DECLARATION OF WADE P. COLLINS

I, Wade P. Collins, hereby declare and state:

1. I am employed as a Deputy by the Gould County Police Department (GCPD) and have been so employed for approximately ten years. This declaration is being submitted in support of the Government's Opposition to Defendant Robert Hobs's Motion to Suppress Evidence.

2. On February 16, 2007, I was on duty in my patrol car, driving on Interstate 104 about thirty miles outside of Gould City, California, when I observed a car exceeding the speed limit. I pulled the car over and approached the driver's door.

3. As I approached, I noticed that markings on the car indicated that it was a rental. I asked the driver for his driver's license and the rental agreement. He provided me with a California driver's license that indicated that his name was Robert Hobs and a copy of a rental agreement from Mavis Car Rentals, which showed that the car had been rented by a woman named Emma Rose. I noticed that Hobs was not listed on the agreement as an authorized driver. I asked Hobs why he was driving a car rented by Emma Rose. He responded that she was his girlfriend and was very sick, and that he was trying to get to the hospital to see her.

4. I was suspicious that Hobs was doing something illegal because he seemed agitated and nervous. Additionally, based on my training and experience, I know that criminals will frequently make up sympathetic stories to convince police officers to take pity on them and let them go, so I decided to search the rental car for evidence of illegal conduct. I asked Hobs for permission to search the car and he refused, stating

that he needed to get to the hospital as soon as possible. Because I did not trust his story, I asked him to step out of the vehicle so that I could search it. He complied with my request.

5. When I searched Hobs's car, on the front seat I found a bar napkin bearing the notation "Ty Allen, 555-0386," and in the trunk I found a cooler bearing a label that read "Bio Hazard – Perishable Transplant Materials – If found, please contact health authorities immediately." I opened the cooler and saw that it contained what appeared to be a human heart. I then informed Hobs that he was under arrest for a violation of Gould Penal Code § 403(a).

6. After arresting him, I read Hobs his Miranda rights and he waived them. I asked him why he had the heart and where he had gotten it from. He responded, "I have nothing to say to you." I then asked him where he was taking the heart and who was going to perform the surgery. He refused to answer, stating again, "I have nothing to say to you." At that point, I transported him to the county station, where he was booked into custody.

I hereby declare under penalties of perjury that the foregoing is true and accurate. Executed this 8th day of December, 2007 in Gould City, California.

_____

WADE P. COLLINS

DECLARATION OF REDFORD J. WELLS

I, Redford J. Wells, hereby declare and state:

1. I am employed as a Special Agent by the United States Department of Health and Human Services (HHS) and have been so employed for approximately seven years. This declaration is being submitted in support of the Government's Opposition to Defendant Robert Hobs's Motion to Suppress Evidence.

2. On February 27, 2007, I was working as the HHS duty agent taking incoming calls from the public and other law enforcement agencies. I received a call from Deputy Wade Collins of the Gould County Police Department. He told me that he had a defendant named Robert Hobs in custody and that he had arrested Hobs for illegally acquiring a human heart for use in human transplantation. He described how he stopped Hobs in a rental car, searched the car, and discovered the heart in a cooler in the car's trunk. He explained that the Gould County District Attorney (DA) was going to dismiss the state case because the DA thought the heart would be suppressed and that it would not have enough evidence to convict Hobs without the heart as evidence. I asked Collins if Hobs had made any statements about the heart and he told me that Hobs had refused to answer his questions. Collins asked me if I would be interested in filing federal charges and urged that I do so before the DA dismissed the state case. I decided to interview Hobs before determining if there was enough evidence to bring federal charges.

4. On February 28, 2007, I flew to Gould City to interview Hobs. Collins escorted Hobs to an interview room and assisted me in conducting the interview by asking follow-up questions.

The interview was recorded. I began the interview by reading Hobs his Miranda rights. He said that he understood his rights and waived them. He then gave a full confession, admitting that he purchased the heart for his girlfriend to receive as a transplant. He admitted that he met an unidentified man in a bar and told the man his story; the man gave him the telephone number for a woman named Ty Allen; he decided to call Allen; Allen offered to find a heart for his girlfriend and have a surgeon perform the transplant surgery for $50,000; he sold his most valuable possessions to raise the funds to purchase the heart; and ultimately, he had taken his girlfriend's rental car to Bakersfield to retrieve the heart in exchange for $50,000 cash. He also described Allen's plan to use a nearby clinic for the surgery.

I hereby declare under penalties of perjury that the foregoing is true and accurate. Executed this 8th day of December, 2007 in Gould City, California.

_____
REDFORD J. WELLS

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

UNITED STATES OF AMERICA,

PLAINTIFF,

v.

ROBERT HOBS,

DEFENDANT.

HONORABLE JULIE CRISP, DISTRICT JUDGE, PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION TO SUPPRESS EVIDENCE

GOULD CITY, GOULD

DECEMBER 10, 2007

APPEARANCES BY COUNSEL:

FOR THE UNITED STATES:

OFFICE OF THE UNITED STATES ATTORNEY

BY: MICHAEL SZCZUREK

ASSISTANT UNITED STATES ATTORNEY

UNITED STATES COURTHOUSE

1000 THIRD STREET

GOULD CITY, GOULD 90005

FOR THE DEFENDANT:

BY: JASON YU

ATTORNEY AT LAW

600 SOUTH FIG STREET

GOULD CITY, GOULD 90005

GOULD CITY, GOULD: DECEMBER 10, 2007

(COURT IN SESSION AT 1:30 P.M.)

THE CLERK: Calling CR No. 07-285-JC: United States v. Hobs.

MR. SZCZUREK: Mike Szczurek for the United States. Good afternoon, your Honor. With me are Deputy Collins of the Gould County Police Department and Special Agent Wells of the United States Department of Health and Human Services.

MR. YU: Good afternoon, your Honor. Jason Yu present with Mr. Robert Hobs.

THE COURT: It's your motion to suppress, Mr. Yu. How would you like to proceed?

MR. YU: Your Honor, I believe that the government has submitted the declarations of Deputy Collins and Special Agent Wells as their direct testimony. At this time, I'd like to cross-examine Deputy Collins.

GOVERNMENT'S WITNESS WADE P. COLLINS, SWORN

THE CLERK: Please take the stand. Please state your full name and spell your last name for the record.

THE WITNESS: Deputy Wade P. Collins. C-O-L-L-I-N-S.

THE CLERK: Thank you.

CROSS-EXAMINATION BY MR. YU:

Q: Why did you stop Mr. Hobs's car on February 16, 2007?

A: Because he was speeding.

Q: Other than speeding, did you see him do anything else illegal before you stopped him, such as driving recklessly or hitting another car?

A: No.

Q: Deputy, speeding is very common, isn't it?

A: Yes.

Q: You don't stop every speeding driver, do you, especially if they are going only ten miles an hour over the speed limit?

A: Speeding is a violation and I stop speeders.

Q: Are you telling us that every single time you have ever seen a car driving ten miles an hour over the speed limit, you have stopped it?

A: Well, maybe not every time, but . . . .

Q: Let's move on. When you walked up to the car, did you smell alcohol on his breath?

A: No.

Q: Did you smell marijuana or other drugs?

A: No.

Q: Did you see a gun, a knife, or any other weapon?

A: No.

Q: Did you see blood on his clothes?

A: No. Why would I?

Q: So before you searched my client's car, you had no evidence indicating that my client had committed any crime other than speeding, did you?

A: Well, he seemed agitated and nervous, and I saw that he was driving a rental car. When I asked for the rental agreement, I saw that he wasn't the renter or an authorized driver. Those things made me suspicious.

Q: Did you have any specific reason to believe that alcohol, drugs, a gun, or other contraband was in the car?

A: Specifically, no.

Q: Did Mr. Hobs explain to you that he was in a rush to get to the hospital to see his girlfriend?

A: Yes.

