *Id.* at 139.

[111] *Id.* at 142-43. The Court did emphasize, however, it was not disagreeing with the conclusion in *Jones* that Jones's Fourth Amendment rights were violated. *Id.* at 141.

[112] *Id.* at 143.

[113] Justin E. Simmons, Comment, *Hertz and the Fourth Amendment: A Post*-Rakas *Examination of an Unauthorized Driver's Standing to Challenge the Legality of a Rental Car Search*, 15 GEO. MASON. L. REV. 479, 491 (2008).

IV. THE THREE-WAY CIRCUIT SPLIT

The issue of standing in the context of automobile searches is most glaring in the case of an unauthorized driver of a rental car. An unauthorized driver is a person driving a rental vehicle who has the permission of the person who rented the car, but neither has the permission of the rental company nor is listed on the rental agreement.[114] Federal courts have adopted three distinct approaches when determining whether an unauthorized driver has standing to challenge the legality of a vehicle search.[115] In all cases, the unauthorized driver knew of the rental agreement, knew the contract forbade the unauthorized driver from driving the vehicle, and thus, was acting in bad faith.[116] It is unclear how the circuits would resolve a situation where an unauthorized driver did not know the terms of the rental agreement, and was thus acting in good faith.[117] Additionally, the authorized driver of the vehicle – the one who rented the car – was never present during any of the searches discussed below. It is unlikely, however, that the outcomes would have changed should the renter be present but not driving the vehicle (a passenger). Standing is a personal right.[118] Thus, while the renter would have standing to challenge the search and have the evidence against him suppressed, the renter

[114] This Note refers to an "unauthorized driver" as necessarily having the renter's permission. Technically speaking, this is not required for an unauthorized driver. A person who steals a rental car would also be an "unauthorized driver" because the thief did not have the renter's (or owner's) permission. In such a situation, however, the driver would probably (definitely in this Note) not be referred to as an "unauthorized driver" but rather as the "thief" or the "driver of the stolen vehicle."

[115] *See* United States v. Thomas, 447 F.3d 1191, 1196 (9th Cir. 2006).

[116] *See, e.g.*, *id.* at 1195.

[117] The Court has been inconsistent in its treatment of the relevance of good and bad faith in Fourth Amendment jurisprudence. *Compare* Whren v. United States, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."), *with* United States v. Leon, 468 U.S. 897, 926 (1984) (allowing a good faith exception to the exclusionary rule). While a thorough discussion of the proper treatment of good and bad faith in Fourth Amendment jurisprudence is beyond the scope of this Note, it is the author's opinion that the driver's good faith is irrelevant. The cases indicate a pattern where an *officer's* good faith mistake but not his bad faith intention matters for Fourth Amendment purposes. No case, however, has indicated that a *defendant's* knowledge, or good and bad faith, is relevant.

[118] *See* Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009) ("The doctrine of standing is one of several doctrines that . . . requires federal courts to satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'" (quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975))); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974) ("[T]here is a real need to exercise the power of judicial review in order to protect the interests *of the complaining party*." (emphasis added)); Alderman v. United States, 394 U.S. 165, 174-75 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.").

would not be able to assert his standing to prevent the evidence from being admitted against the unauthorized driver.[119]

The first approach, adopted by the Tenth, Fourth, and Fifth Circuits, establishes a bright-line rule where an unauthorized driver *does not* have standing and *cannot* challenge the legality of a search of the vehicle.[120] The Eighth and Ninth Circuits, on the other hand, have adopted the opposite bright-line rule.[121] There, an unauthorized driver *does* have standing and *can* challenge the legality of a search of the vehicle.[122] Finally, the Sixth Circuit has adopted a third approach.[123] Here, courts must perform a balancing test, based on the totality of the circumstances.[124] Before delving into the three approaches, it is first necessary to discuss how other drivers – those not categorized as "unauthorized" – are treated with regards to standing.

A. *Treatment of Non-Unauthorized Drivers*

If a driver is not an "unauthorized driver," the driver can be placed into one of three other categories, which I label as follows: an owner-driver, a non-owner authorized driver, and a thief driver.[125] Each category has its own treatment regarding standing, and, unlike the unauthorized driver category,

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[119] *See* Rakas v. Illinois, 439 U.S. 128, 134 (1978) (explaining that "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed" and while that third party can raise a Fourth Amendment violation, the person aggrieved cannot).

[120] *See* United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994); United States v. Roper, 918 F.2d 885, 887-88 (10th Cir. 1990); United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990).

[121] *See* United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006); United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998) ("If [the renter] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing.").

[122] *Thomas*, 447 F.3d at 1199; *Best*, 135 F.3d at 1225.

[123] *See* United States v. Smith, 263 F.3d 571, 586-87 (6th Cir. 2001) (identifying five factors that established a legitimate expectation of privacy for defendant).

[124] *Id.* at 586.

[125] One could also create a fourth category. In this situation, a driver borrows a car from a person he believes to be either the owner of the car or somebody with the authority to grant the driver permission to use the vehicle. In reality, however, the person has no authority to grant the driver permission. To this author's knowledge, no court has definitively ruled on this situation. Some may suggest this is no different from an unauthorized rental car driver, but such a suggestion would be misplaced. A rental agreement involves a contractual obligation which is lacking in this hypothetical situation. This contractual obligation significantly alters and differentiates the two situations. While the treatment of such a person is clearly an important issue, both extrapolating a court's treatment of such a person and suggesting the proper treatment potentially involve issues of good faith, mistaken knowledge, and willful ignorance, and are well beyond the scope of this Note. *See supra* note 117.

courts do not disagree as to the treatment of these categories of drivers. The first category is that of an owner-driver, a person who owns the searched car. According to Blackstone, one of the main rights attached to property is the right to exclude others, and one 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.[126] An owner-driver clearly fits into this category, and courts recognize an owner's standing to raise a Fourth Amendment violation.[127] The second category involves a non-owner authorized driver. In such a situation, a driver borrows a car from either an owner or a person authorized to grant permission to drive the car. The driver is legitimately using the vehicle per a valid consent. Here, like an owner-driver, the non-owner authorized driver has a legitimate expectation of privacy and can raise a Fourth Amendment claim.[128] A person renting a car fits in this category.[129] On the other end of the spectrum is the final category. Courts find that a thief-driver – a person knowingly driving a stolen vehicle – has no standing.[130] No evidence found in any search of the vehicle will be suppressed; the driver cannot raise a Fourth Amendment claim.

There is an additional group of car occupants that has yet to be discussed: passengers. An automobile passenger's standing is minimal at best. Since

[126] 2 WILLIAM BLACKSTONE, COMMENTARIES *1, *1-2 ("[T]he right of property . . . that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."). While the right to exclude (and other property concepts) goes into the determination of a legitimate expectation of privacy, it is not always sufficient to establish such with respect to activity conducted on (or in) the property. *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

[127] *See Rakas*, 439 U.S. at 148 (denying standing to petitioners because they "asserted neither a property nor a possessory interest in the automobile"); *cf.* United States v. McBean, 861 F.2d 1570, 1574 (11th Cir. 1988) (denying standing to challenge a Fourth Amendment violation based on a disavowal of ownership).

[128] *See* United States v. Rubio-Rivera, 917 F.2d 1271, 1275 (10th Cir. 1990) ("Where the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle."); United States v. Garcia, 897 F.2d 1413, 1419 (7th Cir. 1990); United States v. Miller, 821 F.2d 546, 548 (11th Cir. 1987); United States v. Portillo, 633 F.2d 1313, 1317 (9th Cir. 1980) ("Here, [defendant] had both permission to use his friend's automobile and the keys to the ignition and the trunk, with which he could exclude all others, save his friend, the owner. [Defendant], therefore, possesses the requisite legitimate expectation of privacy necessary to challenge the propriety of the search.").

