

No. 08-1016

IN THE
SUPREME COURT OF THE UNITED STATES

FALL TERM 2008

JOHN BENTLEY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

September 24, 2008

Counsel for Respondent

QUESTIONS PRESENTED

- I. Does an unauthorized driver of a rental car lack a reasonable expectation of privacy and therefore the right to raise a Fourth Amendment challenge regarding the legality of a vehicle search?

- II. Should the federal government be permitted to make use of freely and constitutionally gathered incriminating evidence via an extension of the Dual Sovereignty Doctrine to the Sixth Amendment right to counsel context?

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BRIEF FOR RESPONDENT

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

STATEMENT OF THE CASE

Preliminary Statement

Petitioner John Bentley (“Petitioner”) was indicted by a federal grand jury for murder under 18 U.S.C. § 1111 and drug possession under 21 U.S.C. § 844 on August 15, 2006. R. at 4. On August 29, 2006, based on a recorded, transcribed and signed confession to Detective Miller of the Richmond Police Department, Petitioner was also charged with murder under Virginia Code section 18.2-31(4). R. at 4. On October 2, 2006 Petitioner filed two Motions to Suppress in the United States District Court for the Eastern District of Virginia, Richmond Division, which

were heard on October 30, 2006, asking the court to exclude the semi-automatic pistol due to a Fourth Amendment search violation and his sworn confession statement because it was obtained in violation of his Sixth Amendment right to counsel. R. at 5. During this proceeding, the government made two concessions: (1) Petitioner's right to counsel for the federal charge attached prior to Detective Miller's interrogation; and (2) the federal murder charge and the state murder charge shared the same essential elements. R. at 5. The district court denied both Motions to Suppress on November 1, 2006. R. at 6.

On November 6, 2006, the Commonwealth of Virginia dropped the murder charge against Petitioner. R. at 7. At the federal trial, a jury convicted Petitioner of murder based on his signed confession and the semi-automatic pistol with his prints found in the rental car he drove. R. at 7. Petitioner appealed the district court's order denying his motions to suppress the admission of the pistol and the sworn statement. R. at 8-9. The United States Court of Appeals for the Fourth Circuit affirmed the district court's holding denying Petitioner's Motions to Suppress, finding that Petitioner lacked standing to assert a Fourth Amendment claim and that Petitioner's Sixth Amendment right to counsel only attached to the federal charge. R. at 9. This Court granted *certiorari* on August 15, 2008. R. at 10.

Statement of Facts

On March 20, 2006, Petitioner and his wife, Heather Bentley, obtained a rental car from Hertz in Richmond, Virginia. R. at 1. Petitioner had recently lost his job and Ms. Bentley was the couple's sole source of income. R. at 1. Consequently, as Ms. Bentley was "going to have to pay for [the rental car]" she was listed as the sole "Authorized Driver" on the rental agreement. R. at 1. Ms. Bentley executed the rental agreement which read in pertinent part: "No one other

than the Authorized Driver shall be allowed to drive the rental car.” R. at 1-2. Ms. Bentley selected the car and took possession of it. R. at 2.

On Saturday, March 26, 2006, Petitioner took the rental car under the pretenses of driving out of town for a job interview. R. at 2. State Trooper Smith pulled Petitioner over for driving seventy-one miles per hour in a sixty mile per hour zone. R. at 2. Upon receiving Petitioner’s license and a copy of the rental agreement, Trooper Smith noticed that Ms. Bentley was listed as the sole Authorized Driver. R. at 2. Trooper Smith’s drug sniffing dog then indicated the presence of contraband in the vehicle’s side door. R. at 2. She opened the door and discovered both marijuana and a semi-automatic pistol. R. at 3. She confiscated the contraband and, pursuant to Hertz’s instructions, impounded the car. R. at 3. Petitioner agreed to accompany Trooper Smith to the stationhouse to answer questions. R. at 3.

After running the serial number on the gun, Detective Miller learned that the weapon had been used during the robbery of the Federal Reserve Bank of Richmond and in the shooting of an employee on May 30, 2005. R. at 3. Detective Miller contacted Agent Brown, an FBI investigator, and informed him of Petitioner’s detention. R. at 3.

Later that day, Agent Brown *Mirandized* and questioned Petitioner concerning the presence of the gun. R. at 3. Agent Brown informed Petitioner that the gun had been used in the robbery of the bank and the murder, and that his fingerprints were on the gun. R. at 3. Petitioner denied involvement and demanded an attorney. R. at 3. Immediately upon hearing Petitioner request the presence of an attorney, Agent Brown ended his questioning. R. at 3.

On August 29, 2006, after Petitioner’s federal indictment, state officials asked him if he would be willing to come to the station to answer questions regarding the May 30, 2005 robbery

and murder. R. at 4. Petitioner, again, was *Mirandized*. R. at 4. After voluntarily waiving his *Miranda* rights, during questioning, Petitioner confessed:

I just want to come clean. . . . I figure a state court judge might be more lenient on me if I confess. . . . I decided to go in on May 30, 2005, shoot him, and rob the bank After the robbery . . . I buried the gun. . . . I lied to my wife and told her that I had a job interview. I went to Lexington, dug up the gun, and was driving back to Richmond . . . when I was pulled over.

R. at 4. With Petitioner's consent, state officials recorded the conversation, transcribed it, and had Petitioner sign and date the transcription confirming that the confession was his. R. at 4.

