

**In The
Supreme Court of The United States**

TERRELL JAMAR HOUSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**PETITIONER'S REPLY TO GOVERNMENT'S
BRIEF IN OPPOSITION**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
ARGUMENT	1
I. The Court should hold this petition until it decides Byrd v. United States, No. 16-1371.....	1
II. Regardless of the decision in Byrd, the Court should grant certiorari on the second question presented, vacate, and remand.....	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

<i>Alvarado v. United States</i> , 497 U.S. 543 (1990).....	6
<i>Ash v. Tyson Foods, Inc.</i> , 546 U.S. 454 (2006).....	6
<i>Bates v. United States</i> , 323 U.S. 15 (1944).....	6
<i>Birchfield v. North Dakota</i> , 136 S. Ct. 2160 (2016).....	3
<i>Byrd v. United States</i> , No. 16-1371	1, 2, 3, 4, 7
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	3, 5
<i>Ferguson v. City of Charleston</i> , 532 U.S. 67 (2001).....	3
<i>Florida v. Jimeno</i> , 500 U.S. 248 (1991).....	2
<i>Jennings v. Rodriguez</i> , ____ U.S. ____, 2018 WL 1054878 (2018)	3, 5, 6
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1978).....	5
<i>Rodriguez v. United States</i> , 135 S. Ct. 1609 (2015).....	2
<i>United States v. Houston</i> , 689 F. App'x 170 (4th Cir. 2017)	2, 4, 5
<i>United States v. Wellons</i> , 32 F.3d 117 (4th Cir. 1994)	5

<i>Zivotofsky ex rel. Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012).....	3
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ARGUMENT

I. The Court should hold this petition until it decides *Byrd v. United States*, No. 16-1371.

The Fourth Circuit applied a two-part, bright-line rule in this case: First, it ruled that because Terrell Houston had driven a rental car without being listed as a driver on the rental contract, he automatically had no legitimate privacy interest in the car itself. Second, it ruled that a driver not listed on a rental-car contract can never have a reasonable expectation of privacy in luggage or personal effects stored in the rental car. App. 3a. Both parts of that bright-line rule depend on the question presented in *Byrd v. United States*, No. 16-1371: Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement? And if the Court rules in the petitioner's favor in *Byrd*, both parts of the Fourth Circuit's bright-line rule are indefensible.

The government concedes that "if the Court believes that its forthcoming decision in *Byrd* may bear on the proper analysis of either question presented in this case, it may wish to hold this petition and dispose of it as appropriate in light of the decision in *Byrd*." U.S. Opp. 7. Since the Fourth Circuit's decision below hinges on the answer to the question presented in *Byrd*, it can hardly be disputed that *Byrd* "may bear on the proper analysis" of *both* questions presented in this case. The Court should hold this petition until it decides *Byrd*.

The government contends that, because an agent of the rental-car company consented to the search of the car itself, “[t]he Court’s disposition of *Byrd* therefore will not affect the determination whether the search of the car violated petitioner’s Fourth Amendment rights.” Opp. 6. That contention is wrong. First, Houston does not concede that the rental-car agent gave *valid* consent to search the car. He argued in the Court of Appeals that (1) the agent lacked actual and apparent authority to consent to a search of either the car itself or Houston’s bag found inside the car, and (2) she did not actually consent to a search of his bag. Br. of Appellant at 30–35, Rep. Br. of Appellant at 13–22, *United States v. Houston*, 689 F. App’x 170 (4th Cir. 2017). And second, while Judge Traxler suggested in his concurrence that “the search here was conducted at the express request of the undisputed owner of the car and as part of the process of returning the car to the owner,” App. 7a, the majority of the panel did not adopt this view or even address it, and the concurrence itself does not address Houston’s challenge to the validity of the consent. And finally, the government’s consent argument relies on a single case—*Florida v. Jimeno*, 500 U.S. 248 (1991)—which does not even address the validity or scope of a rental-car agency’s consent to search. *See* Opp. 12.

The Court should decline the government’s invitation to decide the consent issue in the first instance, because the questions presented in this case are threshold questions that this Court can and should decide without addressing the remaining issues that the Fourth Circuit has not yet addressed. *See, e.g., Rodriguez v. United States*, 135 S. Ct. 1609, 1616–17 (2015) (after holding that prolonging

traffic stop without reasonable suspicion violates the Fourth Amendment, remanding for court of appeals to address in the first instance whether reasonable suspicion justified extending the stop). This Court is “a court of review, not of first view.” *Jennings v. Rodriguez*, ___ U.S. ___, 2018 WL 1054878 at *19 (2018) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). It is only necessary to consider the consent issue if it is first possible for Houston to have a reasonable expectation of privacy in his bag. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (addressing question of consent only after concluding that driver had reasonable expectation of privacy in blood sample). When the Court of Appeals has not yet ruled on a consent-to-search issue, this Court will “assume for purposes of [its] decision” that consent was not given. *Ferguson v. City of Charleston*, 532 U.S. 67, 77 & 77 n.11 (2001).

This Court’s decision in *Byrd* is critical to the validity of the ruling below. Regardless of the ultimate outcome of the consent issue, a ruling in the petitioner’s favor in *Byrd* will completely undercut the Court of Appeals’ reasoning that Houston automatically lost any privacy interest in his bag by placing it a rental car without being listed as a driver on the rental-car contract. The Court should hold this petition until it issues the decision in *Byrd* and, if it rules in Byrd’s favor, should remand this case so that the Fourth Circuit can decide the consent issue in the first instance. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (explaining that when the Court “reverse[s] on a threshold question, [it]

typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing").