[129] *See, e.g.*, United States v. Walker, 237 F.3d 845, 849 (7th Cir. 2001).

[130] *See* United States v. Caymen, 404 F.3d 1196, 1201 (9th Cir. 2005) ("[O]ne who takes property by theft or fraud cannot reasonably expect to retain possession and exclude others . . . . Whatever expectation of privacy he might assert is not a legitimate expectation that society is prepared to honor."); United States v. Tropiano, 50 F.3d 157, 161 (2d Cir. 1995); United States v. Lanford, 838 F.2d 1351, 1353 (5th Cir. 1988); United States v. Hensel, 672 F.2d 578, 579 (6th Cir. 1982); United States v. Hargrove, 647 F.2d 411, 413 (4th Cir. 1981).

Rakas, a passenger will virtually never have standing to challenge a search of the vehicle.[131] A passenger may, however, have limited standing to challenge the search of *his or her belongings* located in the vehicle, so long as he or she has asserted an ownership or possessory interest.[132]

B. *The Fourth, Fifth, and Tenth Circuits' Bright-Line Approach*

1. The Tenth Circuit

The first federal appellate court to decide a case involving the standing of an unauthorized driver of a rental car was the Tenth Circuit.[133] In *United States v. Obregon*,[134] the defendant was driving a rented automobile when he was stopped at a roadblock intended to conduct routine driver's license and registration checks.[135] The officer learned that Obregon was driving a rental car and his name was not on the rental contract.[136] The officer also observed the car had expired license plates.[137] Fearing the car was stolen, the officer requested permission to search the car, and Obregon consented.[138] During the search, the officer discovered three bags of cocaine.[139]

Obregon moved to suppress the evidence, contending both the stop and the search were unconstitutional.[140] The Tenth Circuit, realizing this was a case of first impression, held that Obregon did not have standing to challenge the

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[131] *Rakas*, 439 U.S. at 148 ("[Petitioners] asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. . . . [T]hat they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched."); *Portillo*, 633 F.2d at 1317.

[132] *See* Wyoming v. Houghton, 526 U.S. 295, 302 (1999) (allowing defendant passenger to challenge a search of her purse located in an automobile); United States v. Edwards, 242 F.3d 928, 936-37 (10th Cir. 2001) (holding defendant has standing to challenge the search of his or her personal luggage in the trunk of a car even if he had no standing to challenge the search of the car); *cf. McBean*, 861 F.2d at 1574 (denying standing to challenge search of luggage found in automobile because defendant had disavowed ownership of the luggage, even though there was no possessory interest in the automobile itself).

[133] *See* United States v. Obregon, 748 F.2d 1371, 1374-75 (10th Cir. 1984).

[134] *Id.*

[135] *Id.* at 1373.

[136] *Id.* At the hearing, Obregon testified an unrelated third party arranged the car rental. *Id.* at 1374. Obregon waited outside the Miami airport while this third party went inside to rent the car. *Id.*

[137] *Id.* at 1373.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 1374. Even though Obregon consented, if the stop was illegal, then any subsequent actions must be suppressed as "fruit of the poisonous tree." *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963).

search.[141] The court relied on *United States v. Erickson*,[142] which involved a challenge to the installation of a transponder in an airplane.[143] There, the Tenth Circuit held the defendant was unable to prove he had any connection with the airplane's owner or that the owner authorized the defendant to "possess, use, or fly the aircraft."[144] As a result, Erickson was unable to show "*lawful* possession or control to confer standing."[145] Because Obregon presented no evidence that he was legitimately allowed to drive the car, the Tenth Circuit held the district court was not "clearly erroneous in finding that Obregon did not have a legitimate expectation of privacy . . . and therefore he did not have standing."[146]

This approach was affirmed and more explicitly stated in *United States v. Roper*.[147] As in *Obregon*, Roper was driving a rental vehicle.[148] The authorized renter of the car permitted her common-law husband to drive the car even without authorization in the rental contract.[149] He then loaned the car to Roper.[150] Thus, Roper had permission to drive the car from a man who actually had permission to drive the car from the only authorized driver on the rental contract. This places Roper clearly in a gray area considering the categories above.[151] Expanding on *Obregon* and *Erickson*, the court held that Roper had no standing because "[h]e was not the owner nor was he in lawful possession or custody of the vehicle."[152] By not being listed as an additional authorized driver in the rental contract, Roper was not in "lawful possession or custody."[153]

2. The Fifth Circuit

The Fifth Circuit followed suit a few years later when it decided *United States v. Boruff*.[154] Boruff and a co-conspirator, Taylor, planned to smuggle marijuana from Mexico into Texas.[155] Taylor drove a truck (which Boruff

[141] *Obregon*, 748 F.2d at 1374-75.

[142] 732 F.2d 788 (10th Cir. 1984).

[143] *Id.* at 789.

[144] *Id.* at 790.

[145] *Id.* (emphasis added).

[146] *Obregon*, 748 F.2d at 1375.

[147] 918 F.2d 885, 887 (10th Cir. 1990).

[148] *Id.* at 886.

[149] *Id.* at 887 (characterizing the case as "almost on all fours" with *Obregon*).

[150] *Id.*

[151] *See supra* Part IV.A.

[152] *See Roper*, 918 F.2d at 888.

[153] *Id.*

[154] 909 F.2d 111, 117 (5th Cir. 1990) ("Boruff had no legitimate expectation of privacy in the rental car." (citing United States v. Obregon, 573 F. Supp. 876, 879-80 (10th Cir. 1984))).

[155] *Id.* at 113.

owned) while Boruff drove a white car rented by Boruff's girlfriend, Brenda Lawless.[156] Lawless rented the car in her name, and there were no other authorized drivers.[157] On the first leg of the trip into Mexico, border patrol agents observed the truck and rental car driving in a way that fit a common "smuggler pattern."[158] On the return trip the following morning, the agents once again observed the two vehicles, but also noticed a CB antenna on top of the rental car and saw Boruff put something akin to a microphone to his mouth.[159] The agents stopped the truck, found large amounts of marijuana, and arrested Taylor.[160] Then, a border patrol agent stopped Boruff and arrested him, prior to searching his car and discovering the incriminating evidence.[161]

Boruff filed a motion to establish standing and challenge the search of the rental car.[162] Looking to *Obregon* for guidance, the Fifth Circuit held Boruff did not have standing to challenge the constitutionality of the search of the rental car.[163] According to the court, Boruff had full knowledge of the rental agreement, which stated only Lawless could legally operate the vehicle and that the vehicle could not be used for illegal purposes.[164] Thus, not only did Lawless lack authority to give Boruff control of the rental vehicle, but Boruff also knew of the restrictions.[165] Based on his knowledge, the court found Boruff had no legitimate expectation of privacy in the rental car, and therefore had no standing.[166]

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[156] *Id.*

[157] *Id.* at 113-14.

[158] *Id.* at 114.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 115. Boruff also attempted to establish standing with regard to the pickup truck. *Id.* The court concluded, however, that Boruff had no standing to challenge the search of the truck because he completely disassociated himself from the truck. *Id.* at 116. Boruff told the officers he had no knowledge or interest in the truck, and he was not present when the truck was searched. *Id.* Additionally, Boruff challenged the legality of the stop. *Id.* at 117. This argument also failed because roving border patrols, such as the one here, "may stop vehicles near the border if the agents have reasonable suspicion that the vehicles contain contraband or illegal aliens." *Id.* (citing United States v. Cortez, 449 U.S. 411, 417-18 (1981)).

