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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

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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

INTRODUCTION

For many people living in large cities, hourly rental cars are fast becoming a cost-effective alternative to owning a car.¹ Similarly, many college campuses are partnering with hourly car rental services to provide college students with cheap, convenient transportation.² An

¹ See, e.g., Steven Ginsberg, *More Area Car Owners Shift to Hourly Rentals*, WASHINGTON POST, Mar. 29, 2005, at A01; Michael Cabanatuan, *Car-sharing catching on with Bay Area drivers*, SAN FRANCISCO CHRONICLE, Jan. 22, 2007, at A-1; Jim Hopkins, *Tired of Costs, Hassles, Some City Dwellers Try Car-Sharing*, USA TODAY, Sep. 15, 2005, at B4; Ian Hardy, *Re-thinking Urban Car Journeys*, BBC NEWS, Apr. 15, 2005, http://news.bbc.co.uk/2/hi/programmes/click_online/4446271.stm (last visited Mar. 26, 2007).

² See, e.g., UCLA Car Share, <http://www.transportation.ucla.edu/students/commuting/rideshare/flexcar/index.htm> (describing hourly car rental plans for UCLA students) (last visited Mar. 26, 2007); Zipcar for Universities, <http://www.zipcar.com/universities/> (explaining partnership programs with universities) (last visited Mar. 26, 2007).

590 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37

hourly car rental, or car sharing, typically involves renting a car for a few hours to run errands or for trips to the suburbs, where public transportation may be difficult to use.³ Cars are parked in lots spread throughout a city in various neighborhoods.⁴ Oftentimes, customers reserve the car by phone or online and pick up the car without interacting with a rental agent.⁵

However, car-sharing flexibility raises critical legal issues with respect to a driver's ability to challenge a governmental search of the rental vehicle. If a multiple-person household had several small errands to run, the household may rent one car under one person's name and split the use of the car amongst the various members of the household. For example, in the college setting, a group of roommates may alternate using the car to accomplish their household errands. Likewise, a husband and wife may have to alternate using the same car share vehicle to pick up children and to shop for groceries. Importantly, different jurisdictions interpret a person's Fourth Amendment right to challenge unreasonable government searches using a variety of legal standards.⁶

The Court of Appeals for the Ninth Circuit, in *United States v. Thomas*, adopted a rule concluding that unauthorized drivers⁷ of a rental car lack a legitimate expectation of privacy unless they can show they had permission to drive the rented vehicle.⁸ The *Thomas* court held that the defendant, who was engaged in drug trafficking using rental cars, did not have a legitimate expectation of privacy to challenge a search of the vehicle because he could not show that he was given permission to drive the rental car.⁹ Although this rule may have functioned well in order to bring a drug trafficker to justice in *Thomas*, it risks being short-sighted by not anticipating the growing possibility of unauthorized drivers of a car sharing vehicle who may lack a showing of permission.¹⁰ *Thomas* involved a traditional rental car, not a car share, but it is not difficult to imagine a similar situation involving a car share. The Ninth Circuit's permission rule applies to all rental cars and this issue may have to be

³ See Jim Hopkins, *Tired of Costs, Hassles, Some City Dwellers Try Car-Sharing*, USA TODAY, Sep. 15, 2005, at B4.

⁴ *Id.*

⁵ *Id.*

⁶ See *infra* notes 95–102 and accompanying text.

⁷ For purposes of this Note, an “unauthorized driver” of a rental car is one who is not listed on the rental agreement and lacks any other form of explicit authority to drive the car.

⁸ *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006).

⁹ *Id.*

¹⁰ Michael Cabanatuan, *Car-sharing catching on with Bay Area drivers*, SAN FRANCISCO CHRONICLE, Jan. 22, 2007, at A-1 (recounting how multiple users may use the car during one rental period).

revisited in the event of a car-sharing situation.

This Note argues that the proper inquiry for determining whether a defendant has a legitimate expectation of privacy in a rental vehicle when that defendant is the unauthorized driver of a rental car is the totality-of-the-circumstances test, not the permission test adopted by the Ninth Circuit. A test requiring permission is unsupported by Supreme Court precedent and will yield inconsistent results when applied. Part I provides a brief historical background for challenges to Fourth Amendment searches.¹¹ Part II sets forth the background and analysis of the opinion in focus, *United States v. Thomas*.¹² Part III evaluates the court's analysis in *Thomas*.¹³ Finally, Part IV concludes that the proper test for standing is the totality-of-the-circumstances test.¹⁴

I. DEVELOPMENT OF A DEFENDANT'S ABILITY TO CHALLENGE A FOURTH AMENDMENT SEARCH

The Fourth Amendment protects the people from unreasonable searches and seizures of their persons or property.¹⁵ A person may assert his or her Fourth Amendment right against unreasonable government intrusion by way of the doctrine of standing.¹⁶

A. THE EXCLUSIONARY RULE AND THE BIRTH OF STANDING

After the Supreme Court adopted the exclusionary rule, courts began creating standards to control who may challenge government searches.¹⁷ This early version of standing was very broad by today's standards and allowed any defendant who could prove an ownership or

¹¹ See *infra* notes 15–102 and accompanying text.

¹² See *infra* notes 103–138 and accompanying text.

¹³ See *infra* notes 139–167 and accompanying text.

¹⁴ See *infra* notes 168–170 and accompanying text.

¹⁵ U.S. CONST. amend. IV. The Fourth Amendment provides that “[t]he 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.” *Id.*

¹⁶ The Supreme Court dispensed with the term “standing” for purposes of challenging a Fourth Amendment search. See *Rakas v. Illinois*, 439 U.S. 128, 133 (1978) (dispensing with “standing” as an analytic element of a Fourth Amendment case). However, courts have been reluctant to relinquish the term “standing” as a convenient label to describe a defendant’s right to challenge a search. See *United States v. Bouffard*, 917 F.2d 673, 675 (1st Cir. 1990). This Note will freely interchange the word “standing” with the phrase “legitimate expectation of privacy.”