Q: And he explained to you that she was dying?

A: He mentioned that, yes.

Q: Did you have any reason not to believe him?

A: Not really, I guess.

Q: So you decided to detain him and search the car for no specific reason, isn't that true?

A: As I explained before, he looked nervous . . . .

Q: And you didn't think that perhaps he was anxious because his fiancée might die before he returned?

A: I guess he could have been, but at the time, I didn't know if he was telling the truth.

Q: So because my client seemed anxious and nervous, you searched his car, correct?

A: And because he was not on the rental agreement.

Q: But you asked for his consent to search the car even though he wasn't on the agreement, isn't that true?

A: Yes. I asked for consent to search and he refused.

Q: When he refused, he told you why, didn't he?

A: Well, he said he couldn't let me search because he needed to get to the hospital.

Q: But you searched the car anyway, didn't you?

A: Yes.

Q: And the only thing you found was the heart, right?

A: Yes.

Q: After you placed Hobs under arrest, what did you do?

A: I asked him a few questions.

Q: What type of questions did you ask Hobs?

A: I asked where the heart came from, whether he bought it, whether he intended to sell it, where he intended to take it, and who was going to do the transplant. I may have asked more questions along those lines as well, but it didn't matter because he just kept repeating, "I have nothing to say."

Q: What role did you play in the federal case?

A: Well, I contacted Special Agent Wells at HHS on February 27, 2008 because the Gould County District Attorney had informed me that he planned to dismiss the case that Friday. For some reason, he thought the heart would be suppressed. He wanted to know what other evidence I had gathered and if Hobs had made any incriminating statements. When I told him Hobs refused to answer my questions, he did not think we had enough to convict Hobs. I think the DA was just afraid to take on an unusual case like this one.

Q: At some point, were you taken off Hobs's case?

A: Special Agent Wells requested that I remain on the case, so I stayed to help him.

Q: Did Agent Wells say why he wanted you to stay on the case?

MR. SZCZUREK: Objection. Calls for hearsay.

THE COURT: Overruled. It goes to his state of mind. Please answer the question.

A: I was the only person who really knew the facts of the case. Without me, it would have been much harder to prosecute Hobs.

Q: How did you assist with the federal case?

A: I used my sources to try to find the source of the heart. I also interviewed potential government witnesses,

including people at the girlfriend's hospital and character witnesses.

MR. YU: Thank you, Deputy Collins.

REDIRECT EXAMINATION BY MR. SZCZUREK:

Q: Do you feel as though you did anything in this case that you would not have done in any other case?

A: No. I just did my job like on any other case.

Q: In your years of experience as an officer, have people ever lied to you when you questioned them?

A: Sure. All the time.

Q: Based on your training and experience, do you think that people who are trying to conceal evidence of a crime would be likely to make up a story about a dying girlfriend to avoid a search?

A: Yes. Definitely. People who are transporting guns or drugs often have elaborate excuses about pregnant wives giving birth, dying parents, or being late to coach a child's little league game. Anything to make the officer feel sympathetic or less suspicious. This guy was nervous. I knew something was going on. That is why I searched the vehicle. And I was right.

Q: Was it your idea to contact HHS?

A: Yes, but GCPD has always encouraged its deputies to keep open lines of communication between GCPD and federal authorities.

Q: When you contacted HHS, did you intend to remain involved in the federal investigation?

A: No, but it made sense that I conduct the interviews. I knew the case and all the witnesses were within twenty miles of the Gould station. I guess it was convenient.

MR. SZCZUREK: Thank you, Deputy Collins.

THE COURT: Mr. Yu, is there anyone else the defense would like to question?

MR. YU: Yes, your honor. I would like to examine Special Agent Wells.

GOVERNMENT'S WITNESS REDFORD J. WELLS, SWORN

THE CLERK: Please take the stand. Please state your full name and spell your last name for the record.

THE WITNESS: Redford J. Wells. W-E-L-L-S.

THE CLERK: Thank you.

CROSS-EXAMINATION BY MR. YU:

Q: How did you hear about Hobs's case?

A: Deputy Collins contacted HHS and I was the duty agent taking calls that day.

Q: Does HHS regularly receive calls from state police departments?

A: No, but most HHS cases involve years of undercover investigation, not reactive cases like a traffic stop.

Q: Why did you go to interview Hobs the day after Deputy Collins contacted you?

A: Deputy Collins told me that Hobs would be released from custody by the end of the week. In my experience, defendants are hard to find after they are released and they tend to be more cooperative while in custody. Also, if I decided to seek federal charges, it would be easier to have him transferred from state custody directly to federal

custody. For all those reasons, I wanted to be sure that I talked to Hobs immediately.

Q: Were you aware that the state court had appointed a public defender to represent Hobs roughly a week and a half prior to your interrogation?

A: Yes. Deputy Collins gave me a quick rundown of Hobs's case, the facts, the case status, and things like that.

Q: Did you suggest that Hobs have his appointed counsel present during the interrogation?

A: No. I did not think it was necessary. I read Hobs his Miranda rights and explained that he had a right to have counsel present.

Q: But did you refer in any way to his state-appointed counsel?

A: No.

Q: Why not?

A: I didn't think that Hobs's state counsel would need to be present for a federal interrogation when the state charges were about to be dropped.

MR. YU: Thank you, Agent Wells.

REDIRECT EXAMINATION BY MR. SZCZUREK:

Q: Did Hobs appear uncomfortable during the interrogation?

A: No. He looked like he was physically comfortable, but he did say that his girlfriend had passed away that morning, and he was emotional about it.

Q: Was there anyone else in the room with you and Hobs?

A: Yes. Deputy Collins.

Q: Why was Deputy Collins there?

A: He had escorted Hobs into the room, and I asked him to stay to make sure that I asked all the relevant questions. At that point, he knew the case way better than I did.

Q: How many questions did Deputy Collins ask?

A: He asked a few follow-up questions after my questions.

Q: Can you think of an example?

A: Ummm. Well, not off the top of my head, but he did not play a major role in the interrogation.

Q: How did the interrogation end?

A: Hobs confessed in detail. He stated that he got the heart from a woman named Ty Allen, and that it was for his sick girlfriend, who would die without a transplant. He explained that his girlfriend had been on a transplant list for some time but had not received a heart, and her time was running short. He admitted that he received Allen's contact information from an unidentified male in a bar, and he contacted Allen the next day. He said he discussed his plans to acquire a black-market heart with his girlfriend, and she supported the idea. He explained that he raised the money by selling some valuables, like his car. He said Allen was going to arrange to get his girlfriend from the hospital to a nearby clinic. Allen had a surgeon who was willing to perform the operation, but she would not tell him the physician's name. After the interview, I felt that I had sufficient evidence to prosecute Hobs.

MR. SZCZUREK: Thank you, Agent Wells.

THE COURT: Thank you. I will take the matter under submission.

(Whereupon the proceedings were adjourned.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

UNITED STATES OF AMERICA,	)	CR No. 07-285-JC
	)	
PLAINTIFF,	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO SUPPRESS EVIDENCE
v.	)	
	)	
ROBERT HOBS,	)	
	)	
DEFENDANT.	)	
	)	

This matter comes before the Court on Defendant Robert Hobs's motion to suppress evidence. Hobs moved to suppress (1) a human heart that was seized from the rental car he was driving and (2) his recorded confession.

I. Factual Background

On Friday, February 16, 2007, Hobs was driving a rental car when Deputy Wade Collins of the Gould County Police Department (GCPD) pulled him over as part of a routine traffic stop. The car had been rented by Hobs's now-deceased girlfriend, who, according to the rental company's records, was the sole authorized driver. During the traffic stop, Deputy Collins realized that Hobs was not authorized to drive the car. He became suspicious and asked Hobs for consent to search the car. Hobs refused to give consent, saying that he had to rush to the hospital to see his sick girlfriend. Nevertheless, Deputy

Collins asked Hobs to step out of the car so that he could conduct a search, during which he discovered a human heart in a cooler in the trunk. Hobs was arrested and refused to answer any further questions by Deputy Collins.