[163] *Id.* at 117.

[164] *Id.* at 114, 117.

[165] *Id.*

[166] *Id.* at 117 (reaching its decision in part because defendant knew about the rental restrictions). The court did not discuss what would happen if an unauthorized driver was unaware of the rental agreement's terms. A few months prior to *Boruff*, the Fifth Circuit decided *United States v. Kye Soo Lee*, 898 F.2d 1034 (5th Cir. 1990). In *Kye Soo Lee*, the court found that two men who were hired to drive a truck, rented by an unrelated and absent third party, had standing to raise a Fourth Amendment claim. *Id.* at 1038. The court reasoned that if a person borrows an automobile from an owner with that owner's consent,

3. The Fourth Circuit

In *United States v. Wellons*,[167] the Fourth Circuit joined the Fifth and Tenth Circuits by adopting the bright-line rule denying standing for unauthorized drivers.[168] In *Wellons*, police pulled over the defendant for speeding.[169] Wellons was driving a car rented by Dixon, the only authorized driver of the vehicle.[170] Wellons explained to the officer that Dixon had rented the vehicle and that Wellons could not locate the rental agreement.[171] The officer asked to search the rental car, but Wellons declined.[172] The police arrested Wellons after a subsequent warrantless search of the rental car revealed two bags of luggage containing cocaine and a third bag containing heroin.[173]

Wellons raised a Fourth Amendment challenge to the search of the automobile.[174] Citing *Obregon* and *Boruff*, the Fourth Circuit held that Wellons, "as an unauthorized driver of the rented car, had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights."[175] According to the court, the fact that Wellons may have had Dixon's permission to drive the rental car was irrelevant because Wellons did not have the rental company's permission to do so.[176] The court likened the unauthorized driver of a rental car to the driver of a stolen vehicle – both lack a reasonable expectation of privacy because neither should be driving the vehicle.[177] The Fourth Circuit has recently reaffirmed this position, once again holding that a driver not

the borrower has standing. *Id.* Though *Kye Soo Lee* did not distinguish rented cars from owned cars and has not been explicitly overruled, no court in the Fifth Circuit has cited *Kye Soo Lee* for this proposition as related to rented vehicles. In fact, *Boruff* fails to mention *Kye Soo Lee* at all. However, courts both inside and outside the Fifth Circuit have identified *Boruff* as the controlling law in the circuit. *See, e.g.*, United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (citing *Boruff* for the proposition that an unauthorized driver of a rental car has no legitimate privacy interest and therefore cannot raise a Fourth Amendment claim); United States v. Vaughns, 202 F. Supp. 2d 572, 576 (E.D. Tex. 2001).

[167] 32 F.3d 117 (4th Cir. 1994).

[168] *Id.* at 119.

[169] *Id.* at 118.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 119.

[173] *Id.*

[174] *Id.*

[175] *Id.* In addition to challenging the general search of the automobile, Wellons unsuccessfully challenged the specific search of the closed luggage. *Id.* Quoting *United States v. Hargrove*, 647 F.2d 411, 413 (4th Cir. 1981), the court stated that "one who can assert no legitimate claim to the car he was driving cannot reasonably assert an expectation of privacy in a bag found in that automobile." *Wellons*, 32 F.2d at 119-20.

[176] *Wellons*, 32 F.2d at 119 n.2.

[177] *See id.* (comparing the *Wellons* case to *Hargrove*, 647 F.2d at 413, in which the driver of a stolen car did not have a reasonable expectation of privacy in a stolen vehicle).

authorized by the rental company has no reasonable expectation of privacy in the rental car.[178]

In both cases, the court relied almost entirely upon *Rakas* and the language "legitimate expectation of privacy" to deny standing.[179] The court felt that the contractual obligations embodied in the rental agreements, and the drivers' decisions to ignore the terms of the agreements, made any expectations of privacy "illegitimate."[180]

C. *The Eighth and Ninth Circuits' Bright-Line Approach*

1. The Eighth Circuit

The Eighth and Ninth Circuits have also adopted a bright-line approach to determine whether an unauthorized driver has standing to challenge a search. This second approach, however, completely opposes the Tenth Circuit's approach. In the Eighth and Ninth Circuits, an unauthorized driver *always* has standing to challenge a search, so long as the unauthorized driver had the permission of an authorized driver.[181]

The Eighth Circuit first discussed this issue, albeit in dicta, in *United States v. Muhammad*.[182] Police stopped Muhammad, who drove a rented automobile, in connection with a drug investigation.[183] Candace Jordan, who rented the car, was the only authorized driver.[184] Police searched the car and found cocaine in the trunk, and subsequently arrested Muhammad.[185] Muhammad moved to suppress the evidence, arguing that he had a legitimate expectation of privacy in the vehicle.[186] Although the court denied Muhammad standing and allowed the evidence, the rationale behind the decision granted unauthorized drivers the ability to establish standing if they met certain requirements.[187] According to the court, Muhammad would have demonstrated standing if he

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[178] *See* United States v. Mincey, 321 Fed. App'x 233, 240 (4th Cir. 2008).

[179] *Id.* at 239 ("[I]t is well settled that only where a search intrudes upon a space as to which an individual has 'a legitimate expectation of privacy' may the individual contest the search on Fourth Amendment grounds." (citing *Wellons*, 32 F.3d at 119)).

[180] *Id.* at 239-40 ("[T]he only question presented is whether [Mincey's] subjective expectation of privacy was objectively reasonable, thus rendering it 'legitimate' and entitled to Fourth Amendment protection. . . . [A]n unauthorized driver of a rental vehicle has no legitimate privacy interest in the vehicle . . . ."); *Wellons*, 32 F.3d at 119.

[181] *See* United States v. Thomas, 447 F.3d 1191, 1199 (2006).

[182] 58 F.3d 353 (8th Cir. 1995).

[183] *Id.* at 354.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 355.

[187] *Id.* ("[T]he defendant must demonstrate (1) a subjective expectation of privacy; and (2) that the subjective expectation is one that society is prepared to recognize as objectively reasonable. . . .").

had presented "some evidence of consent or permission from the lawful owner/*renter* to give rise to an objectively reasonable expectation of privacy."[188] Thus, as opposed to the Tenth Circuit's approach, where an unauthorized driver does not have standing even if she has the renter's permission, the Eighth Circuit automatically grants an unauthorized driver standing if she can show that the authorized renter gave permission.

The court reaffirmed this position three years later in *United States v. Best*.[189] Best was driving a rented car when an officer pulled him over for weaving.[190] Because Best's friend, Susan Thomas, rented the car, Best was an unauthorized driver.[191] After stopping Best, the officer discovered that Best's license was suspended, and he therefore could not drive the car from the scene.[192] After the officer arranged for the car to be towed, he performed an inventory search and found marijuana hidden in the door panels.[193] Because the inventory search was deemed improper, the evidence was suppressed.[194] The remaining issue was whether Best had standing to challenge the search.[195] The district court had not ruled on Best's standing, so the Eighth Circuit remanded for further proceedings.[196] However, the court stated the standard that has become the bright-line rule: "If Thomas [the authorized rental driver] had granted Best [the unauthorized driver] permission to use the automobile, Best would have a privacy interest giving rise to standing."[197]

2. The Ninth Circuit

The Ninth Circuit adopted the Eighth Circuit's bright-line test in *United States v. Thomas*.[198] There, the police, conducting a drug investigation, contacted rental car companies regarding a police investigation of Thomas and McGuffey.[199] When McGuffey called to rent an automobile, the rental company contacted the police and allowed them to install a tracking device on

[188] *Id.* (emphasis added).