II. Regardless of the decision in *Byrd*, the Court should grant certiorari on the second question presented, vacate, and remand.

Contrary to the position the government took in the Court of Appeals, Br. of the United States at 19, 24–25, *Houston*, 689 F. App'x 170, it now concedes that the ruling below is “incorrect in its view that if an unauthorized driver lacks a legitimate expectation of privacy in a rental car, he necessarily lacks a legitimate expectation of privacy in a container found inside.” Opp. 8. It now acknowledges that “[a] person who has a legitimate expectation of privacy” in effects such as his personal luggage “does not necessarily lose that expectation when he places his effects in someone else’s car.” *Id.* And it now admits that, contrary to the Court of Appeals’ ruling, “[w]hether an unauthorized driver may assert a legitimate expectation of privacy” in a bag or container found in the car “depends instead on the particular circumstances of each case.” Opp. 9. The government also concedes that the Fourth Circuit’s ruling conflicts with other circuits and state courts of last resort. Opp. 10–11.

Despite its concessions, the government contends, without citing any authority, that review is not warranted because “whether or not petitioner had a legitimate expectation of privacy in the rental car, he lacked a legitimate expectation of privacy in the bag, because he has not shown a possessory interest in it.” Opp. 8. That contention is flawed in two respects.

First, it is legally erroneous. Capacity to claim Fourth Amendment protection depends on whether the person “has a legitimate expectation of privacy in the invaded place.” *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Thus, if Houston had a reasonable expectation of privacy in the rental car, that expectation of privacy included any containers or bags found in the car.

Second, the Court of Appeals never considered whether Houston had shown a possessory interest in the bag. Houston argued on appeal that the district court’s finding of “no evidence” to show a possessory interest was clearly erroneous. Br. of Appellant at 28–30, Rep. Br. of Appellant at 8–13, *Houston*, 689 F. App’x 170. He pointed to repeated statements by his counsel at the hearing asserting his ownership of the bag, testimony and exhibits before the court that established his possessory interest in the bag, and the fact that he never denied ownership of the bag and was not even present when officers searched it. *Id.* But instead of considering whether the district court clearly erred, the Court of Appeals based its ruling entirely on its view that, under *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994), an authorized driver of a rental car can have no reasonable expectation of privacy either in the car itself or in a bag found inside the car. Pet. App. 1a–5a.

Thus the government, while acknowledging that the Court of Appeals’ ruling is erroneous, asks this Court to decide in the first instance whether the district court erred in ruling that there was “no evidence” that the bag belonged to Houston. *See* Opp. 9; Pet. App. 100a. But, again, this Court is “a court of review, not of first view.” *Jennings v. Rodriguez*, 2018 WL 1054878 at *19 (quoting *Cutter v.*

Wilkinson, 544 U.S. at 718 n.7). When a Court of Appeals' erroneous ruling results in its having "had no occasion to consider . . . arguments on their merits," this Court will "remand the case to the Court of Appeals to consider them in the first instance." *Id.* For example, in *Bates v. United States*, the government conceded that the petitioner's conviction could not be sustained on the grounds given by the Court of Appeals, but it argued that the conviction could be sustained on other grounds that the court had not considered. 323 U.S. 15, 17 (1944). Nevertheless, this Court granted the petition for certiorari, vacated the conviction, and remanded the case to the Court of Appeals, "deem[ing] it more appropriate that the Court of Appeals consider that question in the first instance." *Id.*; see also *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 458 (2006) (granting certiorari, vacating judgment, and remanding for court of appeals to determine whether "the two aspects of its decision here determined to have been mistaken were essential to its holding").

"When the Government has suggested that an error has been made by the court below, it is not unusual" for the court "to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court." *Alvarado v. United States*, 497 U.S. 543, 544 (1990). "Nor is it novel to do so when error is conceded but it is suggested that there is another ground on which the decision below could be affirmed if the case were brought here." *Id.* In such a case, the Court will remand to the Court of Appeals to address the alternative ground in the first instance. *Id.* at 545.

The government's concessions demonstrate that, regardless of the outcome in *Byrd*, the Court should grant certiorari, vacate the Court of Appeals' ruling, and remand the case to that court for reconsideration in light of the government's change of position. *See* Opp. 9 ("Whether an unauthorized driver may assert a legitimate expectation of privacy" in a bag or container found in the car "depends instead on the particular circumstances of each case."). That disposition will permit the Court of Appeals to consider, in the first instance, whether the district court clearly erred in finding "no evidence" that the bag belonged to Houston.

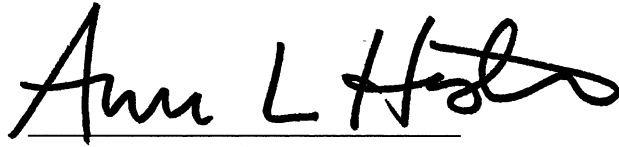
CONCLUSION

For the foregoing reasons, the Court should hold this case for disposition pending its decision in *Byrd* and then grant certiorari, vacate the judgment of the Fourth Circuit, and remand the case for further proceedings in light of *Byrd*. Further, even if *Byrd* is not decided favorably to the petitioner, the court should grant certiorari on the second question presented, vacate the judgment below, and remand with instructions to reconsider the question in light of the government's change in position.

March 7, 2018

Respectfully submitted,

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A handwritten signature in black ink, reading "Ann L. Hester". The signature is fluid and cursive, with a horizontal line drawn underneath the name.

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