SUMMARY OF ARGUMENT

The unauthorized driver of a rental car lacks a reasonable expectation of privacy and therefore cannot assert the Fourth Amendment right to challenge the legality of a vehicle search. Fourth Amendment rights are personal rights, and so a defendant must establish a reasonable and legitimate expectation of privacy in the area searched in order to bring a Fourth Amendment claim and successfully suppress evidence. The bright-line rule established by the Fourth, Fifth, and Tenth Circuits, which states that an unauthorized rental car driver lacks a reasonable expectation of privacy, is the appropriate standard which this court should explicitly adopt. This rule is accepted by the majority of circuits, is consistent with this Court's Fourth Amendment search jurisprudence, supports public policy, and protects Fourth Amendment goals.

During concurrent state and federal investigations of one series of incidents, the Federal Government's reliance on a freely and constitutionally obtained pre-charge confession taken by state officials does not encroach on the confessor's Sixth Amendment right to counsel. Pursuant to the plain language of valid Supreme Court precedent and a series of recent circuit court decisions, the Dual Sovereignty Doctrine is necessarily imported into the Sixth Amendment right to counsel context. Accordingly, despite the fact that the state and federal charges derive out of

the same offense, because the state of Virginia and the Federal Government are separate sovereigns, Petitioner's confession is accessible to the Federal Government in their proceedings against him.

ARGUMENT

I. AN UNAUTHORIZED DRIVER OF A RENTAL CAR LACKS A REASONABLE EXPECTATION OF PRIVACY AND SUBSEQUENTLY THE FOURTH AMENDMENT RIGHT TO CHALLENGE THE LEGALITY OF A VEHICLE SEARCH AND SUPPRESS ANY EVIDENCE OBTAINED THEREIN.

The Fourth Amendment provides that people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend.

IV. In *Weeks v. United States*, this Court adopted the exclusionary rule, a judicial remedy for Fourth Amendment violations which is applied in criminal cases to bar the use of evidence obtained from unreasonable searches and seizures. 232 U.S. 383 (1914).¹ This Court provided rationales for adopting the exclusionary rule: preservation of judicial integrity; deterrent for police misconduct; and a logical and constitutionally necessary remedy for Fourth Amendment violations. *See, e.g., Weeks*, 232 U.S. at 394; *Mapp*, 367 U.S. at 655-56. The social cost of applying the exclusionary rule to vicarious Fourth Amendment claims, however, exceeds any potential social benefit as, "[r]elevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Rakas v. Illinois*, 439 U.S. 128, 137-38 (1978).

Furthermore, Fourth Amendment rights are personal rights which may be asserted only by a defendant who has a legitimate expectation of privacy in the invaded place or thing searched. *Id.* at 133-34, 143. Thus, to succeed on a motion to exclude evidence based on an unreasonable search and seizure claim, a defendant must first establish a personal, reasonable, and legitimate expectation of privacy in the particular area searched. *United States v. Payner*,

¹ Exclusionary rule extended to state prosecutions in *Mapp v. Ohio*, 367 U.S. 643 (1961).

447 U.S. 727, 731 (1980).² It is a defendant that bears the burden of showing this legitimate expectation of privacy, or standing, to assert a Fourth Amendment claim under the circumstances. *Rakas*, 439 U.S. at 132 n.1.

A. Current Supreme Court Precedent Examining the Reasonable Expectation of Privacy in the Context of Vehicle Searches is Consistent with a Bright-Line Rule Denying Standing to Unauthorized Drivers of Rental Cars.

Throughout its Fourth Amendment search jurisprudence, this Court has traditionally assigned a lower expectation of privacy to automobiles. Since cars are operated on public streets and parked in public places, the expectation of privacy in one’s car is “significantly different from the traditional expectation of privacy and freedom in one’s residence.” *Id.* at 154 (Powell, J., concurring) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)). In *Rakas*, police stopped a vehicle driven by robbery suspects, searched their car, and found bullets in the glove compartment and a firearm under the front passenger seat. 439 U.S. at 128. This Court held that the passengers had no legitimate expectation of privacy in the car because they neither owned nor leased the car, and did not assert any interest in the items seized. *Id.* at 148. The Court wrote:

[Petitioners] asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. . . . [T]he fact that they were “legitimately on [the] premises” in the sense that 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.

Id.

² See also *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (to qualify for Fourth Amendment protection “first [one must] have exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation must be one that society is prepared to recognize as ‘reasonable’”).

Since *Rakas* was decided, this Court has only reexamined the issue of Fourth Amendment standing in the context of residential searches. In *Minnesota v. Olson*, this Court held that the defendant, an overnight guest in a friend's home, had a legitimate expectation of privacy in the premises, and could therefore challenge the legality of the search. 495 U.S. 91, 95-97 (1990). Conversely, in *Minnesota v. Carter*, this Court held that the defendant, who was in another's home for a business transaction, did not have a legitimate expectation of privacy in the premises and so could not raise a Fourth Amendment claim. 525 U.S. 83, 91 (1998).

