No. 07-542

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

-vs-

RODNEY JOSEPH GANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW.

In *New York v. Belton*, 453 U.S. 454 (1981), this Court held that risks to officer safety and preservation of evidence may create exigent circumstances that permit a contemperaneous, warrantless search of a vehicle when an occupant is arrested. In *Thornton v. United States*, 541 U.S. 615, (2004), this Court held that *Belton* type searches may be conducted if the arrestee is a recent occupant who is no longer in the vehicle at the time of the arrest.

This case presents the question whether the Fourth Amendment permits police to conduct a warrantless search of a vehicle, following the arrest of an occupant or recent occupant, even when the search is not contemporaneous with the arrest such that the twin exigencies of officer safety and evidence preservation no longer exist because the arrest scene and the arrestee are secure, and the arrest has been completed at the time when the search takes place.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent RODNEY JOSEPH GANT respectfully urges this Court to deny the Petition for Writ of Certiorari submitted by the State of Arizona and amicii. The Arizona Supreme Court's decision was well reasoned and is both consistent with this Court's Decisions in *New York v. Belton*, *supra*., and *Thornton v. United States*, and with the Fourth Amendment's protections against unreasonable searches and seizures.

OPINION BELOW

On July 25, 2007, the Arizona Supreme Court held that the warrantless search of Respondent's vehicle subsequent to his arrest upon a charge of driving on a suspended license was unreasonable and improper. The court's Opinion is attached to the Petition as Appendix A. The Arizona Supreme Court reasoned that the search was not contemporaneous with the arrest because the arrestee was already secured in the back of a locked police vehicle, and the scene of the arrest was otherwise secure at the time the search was conducted. From these facts, the court concluded that the twin concerns of officer safety and preservation of evidence no longer existed to justify a warrantless search of Respondent's vehicle at the time the search took place.

STATEMENT OF JURISDICTION

On July 25, 2007, the Arizona Supreme Court affirmed the decision of the Arizona Court of Appeals reversing the trial court's denial of Respondent's Motion to Suppress Evidence (Illegal Search), and vacating Respondent's conviction. Respondent acknowledges this Court's jurisdiction as this matter presents a federal constitutional question.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner State of Arizona has unsuccessfully petitioned the Arizona courts to recognize a "bright line" rule that ignores fundamental Fourth Amendment protections against unreasonable searches and seizures. Petitioner has rallied behind the twin exigencies of officer safety, and preservation of evidence. Primarily focusing upon the former, the

Petitioner has argued that the arrest of a recent occupant of a motor vehicle affords the State *unlimited relief from the warrant requirements of the Fourth Amendment* due to the overshadowing concern for the safety of law enforcement officers working the scene of an arrest. What the Petitioner and Amicii wish this Court to overlook, however, are the time-honored principles underlying every warrant exception born of exigency.

A. Material Facts.

Respondent was arrested outside a private residence after he exited his vehicle, closed the door, and met Tucson Police Department (TPD) Officer Griffith in the middle of an open area 8 – 12 feet behind the vehicle. *App. Pet. for Cert*., C-3. He was immediately handcuffed and secured in a patrol vehicle under the supervision of attending TPD officers. *Id*.. Officers then held Gant in custody until a patrol vehicle arrived so that they could secure him in the vehicle. *Id*. Two other individuals, Mr. White and Ms. Porras, were already in custody when Gant arrived on the scene and was arrested, and Mr. White was secured in a patrol vehicle at the time Gant was arrested. *App.Pet.for Cert.*, A-3, ¶3. Ms. Porras was secured in Officer Ambrose's vehicle. *Id*.