¹⁷ See *Weeks v. United States*, 232 U.S. 383, 393 (1914) (adopting the exclusionary rule whereby the exclusion of evidence was used as a deterrent for illegal government searches and seizures), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

592 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

possessory interest in the property being seized, or a substantial possessory interest in the premises searched, to challenge the search or seizure.¹⁸ However, lower courts reluctantly excluded evidence by applying narrow definitions of standing.¹⁹

In *Jones v. United States*, the Supreme Court broadened the then-existing standing doctrine.²⁰ The Court extended standing to defendants who not only showed a possessory or ownership interest in the place or property searched, but also to those defendants who were “legitimately on the premises.”²¹ The defendant in *Jones* challenged the admissibility of drugs seized during a search of his friend’s apartment.²² The defendant was able to show that he was legitimately on the premises because his friend gave him a key to the apartment, he stored a suit there, and he had stayed at the apartment for one night.²³ The *Jones* Court emphasized that constitutional safeguards, and not distinctions in property law, should control for purposes of determining a defendant’s standing to challenge a search.²⁴

As an alternative to a defendant being “legitimately on the premises,” the *Jones* Court also allowed defendants to have “automatic standing” when being charged with a possessory crime.²⁵ Before automatic standing, defendants were first required to claim possession of any contraband in order to challenge the search and seizure of that same contraband.²⁶ The defendant’s claim of possession could then be used as an admission in the subsequent prosecution of the possessory crime.²⁷ Thus, the Court reasoned, automatic standing in circumstances of possession crimes would avoid this self-incrimination dilemma.²⁸

After *Jones*, the Court shifted away from a standing analysis based

¹⁸ See, e.g., *Jeffers v. United States*, 187 F.2d 498, 501 (D.C. Cir. 1950) (holding that only defendants who claim ownership or right of possession of premises searched or property seized may object to Fourth Amendment violations).

¹⁹ See David A. MacDonald, Jr., *Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course*, 63 TEMP. L. REV. 559, 562 (1990).

²⁰ See *Jones v. United States*, 362 U.S. 257 (1960), *overruled by* *United States v. Salvucci*, 448 U.S. 83 (1980); see also *infra* notes 60–66 and accompanying text (discussing *Salvucci*).

²¹ *Jones*, 362 U.S. at 267.

²² *Id.* at 259.

²³ *Id.* at 267.

²⁴ See *id.* at 266 (“Distinctions such as those between ‘lessee,’ ‘licensee,’ ‘invitee’ and ‘guest,’ often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.”).

²⁵ See *id.* at 263–64. But see *United States v. Salvucci*, 448 U.S. 83, 84–85 (1980) (overruling “automatic standing” from *Jones*).

²⁶ *Jones v. United States*, 362 U.S. 263–64 (1960).

²⁷ *Id.*

²⁸ *Id.*

2007] *EXPECTATION OF PRIVACY IN RENTAL CARS* 593

on property concepts.²⁹ Instead, the inquiry was focused on a defendant's "reasonable expectation of freedom from governmental intrusion."³⁰ By the early 1970s, defendants had four ways to assert standing: (1) the defendant met the requirements of automatic standing; (2) the defendant had a possessory or property interest in the place searched or the item seized; (3) the defendant was legitimately on the premises at the time of the search; or (4) the defendant had a reasonable expectation of freedom from governmental intrusion.³¹ The Court's four tests survived until the seminal case of *Rakas v. Illinois*.³²

B. *RAKAS* AND THE NARROWING VIEW OF STANDING

In 1978, the Supreme Court issued a landmark decision that remains the benchmark for the Court's standing analysis.³³ *Rakas* overruled the "legitimately on the premises" test from *Jones* and shifted the standing inquiry from whether a defendant has an expectation of freedom from government intrusion to whether the defendant has an expectation of privacy in general.³⁴ The *Rakas* Court held that a defendant can challenge a search only by showing a "legitimate expectation of privacy" in the area or property searched.³⁵

In *Rakas*, the police stopped a car and asked all the occupants to exit the vehicle.³⁶ The defendants were passengers in the car.³⁷ During a search of the vehicle, the police found a sawed-off rifle under a car seat and some shotgun shells in the glove compartment.³⁸ The defendants asserted no possessory or ownership interest in the weapon or the

²⁹ See David A. MacDonald, Jr., *Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course*, 63 TEMP. L. REV. 559, 564 n.43 (1990) (rejecting concerns with invasions of property rights and focusing instead on invasions of privacy expectations) (internal citations omitted).

³⁰ See *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968).

³¹ See *Brown v. United States*, 411 U.S. 223, 229 (1973) (referring to standing principles as including traditional test and *Jones* test).

³² See *Rakas v. Illinois*, 439 U.S. 128 (1978).

³³ See *id.*

³⁴ See generally *id.*

³⁵ *Id.* at 143 n.12 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Essentially, the *Rakas* court adopted the Fourth Amendment inquiry from *Katz* in order to determine whether a defendant has a legitimate expectation of privacy. *Id.* This inquiry is a two-pronged test, under which it is first determined whether a defendant has a subjective expectation of privacy in the property being searched, and second, whether society is willing to recognize that expectation of privacy. See *Katz*, 389 U.S. at 361.

³⁶ See *Rakas v. Illinois*, 439 U.S. 128, 130 (1978).

³⁷ See *id.*

³⁸ See *id.*

594 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

ammunition.³⁹ Instead, the defendants proffered two theories for challenging the search: (1) the “target theory” that the police targeted them in the search; and (2) the “legitimately on the premises” theory.⁴⁰

The *Rakas* Court held that the defendants lacked standing to challenge the search.⁴¹ The Court rejected both the “target” and the “legitimately on the premises” theories proffered by the defendants.⁴² The phrase “legitimately on the premises” coined in *Jones* created “too broad a gauge for measurement of Fourth Amendment rights.”⁴³ The Court held that the only way to determine standing was to determine whether a defendant had a legitimate expectation of privacy in the property being searched.⁴⁴ The defendants had no legitimate expectation of privacy because they did not assert a possessory interest in the property searched and because mere passengers do not have an expectation of privacy in the glove compartment of a car or under a car’s seat.⁴⁵ The Court reasoned that an expectation of privacy is legitimate when, at the very least, the defendants have a right to exclude others.⁴⁶ The defendants in *Rakas* made no such showing with respect to the glove compartment and beneath the seat of the car.⁴⁷

³⁹ See *Rakas v. Illinois*, 439 U.S. 128, 130–31 (1978).