Similarly to the defendants in *Rakas*, although Petitioner had permission to access the vehicle (here, however, from the authorized renter), he did not own, lease, or rent the vehicle himself, nor obtain the owner, Hertz's, permission for its use. Therefore he lacked a property or possessory interest in the vehicle and its compartments. Additionally, the instant case is more analogous to the situation in *Carter* since Petitioner only had the authorized renter's permission to use the vehicle for a very limited purpose, to attend a job interview, more like the business guest scenario in *Carter* as opposed to the full-access overnight guest in *Olson*. Moreover, as this Court has noted, the level or expectation of privacy shared in one's home is highly distinguishable from that of a rental car. *Rakas*, 439 U.S. at 154 (Powell, J., concurring). Consequently, Petitioner does not have any legitimate expectation of privacy in the rental car and cannot assert a Fourth Amendment right to challenge the legality of its search.

B. The Majority of Circuit Courts Have Adopted a Bright-Line Rule Rejecting the Notion that Unauthorized Drivers of Rental Cars Have a Legitimate Expectation of Privacy to Invoke a Fourth Amendment Challenge to a Vehicle Search.

The Federal Circuit Courts have adopted three varying approaches to address the issue of whether an unauthorized rental car driver has standing to challenge the legality of a search. The majority, including the Fourth, Fifth, and Tenth Circuits, have established a bright-line test,

simply denying Fourth Amendment standing to an unauthorized driver of a rental car. *See, e.g., United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994); *United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990); *United States v. Roper*, 918 F.2d 885 (10th Cir. 1990).

1. This Court should adopt the bright-line rule accepted by the majority of circuit courts as the appropriate standard for determining the legitimate expectation of privacy afforded unauthorized rental car drivers.

The Fourth Circuit, the controlling authority for the opinion below, held that “an unauthorized driver of the rented car had no legitimate privacy interest in the car and, therefore, the search of which he complain[ed] cannot . . . violate his Fourth Amendment rights.” *Wellons*, 32 F.3d at 119. In *Wellons*, the defendant was stopped for exceeding the speed limit while driving a car rented by a friend for which he was not an authorized driver. *Id.* at 118-19. Upon investigation with a drug-sniffing canine, narcotics were discovered in the vehicle. *Id.* The court held that despite being in possession of the car at the time of the search, and perhaps having the permission of the authorized driver, the defendant did not have a reasonable expectation of privacy in the car, and lacked standing to challenge the legality of the search. *Id.* at 119-20. The Fourth Circuit further explicitly held that only the lawful owner of the vehicle, the rental car company, could authorize one to use the car. *Id.*

In *Boruff*, the Fifth Circuit held that although the defendant had permission to use a rental car from the authorized driver, his girlfriend, and was in sole possession of it at the time of the search, he did not have a legitimate expectation of privacy because under the terms of the rental agreement, only his girlfriend was authorized to drive the vehicle. 909 F.2d at 117. The

girlfriend had absolutely no authority to give the defendant control of the car; therefore the defendant lacked standing to assert a Fourth Amendment challenge. *Boruff*, 909 F.2d at 117.³

In *United States v. Obregon*, the Tenth Circuit relied on *Rakas* in holding that an individual who is not named on a rental agreement as renter or authorized driver, and is driving a vehicle with no showing that any arrangement had been made with the rental company does not have a legitimate expectation of privacy. 748 F.2d 1371, 1374 (10th Cir. 1984). In that case, although “[d]efendant had the keys to the car and may have had permission from the renter of the car to use it . . . this is not determinative of the standing inquiry” *Id.*⁴

Like the defendants in *Wellons*, *Riazco*, *Obregon*, and *Roper*, Petitioner in the present case was also an unauthorized driver of a rental vehicle who was initially stopped for a traffic violation. Just as in *Wellons*, *Boruff*, and *Roper*, Petitioner alleges that he received permission from the authorized driver of the rental car, someone with whom he has a close relationship, his wife. However, according to the bright-line rule established by these majority circuit courts, this is inconsequential, and Petitioner lacks a reasonable expectation of privacy and therefore the Fourth Amendment right to challenge the legality of the vehicle search which uncovered the incriminating evidence.

³ See also *United States v. Riazco*, 91 F.3d 752, 754 (5th Cir. 1996) (Defendant “did not assert a property or possessory interest in the vehicle” and could not establish a subjective expectation of privacy which society would recognize as objectively reasonable because he “neither owned nor rented [the vehicle, and t]he rental agreement specifically stated that the car was to be driven only by persons authorized by the car rental company, and [he] was not so authorized.”).

⁴ See also *Roper*, 918 F.2d at 886-88 (The defendant and a passenger were stopped for a traffic violation in a rental car transporting cocaine for which *Roper* was not an authorized driver; the vehicle had been rented by the passenger’s wife. Despite this close connection to the authorized renter, the court found that since the defendant “was not the owner nor . . . in lawful possession or custody of the vehicle” he lacked standing to challenge the search.).

In the instant case, Petitioner’s wife explicitly took control of obtaining a rental car since she would be the one using it and paying for it due to his unemployment. The Hertz rental representative clearly asked Petitioner and his wife who would be the driver of the car, and his wife replied, “I am.” R. at 1. Petitioner stayed inside while his wife accompanied the representative in selecting the vehicle. The wife paid for the vehicle with a credit card that solely she makes payments on, and signed only her name under the “Authorized Driver” section of the rental agreement. The Authorized Driver clause of the Hertz rental agreement plainly states: “No one other than the Authorized Driver shall be allowed to drive the rental car.” R. at 2. The agreement is unambiguous, and Petitioner was even present while the contract was established. Therefore, in applying the bright-line rule, this Court should reject the notion that Petitioner, an unauthorized rental car driver, has a legitimate expectation of privacy; he therefore lacks standing to challenge the legality of the search.