[189] 135 F.3d 1223 (8th Cir. 1998) (reiterating that the *Muhammad* ruling hinged on the absence of evidence that the authorized driver had granted Muhammad permission to drive the car and directing the court below to determine if Best had permission on remand).

[190] *Id.* at 1224.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *See id.* at 1225 (finding the search improper because searching inside car doors was not standard search procedure); *see also* South Dakota v. Opperman, 428 U.S. 364, 372-73 (1976) (explaining that a warrantless inventory search must be done pursuant to *standard* police procedures and must be done in order to protect the car and its contents).

[195] *Best*, 135 F.3d at 1226.

[196] *Id.*

[197] *Id.* at 1225.

[198] 447 F.3d 1191 (9th Cir. 2006).

[199] *Id.* at 1194.

the car.[200] McGuffey picked up the car and signed a rental agreement stating "[o]nly I and authorised [sic] driver(s) may drive the vehicle."[201] Thomas was not listed as an authorized driver.[202] The following day, police, using the tracking device, stopped the rental car and found Thomas alone in the car.[203] The police arrested Thomas and searched the vehicle.[204] While searching the trunk, the officer found cocaine, heroin, and a large amount of cash.[205]

Thomas moved to suppress the evidence found in the trunk.[206] The Ninth Circuit, after thoroughly discussing the three different approaches to an unauthorized driver's standing, decided to follow the Eighth Circuit, and held that "[a]n unauthorized driver may have standing to challenge a search if he or she has received permission to use the car."[207] In effect, the court equated an unauthorized driver of a rental car with a non-owner authorized driver of a privately-owned car.[208] Additionally, the court determined that a privacy interest exists "*even if* a defendant is in technical violation of a leasing contract."[209] Even though the Ninth Circuit adopted the bright-line rule

[200] *Id.* The use of tracking devices and beepers is constitutional. *See* United States v. Knotts, 460 U.S. 276, 285 (1983) (holding that placing a beeper in a container of chemicals to track its movement did not invade any legitimate expectation of privacy and that this was neither search nor seizure); United States v. Butts, 729 F.2d 1514, 1517 (5th Cir. 1984) ("[M]onitoring signals from an electronic tracking device that tells officers no more than [location] . . . does not violate any reasonable expectation of privacy. . . . The movement . . . of an automobile on a highway[] is not something in which a person can claim a reasonable expectation of privacy.").

[201] *Thomas*, 447 F.3d at 1195.

[202] *Id.*

[203] *Id.* Had McGuffey been in the car, the situation would have been no different. McGuffey may have had a Fourth Amendment challenge, but Thomas still would not. *See* Rakas v. Illinois, 439 U.S. 128, 134 (1978) (explaining that "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed" and while that third party can raise a Fourth Amendment violation, the person aggrieved cannot).

[204] *Thomas*, 447 F.3d at 1195.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 1199. The Court focused solely on the standing issue and did not discuss the applicability of the automobile exception or inevitable discovery. *Id.* at 1199 n.9. Moreover, the search could not be validated as a search incident to arrest because car searches incident to arrests exclude the trunk. *See* New York v. Belton, 453 U.S. 454, 461 n.4 (1981) (explaining that the search may encompass "only the interior of the passenger compartment of an automobile and does not encompass the trunk").

[208] *Thomas*, 447 F.3d at 1198-99. For a discussion of the treatment of a non-owner authorized driver, see *supra* note 128 and accompanying text.

[209] *Id.* at 1198. *See also, e.g.*, United States v. Henderson, 241 F.3d 638, 647 (9th Cir. 2001) ("The Eleventh Circuit has held that a lessee may have a reasonable expectation of

granting standing to unauthorized drivers with the permission of the renter, the court still denied Thomas standing because he failed to show that he received McGuffey's permission to use the rental car.[210]

Contrary to the Fourth, Fifth, and Tenth Circuits, the Eighth and Ninth Circuits do not consider the contractual agreement between the authorized driver and the rental company relevant when determining an unauthorized driver's standing to challenge a search.[211] According to these circuits, whether the driver had permission from an authorized driver matters most. It is irrelevant to a standing determination that the authorized driver cannot grant permission to the unauthorized driver on behalf of the rental company to drive the rental car, or that the unauthorized driver knew of this restriction.

D. *The Sixth Circuit's Balancing Test Approach*

The Sixth Circuit confronted the issue head-on in 2001 and offered a third approach to an unauthorized driver's standing to challenge a search of a rental vehicle.[212] In *United States v. Smith*,[213] a police officer pulled over Steven Smith, who was driving a rented car, for failing to maintain lane control.[214]

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privacy in a rental car even after the rental agreement has expired. . . . We find this reasoning persuasive . . . .").

[210] *Thomas*, 447 F.3d at 1199.

[211] *Compare* United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (finding defendant had no legitimate expectation of privacy in rental vehicle when he was not authorized by the rental agreement), United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990) (finding defendant had no standing when rental agreement did not give the renter authority to give defendant control of the car), *and* United States v. Obregon, 748 F.2d 1371, 1375 (10th Cir. 1984) (finding no clear error in denying defendant standing when he did not rent the vehicle), *with Thomas*, 447 F.3d at 1198-99 (holding that the court "cannot base constitutional standing entirely on a rental agreement to which the unauthorized driver was not a party [that] may not capture the nature of the unauthorized driver's use of the car"), *and* United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998) (disregarding terms of rental agreement and declaring defendant had standing if renter gave defendant permission to use the rental vehicle).

[212] The Sixth Circuit had previously discussed the issue of an unauthorized driver's standing in an unpublished decision. United States v. Frederickson, No. 90-5536, 1990 WL 159411 at *2-3 (6th Cir. Oct. 22, 1990). Because the court ruled the arrest was lawful, a search of the vehicle was also lawful, and the evidence admissible regardless of the standing determination. *Id.* The court did, however, discuss the issue in dicta. The court stated that Frederickson would not have standing because she failed to establish a legitimate expectation of privacy; she was either a passenger, or, if her story of switching seats with the other occupant upon being stopped was believed, she was an unauthorized driver not carrying a driver's license. *Id.* (recognizing Fredrickson would lack standing because her name was not on the rental agreement and she carried no driver's license). The court made no mention of the five factors discussed in *United States v. Smith*, 263 F.3d 571, 586-87 (6th Cir. 2001), or of a balancing test. *See infra* text accompanying note 223.

[213] 263 F.3d 571.

[214] *Id.* at 575.