⁴⁰ See *id.* at 133. Only the second theory would have been persuasive under the *Jones* decision. *Id.* at 135 n.4. “Had the Court intended to adopt the target theory now put forth by petitioners, neither of the above two holdings would have been necessary since *Jones* was the ‘target’ of the police search in that case.” *Id.* The defendants did not claim a possessory interest in the seized property so the issues regarding showing a possessory interest and automatic standing were not addressed in this opinion. *Id.*

⁴¹ See *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

⁴² See *id.* at 135, 143. Justice Rehnquist, writing for the majority, also stated that the deterrent purposes of the exclusionary rule are not served if society allows defendants whose personal rights had not been violated to challenge a search. *Id.* at 137.

⁴³ *Id.* at 135, 142. Specifically, in *Rakas*, the Court held that legitimate expectations of privacy “must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Id.* at 143 n.12.

⁴⁴ See *id.* at 143.

⁴⁵ See *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

⁴⁶ See *id.* at 143 n.12 (internal citations omitted).

One of the main rights attaching 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. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. These ideas were rejected both in *Jones* . . . and *Katz*[.] But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.

Id.

⁴⁷ See *id.* at 148.

2007] *EXPECTATION OF PRIVACY IN RENTAL CARS* 595

The Court distinguished the facts in *Rakas* from those in *Jones*.⁴⁸ The *Rakas* Court acknowledged that the defendant in *Jones* was granted standing because he was “legitimately on the premises” and not because of an expectation of privacy.⁴⁹ Nonetheless, the *Rakas* Court reasoned that Jones would have had a legitimate expectation of privacy based on the facts in that case.⁵⁰ Additionally, the Court explained that, although cars are treated differently from other locations for Fourth Amendment purposes, the Court’s decision in *Rakas* was not based on such differences.⁵¹

C. POST-*RAKAS* DECISIONS

After the Court set forth the modern approach for standing in *Rakas*, it addressed whether a property or possessory interest in the item seized was, alone, sufficient to confer standing, and whether the Court should retain the automatic standing rule it had developed in *Jones*.⁵² In two cases heard on the same day, the Court overruled the “automatic standing” doctrine created in *Jones* and refined a defendant’s ability to challenge a search based on an ownership interest alone.⁵³

In *Rawlings v. Kentucky*, the Court decided that an ownership interest, alone, is insufficient to confer standing upon a defendant.⁵⁴ In *Rawlings*, police found drugs in a purse owned by the defendant’s friend.⁵⁵ Rawlings had permission from his friend to hide the drugs in the purse, but the Court held that he lacked standing to challenge the search because the defendant had no right to exclude others from the purse and had no expectation that the purse would be free from governmental intrusion.⁵⁶

The Court’s holding was based on two rationales. First, the

⁴⁸ See *id.* at 149.

⁴⁹ See *id.*

⁵⁰ See *Rakas v. Illinois*, 439 U.S. 128, 149 (1978) (stating “Jones not only had permission to use the apartment of his friend, but also had a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment”).

⁵¹ See *id.* at 148. The Court was reluctant to recognize a difference between an automobile and dwelling in this situation, with respect to a person’s expectation of privacy, because the defendants’ claim here would “fail even in an analogous situation in a dwelling place.” *Id.*

⁵² See David A. MacDonald, Jr., *Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course*, 63 TEMP. L. REV. 559, 568 (1990).

⁵³ See *id.* In *United States v. Salvucci*, 448 U.S. 83 (1980), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Supreme Court eliminated automatic standing, and standing based on a possessory interest alone, respectively. See MacDonald, *supra* note 53, at 568.

⁵⁴ *Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980).

⁵⁵ *Id.* at 101.

⁵⁶ *Id.* at 105.

596 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

defendant only knew the friend for a few days, and thus, had a lower expectation of privacy in the purse.⁵⁷ Second, the Court reasoned that hiding the drugs in an acquaintance's purse carried a similar privacy expectation as if the drugs were being placed in plain view.⁵⁸ Therefore, basing a defendant's standing solely on a property interest—that it was in the possession of a third party, inside a purse—did not create an expectation of privacy consistent with the *Rakas* decision.⁵⁹

In *United States v. Salvucci*, the Court dealt with the question whether defendants charged with possession of stolen mail could challenge the search of an apartment owned by one defendant's mother, where the stolen mail was located.⁶⁰ The district court granted the defendants' motion to suppress based on lack of probable cause to issue a search warrant.⁶¹ The Court of Appeals affirmed the district court's ruling pursuant to the automatic standing doctrine from *Jones*.⁶² The Supreme Court reversed, overruling the automatic standing doctrine for two reasons.⁶³ First, the Court concluded that the self-incrimination dilemma in *Jones* was no longer a concern.⁶⁴ Second, based on the reasoning in *Rawlings*, the Court clarified that "legal possession of a seized good [was] not a proxy for determining whether the owner had a Fourth Amendment interest," but that "property ownership [was] clearly a factor."⁶⁵ Essentially, the Court was not convinced that the value of excluding evidence by way of the automatic standing doctrine to deter illegal police searches outweighed the public interest in prosecuting criminals.⁶⁶

Following *Rakas*, *Rawlings*, and *Salvucci*, a defendant's ability to

⁵⁷ *Id.*

⁵⁸ *Id.* at 105–06 (stating that "[w]hile petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that 'arcane' concepts of property law [the mere fact that the drugs were in a purse as opposed to plain view] ought to control the ability to claim the protections of the Fourth Amendment").

⁵⁹ *Id.* (stating that "[w]hile petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment").

⁶⁰ *United States v. Salvucci*, 448 U.S. 83, 85 (1980).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 85–86.