2. The bright-line rule denying standing to unauthorized rental car drivers is consistent with public policy and protects the guarantees of the Fourth Amendment.

The bright-line rule denying standing to unauthorized drivers of rental cars provides police the proper guidance they need to avoid trampling on Fourth Amendment rights. Fourth Amendment Doctrine should be expressed in terms that are readily applicable by the police in the context of law enforcement activities. While highly sophisticated sets of rules, with various qualifications, may be fine for lawyers and judges, they may be literally impossible for application in the field. “The fact that even well-trained officers [are] so frequently unable to identify and apply [search and seizure] rules indicates that, as currently formulated, the complexity of the law imposes a substantial limitation on the possibility of deterring police illegality.” William C. Heffernana & Richard W. Lovely, *Evaluating the Fourth Amendment*

Exclusionary Rule: The Problem of Police Compliance with the Law, 24 U. MICH. J.L. REFORM 311, 339 (1991). Alternative rules and tests, such as a totality of the circumstances approach or a test requiring permission from an authorized driver would be extremely difficult to apply by police in the field who need set rules in order to act quickly, efficiently, and within constitutional bounds. The bright-line rule is more faithful to the Fourth Amendment search jurisprudence because it is more apt to protect the guarantees of the Fourth Amendment by efficiently and effectively deterring police misconduct while promoting public safety.

The bright-line rule allows the Fourth Amendment to effectively achieve its purpose without standing in the way of obtaining valuable evidence from suspects. This Court stated in *Michigan v. Tucker* that, “when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence.” 417 U.S. 433, 450 (1974). A less explicit approach to this issue of standing would pose an onerous burden on police officers, providing an administrative obstacle that could lead to the inadmissibility of valuable evidence.

C. The Minority Approaches to Determining the Standing of an Unauthorized Driver of a Rental Car to Raise a Fourth Amendment Claim are Inappropriate and Should be Disregarded by this Court.

A minority of circuit courts have split from the majority and developed their own standard for examining the standing of unauthorized rental car drivers to assert Fourth Amendment rights in challenging vehicle searches.

1. The “permission” test established by the Eighth and Ninth Circuits is inapplicable, contrary to this Court’s precedent, and against public policy.

The Eight Circuit held that one who possesses permission to drive a rental vehicle from the authorized driver has a legitimate expectation of privacy in the car and standing to challenge the legality of a search. *United States v. Muhammed*, 58 F.3d 353, 354-55 (8th Cir. 1995). In

Muhammed, the defendant was stopped in connection with a narcotics investigation while driving a vehicle leased to another person. 58 F.3d at 354-55. Since he presented no evidence that he had been given permission to use the car by the authorized driver, he did not have either a subjective or objective expectation of privacy in the car and lacked standing to challenge the legality of the search. *Id.* The Eighth Circuit held that in order to satisfy the standing requirement, one needs to make an affirmative showing that he had consensual possession of the car at the time of the search. *Id.*

In a recent decision, the Ninth Circuit also granted standing to an unauthorized driver who had the permission of an authorized driver to use the car at the time of the search. *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006). The court noted that an unauthorized driver may still have a legitimate privacy interest in a rental car even though he or she is in technical violation of the rental agreement. *Id.* at 1198. However, the Ninth Circuit held that the defendant lacked standing because he had not established that he had permission to use the rental car. *Id.* at 1199.

This “permission” test is inappropriate and should not be adopted by this Court as it conflicts with this Court’s precedent in the area of Fourth Amendment standing jurisprudence. In *Rakas*, this Court observed that “one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them” 439 U.S. at 141. In the present case, Petitioner’s violation of the rental agreement terms could be seen as tantamount to a wrongful presence. At most, Petitioner alleges to have had permission from his wife, the authorized driver of the car, but he lacked permission from the actual owner of the vehicle, Hertz. Furthermore, by adopting the “permission” rule, the Eighth and Ninth Circuits revisit concerns that *Rakas* put to rest. They require a showing of permission just as *Jones v. United States* had required a showing

that the defendant was legitimately on the premises. *Jones*, 362 U.S. 257 (1960). Therefore, this “permission” test essentially reverted the Court’s standing analysis back to the “legitimately on the premises” test from *Jones*, which this Court explicitly overruled in *Rakas*. *Rakas*, 439 U.S. at 141-43.

Additionally the “permission” rule is contrary to public policy and is likely to yield inconsistent results in the field, thereby hindering the functionality of the Fourth Amendment. Neither of the circuits had opportunity to set forth proper guidelines or parameters for other courts to follow when analyzing what constitutes a sufficient showing of affirmative permission to drive a rental car. This creates ambiguity for officers as well as a slippery slope in determining what types of relationships or permission are sufficient to meet these standards. Further defendants are therefore subject to an ad-hoc or arbitrary legal standard.

However, even if the Court were to adopt a version of the “permission” rule, Petitioner in the present case would still not meet the standard and lack standing to challenge the legality of the search at issue. Like the defendants in *Muhammed* and *Thomas*, Petitioner made no explicit affirmative showing of permission by his wife, the authorized driver, to drive the rental car. And even if the Court rejects the notion of an affirmative showing, Petitioner at most obtained permission from his wife to use the vehicle for a narrow and limited purpose, a job interview, from which he deviated.