Hobs was charged with the illegal acquisition of a human heart for use in human transplantation, in violation of Gould Penal Code § 403(a).[1] Hobs was then taken to the Gould County Jail, where he was booked into custody. On Monday, February 19, 2007, Hobs attended his arraignment and bond hearing, at which the court appointed a public defender to represent him.

Shortly thereafter, the Gould County District Attorney told Deputy Collins that he intended to dismiss the state case against Hobs. The District Attorney feared that the heart would be suppressed and that there would then be insufficient evidence to prosecute Hobs. After learning of the District Attorney's intent, Deputy Collins contacted Special Agent Redford Wells of the United States Department of Health and Human Services (HHS) and asked him to immediately initiate a federal investigation.

On February 28, 2007, Agent Wells interrogated Hobs with Deputy Collins present. Although Agent Wells knew that Hobs had state counsel, he questioned Hobs without his counsel present. After voluntarily waiving his Fifth Amendment rights, Hobs fully

[1] Gould Penal Code § 403(a) criminalizes "the acquisition, receipt, or otherwise transfer of any human organ for valuable consideration for use in human transplantation."

confessed, detailing his purchase of the heart from a woman named Ty Allen. Following that interrogation, the state charges were dismissed and a federal indictment was returned, charging Hobs with a violation of 42 U.S.C. § 274e(a).[2] Hobs moved to suppress the heart and his incriminating statements.

II. Legal Analysis

The issues presented are two-fold. First, did Hobs, as an unauthorized driver of a rental car, have standing under the Fourth Amendment to object to the search of the car? Second, did Agent Wells's interrogation of Hobs violate his Sixth Amendment right to counsel? The Court hereby finds that Hobs did not have standing to object to the search of the rental car and, in any event, his Sixth Amendment rights were not violated. The motion to suppress is DENIED.

A. Defendant's Motion to Suppress the Heart Is Denied Because He Was an Unauthorized Driver Who Did Not Have Standing to Object to the Search of a Rental Car

This case presents an issue of first impression in the Twelfth Circuit and an issue over which other circuits are split. After careful consideration, this Court agrees with the Fourth, Fifth, and Tenth circuits that an unauthorized driver of a rental car has no standing under the Fourth Amendment to

[2] 42 U.S.C. § 274e(a) states in relevant part: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."

challenge a search of the car. See United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994); United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990); United States v. Obregon, 748 F.2d 1371, 1374-75 (10th Cir. 1984).

In the first case to address this issue, the Tenth Circuit determined that the defendant's relationship to the car was "too attenuated to support a claim of standing" to object to a search because he had no relationship with the rental car company. Obregon, 748 F.2d at 1374. Although the defendant was in sole possession of the car and had permission from the renter, he could not have a legitimate expectation of privacy in a car that he had no right to legitimately drive. Id.

Two other circuits subsequently agreed that Fourth Amendment rights are not implicated when an unauthorized driver of a rental car objects to a search. See Wellons, 32 F.3d at 119; Boruff, 909 F.2d at 117.

Although the Eighth and Ninth circuits have granted standing to drivers who have permission from the authorized driver of a rental car, see United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998); United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006), this Court is not persuaded by their reasoning. For example, in Thomas, the Ninth Circuit analogized unauthorized drivers of rental cars to defendants in technical violation of a leasing agreement but who nevertheless maintained

a legitimate expectation of privacy. 447 F.3d at 1198. The court concluded that if an authorized driver gives another person permission to use the car, then the second person has standing to challenge a search of the car. Id. at 1199. This Court finds this conclusion insupportable because only the rental company can give permission to drive its cars.

Here, Hobs was not authorized by the rental company to drive the rental car. Further, because he had a copy of the rental agreement, he had actual notice that he was not authorized to drive the car and could not, therefore, have had a legitimate expectation of privacy. These facts compel a conclusion that he has no standing to object to the search of the rental car. Because this Court has found that Hobs lacks standing to object to the search of the rental car, it is not necessary to decide whether Deputy Collins's search of that car was legal, and this Court hereby declines to reach that issue.

B. Defendant's Motion to Suppress his Incriminating Statements Must Be Denied Because his Sixth Amendment Right to Counsel Had Not Attached in the Federal Case

Neither the U.S. Supreme Court nor the Twelfth Circuit has directly addressed whether a defendant's invocation of his Sixth Amendment right to counsel in a state case automatically invokes his right to counsel in a subsequent federal case when the federal case is based on the same facts. This Court is persuaded by the reasoning of the First, Fourth, Fifth, and

Eleventh circuits that even if the state and federal offenses are based on identical conduct, they are not the same offense for purposes of the Sixth Amendment because the charges are brought by separate sovereigns. Therefore, the defendant's invocation of his right to counsel in the state case does not automatically invoke his right to counsel in the subsequent federal case. See United States v. Burgest, 519 F.3d 1307, 1310-11 (11th Cir. 2008), petition for cert. filed, (U.S. July 22, 2008) (No. 08-5476); United States v. Alvarado, 440 F.3d 191, 194 (4th Cir. 2006); United States v. Coker, 433 F.3d 39, 44 (1st Cir. 2005); United States v. Avants, 278 F.3d 510, 517 (5th Cir. 2002). As the Fifth Circuit stated in Avants, the Sixth Amendment right to counsel is an offense-specific right that attaches only once adversarial judicial proceedings have commenced. 278 F.3d at 517.

Although the Supreme Court has never explicitly stated that the dual sovereign doctrine should be incorporated into Sixth Amendment jurisprudence, its decision in Texas v. Cobb, 532 U.S. 162, 173 (2001), impliedly incorporated all of its double jeopardy jurisprudence into its Sixth Amendment jurisprudence.[3] In Cobb, the Supreme Court explicitly stated that there is "no

[3] The dual sovereign doctrine provides that when a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct offenses for double jeopardy purposes. Heath v. Alabama, 474 U.S. 82, 88 (1985).

constitutional difference between the meaning of the term 'offense' in the context of double jeopardy and of the right to counsel." Id. at 173. Accordingly, the Court held that the Sixth Amendment right to counsel attaches to offenses that are the same offense under the test announced in Blockburger v. United States, 284 U.S. 299, 304 (1932), regardless of whether the offenses have been formally charged. Cobb, 532 U.S. at 173. In this sense, the Sixth Amendment right to counsel is "prosecution specific." Id. at n.3.

Because the Supreme Court has never explicitly incorporated the dual sovereign doctrine into its Sixth Amendment jurisprudence, at least one circuit has disagreed with this conclusion and held that it should not be incorporated. See United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005). In Mills, the Second Circuit held that the dual sovereign doctrine should not be incorporated in the Sixth Amendment context because its incorporation would let two sovereigns work together to evade a defendant's Sixth Amendment protection. Id. It hypothesized that once one sovereign had charged and appointed counsel to represent a defendant, a second sovereign could question the defendant without counsel present and share the resulting evidence, thereby improperly giving the first sovereign an uncounseled confession. Id.

This Court believes that the Supreme Court's opinion in Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959), renders the Second Circuit's concerns in Mills unfounded. In Bartkus, the Court carved out a narrow exception to the dual sovereign doctrine, disallowing successive prosecutions of an offense when the second sovereign acted merely as the "tool" of the first sovereign and deliberately avoided the defendant's constitutional protections. See United States v. Aboumoussallem, 726 F.2d 906, 910 (2d Cir. 1984) (citing Bartkus, 359 U.S. at 123-24). The exception has been applied in the Sixth Amendment context whenever "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." United States v. Guzmán, 85 F.3d 823, 827 (1st Cir. 1996); see also United States v. Krueger, 415 F.3d 766, 778 (7th Cir. 2005); United States v. Red Bird, 287 F.3d 709, 715 (8th Cir. 2002). However, more than mere collaborative efforts are needed to trigger the Bartkus exception. Alvarado, 440 F.3d at 198.