⁶⁴ *Id.* at 89–90 (citing *Simmons v. United States*, 390 U.S. 377, 394 (1964)). The *Simmons* Court held that when a defendant testifies in support of a motion to suppress on Fourth Amendment grounds, the defendant's testimony cannot be admitted against the defendant, unless the defendant makes no objection. See *MacDonald*, *supra* note 52, at 569–70. The Court did not reach the issue of using the suppression hearing testimony for impeachment purposes. *Id.* at 570.

⁶⁵ *United States v. Salvucci*, 448 U.S. 83, 91 (1980).

⁶⁶ See *id.* at 94.

2007] *EXPECTATION OF PRIVACY IN RENTAL CARS* 597

challenge a search solely depends on the defendant showing a legitimate expectation of privacy in the property or place searched.⁶⁷ However, federal circuits employ different approaches to analyze a defendant's expectation of privacy.⁶⁸ The Ninth Circuit in particular has its own approach involving joint possessory interests.⁶⁹

D. THE NINTH CIRCUIT'S FOURTH AMENDMENT JOINT-VENTURE STANDING

The Ninth Circuit permits a defendant to base standing on a right that seemingly belongs to a third party.⁷⁰ A defendant may demonstrate a legitimate expectation of privacy in a place or property by proving the existence of joint control and supervision over the place or property being searched.⁷¹ A defendant must establish either of the following: (1) ownership of the place or area searched, which gives him or her "inherent" dominion and control over that place or area, as well as the right to exclude others; or (2) active joint control with the owner of the place or area that he or she does not own.⁷² Ninth Circuit decisions require defendants to take reasonable precautions in maintaining privacy over the area being searched.⁷³ Additionally, the defendant must have a proprietary interest in the items seized.⁷⁴ If established by joint control, a defendant's proprietary interest may be shown by a formalized arrangement with another person.⁷⁵ However, other circuits have been

⁶⁷ See *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980) (holding that property interest in item seized alone is insufficient to establish standing); *Salvucci*, 448 U.S. at 85 (eliminating automatic standing); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (rejecting target theory and legitimately-on-the-premises test).

⁶⁸ See MacDonald, *supra* note 52, at 571-81.

⁶⁹ See Michelle Alexandria Curtis, *Ninth Circuit Joint Venture Standing: A Joint Possessory Interest Is Sufficient to Establish Fourth Amendment Standing*, 34 ARIZ. L. REV. 311, 323-30 (1992) (describing Ninth Circuit joint venture standing). "Joint control" and "joint venture" are used interchangeably in this Note.

⁷⁰ See generally *id.* at 329-35 (describing Ninth Circuit joint-venture standing and discussing some criticisms against it).

⁷¹ See *id.* at 323 (1992).

⁷² *Id.*

⁷³ *Id.* at 323 n.110.

⁷⁴ *Id.*; see generally *United States v. Kovac*, 795 F.2d 1509 (9th Cir. 1986) (recognizing and discussing Ninth Circuit trend toward applying joint-control standing).

⁷⁵ See *Kovac*, 795 F.2d at 1510-11 (discussing cases establishing a formal agreement to support joint-control standing). See, e.g., *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980) (holding that defendant had a legitimate expectation of privacy in a car he did not own because he was in possession of the car with the permission of the owner and had a key, thus having the requisite level of control over the car), *cert. denied*, 450 U.S. 1043 (1981); *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (holding that the defendants had a legitimate expectation

598 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

reluctant to adopt the Ninth Circuit's joint-control doctrine, and the Supreme Court has yet to resolve the issue.⁷⁶ In particular, the Ninth Circuit has explained the joint-control doctrine in four main cases.⁷⁷

In *United States v. Perez*, the Ninth Circuit allowed co-conspirators following behind an associate's truck to assert standing to challenge a search of the truck's gas tank.⁷⁸ In *Perez*, the police seized heroin found in the gas tank of a truck during a border patrol search.⁷⁹ The defendants were co-conspirators with the truck driver, following behind in another vehicle.⁸⁰ The Ninth Circuit upheld joint-control standing upon a second appeal of a district court's denial of standing.⁸¹ Based on the formal arrangement between the co-conspiring defendants and their joint supervision of the truck, the Ninth Circuit found that the defendants had standing to challenge the search of the truck.⁸²

The Ninth Circuit expanded on *Perez* by developing standards for recognizing joint control.⁸³ *United States v. Johns* expanded the joint-control doctrine to encompass the bailor/bailee relationship.⁸⁴ In *Johns*, a plane piloted by the defendants landed on a remote landing strip and defendants gave wrapped bales of marijuana to a waiting party of co-defendants.⁸⁵ After the plane took off from the landing strip, police

of privacy in a truck they did not own because they were closely following and supervising the truck as it made its journey); *United States v. Johns*, 707 F.2d 1093, 1100 (9th Cir. 1983) (holding that because they had a formal arrangement over the vehicle for transportation of contraband, defendants had a legitimate expectation of privacy in marijuana bales seized from a vehicle they did not own), *rev'd on other grounds*, 469 U.S. 478 (1985); *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984) (holding that defendant was co-operator of a drug laboratory in his friend's house; he was exercising "joint control" over the property, and thus had a legitimate expectation of privacy in the house).

⁷⁶ See Curtis, *supra* note 69, at 326 (maintaining joint control as "still good law within the Ninth Circuit").

⁷⁷ See Kovac, 795 F.2d at 1510–1511 (discussing *Portillo*, *Perez*, *Johns*, and *Pollock*).

⁷⁸ *United States v. Perez*, 689 F.2d 1336 (9th Cir. 1982). In *Perez*, the police seized heroin found in the gas tank of a truck during a border patrol search. The defendants were co-conspirators with the truck driver, following behind in another vehicle. The Ninth Circuit developed joint-control standing on a second appeal of a district court's denial of standing. *Id.*; see also *United States v. Perez*, 644 F.2d 1299 (9th Cir. 1981) (remanding case for standing purposes). *Perez* was appealed twice on standing grounds. Compare *United States v. Perez*, 644 F.2d 1299 (9th Cir. 1981), with *United States v. Perez*, 689 F.2d 1336 (9th Cir. 1982).