2. The “totality of the circumstances” test established by the Sixth Circuit is inappropriate as it would prove unworkable for law enforcement.

In *United States v. Smith*, the Sixth Circuit refused to adopt a bright-line test and instead examined a variety of factors surrounding the use of a rental vehicle. 263 F.3d 571, 586 (6th Cir. 2001). In *Smith*, the defendant was stopped for a traffic violation in a rental car for which his wife was the authorized driver. *Id.* at 575-76. Upon a search, narcotics and a firearm were

located in the vehicle. *Smith*, 263 F.3d at 575-76. The court considered five factors in deciding that the defendant's case was an exception to the general rule: (1) possession of a valid driver's license; (2) ability to provide the rental agreement and sufficient information; (3) fact that defendant's wife was the authorized driver; (4) defendant received permission from his wife; and "most significantly" (5) defendant had established a business relationship with the rental car company when he reserved the vehicle himself and paid for it using his own credit card. *Id.* at 586-87. The court emphasized the importance of the defendant's relationship with the rental car company, noting that he had made the call to reserve the vehicle and was personally given a reservation number, and he had provided the company with his credit card and paid for the vehicle. The defendant's "business relationship with the rental company . . . [is] recognized by law and society." *Id.* at 587.

This Court has said that "[w]here factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning a case-by-case analysis, we have not hesitated to do so." *Rakas*, 439 U.S. at 147. Therefore the "totality of circumstances" approach can and should be abandoned in this case, since the bright-line test better serves the purpose behind the Fourth Amendment and the exclusionary rule. Such a complex and multi-factor test cannot easily and correctly be applied by police in the field. Officers need simple and straightforward tests such as the bright-line rule. It is patently unclear from the holding in *Smith* which types of relationships will confer standing on an unauthorized driver and which will not. Failure of the court to define the parameters for these and other factors that may be examined makes it difficult for the police to determine beforehand whether a search will violate an individual's Fourth Amendment rights or not.

However, even if a “totality of circumstances” test is applied, the present case is distinguishable from *Smith*, and Petitioner would still lack a legitimate expectation of privacy and the right to assert a Fourth Amendment challenge. In *Smith*, the Sixth Circuit heavily emphasizes the defendant’s relationship with the rental company and all the personal steps he took throughout the rental process in establishing his standing for Fourth Amendment purposes. This pivotal element is entirely lacking in Petitioner’s case.

D. Even if Petitioner Has a Legitimate Expectation of Privacy and the Ability to Assert a Fourth Amendment Right, Evidence of the Pistol Should Not be Suppressed.

This Court has held “[t]he decision to stop an automobile [to be] reasonable where the police have probable cause to believe that a traffic violation has occurred.” *Whren v. United States*, 517 U.S. 806, 810 (1996).

Furthermore, allowing a trained narcotics detector dog to sniff objects in a public place is not a search within the meaning of the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 707 (1983). A positive reaction, or “alert,” by a trained and reliable narcotics detection dog constitutes probable cause to search. *Id.*

In a case highly analogous to the case at bar, this Court held that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). In *Caballes*, a state trooper stopped respondent for speeding, and while he issued a citation, walked a narcotics dog around the vehicle and was alerted to the presence of contraband in the trunk. *Id.* at 406. Upon searching, he recovered marijuana and arrested respondent. *Id.* “The dog sniff was performed on the exterior of respondent’s car while he was lawfully seized for a traffic violation, [therefore a]ny intrusion on

respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.” *Caballes*, 543 U.S. at 409.

In the present case, the traffic stop at issue, based on an incident of speeding, was valid, and the subsequent detection of the drug and weapon evidence by the narcotics sniffing canine provided the officer with the necessary probable cause to search Petitioner; therefore, the evidence should not be suppressed.

II. THE DUAL SOVEREIGNTY DOCTRINE IS VALIDLY IMPORTED INTO THE SIXTH AMENDMENT RIGHT TO COUNSEL CONTEXT AS A MEANS OF PRESERVING THE UTILITY OF FREELY AND CONSTITUTIONALLY OBTAINED PRE-CHARGE INCRIMINATING EVIDENCE.

The Sixth Amendment guarantees that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. The Sixth Amendment right to counsel was designed to be “offense specific” insofar as it could not be invoked “once and for all future exceptions.” *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1961). As follows, the right attaches at “the initiation of adversary judicial criminal proceedings” *Id.*; see also *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972). Accordingly, here, Petitioner’s Sixth Amendment Right to Counsel attached in the federal case on August 15, 2006 and to the state case on August 29, 2006.

In *Texas v. Cobb*, this Court affirmed that the Sixth Amendment right to counsel is “offense specific.” 532 U.S. 162, 164 (2001). In that case, this Court observed, “the definition of an offense is not limited to the four corners of a charging instrument” and articulated the need for a bright-line test to determine what constitutes the “same offense.” *Id.* at 173.

In *Cobb*, this Court held that the Double Jeopardy and right to counsel uses of the word “offense” were sufficiently similar to warrant importation of the Double Jeopardy “same offense” test into the Sixth Amendment right to counsel. *Id.* The Double Jeopardy test for

“same offense” mandates that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”

Blockburger v. United States, 284 U.S. 299, 304 (1932). Evidencing the importation of the Double Jeopardy test, this Court affirmed: “We hold that when the Sixth Amendment Right to Counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.” *Cobb*, 532 U.S. at 173.