In this case, the evidence shows that the cooperation between Deputy Collins and Agent Wells was not driven by a desire to evade Hobs's Sixth Amendment right to counsel but instead by a desire to ensure that Hobs did not escape punishment for his illegal actions. The actions of Deputy

Collins and Agent Wells represented nothing more than routine collaboration. The ability of law enforcement to investigate crimes would be irreparably harmed if this type of basic coordination between sovereigns was punished rather than rewarded. This Court is confident that state and federal authorities will exercise sufficient restraint when facing any temptation to evade a defendant's constitutional rights. This Court finds that such restraint was exercised in this case, and the Bartkus exception is, therefore, inapplicable.

III. Conclusion

In summary, an unauthorized driver of a rental car does not have standing under the Fourth Amendment to object to a search of that car. In addition, the Sixth Amendment right to counsel is offense specific, and attachment of the right in a state case does not automatically equal attachment of the right in a successive federal case.

Based on the foregoing, the motion to suppress evidence is hereby DENIED.

Dated: December 12, 2007

_____
JULIE CRISP
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 08-1844

Decided Aug. 8, 2008

UNITED STATES OF AMERICA,

PLAINTIFF/APPELLEE,

v.

ROBERT HOBS,

DEFENDANT/APPELLANT.

APPEAL from a judgment of the United States District Court for the District of Gould. Before Nichols-Julien, Robowski, and Lehman.

Opinion by LEHMAN, J. Reversed.

Defendant-Appellant Robert Hobs appeals from his conviction following a jury trial for illegally purchasing a human heart to be used in human transplantation, in violation of 42 U.S.C. § 274e(a). Hobs contends that his conviction must be reversed because the district court erred by denying his motion to suppress (1) the heart that was seized from the rental car he was driving and (2) his subsequent confession to a federal agent.

Specifically, Hobs argues that his Fourth Amendment right against unreasonable search and seizure was violated when Deputy Collins of the Gould County Police Department (GCPD) searched the rental car that Hobs was driving, over his objections. We agree. Deciding an issue of first impression in this circuit, we hereby hold that an unauthorized driver of a rental car has standing to challenge the search of a rental car when the totality of the circumstances shows that the driver had a subjective expectation of privacy that was objectively reasonable.

Additionally, Hobs argues that Special Agent Redford Wells of the United States Department of Health and Human Services (HHS) violated Hobs's Sixth Amendment right to counsel by interrogating him without his counsel present. Hobs concedes that he waived his Fifth Amendment right to counsel but argues that his Sixth Amendment right to counsel had attached for all

offenses involving the purchase of the heart, and that his appointed state counsel should, therefore, have been present during the interrogation. In the alternative, Hobs claims that even if the dual sovereign doctrine would normally mean that his Sixth Amendment right to counsel had not attached in the federal case, the collusion between the state and federal authorities in this case rendered the dual sovereign doctrine inapplicable and the use of his confession illegal. Deciding another issue of first impression in this circuit, we hereby hold that the dual sovereign doctrine does not apply to the Sixth Amendment, and Hobs's Sixth Amendment right to counsel had attached in the federal case. In the alternative, we find that even if the dual sovereign doctrine would normally apply, under the Bartkus exception, Hobs's confession should have been suppressed because the improper collusion between the state and federal authorities rendered the doctrine inapplicable in this case. Accordingly, we find that the district court erred in denying Hobs's motion to suppress, that error was not harmless, and Hobs's conviction must be reversed.

I. FACTUAL AND PROCEDURAL SUMMARY

A. Pre-Arrest Facts

At the time of his original arrest, Hobs was engaged to a woman named Emma Rose. The couple had been involved in an intimate, committed relationship for nearly three years. The

couple did not live together, although they carried keys to each other's apartments. They each independently owned separate cars. They did not have joint bank accounts, insurance policies, or other similar legal ties.

In January of 2007, Rose began experiencing frequent shortness of breath, general weakness, and fatigue. On January 17, 2007, during an episode of extreme physical weakness, Rose crashed her 2002 Honda Civic into a telephone pole. Although she was uninjured, her car required extensive repairs. The auto mechanic informed Rose that the car would need to be in the shop for an indeterminate amount of time. Her insurance company arranged for her to get a long-term rental car.

On January 18, 2007, Rose went to Mavis Car Rentals to pick up her rental car. The agent who handled her contract testified that Rose appeared pale, weak, and "a little out of it." He could not say with confidence that she understood what she was signing. He did not remember whether he asked Rose if she would like to list any additional authorized drivers on the rental agreement. A copy of the rental agreement shows that she did not list any other authorized drivers or pay the necessary fee to allow additional drivers.[4]

[4] The rental agreement read in relevant part: "Only listed drivers are authorized to drive the car. Additional authorized drivers may be added at the time of rental. There may be a surcharge for each additional authorized driver. . . . The car may not be used for any illegal purpose. . . . Any violation of

After the accident, on January 25, 2007, Rose was diagnosed with advanced viral cardial myopathy, a condition causing heart failure. In 95% of cases, this condition requires a heart transplant. Rose was immediately hospitalized and placed on Gould's official heart transplant list. The doctors assured Hobs that Rose was an attractive transplant candidate because of her young age and healthy lifestyle, but cautioned that she was likely to survive only four to six weeks without a transplant.

Hobs stayed by Rose's side every day at the hospital. After two weeks passed, he became increasingly concerned that she would not receive a heart in time to save her life. On the evening of February 8, 2007, after a particularly upsetting day, Hobs went to get a drink at a bar near the hospital. At the bar, he met an unidentified man with whom he shared his story and his concern that Rose would die waiting for a transplant. The man asked Hobs if he had considered looking elsewhere for a heart. Hobs replied that he would not know where to look. The man then wrote on a bar napkin "Ty Allen, 555-0386."

When Hobs arrived home that evening, he called Allen and explained his girlfriend's situation. Allen asked a few questions and said that she would be in touch if a suitable heart became available. She also told him that if a heart did

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this agreement will constitute a breach and may result in immediate repossession. This car is at all times the property of Mavis Car Rentals."

become available, he would need to pick it up within twelve hours, then take it and Rose to a nearby clinic, where a surgeon would be waiting to perform the transplant. She explained that Hobs would have to pay $50,000 in cash when he picked up the heart.

The following day, Hobs went back to the hospital to see Rose. He told her about Allen and asked how she felt about purchasing a heart on the black market if necessary. She agreed that it was worth the risk and asked him to try to obtain it. She told him that he could sell or use any of her possessions, including the rental car. On February 10, 2007, Hobs sold his car, Rose's engagement ring, and a piece of artwork to get the $50,000 cash to pay for the heart.

On the morning of February 16, 2007, Hobs got a call from Allen. She informed him that she had a matching heart in Bakersfield, California, approximately four hours from Gould City, Gould. She informed him that if he left immediately, he could retrieve the heart and get it back to the transplant clinic in Gould City before it became unusable. Because of the short window of time, she said she would arrange to get Rose to the clinic and for a doctor to perform the surgery.

Hobs left immediately, driving Rose's rental car to a gas station near Bakersfield, California, where he met a man whom he had never seen before. Hobs gave the man $50,000 in exchange

for a cooler containing the heart preserved on ice. He put the cooler in the car's trunk and drove back toward Gould City.

About thirty miles outside of Gould City, in the county of Gould, GCPD Deputy Wade Collins was patrolling Interstate 104 when he "clocked" Hobs driving at 79 miles per hour in a 65-mile-per-hour zone. Deputy Collins stopped Hobs and asked him for his license and the rental agreement. Hobs provided a valid driver's license and the agreement. Deputy Collins noted that the rental agreement did not list Hobs as an authorized driver and asked why he was driving the car. Hobs responded that his girlfriend had rented the car, but she was very sick and he was desperate to get to the hospital to see her.