⁷⁹ *United States v. Perez*, 689 F.2d 1336, 1337 (9th Cir. 1982).

⁸⁰ *Id.*

⁸¹ *Id.* at 1337–1338.

⁸² *Id.* at 1338.

⁸³ See *United States v. Kovac*, 795 F.2d 1509 (9th Cir. 1986) (citing *United States v. Johns*, 707 F.2d 1092, 1095, 1100 (9th Cir. 1983)).

⁸⁴ See Kovac, 795 F.2d at 1511 (citing *Johns*, 707 F.2d at 1095, 1100).

⁸⁵ *United States v. Johns*, 707 F.2d 1092, 1095, 1099–1100 (9th Cir. 1983).

arrested the receiving parties and seized the marijuana.⁸⁶ The court granted the pilots standing to challenge the seizure of the bales based on the legitimate expectation of privacy formed by the pilots' prior arrangement with the receiving party and the steps that the pilots took to maintain privacy of the marijuana by wrapping the bales in opaque plastic.⁸⁷

The Ninth Circuit affirmed yet narrowed this approach in *United States v. Pollock*.⁸⁸ *Pollock* limited the broad interpretation of joint-control standing in *Johns* to require a defendant to demonstrate that his or her own Fourth Amendment rights were infringed in order to challenge a search or seizure.⁸⁹ *Pollock* involved co-defendants running a methamphetamine lab where the defendants would frequently change the location of the lab to avoid detection.⁹⁰ The defendants established joint-control standing by showing joint supervision over the lab, and by showing an active maintenance of privacy by frequently changing the lab's location.⁹¹ Thus, the court granted the defendants joint-control standing to challenge the police search of the lab.⁹²

The joint-control doctrine, unique to the Ninth Circuit, can be controversial.⁹³ However, a court may still employ the totality-of-the-circumstances test adopted in *Rakas* and be consistent with the joint-control doctrine.⁹⁴

E. THE CURRENT CIRCUIT SPLIT FOR AN UNAUTHORIZED DRIVER OF A RENTAL CAR TO CHALLENGE A SEARCH

Unauthorized drivers of rental cars confront a three-way circuit split when determining whether they will be granted standing to challenge a search of a rental vehicle.⁹⁵ The first approach is used in the Fourth, Fifth, and Tenth Circuits.⁹⁶ This approach is a bright-line test whereby

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984).

⁸⁹ *See id.*

⁹⁰ *Id.* at 1465.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See Curtis, supra* note 69, at 329–35 (discussing criticisms of the joint-control doctrine).

⁹⁴ *Id.* at 335.

⁹⁵ *United States v. Thomas*, 447 F.3d 1191, 1196–97 (9th Cir. 2006).

⁹⁶ *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). *But see United States v. Kye Soo Lee*, 898 F.2d 1034 (5th Cir. 1990) (concluding that an unauthorized driver may have standing to challenge the search of a rental truck if the driver had the

600 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

an individual who is not listed on a rental agreement lacks standing to object to a search of the vehicle.⁹⁷ Essentially, an unauthorized driver will always lack an expectation of privacy due to his or her inherent lack of a possessory interest by not being listed on the rental agreement.⁹⁸

The Sixth Circuit employs a second approach and examines the totality of circumstances, considering a range of factors.⁹⁹ These factors include the following: (1) whether the defendant had a driver's license, (2) the relationship between the unauthorized driver and the lessee, (3) the driver's ability to present rental documents, (4) whether the driver had the lessee's permission to use the car, and (5) the driver's relationship with the rental company.¹⁰⁰

Finally, the Eighth Circuit's approach, adopted by the Ninth Circuit in *Thomas*, hinges on whether an unauthorized driver had the permission of an authorized driver to drive the rental car.¹⁰¹ This approach focuses on the relationship between the authorized and unauthorized drivers and not on the contractual relationship between the rental car company and the renter.¹⁰²

II. *UNITED STATES V. THOMAS*

In *United States v. Thomas*, the Ninth Circuit decided whether an unauthorized driver of a rental car had a possessory or ownership interest in the car so as to establish standing to challenge a search of the

renter's permission). However, subsequent Fifth Circuit cases have followed a bright-line approach and have noted that *Kye Soo Lee* "is not controlling . . . because it neither reflects nor addresses the terms of the truck rental agreement." *United States v. Seeley*, 331 F.3d 471, 472 n.1 (5th Cir. 2003); *see also United States v. Dortch*, 199 F.3d 193, 205 (5th Cir. 1999) ("The suppression hearing record does contain evidence that under the rental agreement neither Dortch nor the passenger was an authorized driver. These facts distinguish the instant case from [*Kye Soo Lee*.]").

⁹⁷ *United States v. Thomas*, 447 F.3d 1191, 1196 (9th Cir. 2006).

⁹⁸ *Id.* at 1196–97.

⁹⁹ *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001).

¹⁰⁰ *Id.*

¹⁰¹ *See United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998); *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995).

¹⁰² *Muhammad*, 58 F.3d at 355 (citing *United States v. Sanchez*, 943 F.2d 110, 114 (1st Cir. 1991)). *Sanchez* held, for a privately owned car, that a defendant would have standing on a showing of "a more intimate relationship with the car's owner or a history of regular use of the [car]". *Sanchez*, 943 F.2d at 114. "In effect, this approach equates an unauthorized driver of a rental car with a non-owner driver of a privately owned car." *United States v. Thomas*, 447 F.3d 1191, 1197 (9th Cir. 2006). *Cf. United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980) (holding the non-owner has standing to challenge a search where he has "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").

vehicle.¹⁰³

A. FACTS AND PROCEDURAL POSTURE

In November 2002, a Spokane, Washington, police officer and Drug Enforcement Agency (“DEA”) task force officer received a tip regarding defendant Roshon Thomas.¹⁰⁴ The source of the tip told the police that Thomas had been renting cars to transport crack cocaine between Long Beach, California, and Spokane, Washington.¹⁰⁵ The source claimed to have participated in Thomas’s drug trafficking operation one to two years earlier.¹⁰⁶