Because Petitioner was tried for one crime by two distinct sovereignties, this Motion to Suppress squarely presents the issue of whether the Dual Sovereignty Doctrine should be imported into the Sixth Amendment right to counsel.

A. The Dual Sovereignty Doctrine Is Unquestionably a Fundamental Component of the “Same Offense” Test as Applied in the Double Jeopardy Context.

Dual Sovereignty Doctrine mandates that “[a]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.” *United States v. Lanza*, 620 U.S. 377, 382 (1922). Further, this Court has explicitly held that the Dual Sovereignty Doctrine is an essential part of the Double Jeopardy “same offense” analysis. *Heath v. Alabama*, 474 U.S. 82, 87-93 (1985). Accordingly, in the Double Jeopardy context, two crimes, even if identically phrased and requiring proof of no additional facts, are always considered separate offenses simply by virtue of being passed by separate sovereigns. Charles Morrison, *The Supreme Court May Have Meant What it Said, But it Needs to Say More: A Comment On the Circuit Split Regarding the Application of the Dual Sovereignty Doctrine to the Sixth Amendment Right to Counsel*, 39 U. TOL. L. REV. 153, 166 (2007). In other words, when a defendant’s singular course of conduct simultaneously violates a state and federal statute, he has committed two distinct crimes for Double Jeopardy purposes

notwithstanding the fact that these statutes would be considered the same under a *Blockburger* analysis. *United States v. Coker*, 433 F.3d 39, 43 (10th Cir. 1979).

If the Dual Sovereignty Doctrine interacts with the Sixth Amendment conception of “offense” as it does with the Double Jeopardy conception of “offense,” then, even if the state and federal charges contain the same essential elements, the attachment of the right to counsel in one sovereignty will not flow to the other.

B. A Literal Reading of *Texas v. Cobb* Requires Importation of the Dual Sovereignty Doctrine Into the Sixth Amendment Right to Counsel Context.

Advocates and critics of importing the Dual Sovereignty Doctrine into the Sixth Amendment right to counsel have recognized that a plain reading of *Cobb* requires the extension. Morrison, *supra*, at 176; *see also* David J. D’Addio, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 YALE L.J. 1991 (2004).

1. In *Cobb*, this Court’s expansive likening of “offense” as construed in both the Double Jeopardy and Sixth Amendment right to counsel contexts evidences an intent that the Dual Sovereignty Doctrine be extended.

In *Cobb*, this Court held, “[t]here is no constitutional distinction between the meaning of the term offense in the Double Jeopardy clause and the meaning of offense . . . in the Sixth Amendment context.” 532 U.S. at 173. “If courts take seriously the idea that offense in the Right to Counsel context is equivalent to offense in the Double Jeopardy context, then the Dual Sovereignty Doctrine, alive and well in Double Jeopardy jurisprudence must apply with equal force to the Right to Counsel.” D’Addio, *supra*, at 1992, 1996; *see also* Morrison, *supra*, at 166.

This implication of the plain meaning of *Cobb* has been recognized recently by multiple circuit courts. *See, e.g., United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002); *United States v. Alvarado*, 440 F.3d 191, 196 (4th Cir. 2006).

2. By identifying the Sixth Amendment as “prosecution specific,” this Court explicitly allowed for the extension of the Dual Sovereignty Doctrine to the Sixth Amendment right to counsel context.

In *Cobb*, this Court observed, “we could just as easily describe the Sixth Amendment as ‘prosecution specific,’ insofar as it prevents discussion of charged offenses that, under *Blockburger*, could not be the subject of a later prosecution.” *Cobb*, 532 U.S. at 173 n. 3. Because, under Double Jeopardy law, the Federal Government can always later prosecute a defendant under a federal statute, even if a defendant, through one course of conduct, faces chronological state and federal charges, the Sixth Amendment right to counsel would not attach to the latter charge by virtue of having attached to the former. Morrison, *supra*, at 166; *see, e.g., United States v. Raymer*, 941 F.2d 1031, 1037-38 (9th Cir. 2005); *see also Coker*, 433 F.3d at 44-45; *Alvarado*, 440 F.3d at 196-97.

C. The Weight of Current Authority Interprets *Cobb* to Import the Dual Sovereignty Doctrine Into the Sixth Amendment.

There are three cases, one of which is a Fourth Circuit decision, that adhere to the plain language of this Court’s decision in *Cobb*. Each of the cases following the majority position is factually similar to the instant case. While there are two cases to the contrary, they are readily distinguishable from the instant facts and misconstrue the correct solution to be applied.

1. The majority of circuit court decisions dealing with the issue have adhered to the plain meaning of *Cobb* by importing the Dual Sovereignty Doctrine into the Sixth Amendment.