Deputy Collins was suspicious of Hobs's story. Because Hobs looked agitated and upset, he decided to search the car. He asked Hobs for consent to search the car, but Hobs refused, responding that he needed to get to the hospital as soon as possible. Nevertheless, Deputy Collins told Hobs to step outside the car so he could search it. On the front seat, he found a bar napkin bearing the notation "Ty Allen, 555-0386." Upon opening the trunk, Deputy Collins immediately noticed a large cooler bearing a label that read "Bio Hazard – Perishable Transplant Materials – If found, please contact health authorities immediately." He opened it and found the heart.

Upon discovering the heart, Deputy Collins told Hobs that he was under arrest for a violation of Gould Penal Code § 403(a).

After reading Hobs his Miranda rights, Deputy Collins questioned him. Hobs refused to answer Deputy Collins's questions. Deputy Collins then transported him to the county station, where he was booked into custody.

B. Post-Arrest Facts

That same day, the Gould County District Attorney filed a criminal complaint charging Hobs with the unlawful acquisition of a human organ for use in human transplantation, in violation of Gould Penal Code § 403(a).

On Monday, February 19, 2007, Hobs appeared in court for his arraignment and bond hearing. At the hearing, the court appointed a Gould County Deputy Public Defender to represent him. Hobs was unable to post bail and remained in custody at the county jail pending further proceedings.

On Monday, February 26, 2007, a week after Hobs's only court appearance, the Gould County Assistant District Attorney (ADA) assigned to the case asked to meet with Deputy Collins because he was concerned about the legality of the search and wanted to know what other evidence had been gathered. At the meeting, Deputy Collins admitted that he did not have much evidence besides the heart. The ADA told Deputy Collins that he believed that the search violated Hobs's Fourth Amendment rights

and the heart probably would be suppressed. He added that, without the heart or other evidence, like a full confession, he did not think they had enough to convict Hobs. The ADA told Deputy Collins that he intended to dismiss the case that Friday.

Dismayed, on February 27, 2007, Deputy Collins contacted HHS Special Agent Redford Wells. After explaining the facts of the case and the ADA's intention to dismiss the state case, Deputy Collins urged Agent Wells to file federal charges against Hobs before that Friday. Agent Wells said that he would need more evidence and decided to interview Hobs as soon as possible. The next day, he flew to Gould.

On Wednesday, February 28, 2007, Deputy Collins escorted Hobs to an interview room so that Agent Wells could interview him. The interrogation was recorded. Deputy Collins assisted Agent Wells in conducting the interrogation, asking follow-up questions based on details discovered during the state investigation. Hobs was read his Miranda rights and waived them before he was questioned. Although Agent Wells admitted that he knew that Hobs had appointed state counsel, he never told Hobs anything about his right to have his appointed counsel present, nor did he contact Hobs's appointed counsel before questioning Hobs. During the interrogation, Hobs gave a full confession, admitting that he purchased the heart for Rose to receive as a transplant.

C. Dismissal of the State Court Proceedings and Subsequent Filing of Federal Charges

On Friday, March 2, 2007, the Gould County District Attorney dismissed the state case against Hobs. Before Hobs was released from state custody, he was indicted by a federal grand jury for the illegal purchase of a human heart to be used in human transplantation, in violation of 42 U.S.C. § 274e(a). Deputy Collins turned over all the state's evidence to Agent Wells. Deputy Collins continued to assist in the federal case, trying to locate Allen and interviewing numerous potential witnesses.

Hobs filed a timely motion to suppress the heart and his confession. Hobs argued that Deputy Collins did not have the authority to search the car over his objection and that the interrogation violated his Sixth Amendment right to counsel. The district court denied the motion, holding that Hobs did not have standing under the Fourth Amendment to object to the search of the rental car and that the federal interrogation did not violate Hobs's Sixth Amendment rights because the appointment of state counsel did not trigger the attachment of the Sixth Amendment in an uncharged federal offense.

The parties agree that the heart and Hobs's confession constituted the government's key evidence. The government's other evidence was quite limited, consisting mainly of a copy of the rental car agreement, the bar napkin bearing Ty Allen's name

and number, and Hobs's statement before his arrest concerning his sick girlfriend. Based on this evidence, Hobs was convicted by a jury. Hobs filed a timely appeal of that conviction.

II. DISCUSSION

A district court's denial of a motion to suppress is a legal question that is reviewed de novo, but the factual findings underlying the denial are reviewed for clear error. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995) (appellate courts should "accept[] findings of fact that are not 'clearly erroneous' but decid[e] questions of law de novo"). If a defendant's constitutional rights were violated, the conviction must be overturned unless the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).

A. The District Court Erred when it Held that Hobs Did Not Have Standing to Object to the Search

The Fourth Amendment to the U.S. Constitution 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 . . . ." U.S. Const. amend. IV. To give substance to the Fourth Amendment, the judiciary created the exclusionary rule to stop the government from using illegally obtained evidence against an individual whose rights were violated. Weeks v. United States, 232 U.S. 383, 392 (1914). Only persons whose rights have been actually infringed

can benefit from the exclusionary rule. Rakas v. Illinois, 439 U.S. 128, 134 (1978). "Because the Fourth Amendment protects people, rather than places," a person can challenge a search whenever he or she has a legitimate expectation of privacy. Id. at 148.

The Supreme Court has recognized several situations in which a defendant has standing under the Fourth Amendment to challenge a search that occurred in a place where the defendant did not have a proprietary or possessory interest. See, e.g., Minnesota v. Olson, 495 U.S. 91, 98-99 (1990) (finding that overnight guest has legitimate expectation of privacy in host's home, regardless of circumstances of the stay); Rakas, 439 U.S. at 148-49 (recognizing that defendants can challenge searches whenever they have legitimate expectation of privacy, but holding that passengers in cars normally do not have such expectation because they do not have property or possessory interest in car). But see Minnesota v. Carter, 525 U.S. 83, 90-91 (1998) (finding that defendant did not have a legitimate expectation of privacy in another's home where he was conducting an illegal business transaction).

In Rakas, the Supreme Court provided guidance on how to determine whether a person has standing to challenge a search. See 439 U.S. at 148-49. In that case, the defendants were passengers in a suspected getaway car that was searched by the

police. Id. at 130. The Court determined that the defendants had no legitimate expectation of privacy because, as passengers, they had no possessory interest in the car or the areas searched. Id. at 148-49. The Court noted, however, that constitutional rights can attach even if a person is not the lawful owner of the place searched because "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control." Id. at 143. The Court instead directed courts to determine standing by considering factors such as dominion and control over the area searched, the right to exclude others, and permission from the lawful owner. Id. at 149. Courts must use those factors to determine if the defendant had a subjective "expectation of privacy" that society is prepared to recognize as objectively reasonable. Id. at 143 n.12.

Relying on Rakas, three circuits have adopted a bright-line approach and held that unauthorized drivers of rental cars have no reasonable expectation of privacy in the car and, therefore, cannot assert rights under the Fourth Amendment. See United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994); United States v. Boruff, 909 F.2d 111, 115 (5th Cir. 1990); United States v. Obregon, 748 F.2d 1371, 1374-75 (10th Cir. 1984). These courts reason that only the lawful owner of the car, the rental company, can authorize its use. See, e.g., Boruff, 909

F.2d at 115. For example, in Boruff, an unauthorized driver of a car rented by his girlfriend objected to a search of the car. Id. at 113-14. The Fifth Circuit found that despite his sole possession of the car and permission from the authorized driver, the defendant had no expectation of privacy because the terms of the rental agreement prohibited his use of the car. Id. at 117.