The police corroborated the source’s information, and were able to confirm that Thomas’s associate, McGuffey, rented a car in November 2002 and returned it with 2,889 additional miles on the odometer.¹⁰⁷ The police also confirmed that the mileage was consistent with a trip from Long Beach to Spokane and that the source correctly identified the rental company from which McGuffey rented the car.¹⁰⁸

On February 27, 2003, the Budget Rental Car Company manager at the Spokane Airport contacted the police to inform them that Thomas and McGuffey had attempted to rent a car that day.¹⁰⁹ Budget refused to complete the rental because Thomas and McGuffey had unpaid fees.¹¹⁰ Accordingly, the Budget manager intended to warn other airport rental car services about Thomas and McGuffey.¹¹¹

On March 4, 2003, police learned that National Car Rental had just issued McGuffey a four-day rental reservation.¹¹² McGuffey was scheduled to pick up a white Dodge Intrepid at noon the following day.¹¹³ The police obtained National’s consent to install a tracking device in the Intrepid before McGuffey rented it.¹¹⁴

The police learned that, based on information from the tracking

¹⁰³ *United States v. Thomas*, 447 F.3d 1191, 1197 (9th Cir. 2006) (stating that “the question becomes whether an unauthorized driver has a possessory or ownership interest in the car”).

¹⁰⁴ *Id.* at 1193.

¹⁰⁵ *Id.* at 1194.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Thomas*, 447 F.3d 1191, 1194 (9th Cir. 2006).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *United States v. Thomas*, 447 F.3d 1191, 1194 (9th Cir. 2006). The police also obtained a warrant authorizing them to install the tracking device. *See id.* at 1194 n.2.

602 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

device, the car had arrived in Washington on March 8, 2003, at 1:30 a.m.¹¹⁵ The police and a DEA agent monitored the freeways until a car matching the description of the rental car appeared on the freeway.¹¹⁶ After stopping the car, the DEA agent approached the car and recognized Thomas from a booking photograph that the police had shown him.¹¹⁷ There were no other individuals in the car.¹¹⁸ Thomas presented the officers with a driver's license bearing the name Roland Phillips.¹¹⁹ Based on Thomas's tattoos, officers ascertained Thomas's true identity and arrested him pursuant to an outstanding warrant.¹²⁰

The police then searched the rental vehicle and found, among other items, nearly 600 grams of cocaine located next to the spare tire in the vehicle's trunk.¹²¹ The police also found \$1,200 and 25.1 grams of heroin.¹²²

Thomas moved to suppress the evidence seized during the search.¹²³ The district court concluded that Thomas failed to show that McGuffey gave him permission to use the car because Thomas had offered no evidence to support such a conclusion.¹²⁴ The district court denied the motion, reasoning that because an unauthorized driver of a rental car has no expectation of privacy, Thomas lacked standing to challenge the search.¹²⁵

B. THE THOMAS COURT'S HOLDING AND REASONING

A three-judge panel decided the case, with Judge Diarmuid F. O'Scannlain writing the opinion.¹²⁶ The panel issued the decision

¹¹⁵ *Id.* at 1195.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *United States v. Thomas*, 447 F.3d 1191, 1195 (9th Cir. 2006).

¹²⁰ *Id.*

¹²¹ *Id.* The government did not justify the search of the vehicle with Thomas's consent of the search. *Id.* at 1195 n.3. Additionally, the possible impropriety of the search of the trunk is not an issue in this decision. The court never reached the issue on whether the search was proper under the automobile exception since Thomas was denied standing to challenge the search. *Id.* at 1199 n.9.

¹²² *United States v. Thomas*, 447 F.3d 1191, 1195 (9th Cir. 2006).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 1195–96. The district court ruled on a number of other grounds outside the scope of this note. “[T]here was probable cause to issue a search warrant; monitoring public movements was not a search in the first place; a *Terry* [v. Ohio, 392 U.S. 1 (1968)] stop was proper under the circumstances; the automobile exception applied and supported the search; and discovery was inevitable in any event.” *Thomas*, 447 F.3d at 1196.

¹²⁶ *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006).

without oral argument.¹²⁷

1. A Possessory or Ownership Interest May Be Shown by “Joint Control” or “Common Authority” Over the Property

The *Thomas* court followed precedent and interpreted a possessory or ownership interest broadly to include a legitimate expectation of privacy in the area searched.¹²⁸ The court stated that a defendant who lacks ownership of the property being searched may still have an expectation of privacy, and thus, standing to challenge a search of that property.¹²⁹ Such a defendant may establish standing upon a showing of “joint control” or “common authority” over the property.¹³⁰ As an example, the court stated that a defendant would have standing to challenge a search of his or her friend’s automobile if the defendant could show that he or she had permission to use the car, held a key to the car, and had the “right and ability to exclude others, except the owner, from the car.”¹³¹ The *Thomas* court drew analogies to situations in which defendants challenged searches of friends’ property to support applying joint-venture standing in cases of unauthorized drivers of rental cars.¹³²

The government argued that a driver has no legal right to control or to possess a rental car in contravention of the lease agreement, but the court found this contention beside the point.¹³³ The court reasoned that a privacy interest may exist even if a defendant was in technical violation of a leasing contract.¹³⁴ The court also held that absent affirmative acts of repossession by the lessor, the expectation of privacy did not

¹²⁷ *Id.* (citing FED. R. APP. P. 34(a)(2)).

¹²⁸ *Id.* at 1197–98.

¹²⁹ *Id.* at 1198.

¹³⁰ *Id.*

¹³¹ *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006) (citing *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980) (holding that defendant, who borrowed a friend’s car, had standing to challenge a search)).

¹³² *Thomas*, 447 F.3d at 1198. The court relied on a number of analogous examples of “friend-of-owner” standing. *See Jones v. United States*, 362 U.S. 257, 259, 265 (1960); *see also Rakas v. Illinois*, 439 U.S. 128, 148–49 (contrasting *Jones* with a defendant who could not make a sufficient showing of standing).

¹³³ *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006).