Steven Smith voluntarily handed over the rental agreement, which listed Tracy Smith, Smith's wife, as the only authorized driver.[215] After giving Steven Smith a warning citation, the officer asked to search the vehicle, but Smith refused.[216] The officer then ordered the defendant out of the vehicle and ran a drug detecting dog around and inside the car.[217] After the dog discovered methamphetamine, amphetamine, and cocaine, Steven Smith was arrested.[218] A subsequent search yielded a loaded pistol, digital scales, and materials used to wrap drugs.[219]

Steven Smith moved to suppress all evidence obtained during the search of the vehicle, in effect urging the court to adopt the bright-line test adopted by the Eighth and Ninth Circuits.[220] In its analysis, the Sixth Circuit, however, explicitly refused to adopt any bright-line test to determine whether an unauthorized driver has standing to challenge a search.[221] While the court acknowledged an initial presumption that an unauthorized driver does not have standing to contest a search, it also created a case-by-case approach that considers the totality of the circumstances to determine if the presumption stands.[222] The court considered five factors: (1) whether the unauthorized driver was a licensed driver who could legally drive a vehicle; (2) whether the unauthorized driver could present the rental agreement and had sufficient knowledge about the vehicle and the rental circumstances; (3) the relationship between the authorized driver and unauthorized driver; (4) whether the authorized driver gave the unauthorized driver permission to drive the car; and (5) whether the unauthorized driver had a business relationship with the rental company.[223]

Applying these factors to the defendant, the Sixth Circuit held that Smith overcame the aforementioned presumption and had standing to challenge the search.[224] The court observed that Smith was a licensed driver, presented the rental agreement and provided sufficient information about the rental, was married to the authorized driver, obtained his wife's permission to drive the car, and had a business relationship with the rental company by making and paying for the reservation.[225] According to the court, this last factor, the

[215] *Id.*

[216] *Id.* at 575-76.

[217] *Id.* at 576.

[218] *Id.*

[219] *Id.*

[220] *Id.* at 577.

[221] *Id.* at 586.

[222] *Id.* ("[A]n unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle, and therefore does not have standing to contest the legality of a search of the vehicle.").

[223] *Id.*

[224] *Id.* at 587.

[225] *Id.* at 586-87.

business relationship, was most significant.[226] Because of these circumstances, Smith had the ability and right to exclude everyone but the authorized renter or the owner from the car, and therefore he had a legitimate expectation of privacy in the rental car.[227] As in *United States v. Thomas*,[228] the *Smith* court believed that "[a]lthough Smith's use of the vehicle was clearly a breach of the agreement with [the rental company], it [did] not follow that he has no standing to challenge the search."[229] The rental company had a genuine claim for breach of contract against Smith and his wife, but, according to the court, in Tennessee it "was not *illegal* for Smith to possess or drive the vehicle," and therefore the breach of contract did not prohibit Smith from challenging the search as a constitutional violation.[230]

E. *The Eleventh Circuit*

While close to half the circuit courts have explicitly adopted a rule to follow, the Eleventh Circuit has not yet adopted a clear position. However, recent cases from the Eleventh Circuit imply a preference for the Sixth Circuit's approach. In *United States v. Cooper*,[231] the court held that an authorized driver does not lose his reasonable expectation of privacy and standing to challenge constitutional violations when a rental car is overdue.[232] The court suggested a contrary decision would lead to the type of "hard-and-fast" rules that the Supreme Court disfavors.[233] Additionally, the court stated that just because a person is subjected to civil liability, she should not be foreclosed from raising Fourth Amendment challenges in a related criminal

[226] *Id.* at 586 (emphasizing that law and society would recognize Smith's marital relationship with the renter and his business relationship with the rental company, both of which support his legitimate expectation of privacy in the vehicle).

[227] *Id.* at 587. Of course, *Rakas* established that the ability and the right to exclude is not the determinative factor for a finding of standing. *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) (recognizing that even though property ownership, along with its inherent right to exclude, often confers standing, "even a property interest in [a searched] premises may not be sufficient to establish a legitimate expectation of privacy"). The *Smith* court likely used this reasoning as an additional consideration to further support the outcome of the balancing test it had just conducted.

[228] 447 F.3d 1191, 1198 (9th Cir. 2006) (rejecting contention that a defendant not listed on a rental agreement lacks standing to challenge a search of a rental vehicle); *see supra* text accompanying notes 114-16, 207-09.

[229] *Smith*, 263 F.3d at 587.

[230] *Id.*

[231] 133 F.3d 1394 (11th Cir. 1998).

[232] *Id.* at 1402 (holding that while Cooper's failure to extend his rental on the vehicle subjected him to civil liability, Cooper "retained a sufficient amount of control and possession over the rental car" to retain standing to challenge a search of the car).

[233] *Id.* at 1401. The Supreme Court's supposed disfavor of "hard-and-fast" rules is not as clear as *Cooper* suggests. *See infra* note 254 and accompanying text.

proceeding.[234] Both of these rationales suggest that, if provided the opportunity, the Eleventh Circuit would likely adopt the Sixth Circuit's totality-of-the-circumstances approach as opposed to a bright-line rule.

A new case from the Middle District of Florida, also in the Eleventh Circuit, further indicates a preference for the Sixth Circuit's totality-of-the-circumstances approach. In *United States v. Crisp*,[235] the defendant was driving a van rented by his girlfriend, Powell.[236] Crisp had Powell's permission to drive the van, but both knew that Crisp was not, and could not have been, authorized to drive the van because Crisp had a suspended license.[237] While Crisp was driving, a police officer noticed the van had a broken back window and became suspicious.[238] The officer followed the van for about a block when Crisp pulled the van over and fled the scene.[239] The officer, noticing that the doors were locked but the driver's window was open, accessed the vehicle through the window and conducted a search, which uncovered a gun.[240]

After Crisp was arrested and charged, he moved to suppress the evidence uncovered during the search.[241] The court distinguished the present case from *Cooper* on the grounds that Cooper was an authorized driver, and explained that the standing of an unauthorized driver had not yet been decided by the Eleventh Circuit.[242] The court held that Crisp did not have a reasonable expectation of privacy in the rental van and therefore could not challenge the search.[243] The court acknowledged that "the weight of authority would support the conclusion that a driver of a rented vehicle who neither rented the vehicle nor is authorized to operate the vehicle" does not have standing but declined to adopt this bright-line rule.[244] Instead, the court stated that the determination of standing must be made "based upon review and consideration of all relevant factors."[245] Thus, while the Eleventh Circuit has not taken a position, the Middle District of Florida seemed to support *Cooper*'s admonition of "hard-

[234] *Cooper*, 133 F.3d at 1402.

[235] 542 F. Supp. 2d 1267 (M.D. Fla. 2008).

[236] *Id.* at 1270.

[237] *Id.* at 1270-71.

[238] *Id.* at 1271.

[239] *Id.*

[240] *Id.*

[241] *Id.* at 1269.

[242] *Id.* at 1276 (adding that it was not even clear that Crisp ever had an expectation of privacy in the rental vehicle, whereas the *Cooper* defendant had an expectation of privacy before the rental agreement expired).

[243] *Id.* at 1279 (bypassing the question of whether an unauthorized, duly licensed driver with the renter's permission had standing to challenge a search of a rental car).

[244] *Id.*

[245] *Id.*

and-fast" rules and to adopt a totality-of-the-circumstances approach to determine standing of an unauthorized driver.

V. ESTABLISHING ONE BRIGHT-LINE RULE: WHY THE APPROACH ADOPTED BY THE TENTH, FOURTH, AND FIFTH CIRCUITS IS PROPER

While the standing of an unauthorized rental driver is already settled in six circuits, the remaining circuits have yet to decide the issue. When the issue does arise, these circuits will have to choose from among the three tests already discussed or create an entirely new one.[246] As will be explained below, these circuits should choose the bright-line rule adopted by the Tenth, Fourth, and Fifth Circuits. This test leads to an outcome most consistent with both Fourth Amendment jurisprudence and Supreme Court precedent. It also serves the efficient purpose of being easy to apply.