In contrast, the Eighth and Ninth circuits have allowed unauthorized drivers who have the permission of the authorized driver to challenge the search of rental cars they were driving. See United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006); United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998). In Thomas, the court held that, as a general rule, an unauthorized driver of a rental car who had permission to use the car had "joint authority" over it and may challenge a search of the car. 447 F.3d at 1199. The court held that the determination of constitutional standing should be based on "indicia of ownership," such as possession, permission, and the right to exclude others, rather than on a "rental agreement to which the unauthorized driver was not a party and may not capture the nature of the unauthorized driver's use of the car." Id. at 1198-99.

Finally, the Sixth Circuit has applied a third and different test, considering the "totality of the circumstances" to determine standing. United States v. Smith, 362 F.3d 571,

586 (6th Cir. 2001). In Smith, the defendant was driving a rental car he arranged and paid for but which was rented in his wife's name. Id. at 575. The court held that, although unauthorized drivers generally do not have a legitimate expectation of privacy in another's rental car, Smith was an exception to that rule and granted him standing. Id. at 586. In finding that Smith was an exception, the court considered five factors, including whether the unauthorized driver had (1) a valid driver's license, (2) possession of the rental agreement and knowledge of the car, (3) a marital relationship with the authorized driver, (4) permission from the authorized driver, and (5) a business relationship with the rental company. Id. at 586-87; cf. United States v. Sanchez, 943 F.2d 110, 113 (1st Cir. 1991) (determining whether driver of borrowed car had legitimate expectation of privacy, First Circuit considered "ownership, possession, and/or control; historical use of the property searched or the thing seized; [and] ability to regulate access" as relevant factors).

We agree with the Sixth Circuit that courts should evaluate the totality of the circumstances when determining a defendant's standing. Only by considering the totality of the circumstances, including permission from the authorized driver, apparent possession and control of the car, and the right to exclude others, can we determine if a defendant had a reasonable

expectation of privacy. As Justice Powell noted in his concurrence in Rakas, "[i]n considering the reasonableness of asserted privacy expectations, the Court has recognized that no single factor invariably will be determinative." 439 U.S. at 152 (Powell, J., concurring).

We find, therefore, that a bright-line rule granting standing to those with permission from the authorized driver is unsupportable. Basing a test on permission alone would equate an unauthorized driver with a "guest" and cannot be reconciled with the holding in Rakas. Although we recognize that permission is one of many factors relevant to determining a person's legitimate expectation of privacy, it cannot by itself be controlling.

Considering the totality of circumstances in this case, five facts show that Hobs had a legitimate expectation of privacy in the rental car. First, Hobs was a licensed driver. There is no reason to believe the rental agency would not have allowed him to drive the car. Second, Hobs was in possession of the rental agreement and had substantial knowledge of the car. Although he did not pay for the car himself, he knew why the car had been rented, the length of the contract, where the car was rented, and where the car was housed. In every way, he had the same knowledge of the car that any authorized driver would be expected to have. Third, Hobs had dominion and control of the

rental car. He had the keys. He had the right to exclude others. He was the sole driver of the car at the time of his arrest and there is no indication that any third party, other than his fiancée, had ever driven the car while under her contract. Fourth, Hobs was in an intimate, committed relationship with the authorized driver. Although Hobs and Rose were not yet married, their relationship was similar to a married couple because they frequently and consistently shared their possessions. Fifth, Hobs had the authorized driver's explicit permission to use the car. By explicitly allowing Hobs to drive the car, Rose granted him joint authority over the car and the right to exclude others.

Accordingly, the totality of the circumstances in this case show that Hobs had an objectively reasonable and legitimate expectation of privacy in the car. He therefore had the right to object to a search of the car and to move to suppress the heart.

B. The District Court Erred by Denying Hobs's Motion to Suppress His Confession

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Sixth Amendment right to counsel attaches at or after the initiation of adversarial proceedings. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). Adversarial

proceedings may be initiated by the filing of a formal charge, an indictment, or an information, or by holding a preliminary hearing or arraignment. Id. Once attached, any waiver of the right is necessarily invalid. Michigan v. Jackson, 475 U.S. 625, 635 (1986). However, the right is "offense specific" and does not attach to "factually related" offenses. Texas v. Cobb, 532 U.S. 162, 168 (2002).

Although the Fifth and Sixth amendments both provide accused persons with a right to counsel, the rights created are distinct. McNeil, 501 U.S. at 177-78. Each right embodies a separate protection and commands its own jurisprudence. The Fifth Amendment right to counsel protects accused persons when dealing with police, while the Sixth Amendment right to counsel "'protects the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of the government and defendant have solidified' with respect to a particular alleged crime.'" Id. (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

Despite this distinction, in Cobb, the Supreme Court incorporated the Blockburger test from its Fifth Amendment jurisprudence into its Sixth Amendment jurisprudence, stating that under the Sixth Amendment, "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 one, is whether each provision requires proof of a fact which the other does not." 532 U.S. at 173. In adopting this test, the Court noted that there is no constitutional reason for defining "offense" differently in Sixth Amendment and Fifth Amendment jurisprudence. Id. Yet, the Court never reached the question of whether the dual sovereign exception found in Fifth Amendment jurisprudence also should be applied in the Sixth Amendment context, which would mean that the attachment of the right to counsel in a state prosecution would not automatically invoke the right in a successive federal prosecution for the same offense.

1. The Supreme Court's opinion in *Texas v. Cobb* does not incorporate the dual sovereign doctrine into Sixth Amendment jurisprudence

As noted above, this is a question of first impression in this Circuit and the subject of a split among our sister circuits. The First, Fourth, Fifth, and Eleventh circuits have interpreted Cobb to impliedly require the incorporation of both the Blockburger test and the dual sovereign doctrine, see United States v. Burgest, 519 F.3d 1307, 1310-11 (11th Cir. 2008), petition for cert. filed, (U.S. July 22, 2008) (No. 08-5476); United State v. Alvarado, 440 F.3d 191, 196 (4th Cir. 2006); United State v. Coker, 433 F.3d 39, 44 (1st Cir. 2005); United States v. Avants, 278 F.3d 510, 517 (5th Cir. 2002), while the Second, Seventh, and Eighth circuits have disagreed, see United

States v. Krueger, 415 F.3d 766, 778 (7th Cir. 2005); United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005); United States v. Red Bird, 287 F.3d 709, 715 (8th Cir. 2002).

The circuits that favor incorporation of the dual sovereign doctrine interpret Cobb as "impliedly" requiring that incorporation. See Burgest, 519 F.3d at 1310-11; Alvarado, 440 F.3d at 196; Coker, 433 F.3d at 44; Avants, 278 F.3d at 517. Yet, in Cobb, the Supreme Court affirmed that "constitutional rights are not defined by inferences from opinions which did not address the question at issue." 532 U.S. at 169. Cobb did not expressly address whether the dual sovereign doctrine was to be applied to the Sixth Amendment but rather determined that an invocation of the Sixth Amendment right to counsel in one offense does not extend to invoke the right in another "factually related" or "intrinsically intertwined" offense. See id. at 173. Since Cobb warned that constitutional rights are not to be defined by inferences, we refuse to do so here.

We cannot, therefore, follow the reasoning of the circuits that interpret Cobb to require application of the dual sovereign doctrine and choose rather to join the Second, Seventh, and Eighth circuits in rejecting its incorporation. See Krueger, 415 F.3d at 778; Mills, 412 F.3d at 330; Red Bird, 287 F.3d at 715. In Mills, the Second Circuit explained why the dual sovereign doctrine should not be incorporated. 412 F.3d at 330.