¹³⁴ *Id.* The court relied on precedent that focused more on the actual possession of the property being searched as opposed to contractual possession of the property. *See United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2001) (having expectation of privacy in rental car after lease period expires, as long as lessee retains possession and control over car). The opinion also examined persuasive precedent from other circuits regarding lease expirations. *See e.g., United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986) (holding that a motel guest has an expectation of privacy after check-out time).

604 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

automatically end when the lease expired.¹³⁵

2. *An Unauthorized Driver of a Rental Car May Have Standing to Challenge a Search With a Showing of Permission From the Authorized Driver*

After discussing the circuit split regarding an unauthorized driver's standing to challenge a search, the Ninth Circuit adopted the rule employed in the Eighth Circuit.¹³⁶ The *Thomas* Court held that the Eighth Circuit approach was in accord with prior Ninth Circuit precedent—that indicia of ownership coupled with possession and permission from the rightful owner might sufficiently establish standing.¹³⁷ However, the Ninth Circuit denied *Thomas* standing because he failed to make a showing that McGuffey had given him permission to drive the rental car.¹³⁸

III. THE PROPER TEST FOR DETERMINING WHETHER A DEFENDANT HAS A LEGITIMATE EXPECTATION OF PRIVACY IS THE TOTALITY-OF-THE-CIRCUMSTANCES TEST

To determine whether a defendant has a legitimate expectation of privacy a court should conduct an inquiry gauging a person's relationship to property and not an inquiry with respect to the person's location.¹³⁹ The appropriate inquiry must be done on a case-by-case basis, considering many factors relevant to an individual's situation.¹⁴⁰ The *Thomas* court, in its expectation-of-privacy inquiry, ultimately adopted a rule that makes short shrift of the Supreme Court's sensitivity and meticulousness in determining a defendant's expectation of privacy.

¹³⁵ *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006) (citing *United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001)). Although the defendant in *Dorais* was a motel guest and not a driver of an automobile, the court did not address factual differences between an expectation of privacy in a room contrasted with an expectation of privacy in a mode of transportation. See *Thomas*, 447 F.3d at 1198.

¹³⁶ *Thomas*, 447 F.3d at 1199. The Eighth Circuit's approach focuses on whether the unauthorized driver has permission from the authorized driver to establish a possessory interest in the rental vehicle. See *supra* notes 101–102 and accompanying text.

¹³⁷ *Thomas*, 447 F.3d at 1199 (citing *Jones v. United States*, 362 U.S. 257, 266 (1960); *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980)).

¹³⁸ *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006).

¹³⁹ See *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

¹⁴⁰ See *id.*; see also *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (holding that visitors to a residence do not have an expectation of privacy because of the economic reason why they were there); *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) (analyzing multiple factors even though defendant was owner of property seized).

2007] *EXPECTATION OF PRIVACY IN RENTAL CARS* 605A. THE *THOMAS* COURT'S FOCUS ON PERMISSION IS UNSUPPORTED BY SUPREME COURT PRECEDENT

In *Thomas*, the court adopted the Eighth Circuit's rule allowing an unauthorized driver of a rental car standing to challenge a search of the car with a showing of permission to drive the rental car.¹⁴¹ Essentially, under that rule, a showing of permission would establish a legitimate expectation of privacy in a car that the driver does not own.¹⁴² The *Thomas* court primarily extended its reasoning from *United States v. Portillo* to support this conclusion.¹⁴³

In *Portillo*, where two defendants fled a robbery in a car that neither owned, there was no assertion that a showing of permission was dispositive for an inquiry into standing to challenge a search.¹⁴⁴ Rather, the court listed factors supporting a finding of a legitimate expectation of privacy in property that the defendant did not own.¹⁴⁵ The *Portillo* court's standing analysis involved drawing analogies between the defendants in that case and the defendants in *Rakas* and *Jones*.¹⁴⁶ The *Portillo* court reasoned that since one of the two defendants was in a position factually similar to that of the defendants in *Rakas*, and the other defendant was in a position similar to that of the defendant in *Jones*, then the former defendant had standing and the latter did not.¹⁴⁷ *Portillo*'s reliance on *Jones* was merely factual.¹⁴⁸

The *Thomas* court similarly relied on *Jones* to draw a factual analogy to a situation where a non-owner of property was able to establish a legitimate expectation of privacy in the property.¹⁴⁹ Specifically, the *Thomas* court noted that *Jones* "had permission to use the apartment, had a key to the apartment, stored his belongings there, and had the right and ability to exclude others, except the owner, from

¹⁴¹ *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006).

¹⁴² *Id.*

¹⁴³ *Id.* (citing *Jones v. United States*, 362 U.S. 257, 266 (1960) and *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980)).

¹⁴⁴ *See United States v. Portillo*, 633 F.2d 1313, 1316–17 (9th Cir. 1980).

¹⁴⁵ *See id.* at 1317 ("Here, [the 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. [The defendant], therefore, possesses the requisite legitimate expectation of privacy necessary to challenge the propriety of the search.").

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006) (citing *Jones v. United States*, 362 U.S. 257, 259, 265 (1960)).

606 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

the apartment.”¹⁵⁰ The *Thomas* court also noted that *Portillo* held that “a defendant may have a legitimate expectation of privacy in another’s car if the defendant is in possession of the car, has the permission of the owner, holds a key to the car, and has the right and ability to exclude others, except the owner, from the car.”¹⁵¹ Accordingly, the *Thomas* court’s reasoning relied upon authority that based its conclusions on multiple factors akin to a totality-of-the-circumstances test, not on one dispositive factor like the permission test.¹⁵²

To limit the inquiry to one dispositive factor is not in keeping with either circuit or Supreme Court precedent.¹⁵³ The *Thomas* court essentially chose to adopt a bright-line rule focused on permission.¹⁵⁴ By doing so, *Thomas* revisited concerns that *Rakas* put to rest.¹⁵⁵ In effect, *Thomas* required a showing of permission, much as *Jones* required a showing that a defendant was legitimately on the premises.¹⁵⁶ *Thomas* reverted the court’s standing analysis back to the “legitimately on the premises” test articulated in *Jones*—the same analysis that the Supreme Court overruled twenty-eight years earlier in *Rakas*.¹⁵⁷

B. THE PERMISSION TEST YIELDS INCONSISTENT RESULTS

In *Thomas*, the court found it unnecessary to apply the permission rule it adopted from the Eighth Circuit because the defendant Thomas did not proffer any evidence of his permission to drive McGuffey’s rental car.¹⁵⁸ The *Thomas* court therefore had no opportunity to set forth proper guidelines for other courts to follow when analyzing a defendant’s permission to drive a rental car. Although this lack of guidance provides lower courts with considerable flexibility, future defendants risk being subject to an ad-hoc, arbitrary legal standard.