A. *The Sixth Circuit Balancing Test Is Unduly Complicated*

The Sixth Circuit approach is a balancing test, meaning the court takes certain factors into account to come up with the "constitutionally appropriate" result in the case at hand. These factors include the licensed status of the unauthorized driver, the unauthorized driver's ability to present the rental agreement and to convey knowledge of the rental circumstances, the relationship between the unauthorized and authorized driver, whether the authorized driver gave permission, and the prior business relationship between the rental company and the unauthorized driver.[247] The Sixth Circuit cases, however, give no guidance on *how* to balance these interests.[248] Does an unauthorized driver have to satisfy two of the five factors? Three of the five? All five? *Smith* does not say. In effect, this test allows a judge to look at five relatively general criteria and come to a determination on how he or she feels the case should be resolved – with very minimal guidance and no requirement of consistency.

Some believe this approach allows for a more just and fair result for individual defendants. Justice Powell, for example, felt a bright-line rule in this context would fail to "safeguard both Fourth Amendment rights and the public interest in a fair and effective criminal justice system."[249] Rather,

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[246] It is entirely possible that a circuit court will use different factors to determine a defendant's standing.

[247] United States v. Smith, 263 F.3d 571, 586 (6th Cir. 2001).

[248] The court did state that the prior business relationship was the most important factor, but it never explained just how important in comparison to the other factors. *See id.*

[249] Rakas v. Illinois, 439 U.S. 128, 155-56 (1978) (Powell, J., concurring); *see also* Matthew M. Shafae, Note, United States v. Thomas*: Ninth Circuit Misunder-"Standing": Why Permission to Drive Should Not Be Necessary to Create an Expectation of Privacy in a Rental Car*, 37 GOLDEN GATE U. L. REV. 589, 608 (2007) ("In order to remain true to core Fourth Amendment principles, courts must conduct an exhaustive analysis . . . . Only

according to Powell, courts should "apply principles broadly" because each search and seizure varies so broadly.[250] While Justice Powell may be correct in his assessment that bright-line rules cannot account for every situation, he was mistaken in believing they create a more effective criminal justice system. To the contrary, courts "must resist 'the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity' lest we end up with 'a fourth amendment with all of the character and consistency of a Rorschach blot.'"[251] With a blurry and inconsistent Fourth Amendment jurisprudence, the criminal justice system cannot operate effectively.

The totality-of-the-circumstances balancing test would be much more damaging to the criminal justice system than the bright-line rule Justice Powell opposes. With a totality-of-the-circumstances balancing test, police patrolling the streets would be unable to know whether or not a potential search violates the Fourth Amendment. The officer would either have to risk a search, hoping the judge's thumb balances the scale in his favor, or allow a potential criminal to proceed on his way. Should the officer opt to search the vehicle and find evidence of criminality, a suppression hearing would almost automatically ensue. In addition to creating even more costs for defendants and adding to the ever-increasing backlog in courts' dockets, there is the possibility that police officers, worried that facts could balance against them and that judges would suppress evidence, would change their testimony to portray situations more amenable to condoning the search.[252]

This backlog and inherent uncertainty, both in police practice and honesty, would undermine a key aspect of Fourth Amendment. As Professor LaFave emphasized, the Fourth Amendment

> is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the

through an analysis of the totality of the circumstances may courts accurately gauge each specific situation.").

[250] *Rakas*, 439 U.S. at 156 (Powell, J., concurring).

[251] Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 321 (1982) (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 375 (1974)).

[252] Such a concern is not that far-fetched. *See* Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1 (describing how New York police officers routinely perjure themselves on the stand to prevent evidence suppression).

> facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[253]

In addition, the Supreme Court has repeatedly discussed the benefits of a bright-line rule over the confusion of a balancing test, stating that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."[254] Justice White, in his *Rakas* dissent, also lobbied for bright-line rules in the Fourth Amendment jurisprudence:

> The [prior] *Jones* rule is relatively easily applied by police and courts; the rule announced today will not provide law enforcement officials with a bright line between the protected and the unprotected. Only rarely will police know whether one private party has or has not been granted a sufficient possessory or other interest by another private party. . . . The Court's rule will ensnare defendants and police in needless litigation over factors that should not be determinative of Fourth Amendment rights.[255]

The best way to accomplish both administrative efficiency and effective criminal justice is to adopt a bright-line rule. With a bright-line rule, officers on the street will have consistent guidelines to follow. The officers will not have to memorize a long list of factors to balance in their heads during the very short interval when a quick decision about whether or not to search a vehicle must be made. Additionally, police will not fear that every search could be overturned on the whim of a judge who felt factor *A* was more important than factor *C*. A bright-line rule abolishes the inconsistencies inherent in the totality-of-the-circumstances approach and provides a more fair and equitable decision in the courts.[256]

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[253] Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141 (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting)).

[254] Atwater v. City of Lago Vista, 532 U.S. 318, 321 (2000); *see also* United States v. Robinson, 414 U.S. 218, 235 (1973) ("A police officer's determination . . . is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search."). The Court's preference for a bright-line test can also be seen in *Arizona v. Roberson*, 486 U.S. 675 (1988). Although *Roberson* is a Fifth Amendment self-incrimination case, its reasoning is equally applicable to a Fourth Amendment search and seizure. *See id.* at 681 ("We have repeatedly emphasized the virtues of a bright-line rule . . . . [W]e explained that the 'relatively rigid requirement . . . has the virtue of informing police and prosecutors with specificity as to what they may do . . . .'" (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979))).

[255] *Rakas*, 439 U.S. at 168 (White, J., dissenting).

[256] As some will no doubt suggest, all of the concerns with a balancing test can also be addressed by requiring probable cause before any search. While this is theoretically possible, a requirement of probable cause would not completely solve the problem. Requiring subjective probable cause raises problems similar to those raised by the balancing

B. *The Eighth and Ninth Circuits' Bright-Line Rule Is as Flawed as the Balancing Test*

After a circuit confronts the issue of an unauthorized rental car driver for the first time and decides to forego a totality-of-the-circumstances approach, there are still two distinct and opposing bright-line rules from which to choose. The Eighth and Ninth Circuits adopted a bright-line rule granting standing, and thus the ability to challenge a search and seizure, to an unauthorized driver of a rental vehicle so long as the driver has the permission of the authorized driver.[257] This approach is also misguided.

A defendant has standing to challenge a search when he has a legitimate expectation of privacy.[258] A person driving a rental car without authorization cannot meet this standard. Supporters of the Eighth and Ninth Circuit test rely on *Jones v. United States*[259] and *Minnesota v. Olsen*[260] to justify an expectation of privacy in a rental car.[261] These cases involved overnight guests, staying with the permission of the homeowner.[262] The Court allowed these guests to assert Fourth Amendment rights for two reasons; they were, at least temporarily, making the homeowner's home their home, and they had the owner's permission.[263] Supporters argue that because the Court has allowed a non-owner of a home to establish a privacy expectation, the same should apply to a non-owner of a car.[264]

This analogy is misplaced. Although the holding was not overruled, *Rakas* discredited *Jones*'s rationale granting standing when a defendant was "legitimately on [the] premises where a search occurs."[265] The holding of *Jones* is still good law, but any attempt to rely on its rationale is questionable.

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test: after the fact probable cause determinations, second-guessing by judges, and increased trial costs and time. Additionally, the policies behind the automobile exception cut against such a strict requirement. *See supra* Part II. Most importantly, however, *no* court has adopted, or even suggested, such an approach, not even the more defendant-friendly Eighth and Ninth Circuits. That no court has even entertained the proposition suggests the impracticality of such a rule.

[257] *See* United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006); United States v. Muhammad, 58 F.3d 353, 355 (8th Cir. 1995).

[258] *See* Rakas v. Illinois, 439 U.S. 128, 143 (1978) ("[T]o claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.").

[259] 362 U.S. 257, 267 (1960).

[260] 495 U.S. 91, 96-97, 99-100 (1990).

[261] *See* Simmons, *supra* note 113, at 506-10 (2008) (arguing for the adoption of the Eighth and Ninth Circuits' bright-line rule throughout the federal circuits on the grounds it is most consistent with the Fourth Amendment).

[262] *See Jones*, 362 U.S. at 267; *see also Olsen*, 495 U.S. at 96-97, 99-100.

[263] *See, e.g.*, Simmons, *supra* note 113, at 501-02.

[264] *See id.* at 502.

[265] *Jones*, 362 U.S. at 267; *see also* Rakas v. Illinois, 439 U.S. 128, 141-42 (1978).

In effect, the supporters of this approach rely on law that is thirty years out of date.

Even if the rationale behind *Jones* were accepted, the argument's logic is flawed. First, and most importantly, cars and homes are not treated equally for Fourth Amendment purposes.[266] A home is afforded the utmost protection, whereas a car is given much less protection.[267] Thus, any comparison that does not consider this difference is fundamentally flawed. Second, the analogy mistakes who is giving the permission. An overnight guest has the home*owner*'s consent to stay in the home. An unauthorized driver, on the other hand, does not have the owner's consent to use the rental vehicle. Instead, the driver has the *renter*'s consent. The proper analogy to make is one in which a homeowner rents out her summer house for a weekend, and then the renter grants a third party permission to stay in the house instead, without the homeowner's permission.[268] The Court, even if it chose to follow *Jones* and *Olsen*, is unlikely to extend standing to this third party.[269]

This bright-line approach also fails to accomplish its intended goal – ease of use. The test does not define what "permission" is, or how it is proven. Would the authorized driver have to write a contract granting driving rights to the unauthorized driver? Would the authorized driver need to be in the car with the unauthorized driver? Would certain language be necessary? Would a police officer be required to contact the authorized driver or could the officer just take the unauthorized driver's word? This is all unclear and undefined. Ironically, a court that attempted to use this bright-line test ended up applying a miniature totality-of-the-circumstances balancing test to determine whether permission had been granted, and thus whether the driver would be eligible for the bright-line determination.[270]

This bright-line rule would not help police officers in the field either. Upon pulling over a suspect who asserts the authorized driver granted permission,

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[266] *See supra* Part II.

[267] *See* Carroll v. United States, 267 U.S. 132, 152-53 (1925) (explaining the longstanding differentiation between a "dwelling house," where a search warrant was necessary and a "movable vessel" such as a car, where one was not).

[268] *Compare* Simmons, *supra* note 113, at 502 ("[A]n unauthorized driver [is] like an overnight guest in a host's home . . . ."), *with* United States v. Wellons, 32 F.3d 117, 119 n.2 (4th Cir. 1994) (likening the situation of an unauthorized driver of a rental car to a driver of a stolen vehicle).

[269] See Jones, 362 U.S. at 267 (explaining that the "legitimately on premises" rationale would "not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched"); Minnesota v. Olsen, 495 U.S. 91, 99 (1990) ("The houseguest is there with the permission of his host, who is willing to share his house and his privacy . . . . On the other hand, few houseguests will invite others to visit them while they are guests without consulting their hosts . . . .").

[270] *See* United States v. Silva, 470 F. Supp. 2d 1202, 1208 (D. Haw. 2006) ("Although explicit permission to borrow or use a car is certainly one method to prove an expectation of privacy, it is not the sole method. . . [g]iven the totality of the circumstances . . . .").

the test would require police officers to believe the unauthorized driver because the officer would have no way to prove the unauthorized driver's story from the scene. The likely results would be for an officer to search every vehicle and hope the renter did not give permission, decline to search vehicles for fear of having the evidence suppressed, or detain the unauthorized driver until permission could be proven (or disproven). None of those options are ideal and, in reality, leave the officers in as precarious a position as if they were following the Sixth Circuit's totality-of-the-circumstances approach.[271] Thus, the Eighth and Ninth Circuit's bright-line rule fails to accomplish its goals and is just as flawed as the Sixth Circuit's approach.

C. *The Fourth, Fifth, and Tenth Circuits' Bright-Line Rule Denying Standing to Unauthorized Drivers Is the Appropriate Test*

The third test, the bright-line rule opposite that from the Eighth and Ninth Circuit, is the approach most consistent with *Rakas* and the Supreme Court's Fourth Amendment jurisprudence. The Fourth, Fifth, and Tenth Circuits adopted the rule that an unauthorized driver of a rental car has no standing, regardless of whether or not she has the authorized driver's permission.[272] Of these two remaining tests, the latter is more consistent with *Rakas* and subsequent Supreme Court decisions.

When a person rents a car, the governing contract lists the specific people authorized to drive the vehicle. Every other person is unauthorized. By permitting an unauthorized person to drive the car, the authorized driver is blatantly violating the terms of the contract. Further, because this is such a standard provision of a rental contract,[273] it is reasonable to believe most people are aware of the provision. Thus, an unauthorized driver is a willing participant in the misconduct. The unauthorized driver is driving a rental car while well aware that she does not have the owner rental company's permission; she thus knows that she is in wrongful possession of the car. As the *Wellons* court noted, the unauthorized driver is in the exact same position as if she had stolen the car from the rental company's premises.[274] Neither person is in *lawful* possession of the car.[275] By equating the unauthorized driver with the driver of a stolen vehicle, the outcome is obvious – just as the driver of a stolen vehicle has no expectation of privacy, neither does an unauthorized driver.[276] Adopting any other test results in an outcome unheard

[271] *See supra* text accompanying notes 249-55.

[272] *See Wellons*, 32 F.3d 117; United States v. Boruff, 909 F.2d 111 (5th Cir. 1990); United States v. Obregon, 748 F.2d 1371 (10th Cir. 1984).

[273] *See supra* note 12.

[274] *See Wellons*, 32 F.3d at 119 n.2.

[275] *See* United States v. Erickson, 732 F.2d 788, 790 (10th Cir. 1984).

[276] *See, e.g.*, United States v. Tropiano, 50 F.3d 157, 161 (2d Cir. 1995) ("[W]e think it obvious that a defendant who knowingly possesses a stolen car has no legitimate expectation of privacy in the car.").

of in Fourth Amendment jurisprudence: a person knowingly located in a place she should not be is actually rewarded with a grant of standing to challenge a search.

Critics of this bright-line rule espouse two main arguments. First, they argue that a constitutional protection trumps a contractual limitation, and thus even though an unauthorized driver violated the terms of the rental agreement, it does not follow she is precluded from asserting a Fourth Amendment protection.[277] This attack is easily dispensed with. There is no question that the Constitution overrules a contractual provision because the Constitution trumps every other law in the land. However, to assert a Fourth Amendment claim, one must first show he or she has a legitimate expectation of privacy. A legitimate expectation of privacy exists when a person believes she has an expectation of privacy and society feels the expectation is reasonable.[278] Here, the contractual violation becomes paramount. An unauthorized driver, as defined in this Note, while not actually the one breaking a contract, still knows he is not allowed to drive the car and is driving a car he should not be operating. Thus, the driver cannot have a subjective expectation of privacy; one cannot expect to have a legitimate expectation of privacy in a place one is not legitimately supposed to be. But, even if the unauthorized driver believed there was an expectation of privacy, society should not recognize a legitimate expectation of privacy resulting from a person's wrongdoing.[279] Because there is no legitimate expectation of privacy, the Fourth Amendment does not apply, and the fruits of the search should be admissible.