Recently, the Fourth Circuit had opportunity to decide whether *Cobb* requires importing the Dual Sovereignty Doctrine into the Sixth Amendment. *See Alvarado*, 440 F.3d 191. There, the defendant, Alvarado, was charged by the Commonwealth of Virginia for possession of cocaine with intent to distribute. *Id.* at 194-95. Subsequently, a federal agent interviewed Alvarado concerning the same sequence of events. *Id.* at 195. After validly waiving his

Miranda rights, Alvarado uttered incriminating statements concerning his involvement in the conspiracy. *Alvarado*, 440 F.3d at 195. In reliance on the statement given to the federal agents, a grand jury indicted Alvarado. *Id.* Alvarado moved to suppress the incriminating statements claiming, as does Petitioner, his Sixth Amendment right to counsel had attached to the earlier charge and should have insulated him from the federal investigation. *Id.*

The Fourth Circuit held there, as it did here, that pursuant to the plain meaning of *Cobb*, the Dual Sovereignty Doctrine is incorporated into the Sixth Amendment right to counsel context and, therefore, the right to counsel did not attach to the subsequent federal investigation. *Id.* at 198.⁵

The logic applied in *Alvarado* necessitates the same result here. The two cases are linked in that the two charges were brought by separate sovereignties and were based on freely offered incriminating statements taken in full compliance with the Fifth Amendment pre-charge constitutional protections. As mentioned, pursuant to the plain meaning of *Cobb*, by virtue of the fact that the two charges were brought by separate sovereignties, Petitioner was not insulated from his freely given confession to state officials.

Similarly, in hearing *Avants*, the Fifth Circuit had the opportunity to adjudicate a factually similar case and deal with the importation issue head-on. There, a white man was charged by Mississippi police with the murder of an African-American farmer. *Avants*, 278 F.3d at 513. Thereafter, in connection with another local crime, the FBI approached the defendant for information. *Id.* After validly waiving his *Miranda* warnings, he proceeded to inform the federal

⁵ See also *Coker*, 433 F.3d at 43 (As a result of the Supreme Court’s decision in *Cobb*, the dual sovereignty doctrine applies in the Sixth Amendment right to counsel context.); *Avants*, 278 F.3d at 522 (“Following the Supreme Court’s decision in *Cobb* . . . a federal and a state offense do not constitute the ‘same offense’ under the Sixth Amendment – even if the offenses are identical in their respective elements – because they are violations of the laws of two separate sovereigns.”).

agent that he was judgment proof in his personal matter because, “you can’t be convicted of killing a dead man.” *Avants*, 278 F.3d at 513. He went on to claim, “[y]eah, I shot the nigger, but before I shot him [Fuller] had already shot him with a carbine. . . . I blew his head off with a shotgun.” *Id.* at 513-14. The defendant was acquitted on his state murder charge in the late Sixties. *Id.* at 514. In the year 2000, he was indicted by a federal jury based on the incriminating statements he revealed to the FBI in 1966. *Id.* The Fifth Circuit found against him, holding:

[F]ollowing the Supreme Court’s decision in *Cobb*, there is no constitutional distinction between the definition of “offense” for purposes of the Sixth Amendment and the Double Jeopardy Clause of the Fifth Amendment. It follows that a federal offense and a state offense do not constitute the “same offense” under the Sixth Amendment – even if the offenses are identical in their respective elements – because they are violations of the laws of two separate sovereigns.”

Id. at 522.

2. The minority position is based on factual scenarios readily distinguishable from the instant case and is not well founded.

The Eighth Circuit, ruling on a similar issue to that presented here found, “[p]ursuant to the test set forth in *Texas v. Cobb*, the federal and tribal complaints charge the same offense for Sixth Amendment purposes. . . . We do not believe that it is appropriate to fully rely on double jeopardy analysis here.” *United States v. Red Bird*, 287 F.3d 709, 715 (8th Cir. 2002).

Red Bird is readily distinguishable from the instant facts because that case dealt with concurrent investigations of the Federal Government and an Indian reservation while the Petitioner’s deals with concurrent investigations of the Federal and State Government. “Tribal and federal authorities commonly cooperated in investigations” while, absent some evidence to the contrary, it is unfair to assume that state and federal authorities consistently work together. *Coker*, 433 F.3d at 46-47. Accordingly, if the goal is to avoid collusion between two sovereigns, the risk is facially greater in the *Red Bird* dynamic than in the Petitioner’s. Scholars on both

sides of the issue have assaulted the decision in *Red Bird* because it refuses to import the Dual Sovereignty Doctrine into the Sixth Amendment with little or no explanation instead making a fact-based inquiry. D’Addio, *supra*, at 1994, 1996.

The Second Circuit had the opportunity to adjudicate a case that factually, appears factually similar to the Petitioner’s. *United States v. Mills*, 412 F.3d 325 (2d Cir. 2005). There, the defendant, a convicted felon, was linked to a weapon that had been used to kill a police officer. *Id.* at 326. State officers approached him for an interview. *Id.* He denied being *Mirandized* and asserted that he was told he was not a suspect and did not know what the purpose of the interview was. *Id.* The defendant proffered incriminating evidence that was later used by the Federal Government in achieving a grand jury indictment for unlawful possession of a firearm by a convicted felon. *Id.* at 328.

Mills is distinguishable from the present case in that in *Mills*, the defendant asserted the facts that he did not know the purpose of the interview, did not receive his *Miranda* warnings, and was informed that he was not a suspect. *Id.* at 326. Conversely, here, Petitioner’s confession was freely and constitutionally given in accordance with his pre-charge right to counsel as protected by the Fifth Amendment. Further, Petitioner knew that he was a suspect and understood exactly why he was being investigated as evidenced by the statement, “I figure a state court judge might be more lenient on me if I confess.” R. at 4.