The defendant was arrested, questioned, and charged with possession of a firearm by a convicted felon, in violation of a Connecticut statute. 412 F.3d at 327. Eight months later, Mills was indicted in a federal case charging the same offense. Id. at 328. The government conceded that the Connecticut and federal statutes required proof of the same "factual elements," except for the additional federal requirement that the gun travelled in interstate commerce. Id. The government argued, however, that the dual sovereign doctrine applied so that Mills's Sixth Amendment rights did not attach in the uncharged federal offense. Id. The Mills court found that "[n]owhere in Cobb, either explicitly or by imputation, is there support for a dual sovereign exception to its holding that when the Sixth Amendment right to counsel attaches, it extends to offenses not yet charged that would be considered the same offense under Blockburger." Id. at 330. The court reasoned that Cobb's incorporation of the Blockburger test simply borrowed the definition of the term "offense" and did not show that the Court intended to incorporate anything more from double jeopardy jurisprudence. Id. Applying the Blockburger test, the Mills court found the state and federal offenses to be the same offense and concluded that Mills's Sixth Amendment right to counsel attached simultaneously to both. Id. But see United States v. Donaldson, 2007 WL 4882641 *5-6 (E.D. Tenn. Dec. 20,

2007) (holding that state and federal charges for being a felon in possession of firearm were not "same offense" under Blockburger because federal offense had additional interstate nexus element).

In this case, we believe that when Hobs's Sixth Amendment right attached in the state case, it also attached in the federal case because prosecution of the state and federal offenses required proof of the same elements. As in Mills, the offenses were essentially identical, with the only difference being that the federal statute required an effect on interstate commerce. Since the offenses were essentially the same, the Sixth Amendment right to counsel attached in both cases when the state filed formal charges, and Hobs's Sixth Amendment right was violated when Agent Wells questioned him without his appointed counsel present. The district court erroneously sanctioned that violation when it denied the motion to suppress.

2. The *Bartkus* exception to dual sovereignty applies in this case

In the alternative, we find that the district court erred even if the Sixth Amendment right to counsel is subject to the dual sovereign doctrine because this case falls within an exception to that doctrine, commonly known as the Bartkus exception. In Bartkus, the defendant was charged in federal court and acquitted of robbing a federally insured bank. Bartkus v. Illinois, 359 U.S. 121, 122 (1959). After the

acquittal, a federal agent turned over the evidence that he had collected against Bartkus to Illinois state agents. Id. Additionally, the federal sentencing of Bartkus's accomplices was strategically continued until after they had testified against Bartkus in state court. Id. at 123-24. The Supreme Court noted that cooperation between state and federal authorities was commendable, but it qualified that statement by adding that if the subsequent state prosecution had been simply a "tool" of the federal authorities, the successive prosecution would have been unconstitutional. Id. at 124. Although the Court ultimately found that the cooperation between the state and federal authorities in that case did not warrant application of this exception, courts have interpreted this discussion in Bartkus as creating an exception to the dual sovereign doctrine, an exception designed to protect against improper collusion between state and federal authorities. See, e.g., Mills, 412 F.3d at 330.

The Bartkus exception applies when "one sovereign so thoroughly dominates or manipulates the prosecution machinery of another that the latter retains little or no volition in its own proceedings." United States v. Guzmán, 85 F.3d 823, 827 (1st Cir. 1996). Like the Blockburger test, the Bartkus exception originates within double jeopardy jurisprudence. All the circuits that have held that the Supreme Court intended to

incorporate the dual sovereign doctrine into its Sixth Amendment jurisprudence have also recognized that such incorporation includes the Bartkus exception. See Coker, 433 F.3d at 46; Alvarado, 440 F.3d at 198; Burgest, 519 F.3d at 311.

Similarly, although the circuits that refused to incorporate the dual sovereign doctrine in the Sixth Amendment context do not discuss the Bartkus exception by name, they have developed similar rules to prevent improper collusion between state and federal authorities. See Red Bird, 287 F.3d at 715; Krueger, 415 F.3d at 778. For example, in Krueger, the state charged the defendant with trafficking marijuana, the defendant was interviewed by federal authorities, and the state dismissed its charges immediately after a federal indictment was returned charging the same marijuana offense. 415 F.3d at 769. A state agent was present when the federal questioning occurred. Id. The Krueger court explicitly noted that an argument could be made for the application of an exception to the dual sovereign doctrine based on the seamlessness of the transfer from state to federal authorities, potentially making the charges appear as one. Id. at 777-78.

Here, there are significant similarities between Hobs's case and Krueger, including the federal agents' knowledge that each defendant had appointed counsel, the state authorities' continued involvement in the federal cases, and the lack of time

between the dismissal of the state charges and the filing of the federal charges. As in Krueger, such a seamless transfer warrants an exception to the dual sovereign doctrine.

To uphold the denial of Hobs's motion to suppress his confession would sanction the deprivation of his Sixth Amendment right to counsel during a critical stage in his prosecution. The Supreme Court has recognized that the time between a defendant's arraignment and the beginning of his or her trial is perhaps the most critical stage of the proceedings, and defendants are entitled to counsel during this period. Massiah v. United States, 377 U.S. 201, 205 (1964).

C. The District Court's Error Was Not Harmless

When a defendant's constitutional rights have been violated, the conviction must be overturned unless the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Here, the government does not dispute that the heart and the confession provided most of the evidence against Hobs, and that the improper admission of either the heart or the confession could not be harmless error. Hobs's conviction must be reversed.

III. CONCLUSION

The Fourth Amendment right against unreasonable search and seizure is based on this country's abhorrence of arbitrary invasions of privacy by the government. Hobs had an objectively

reasonable and legitimate expectation of privacy in the rental car he was driving and must be allowed to challenge the admission of evidence seized from that car. Additionally, the Sixth Amendment right to counsel is not subject to the dual sovereign doctrine. Thus, the questioning of Hobs by a federal agent in the absence of his state-appointed counsel violated his Sixth Amendment right to counsel. As a result, his confession should have been suppressed. For the foregoing reasons, the decision of the district court is REVERSED.

Robowski, J., dissenting.

I respectfully dissent. Unlike the majority, I conclude that Hobs did not have standing under the Fourth Amendment to object to the search of his girlfriend's rental car and that the dual sovereign doctrine applies to the Sixth Amendment right to counsel, meaning that the heart and the confession were admissible against Hobs and his conviction should be upheld.

I. DISCUSSION

A. The District Court Correctly Denied Hobs's Motion

This Court holds today that a defendant who has no legitimate interest in a rental car is constitutionally protected from a search of its contents. I disagree. Because I believe an unauthorized driver cannot have a legitimate

expectation of privacy in another's rental car, I respectfully dissent.

1. *Rakas* does not permit an unauthorized driver to vicariously assert rights in another's car

To claim the benefit of the exclusionary rule, a defendant must show that he was a "victim of a search . . . as distinguished from one who claims prejudice only through use of evidence gathered as a consequence of a search . . . directed at someone else." Jones v. United States, 362 U.S. 257, 261 (1960). In Jones, the defendant was staying alone in an apartment belonging to a friend when the apartment was searched. Id. at 259. The Court determined that the defendant had standing under the Fourth Amendment to challenge the search because "anyone legitimately on the premises where a search occurs may challenge its legality." Id. at 267.

Jones was later reinterpreted, however, to stand only for the proposition that people can have legitimate privacy interests in places other than their own homes. See Rakas v. Illinois, 439 U.S. 128, 142 (1978). Rakas narrowed standing under the Fourth Amendment to defendants with a "legitimate expectation of privacy," which it defined as a subjective expectation of privacy that society is prepared to recognize as reasonable. Id. at 143-44.

The majority's holding in this case fails to recognize this narrowing of defendants' Fourth Amendment rights. This Court's

"totality of the circumstances" test is little more than an attempt to revive Jones. The five circumstances the majority noted at most suggest that Hobs may have thought he was legitimately in the car. The circumstances do not, however, meet Rakas's requirement of an objectively reasonable expectation of privacy that society would be prepared to accept.

No defendant can have an objectively reasonable expectation of privacy in a place where his access is illegitimate. The majority relies, in part, on Hobs's right to exclude others as suggesting indicia of ownership. The rental agreement, however, specifically stated that the rental car remained the property of the company and that only authorized drivers were allowed to use it. If an agreement explicitly denies a person ownership or possessory rights to a piece of property, that person cannot reasonably claim that he or she believed that he or she retained a right to privacy in that property. Not only did Hobs wrongfully drive the car, he also used it for blatantly illegal purposes, which was also expressly forbidden by the agreement. The agreement provided for immediate repossession of the car in the event of a breach. I question whether, after knowingly breaching the rental agreement, Hobs could have had a genuine subjective expectation of privacy, let alone an objectively reasonable one that society is prepared to recognize.

Rakas informs us that Fourth Amendment rights cannot be vicariously asserted. Here, the only party who can lawfully assert standing to object to a search of the rental car is Rose. Because Hobs had no expectation of privacy, or at most an unreasonable expectation of privacy, his claim must fail.

2. Policy considerations compel a bright line rule

Practical considerations weigh against allowing Hobs to benefit from the exclusionary rule. The exclusionary rule is intended to regulate police conduct, yet this Court's totality test will be difficult, if not impossible, for police to apply. Police should know when and where they have a right to search. An officer will not be able to quickly consider all five factors, many of which probably will be unknown at the time of a traffic stop. A bright-line rule, by contrast, easily alerts the police officer to his limitations and the defendant's Fourth Amendment rights simply by reviewing the rental agreement. I would affirm the district court's denial of Hobs's motion.

B. The District Court Did Not Err in Denying Hobs's Motion to Suppress His Confession

1. Hobs's Sixth Amendment right to counsel did not attach in the separate federal case

There is no question that Hobs's Sixth Amendment right to counsel had attached with regard to the state charge. The Supreme Court, however, has stated that the Sixth Amendment "cannot be invoked once for all future prosecutions." McNeil v.

Wisconsin, 501 U.S. 171, 175 (1991). Hobs's federal indictment represented a separate prosecution, and, therefore, under McNeil, his Sixth Amendment right to counsel did not automatically attach in the uncharged federal case.

The Sixth Amendment right to counsel is offense specific, and the state and federal charges were distinct offenses. The state and federal governments are separate sovereigns, each deriving power from different sources. United States v. Lanza, 260 U.S. 377, 382 (1922). Each sovereign may exercise this power in enacting and enforcing its own laws. Id. The jurisdiction of these sovereigns necessarily overlaps, yet each sovereign must have the right to exercise power without interference by the other. Id. It follows that an act denounced by both sovereigns is an independent offense against the peace and dignity of each. Id. Each has an interest in procuring punishment for violation of its laws. See id. When an act violates the laws of two sovereigns, prosecution by each is not double punishment because the defendant has committed two crimes. Moore v. Illinois, 55 U.S. 13, 20 (1852).

When he illegally purchased the heart, Hobs committed two crimes – one federal and one state -- and is, therefore, subject to prosecution by each offended sovereign. The Sixth Amendment is offense specific and does not attach to factually related crimes; thus, Hobs was not automatically entitled under the

Sixth Amendment to counsel for the separate federal offense. See Texas v. Cobb, 532 U.S. 162, 168 (2002).

2. The majority's finding that *Texas v. Cobb* does not require the incorporation of the dual sovereign doctrine into Sixth Amendment jurisprudence was incorrect

The majority misinterpreted the constitutional implications of Cobb. In Cobb, when the Court explicitly adopted the Blockburger test to determine the definition of "offense" within the meaning of the Sixth Amendment, it also impliedly incorporated the dual sovereign doctrine. See Cobb, 532 U.S. at 173. Although traditionally considered an exception to the double jeopardy clause, the dual sovereign doctrine more specifically modifies the Blockburger definition of "offense." Offenses are considered the same under Blockburger when they require proof of overlapping elements, neither offense requiring proof of more than is required under the other. Id. Dual sovereignty is essentially an exception, mandating that when prosecuted by distinct sovereigns, offenses are not the same for purposes of double jeopardy, regardless of Blockburger. See Abbate v. United States, 359 U.S. 187, 199 (1959). When the Supreme Court incorporated the Blockburger test, it also incorporated the exception to that test.

The language in Cobb supports this conclusion. As the Court stated, "[w]e see no constitutional difference between the

meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." Cobb, 532 U.S. at 173. If the Court intended to incorporate only the Blockburger test, this statement would not make sense. See United States v. Coker, 433 F.3d 39, 44 (1st Cir. 2005). There would be a difference between "offense" in the double jeopardy context and "offense" in the Sixth Amendment context. The difference would be "that offenses with the same essential elements under the laws of two separate sovereigns would not constitute the 'same offense' for double jeopardy purposes, while they would constitute the 'same offense' for right to counsel purposes." Id. A footnote in Cobb provides further support for the inclusion of the dual sovereign doctrine: "[w]e could just as easily describe the Sixth Amendment as 'prosecution specific.'" 532 U.S. at 173 n.3. In characterizing the Sixth Amendment right to counsel as "prosecution specific," the Court again suggests that the dual sovereign doctrine is applicable to the Sixth Amendment.

For the foregoing reasons, the majority erred in holding that the dual sovereign exception does not apply here.

3. The *Bartkus* exception should not be applied because cooperation between state and federal authorities is essential

The majority finds that even if the dual sovereign exception applies to the Sixth Amendment, Hobs's confession should be suppressed under the Bartkus exception. The majority

bases this holding on three facts: (1) Agent Wells knew that Hobs had been appointed counsel but did not suggest that counsel be present at the interrogation, (2) the continued assistance of Deputy Collins in the federal prosecution, and (3) the use of a combination of state and federal evidence to convict Hobs. To rule that such inconsequential state and federal cooperation should be punished rather than encouraged would unnecessarily frustrate the collaborative spirit that accompanies our nation's federalism. Agent Wells read Hobs his Miranda rights and Hobs chose not to invoke them. It would be an affront to the pursuit of truth to suppress Hobs's confession.

As recognized by the district court, cooperation between state and federal law enforcement is invaluable and must not be unnecessarily discouraged. "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged." Elkins v. United States, 364 U.S. 206, 221 (1960). Such cooperation is not fostered by a rule that punishes joint investigation. For this reason, the Bartkus exception to dual sovereign must not be liberally applied. See Alvarado, 440 F.3d. at 198. The Bartkus exception should be applied exclusively to protect the accused person's Sixth Amendment right to counsel and should not be extended to support suppression of legitimately gathered evidence.

Moreover, suppression of evidence simply because it was gathered by a different sovereign hinders the pursuit of truth. With the exception of rare examples of deliberate evasion of a defendant's constitutional rights through state and federal collusion, evidence legitimately gathered should be admissible. Regardless of the application of the Sixth Amendment, an accused may never be stripped of, but may only waive, his or her Fifth Amendment right to counsel. An accused person's decision to waive those rights and make incriminating statements will surely be later regretted. This regret, however, should not result in suppression of the resulting statements.

II. CONCLUSION

The Fourth Amendment was never intended to protect from searches and seizures defendants with such tenuous and unreasonable expectations of privacy. Supreme Court precedent does not support such a holding, and I therefore disagree with the majority's decision today. Cobb supports the application of the dual sovereign doctrine to the Sixth Amendment. In the interest of respecting the separate nature of the many sovereigns within our Nation and the continued cooperation between state and federal authorities as well as the continued pursuit of truth, the dual sovereign exception must be applied to the Sixth Amendment. For these reasons, I respectfully dissent and would affirm the district court's order.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 08-65

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT HOBS

Respondent.

The petition for writ of certiorari is granted, limited to consideration of the following questions presented by the petition:

1. Whether a driver of a rental car who was not authorized by the rental company to drive the car can challenge a search of the car as an unreasonable search and seizure under the Fourth Amendment.

2. Whether a federal agent who is investigating an uncharged federal offense violates a defendant's Sixth Amendment right to counsel by interrogating the defendant without counsel after the defendant had counsel appointed in a state case charging the same offense conduct.