No. 07-542

In The

Supreme Court of the United States

State of Arizona,
Petitioner,
vs.

Rodney Joseph Gant,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC., SUPPORTING PETITIONER

William J. Johnson
National Association of Police Organizations, Inc.
317 South Patrick Street
Alexandria, Virginia 22314
(703) 549-0775; Fax: (703) 684-0515

Devallis Rutledge*
Los Angeles County District Attorney's Office
210 West Temple Street, 18-101
Los Angeles, California 90012-3210
(213) 974-6765; (213) 628-8352 (Fax)

*Counsel of Record for *Amicus Curiae*

In The

Supreme Court of the United States

State of Arizona,
Petitioner,

vs.

Rodney Joseph Gant,
Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Amicus curiae National Association of Police Organizations, Inc., respectfully moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Counsel for petitioner has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for respondent has withheld consent. The Court previously granted leave to file *amicus curiae*'s brief in support of the petition for certiorari.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action and education.

Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 2,000 police unions and associations, 238,000 sworn law enforcement officers,

11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

The decision of the Arizona Supreme Court, holding that officers violate the Fourth Amendment by conducting a vehicle search incident to the lawful custodial arrest of a criminal suspect if they first take the safety precaution of securing the arrested person in a police car, adversely affects the interests of our members by establishing a precedent that compromises safety procedures and eliminates clear and unequivocal guidelines for law enforcement officers on the streets.

For these reasons, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

April, 2008

Respectfully submitted,

DEVALLIS RUTLEDGE

Counsel of Record for *Amicus Curiae*
National Association of Police Organizations, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER*

SUMMARY OF ARGUMENT

BECAUSE OF THE IMPERATIVES OF OFFICER SAFETY AND THE NECESSITY FOR PRACTICAL CONSTITUTIONAL GUIDELINES, THE FOURTH AMENDMENT DOES NOT REQUIRE LAW ENFORCEMENT OFFICERS TO DEMONSTRATE A THREAT TO THEIR SAFETY IN ORDER TO JUSTIFY A WARRANTLESS VEHICULAR SEARCH INCIDENT TO ARREST CONDUCTED AFTER THE VEHICLE'S RECENT OCCUPANTS HAVE BEEN ARRESTED AND SECURED.

ARGUMENT

I. CONSIDERATIONS OF OFFICER SAFETY JUSTIFY A BRIGHT-LINE RULE ALLOWING WARRANTLESS VEHICLE SEARCHES INCIDENT TO A RECENT OCCUPANT'S ARREST AND CONFINEMENT.

"By its terms, the Fourth Amendment forbids only 'unreasonable' searches and seizures." *Segura v. United States,* 468 U.S. 796, 806 (1984). According to the Arizona Supreme Court majority, the contemporaneous police search of respondent's vehicle incident to his lawful custodial arrest became unreasonable under the Fourth Amendment only because arresting officers first took the _____

* No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

precaution of handcuffing respondent and securing him in a police car before conducting the search. Had respondent remained unsecured during the search, the same search would not have been unreasonable, according to the opinion below, because the interior of the vehicle would have remained within respondent's actual control. *State v. Gant,* 216 Ariz. 1, 6 (2007). In short, to insure the constitutional reasonableness of a vehicle search incident to arrest in Arizona, officers must not take reasonable precautions for their own personal safety. This ruling is perilously inverted.

Law enforcement work, never particularly safe, has unfortunately become even more dangerous to the men and women who enforce our social contract at great personal risk. According to the National Law Enforcement Officers Memorial Fund, 186 officers died in the line of duty in the United States in 2007. That tragic figure represents a 28% increase over the previous year and was the highest number of police fatalities in 18 years (except for 2001, when 72 officers died while responding to terrorist attacks). Some 60,000 additional officers are assaulted on the job each year. http//www.nleomf.com/TheMemorial/Facts/2007_EndofYear.pdf.

The FBI Uniform Crime Reports summary of officers killed and assaulted on duty in 2006 (latest year reported) shows that 42% of attacks occurred while officers were conducting traffic stops or making arrests. http//www.fbi.gov/ucr/killed/2006/index.html. The Court has previously noted the inherent dangers confronting officers during such encounters. *Pennsylvania v. Mimms,* 434 U.S. 106, 110 (1977) (observing that 30% of shootings of officers occurred when an officer approached a person in an automobile).

As the Court has acknowledged, "Certainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of

their duties." *Terry v. Ohio,* 392 U.S. 1, 23 (1968). Given the hazardous nature of police work in general and of arrests from vehicles in particular, it would be unreasonable to require police officers to take the unnecessary risk of a deadly attack by an unsecured arrestee during a vehicle search incident to arrest.

In support of its conclusion that the search of respondent's vehicle was unreasonable, the court below maintained that officers could simply forego a search after electing to secure the arrestee. *State v. Gant, supra,* 216 Ariz. at 6, ¶ 22. While this proposition is true, it hardly answers the question of whether the Fourth Amendment *requires* officers to choose between taking safety precautions and carrying out their charge to see that the laws are faithfully enforced. In any number of situations, police *could* concentrate solely on protecting themselves while ignoring their law enforcement responsibilities, but such exclusive choices would not serve the public safety interest in the enforcement of the criminal laws, and a choice from such alternatives is not commanded by the Fourth Amendment's mandate of reasonableness.

The restraints already imposed on investigative initiative are many and substantial. They include constitutional limitations, exclusionary rules, state laws, departmental policies and the potential for civil liability, criminal prosecution and administrative discipline. These constraints take a heavy toll on public safety: according to the 2006 Uniform Crime Reports, average national clearance rates for reported crimes of violence (murder, rape, robbery and aggravated assault) were only 44.3%; property crimes (burglary, theft and motor vehicle theft) were cleared in only 15.8% of reported cases. http//www.fbi.gov/ucr/cius2006/offenses/clearances/index.html. These are not statistics that cry out for the added investigative inhibition that would surely result from forcing officers to choose surviving over searching.

II. CONSIDERATIONS OF PRACTICALITY JUSTIFY A BRIGHT-LINE RULE ALLOWING WARRANTLESS VEHICLE SEARCHES INCIDENT TO A RECENT OCCUPANT'S ARREST AND CONFINEMENT.

The Arizona Supreme Court majority rejected the bright-line rule of *New York v. Belton,* 453 U.S. 454 (1981) and *Thornton v. United States,* 541 U.S. 615 (2004), insisting instead that whether or not police officers could search a vehicle incident to a recent occupant's arrest should be determined case-by-case, based on a retrospective evaluation of the circumstances of each particular situation. This ruling is wrong, for at least two reasons.

First, because the Arizona Supreme Court's ruling was based exclusively on the Fourth Amendment, that court was not at liberty to disregard the clear language of *Belton* and *Thornton,* which enunciated a rule (upon which police have long relied) that the passenger compartment of an arrestee's recently-occupied vehicle could be contemporaneously searched, incident to a lawful, custodial arrest, without inquiring into the particular level of danger facing the officer. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."); *accord, Arkansas v. Sullivan,* 532 U.S. 769, 772 (2001).

Second, this Court has explained that the Fourth Amendment "reasonableness" calculation cannot always require case-specific appraisals, because of the need for sensible guidelines that can be understood and applied by police officers in the field, in confrontations that are often, if not always, fraught with potential danger:

"[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. [Citation.] Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules. [Citing *Belton.*] ('Fourth Amendment rules "ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged" and not "qualified by all sorts of ifs, ands, and buts".')"

Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001)

This Court has already generalized, in *Belton* and *Thornton*, that the passenger compartment of a recently occupied vehicle is an area that is inherently within the control of a recent occupant who has been arrested; this generalization substitutes for the case-specific inquiry the Arizona court thought necessary under *Chimel v. California,* 395 U.S. 752 (1969). There is no necessity for examination of the facts of each particular arrest situation, because *Belton* and *Thornton* shaped a rule that searches of the passenger compartment incident to the arrest of a recent occupant are *per se* reasonable. "That we typically avoid *per se* rules concerning searches and seizures does not mean that we have always done so." *Maryland v. Wilson,* 519 U.S. 408, 413, n. 1. Such bright-line rules are susceptible of clear and

easy application by officers in the field and by trial and reviewing courts; the rule announced by the Arizona Supreme Court is not.

A computerized search of the Supreme Court database using the key words "Fourth Amendment" results in 770 case citations. Searches for "*Miranda v. Arizona,*" "*Massiah v. United States,*" "involuntary confessions" and "eyewitness identification" add another 514 cases. Though some of the citations overlap, if the rules and exceptions of these 1284 decisions affecting everyday police functions were the only things that police officers had to know, understand and remember, it would still prove a daunting challenge. Law enforcement officers, like other citizens, are not generally possessed of a recent law degree and photographic memory, nor does the Fourth Amendment require that they be so. Our nation's officers face an already challenging task in learning, knowing and remembering the many rules and exceptions that control their enforcement and investigative activities. They surely do not need to have the bright-line rule of *Belton* and *Thornton* replaced with an amorphous contingency.

Each of the several exceptions to the general warrant requirement of the Fourth Amendment has been carefully defined over many years, and in many cases: Searches of "fleeting targets" require probable cause and lawful access, *United States v. Ross,* 456 U.S. 798 (1982); consent searches require voluntary permission from one with uncontested authority, *Georgia v. Randolph,* 547 U.S. 103 (2006); emergency searches are justified by the need to neutralize exigencies, *Brigham City, Utah, v. Stuart,* 547 U.S. 398 (2006); searches incident to contemporaneous arrest require a lawful, custodial arrest, *Agnello v. United States,* 269 U.S. 20 (1925); officer safety searches require an articulable suspicion of danger, *Terry v. Ohio, supra*, 392 U.S. 1; and some searches are made reasonable by distinct "special needs," *New Jersey v. T.L.O.,* 469 U.S. 325 (1985).

What the majority opinion below attempts to do is to conflate the exception for searches incident to arrest with the exception for officer safety, by requiring officers to justify vehicle searches incident to arrest with articulable suspicion of actual danger, case-by-case. But if officers were able to point to specific facts as independent justification for searching an arrestee's vehicle for weapons, there would be no need to invoke the separate exception for searches incident to arrest. *Michigan v. Long,* 463 U.S. 1032, 1049 (1983). The navigation of Fourth Amendment jurisprudence is quite challenging enough for police officers; erecting a new obstacle by confusing the justification standards for two discrete exceptions for warrantless searches does nothing to insure constitutional reasonableness.

CONCLUSION

The Fourth Amendment guarantees security against *unreasonable* searches and seizures. Because it is not unreasonable to permit law enforcement officers to take the safety precaution of securing an arrestee before conducting a contemporaneous search of his recently-occupied vehicle, the judgment of the Arizona Supreme Court should be reversed.

April, 2008

Respectfully submitted,

DEVALLIS RUTLEDGE

Counsel of Record for *Amicus Curiae*
National Association of Police Organizations, Inc.