This distinction is significant because, as noted by this Court in *Cobb*, “[t]he ready ability to obtain uncoerced confessions is an unmitigated good. . . . Admissions of guilt resulting from valid *Miranda* waivers are more than merely desirable; they are essential to society’s compelling interest in finding, convicting, and punishing those who violate the law.” 532 U.S. at 171. In consideration of this Court’s statement, it would appear that Petitioner’s confession would fall

into the class of the “unmitigated good” by virtue of his valid waiver of his *Miranda* rights with full knowledge of the repercussions. In *Mills*, the court cites the possibilities of collusion and malfeasance as its reason for non-importation. 412 F.3d at 330. In so holding, the court, like the Eighth Circuit in *Red Bird*, was making a decision based on the facts before it in order to avoid what it deemed undesirable consequences. *Morrison, supra*, at 171.

D. Even if a Court Chooses to Avoid Undesirable Consequences Presented by Importing the Dual Sovereignty Doctrine Into the Sixth Amendment, the Decision Below Must Still Be Affirmed in Accordance With the *Bartkus* Exception.

Because the courts in *Mills* and *Red Bird* interpreted the importation question in order to avoid undesirable consequences and to the facts immediately before them, they misapplied this Court’s precedent and failed to recognize the sovereign nature of the constitutional structure. *Morrison, supra*, at 171. Recently, scholars and judges alike have posited that importing the *Bartkus* exception to the Dual Sovereignty Doctrine in the Double Jeopardy context is the adequate solution to the problem of collusion. The *Bartkus* exception mandates that Dual Sovereignty will not permit separate sovereigns to successively prosecute a defendant when the latter prosecution is merely a “sham.” *Id.* at 178. In *Bartkus v. Illinois*, this Court noted in dicta, “[the record] does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment.” 359 U.S. 121, 123-24 (1959).

Many lower courts have read this language to import an exception into the Dual Sovereignty Doctrine. *Morrison, supra*, at 178. For example, one court held, “*Bartkus*, as we view it, stands for the proposition that federal authorities are proscribed from manipulating state processes to accomplish that which they cannot constitutionally do themselves. To hold otherwise would, of course, result in a mockery of the dual sovereignty concept that underlies

our system of criminal justice.” *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1998).⁶

Accordingly, if the plain language of *Cobb* notes absolutely no difference between the word “offense” in the Double Jeopardy and right to counsel contexts, and the *Bartkus* exception is incorporated into Dual Sovereignty for Double Jeopardy purposes, then by necessity, it must also be incorporated into the Sixth Amendment right to counsel. Morrison, *supra*, at 178. The Tenth Circuit fell in line with this position in deciding *Coker*:

Any concerns we may have about potential “end runs” around the Sixth Amendment’s protection are mitigated by an exception to the dual sovereignty doctrine . . . existing where “one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings.” This exception applies with equal force in the Sixth Amendment context.

433 F.3d at 45 (quoting *Guzman*, 85 F.3d at 827).

Judged against the *Bartkus* standard articulated in *Guzman*, it is difficult to see how, in the instant case, the interaction between the federal and state governments rendered the proceeding meaningless. Here, when first interviewing Petitioner, Agent Brown ceased questioning immediately after learning of Petitioner’s desire for counsel. Further, the confession was given constitutionally with a voluntary waiver of *Miranda* rights and the protection of the Fifth Amendment. Finally, the facts contain no evidence of collusion between state and federal authorities. Accordingly, because one sovereign does not so thoroughly dominate the prosecutorial machinery of the other that the latter retains little or no volition in its own proceedings, the *Bartkus* exception, as applied to the instant case, requires an affirmation of the Fourth Circuit decision.

⁶ See also *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1997) (“We find the gravitational pull of *Bartkus* irresistible”).

E. The Dual Sovereignty Doctrine Must be Imported Into the Sixth Amendment in Order to Prevent a Confusing Result for Law Enforcement.

Confusion for law enforcement arises out of the fact that recognizing the Dual Sovereignty Doctrine in reference to successive prosecutions but not in the Sixth Amendment context results in a scenario where the Federal Government may independently prosecute a defendant for violating a federal law but may not interview that defendant outside the presence of counsel prior to initiating charges. Morrison, *supra*, at 155. Not only will this result render application of the law difficult for enforcement officials, it would also tie the quality of the federal investigation to that of the state's. *Id.* at 169. Importation will aid law enforcement by providing a "bright-line rule that eliminates the need for judgment calls about where constitutional boundaries might lie." Coker, 433 F.3d at 52. "It does not make much sense that our constitution would recognize the right to separately prosecute without recognizing a right to separately investigate as well. . . . Just as you cannot be 'sort of pregnant,' neither can our constitution 'sort of' embody the principle of Dual Sovereignty." Morrison, *supra*, at 169, 182.

CONCLUSION

Petitioner, the unauthorized driver of a rental car, lacks a reasonable expectation of privacy and therefore the Fourth Amendment right to challenge the legality of a vehicle search. Furthermore, because the Dual Sovereignty Doctrine is imported into the Sixth Amendment, Petitioner's right to counsel remains intact. Respondent respectfully requests that this Court AFFIRM the decision of the United States Court of Appeals for the Fourth Circuit.

Dated: September 24, 2008

Respectfully Submitted,

Counsel for Respondent

APPENDIX I

United States Constitution, Amendment IV

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.

U.S. CONST. amend. IV

APPENDIX II

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI