No. 08-1482

In the
Supreme Court of the United States

TOMMY ZEKE MINCEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Constitutional Provision:

Other Authorities:

REPLY BRIEF FOR PETITIONER

The government disputes the obvious and glosses over the complex. Courts (including the court below) and commentators have expressly acknowledged a three-way split concerning whether someone who drives a rental car with the renter's permission, but without the owner's permission, has a reasonable expectation of privacy in the car. But the government claims that there is merely "tension" and cursorily claims that the Fourth Circuit's rule is correct.

Neither of the government's claims has merit. The lower courts are indeed in deep and acknowledged conflict, and the Fourth Circuit's rule—which, as the government concedes, equates unlisted rental-car drivers with car thieves—is incorrect.

What is more, the government relies upon its mistaken view of the merits when purporting to identify independent reasons to deny certiorari. In asserting that the police officers validly searched the rental car because Armada instructed them not to release it to Mincey, or because Armada consented to the search, the government assumes that Mincey never possessed a protected privacy interest in the car. But that assumption is precisely what has generated so much controversy in the lower courts. Far from supplying independent grounds to deny certiorari, the government's repeated reliance on a startling claim—that driving a rental car with only the renter's permission is, for purposes of the Fourth Amendment, just like stealing it—confirms that this Court should grant certiorari.

I. There Is An Irreconcilable Conflict In The Lower Courts

The government does not deny that federal courts of appeals and state courts of last resort have articulated different standards for deciding the Fourth Amendment claim of a person who drives a rental car with permission from the renter but not the rental company. Nor does it dispute the reasons set out in the petition and the *amicus* brief for arguing that a lower-court split on that issue—which arises time and again in federal and state court—would warrant this Court's review. It claims, however, that there is no actual conflict that requires this Court's review. Br. in Opp. 9 – 13.

That claim is unique to the government, newly minted for the government's brief in opposition, and incorrect. Many cases and commentaries—including the only commentary cited by the government—recognize that the lower courts follow "conflicting" rules on the first question presented here. 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3 at 26 n.300 (4th ed. Supp. 2008-09) (*LaFave*); see Br. in Opp. 9.[1]

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[1] See, *e.g.*, Pet. App. 13a – 15a (recognizing the split); *United States* v. *Thomas*, 447 F.3d 1191, 1196 – 97 (9th Cir. 2006) (same); *United States* v. *Haywood*, 324 F.3d 513, 516 (7th Cir. 2003) (same); *State* v. *Nelson*, No. A-09-082, 2009 WL 2342734, *5 (Neb. Ct. App. July 28, 2009) (unpublished) ("We decline to adopt the approach taken by the 4th, 5th, and 10th Circuits as urged by the State and instead, adopt the permission test employed by the Eighth Circuit."); see generally 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 (2008); Matthew M.

Before filing its brief in opposition, the government appeared to have joined that consensus. It acknowledged at oral argument below that the Eighth and Ninth Circuits have held "that there is a reasonable expectation of privacy where the defendant is driving with the renter['s] or lessee's permission." 9/23/2008 Oral Argument CD at 18:44 to 18:56; see also Brief of United States at 10, *United States* v. *Brice*, 157 F.3d 906 (11th Cir. 1998) (unpublished) (No. 07-3453), 1998 WL 34184921 ("The courts of appeals are split as to when a defendant who is neither the renter of a rental vehicle nor an authorized driver has a legitimate expectation of privacy in the vehicle.").

The government was right the first time: The lower courts are indeed split. The government's contrary claim, like its defense of the Fourth Circuit's rule, is mistaken.

A. The government argues that the Eighth and Ninth Circuits have rejected the Fourth and Tenth Circuits' rule only in dicta. Br. in Opp. 11-13. But, in fact, the Eighth and Ninth Circuits have squarely held that a person who is not listed as an authorized driver on a rental agreement has a reasonable expectation of privacy in the rental car if an authorized driver permitted him to drive it. *United States* v. *Thomas*, 447 F.3d 1191 (9th Cir. 2006); *United States* v. *Best*, 135 F.3d 1223 (8th Cir. 1998); *United States* v. *Muhammed*, 58 F.3d 353 (8th Cir. 1995).

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 UNIV. L. REV. 589 (2007).

In *Best*, the Eighth Circuit rejected the government's argument that the defendant could not "challenge the validity of the search because the rental agreement did not list Best as an authorized driver." 135 F.3d at 1225. The court therefore remanded the case with this instruction: "If [the authorized driver] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing." *Id.* at 1225.[2]

Best's "explicit directives * * * to the lower court concerning proceedings on remand are not dicta." *Cole Energy Dev. Co.* v. *Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993) (Posner, C.J.). Thus, in cases like this one, district courts of the Eighth Circuit must give *no weight* to a driver's status under a rental agreement. They must instead protect the privacy interests of an unlisted driver so long as he received the renter's permission to drive it. See, *e.g.*, *United States* v. *Humphrey*, No. 8:02cr56, 2002 WL 1485387, *3 (D. Neb. July 10, 2002) (explaining that, under *Best*, "[t]he presence or availability of the authorized driver is immaterial"). The government does not point to a single decision within the Eighth Circuit questioning that *Best* squarely decided the issue, much less one adopting the conflicting interpretation of the Fourth Amendment applied in the decision below.

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[2] As the government notes (Br. in Opp. 7 n.2), courts occasionally "use 'standing' to refer to the threshold substantive determination of whether [a defendant] has a reasonable expectation of privacy under the Fourth Amendment." *United States* v. *Smith*, 263 F.3d 571, 582 (6th Cir. 2001).

The Ninth Circuit follows the same rule. In *Thomas*, it "agree[d] with the Eighth Circuit: An unauthorized driver may have standing to challenge a search if he or she has received permission to use the car." 447 F.3d at 1199. That holding, Judge O'Scannlain explained, meant "reject[ing] the government's contention that a defendant not listed on a lease agreement lacks standing to challenge a search." *Id.* at 1198.

That explicit rejection of the Fourth and Tenth Circuits' rule was not idle dictum. A statement that "explains the Court's rationale * * * is part of the holding." *United States* v. *Bloom*, 149 F.3d 649, 653 (7th Cir. 1998) (Easterbrook, J.); see also *Cetacean Community* v. *Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) ("'[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.'") (citation omitted). Thus, although the defendant in *Thomas* had not obtained anyone's permission to drive the rental car—and thus would have fared poorly under several rationales—the rationale actually selected by *Thomas* binds federal courts in the Ninth Circuit. See, *e.g.*, *United States* v. *King*, 560 F. Supp. 2d 906, 915 (N.D. Cal. 2008) (relying on *Thomas* in granting a motion to suppress evidence discovered in a rental car).[3] Again, the

[3] For the same reason, the government's claim that the New Mexico Supreme Court has not decided this issue is incorrect. Br. in Opp. 13 n.2. That court, like the Ninth Circuit, has rejected a driver's Fourth Amendment claim—where the driver did not even assert that the renter permitted him to drive the rental car—*after* "agree[ing] [with the Eighth Circuit]

government points to no authority from within the Ninth Circuit suggesting otherwise.

B. Just as it overlooks the *existence* of the Eighth and Ninth Circuits' rule, the government overlooks the *significance* of the totality-of-the-circumstances tests applied elsewhere. In particular, its claim that the First and Sixth Circuits would not have recognized a privacy interest in this case (Br. in Opp. 10-11), even if true, is not a reason to deny certiorari.

For starters, every contextual test—by "refus[ing] to adopt a bright line test" that looks only to the rental agreement (*United States* v. *Smith*, 263 F.3d 571, 586 (6th Cir. 2001))—necessarily conflicts with the Fourth and Tenth Circuits' bright-line rule.

To downplay that conflict, the government cherry-picks among the contextual tests; it focuses on the First and Sixth Circuits, while ignoring Texas. See *Parker* v. *State*, 182 S.W.3d 923 (Tex. Crim. App. 2006). As we explained in the petition (at 13), the Texas Court of Criminal Appeals in *Parker* "disagree[d] with the * * * use of a bright-line rule stating that only those listed on a rental agreement as authorized drivers have an expectation of privacy in the vehicle and standing to contest a search." *Id.* at 927. Looking instead to the surrounding "circumstances," the court held that the defendant had possessed a protected privacy interest in the

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that * * * where the driver is neither the renter nor listed on the rental contract as an authorized driver, the burden is on the driver to present evidence of consent or permission from the lawful owner or renter to be in possession of the vehicle in order to establish standing to challenge a search of the vehicle." *State* v. *Van Dang*, 120 P.3d 830, 834 (N.M. 2005).

rental car because "he had [the renter's] express permission to drive [it]," and because "[t]here is nothing in the record that indicates that he knew about the terms of the car rental agreement or that he knew the agreement did not list him as an authorized driver." *Ibid.*

The government does not even acknowledge *Parker*, let alone dispute that petitioner would have prevailed under its reasoning. It therefore has not rebutted petitioner's contention that the Fourth Circuit's bright-line rule squarely conflicts with Texas's contextual test.

Texas's test is also significant for an additional reason: Even assuming that the Fifth Circuit has actually decided to follow the Fourth and Tenth Circuits' rule—as the government claims (Br. in Opp. 9 & n.3; but see Pet. 9 & n.1)—then there is also a conflict within Texas between the Fifth Circuit and Texas's highest criminal court. That fact alone warrants this Court's review.

C. The government devotes much of its brief in opposition to the merits. Br. in Opp. 6-9. In doing so, it asserts that driving a rental car with the renter's but not the owner's permission is "not lawful[] possess[ion]." Br. in Opp. 8.

The government offers no support for that assertion. It does not deny that this Court has deemed conduct "wrongful" for purposes of the Fourth Amendment only when it violates criminal law. See Pet. 17. Nor does it dispute that unlisted drivers frequently receive permission from renters to drive rental cars. Thus, the government does not explain why society would equate an unlisted driver—whose conduct violates a contract to which

he is not even a party—with a car thief, whose conduct violates criminal law.

Consequently, as the court explained in *Parker*, the government's argument founders: "We fail to see how the fact that the car was a rental changes an individual's expectation of privacy in a car that he borrowed from his girlfriend. [The defendant] did not steal the car; he did not even use it without [his girlfriend's] knowledge." 182 S.W.3d at 927.

II. The Government Defense Of The Fourth Circuit's Extinguishment Rationale Is Incorrect And Demonstrates Why This Case Is An Ideal Vehicle For Certiorari

The government's approach to the second question presented—whether Mincey's expectation of privacy, if any, was extinguished when the car rental company instructed the police not to release the car to him—mirrors its approach to the first question. Specifically, the government combines a flawed denial of a circuit split with a bare assertion that the Fourth Circuit "is correct." Br. in Opp. 13.

A. The government claims that the Fourth Circuit's extinguishment rationale does not conflict with *United States* v. *Cooper*, 133 F.3d 1394 (11th Cir. 1998). *Cooper* held that a phone call from the police to a car rental company cannot extinguish the protected privacy interest of someone in possession of a rental car. *Id.* at 1401. To distinguish *Cooper*, the government argues that Cooper was not "an unauthorized third-party driver such as petitioner." Br. in Opp. 15.

That argument simply reprises the government's belief that "unauthorized third-party drivers" never possess protected privacy interests in rental cars. The Fourth Circuit's extinguishment rationale, however, holds that even if those drivers *do* possess protected privacy interests—*i.e.*, even under the Eighth and Ninth Circuits' "line of cases" (Pet. App. 14a n.9)—those interests can be extinguished by phone calls between the police and car rental companies. That holding directly conflicts with *Cooper*, which held that those phone calls do not extinguish protected privacy interests.

The government's insistence that Mincey lacked a protected privacy interest in the rental car also appears to be its only basis for asserting that the Fourth Circuit's extinguishment rationale "is correct." Br. in Opp. 13. But if a defense of the extinguishment rationale must rely on the Fourth Circuit's holding concerning the first question presented, then, as suggested in the petition, the extinguishment rationale "represents no alternative at all." Pet. 22.

B. The government's linkage of the two questions presented confirms that this Court should decide them both in a single case. See Pet. 23 – 25. While the petition explained that the two questions are factually interrelated—because police officers often call car rental companies when they stop unlisted drivers—the government's arguments presume that they are legally interrelated as well. For that reason, addressing both questions together will enable this Court to provide maximum guidance in one case, as opposed to piecemeal guidance in two cases. The Court should therefore address both questions in one fell swoop.

That, of course, is what the Fourth Circuit did below; it simply reached the wrong conclusions. In holding that Mincey's expectation of privacy was unreasonable or, alternatively, extinguished, the Fourth Circuit elevated a rental company's expectations over "the everyday expectations of privacy that we all share." *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990).

III. The Car Rental Company's Purported Consent To The Search Is Not A Reason To Deny Certiorari

Finally, the government claims that the car rental company's consent justified the search of Mincey's car. But the government acknowledges, as it must, that the Fourth Circuit expressly did not reach this issue. Br. in Opp. 16; Pet. App. 15a – 16a. So it is no barrier to this Court's deciding the questions presented here.

If this Court grants certiorari and decides the two questions presented, the Fourth Circuit will of course consider the consent issue on remand. But if this Court denies certiorari, the lower courts will continue to apply conflicting rules in numerous cases involving unlisted drivers. Allowing those conflicts to persist, out of concern for an issue that the court of appeals did not even reach, would serve no purpose.

Moreover, it is easy to see why the Fourth Circuit did not reach the consent issue. If Mincey possessed a reasonable expectation of privacy while driving the rental car, and if his expectation survived the rental company's instruction not to release the car to him, then the company's consent could *not* have authorized the search over Mincey's objection.

The cases cited by the government prove that point. In *United States* v. *Matlock*, 415 U.S. 164 (1974), this Court held that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id.* at 170. More recently, in *Georgia* v. *Randolph*, 547 U.S. 103 (2006), this Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120.

It follows that consent by a *physically absent* party is not valid against a *present, nonconsenting* party who has a reasonable expectation of privacy in the place searched. Thus, if Mincey had a reasonable expectation of privacy in the rental car, Armada could not have telephonically authorized the police to search it. See, *e.g.*, 4 *LaFave* § 8.6(c) at 245 (4th ed. 2004) ("[U]nder ordinary circumstances the bailor may not consent to an intrusion into the bailee's possessory interest."), cited in Br. in Opp. 15; *United States* v. *Kelly*, 414 F. Supp. 1131, 1146 (W.D. Mo. 1976) (holding that a car rental company could not authorize the search of its car even though the renter's contract had expired), rev'd in part on other grounds, 547 F.2d 82 (8th Cir. 1977).

The government's contrary argument falls back on the claim that Mincey "was not in lawful possession" of the rental car. Br. in Opp. 15. Thus, once again, the government has failed to mount any defense of the Fourth Circuit's ruling that does not reference the court's conclusion that Mincey lacked a reasonable expectation of privacy in the rental car. It

has succeeded, however, in showing that several legal issues relate to the question whether Mincey's privacy expectation was reasonable. Because that recurring question has fractured the lower courts, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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