The second criticism is admittedly more reasonable. Here, the argument is ex ante. If an unauthorized driver has no expectation of privacy because he breached the contract, what happens when an authorized driver returns the car late?[280] Based on the bright-line rule against standing, the driver should probably automatically lose standing the second the car is overdue.[281] This is a valid criticism because, in most people's minds, the thought of an authorized driver losing standing for returning the car late is absurd. No case in the Fourth, Fifth, or Tenth Circuit has yet had to reconcile this situation with the bright-line rule. Nevertheless, there are two potential responses.

First, the hypothetical described is very different from an unauthorized driver operating a rental car. The authorized driver who is overdue had a legitimate expectation of privacy prior to the deadline. The Fourth

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[277] *See* Simmons, *supra* note 113, at 505 ("[A]lthough an unauthorized driver's use of a rental car may be a violation of the terms of a rental agreement, it does not follow that he or she is foreclosed from claiming the protection of the Fourth Amendment.").

[278] *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[279] *See* United States v. Erickson, 732 F.2d 788, 790 (10th Cir. 1984).

[280] *See* Simmons, *supra* note 113, at 506.

[281] *See* United States v. Roper, 918 F.2d 885, 888 (10th Cir. 1990) (denying standing to challenge a Fourth Amendment violation because the defendant was not "in lawful possession or custody of the vehicle").

Amendment does not turn into a pumpkin at midnight simply because the car is not back in time.[282] As opposed to an unauthorized rental driver who was never legally in possession of the car, an authorized driver had legal possession at some point. Extending the legitimate expectation of privacy for an overdue rental car would be reasonable[283] and in line with the actions of the rental agency. Considering that the driver has already paid the rental bill, the driver usually has the ability to extend the rental contract by simply making a phone call. Most importantly, the rental company has not yet taken steps to repossess the car, and thus, it is reasonable to assume the rental agency will tolerate delays in returns. These actions suggest that the expectation of privacy is legitimate, and therefore, the overdue driver should retain standing.[284]

Additionally, being late on a rental return does not automatically breach the contract. To the contrary, many contracts account for tardiness and build in penalty fees should a driver return the car late.[285] When an unauthorized driver drives the rental car, however, the contractual provision stating no driver other than those listed shall drive the car is explicitly breached. Because a driver does not necessarily breach the contract by being late, but rather triggers the penalty clause, the authorized driver retains her reasonable expectation of privacy.

Even with these criticisms, the Fourth, Fifth, and Tenth Circuits' bright-line rule denying standing is the proper rule. The rule is easy for police, defendants, and courts to apply. The rule increases efficiency in the criminal justice system because police would instantly know whether they could legally perform a search. The rule also helps potential defendants because they know from the start what an officer can do if she pulls over an unauthorized rental

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[282] *Cf.* CINDERELLA (Walt Disney Pictures 1950).

[283] Of course, the situation would be quite different if the rental car was days or weeks overdue, as opposed to a few hours or minutes. The latter, not the former, is the hypothetical raised by the critics of the bright-line rule. *See, e.g.*, Simmons, *supra* note 113, at 505-06.

[284] *See* United States v. Cooper, 133 F.3d 1394, 1398-99 (11th Cir. 1998) (granting standing to an overdue rental car driver because the driver's expectation of privacy is reasonable and society should recognize it as legitimate). However, because *Cooper* arose in the Eleventh Circuit, which has yet to adopt an explicit position on unauthorized drivers, no clues can be drawn as to how the Fourth, Fifth, and Tenth Circuits would reconcile an overdue driver with an unauthorized driver.

[285] *See, e.g.*, Budget.com, Budget Fastbreak Service Terms and Conditions Effective for Reservations Made on or After January 15, 2009, ¶ 9, http://www.budget.com/budgetWeb/html/en/profile/master_printable.html (Jan. 2, 2009) (charging a fee for late return); Hertz.com, Additional Driver Not Signed On Contract, https://hertz.custhelp.com (search "Additional Driver Not Signed On Contract"; select "Additional Driver Not Signed On Contract") (last visited Apr. 6, 2009) ("Late returns can affect the type of rate assigned to the rental . . . . [I]f you only want to extend by one day past the original due date and have not made any other changes, it is not necessary to call. You will be charged the extra day price that appears on your Rental Agreement.").

car driver. Additionally, the rule is consistent with *Rakas*. When a person is driving a car she is unauthorized to drive, there should be no expectation of privacy in that vehicle. The driver is going against the wishes of the owner, and thus, even if the driver believes there should be privacy, society as a whole should refuse to accept the privacy claim as legitimate. The most logical result to ensure consistency and ease of use by police on the street, regardless of the aforementioned criticisms, is to deny standing to an unauthorized rental car driver in all cases.

Finally, the text of the Fourth Amendment supports this bright-line rule. The text protects the "right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures."[286] An unauthorized driver has no legitimate expectation of privacy, and without this legitimate expectation, the search cannot be unreasonable. If a search is reasonable, the Court has held it is not a violation of the Fourth Amendment.[287]

CONCLUSION

The rental car business has grown in recent years and is unlikely to disappear in the near future. While business has been booming, the law involving these vehicles has remained relatively thin. The issues and problems surrounding rental cars are not going away. The circuits that have not yet dealt with standing of unauthorized rental drivers will soon confront it, and one of the three current tests will likely be adopted.

The Sixth Circuit adopted a balancing test attempting to determine standing based on the totality of the circumstances. In theory, this test seems promising because it allows for a potentially just result in every case, but it is fraught with problems. A balancing test goes against most stated purposes of the Fourth Amendment. The test is almost impossible to implement because officers on the street will never know the proper course of action. Additionally, the courts will become even more backlogged with suppression motions and will never be able to apply the test consistently.

The Eighth and Ninth Circuits, on the other hand, adopted a bright-line rule granting standing to all unauthorized drivers who have the authorized driver's permission. While better than the Sixth Circuit's test, this rule is also troublesome. Determining what counts as permission and when permission was given involves its own balancing test. Additionally, this approach does not solve the problem of easy implementation by police. Finally, the logic behind the test relies on faulty analogies and case law that is thirty years obsolete.

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[286] U.S. CONST. amend. IV (emphasis added).

[287] *See* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (stating that the "essential purpose" of the Fourth Amendment is to "impose a standard of 'reasonableness'"); *cf.* Griffin v. Wisconsin, 483 U.S. 868, 872 (1987) (holding a warrantless home search did not violate the Fourth Amendment because it satisfied the Fourth Amendment's reasonableness requirement).

Thus, the remaining test, the anti-Eighth and Ninth Circuit bright-line rule, which automatically denies standing to an unauthorized driver, is the proper and most reliable rule to adopt. This rule has been implemented in the Fourth, Fifth, and Tenth Circuits. While there are some legitimate criticisms of this approach, these criticisms pale in comparison to the problems of the other two tests. This rule is easy for police to apply on a consistent and proper basis. Moreover, it is consistent with *Rakas* and the Supreme Court's Fourth Amendment jurisprudence. The rule takes into account what society would accept as a legitimate expectation of privacy and adopts a bright-line rule that allows for an efficient criminal justice system. Also, the bright-line rule is most consistent with the text of the Fourth Amendment because the search is not "unreasonable." Therefore, the remaining undecided circuits should adopt this rule – the bright-line rule denying standing to unauthorized drivers – and the Sixth, Eighth, and Ninth Circuits should rethink their current approaches.