¹⁵⁰ *Thomas*, 447 F.3d at 1198 (citing *Jones*, 362 U.S. at 259, 265).

¹⁵¹ *Thomas*, 447 F.3d at 1198 (citing *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980)).

¹⁵² See generally *Jones v. United States*, 362 U.S. 257 (1960) (holding that a number of factors are taken into account when determining Fourth Amendment standing); *United States v. Portillo*, 633 F.2d 1313 (9th Cir. 1980) (holding that joint control is the key inquiry for Fourth Amendment standing for non-owner defendants, listing a number of factors that include permission).

¹⁵³ See *Thomas*, 447 F.3d at 1199 (citing *Jones*, 362 U.S. at 266; *Portillo*, 633 F.2d at 1317).

¹⁵⁴ See *Thomas*, 447 F.3d at 1197 (comparing the permission test of the Eighth Circuit with the totality of the circumstances test of the Sixth Circuit).

¹⁵⁵ See *supra* notes 33–51 and accompanying text.

¹⁵⁶ Compare *United States v. Thomas*, 447 F.3d 1191, 1198–99 (9th Cir. 2006) (seeking a showing of permission), with *Rakas v. Illinois*, 439 U.S. 128, 136 (1978) (quoting *Jones v. United States*, 362 U.S. 257, 264, 267 (1960)).

¹⁵⁷ See *supra* notes 33–51 and accompanying text.

¹⁵⁸ *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006).

2007] *EXPECTATION OF PRIVACY IN RENTAL CARS* 607

As of January 7, 2007, only one court has cited *Thomas* in tackling the permission issue.¹⁵⁹ *United States v. Silva* involved a driver, fleeing arrest using a friend's car, who subsequently crashed the car.¹⁶⁰ The defendant argued standing based on evidence of a longtime friendship between the driver and the car's owner.¹⁶¹ Although there was no structured agreement to use the car, both the owner and the driver understood that the driver was authorized to use the car.¹⁶² Interestingly, the decision employed the totality-of-the-circumstances test to determine permission:¹⁶³

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. To require long-time friends to state explicitly their understanding, when their friendship does not require such explicit conversation, is not required to establish standing. Given the totality of the circumstances, the court finds that Silva has established a reasonable expectation of privacy in the green Honda.¹⁶⁴

The court reasoned that although there was no explicit showing of permission, the surrounding factors weighed in favor of implicit permission.¹⁶⁵ Notwithstanding *Silva's* inquiry into the defendant's permission to use the car, the court's approach was much like the approach proposed by this Note.¹⁶⁶ In light of the *Thomas* court's lack of guidance, one can hope that courts continue to employ the *Silva* interpretation of *Thomas*.

In both Eighth Circuit cases cited in support of the permission rule in *Thomas*, the defendant in each case presented no evidence to prove that he had permission to drive the rental car.¹⁶⁷ Therefore, it is still unclear how courts other than the *Silva* court will deal with this issue.

¹⁵⁹ See *United States v. Silva*, No. 05-00503-05-JMS, 2006 WL 4007006, at *4 (D. Haw. Nov. 9, 2006) (holding that a showing of implicit permission is sufficient to establish a legitimate expectation of privacy).

¹⁶⁰ See *id.* at *1.

¹⁶¹ See *id.* at *4.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *United States v. Silva*, No. 05-00503-05-JMS, 2006 WL 4007006, at *4 (D. Haw. Nov. 9, 2006).

¹⁶⁶ See *id.*

¹⁶⁷ See *United States v. Thomas*, 447 F.3d 1191, 1197 (9th Cir. 2006) (citing *United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998); *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995)); *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994) (defendant testified that he did not have permission).

608 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

IV. CONCLUSION

Allowing unauthorized drivers of rental cars to assert standing to challenge a search of a vehicle could potentially become a bigger issue than it is now. With the growing density of cities and the increasing costs associated with owning a car, city dwellers may elect to use hourly car rentals for daily tasks instead of buying cars.¹⁶⁸

The Ninth Circuit adopted a permission rule that flies in the face of the reasoning behind *Rakas*. The main concern in *Rakas*—that the government violated a defendant’s expectation of privacy and not his or her property rights—is essentially ignored by the permission test adopted in *Thomas*. A driver’s expectation of privacy should be shown through factors other than permission. Furthermore, the Ninth Circuit hastily adopted the permission rule without regard for its practical implications.¹⁶⁹ No case cited by *Thomas* from the Eighth Circuit exhibited a process for finding permission.¹⁷⁰ It makes little sense to pass over the totality-of-the-circumstances test, which ensures that each defendant is afforded a meticulous analysis of his or her expectation of privacy, in favor of a more rigid rule that has not been adequately tested.

In order to remain true to core Fourth Amendment principles, courts must conduct an exhaustive analysis of a defendant’s possessory interest in the searched property. Only through an analysis of the totality of the circumstances may courts accurately gauge each specific situation. By adopting a rigid permission rule in *Thomas*, the Ninth Circuit’s standing jurisprudence has failed to evolve with society’s recognition of an expectation of privacy as intended by interpretations of the Fourth Amendment in *Rakas*.

MATTHEW M. SHAFAE*

¹⁶⁸ See *supra* note 1 and accompanying text.

¹⁶⁹ See *supra* notes 136–137 and 158–167 and accompanying text.

¹⁷⁰ See *supra* notes 101–102 and 167 and accompanying text.

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