The search of Gant's vehicle was conducted after Gant, and two other arrestees, were already *handcuffed and secured in patrol vehicles*. *Id*., A-7, ¶13. Gant was placed in Officer Nolan's patrol vehicle before the search, minutes after he was arrested. Id. He was handcuffed, placed in the back of the patrol vehicle and the door was closed and locked from the

outside *such that Gant could not exit*. Id. At that point in time, there were *four or five officers on scene*, and *three people handcuffed and secured* in patrol vehicles. *Id*. The scene was deemed secure at that time, in that there were enough officers present to maintain security of the officers in the area, and to control the area. *Id*. Two arresting officers admitted candidly that, at the time of the search, Gant had no access to anything in his vehicle and was not a threat to that officer or anyone else. *Id*.

B. Proceedings Below.

On January 6, 2000, Respondent Rodney J. Gant was indicted for violations of A.R.S Sec. 13-3408 (Possession of a Narcotic Drug for Sale), a class 2 felony, and A.R.S. Sec. 13-3415 (A) (Possession of Drug Paraphernalia), a class six felony.

On April 25, 2000, Respondent filed a Motion to Suppress the fruits of the post-arrest search of his automobile, and the matter was set for hearing on May 22, 2000. On May 22, 2000, at the original hearing, the parties stipulated to the facts without presenting witness testimony, and Judge Munger tentatively denied Respondent's motion giving leave for the filing of further memoranda. On June 5, 2000, Judge Munger confirmed the denial.

On appeal, Respondent Gant argued, *inter alia*, that the trial court erred in denying his motion to suppress evidence. The Arizona Court of Appeals reversed. See ***State v. Gant***, 202 Ariz. 240, 43 P.3d 188 (App.2002), *cert. granted*, 538 U.S. 976, 123 S.Ct. 1784 (2003), *opinion vacated and remanded*. Although

the Opinion of the Court was later vacated by the Supreme Court in light of *Dean*, the Court of Appeals' analysis was in many ways both sound and instructive, and bears review.

The Court of Appeals held that ***New York v. Belton***, 453 U.S. 454 (1981), "does not extend to this situation" because "Gant voluntarily – that is, not in response to police direction – stopped his vehicle, exited it, and began to walk away from it."[1] In addition, the court stated its agreement with the holdings of other courts that *Belton* did not apply in situations where the arrestee was apprehended outside the vehicle. *Id.* (citing ***United States v. Strahan***, 984 F.2d 155 (6th Cir. 1993), and ***United States v. Fafowora***, 865 F.2d 360 (D.C. Cir. 1989)). The court agreed that in these circumstances, "the twin concerns of officer safety and evidence preservation that justify, at least theoretically, the search-incident-to-arrest exception to the warrant requirement discussed in ***Chimel v. California,*** 395 U.S. 752 (1969), disappear because the vehicle's passenger compartment is not available to the arrestee at the time the police encounter or arrest the person." *Id.* at A-5 to A-6. This portion of the lower court's Opinion drew tacit disapproval of the United States Supreme Court, which remanded the Opinion for review in light of *Dean*.

The Court of Appeals then agreed with

[1] The court further held that nothing in the record "shows or suggests" that respondent " had seen officers or any other sign of police activity at the residence... either when he arrived at the residence or before he exited his vehicle," and that "the record does not support a finding that Gant was or should have been aware of anyone's approach as he exited his vehicle." *Id.* at A-7.

Respondent Gant's proposition that "*Belton* is limited to the particular factual situation in which it arose. Accordingly, it applies only when 'the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation . . . while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile),'" quoting ***United States v. Hudgins***, 52 F.3d 115, 119 (6th Cir. 1995).

Having concluded that "the narrow *Belton* exception" was inapplicable, *Id.*, the court applied the test announced in *Chimel*. In a single sentence, the court considered and rejected the notion that the search was lawful under *Chimel*, finding that "the passenger compartment of [Gant's] vehicle was not 'within his immediate control' at the time of his arrest." (citing *Chimel*, 395 U.S. at 763). The Court's application of the sound *Fourth Amendment* principles recognized by the United States Supreme Court in *Chimel* is significant, since *Chimel* is the foundation for the warrant exception fashioned in Belton, and later carefully explained by this Court in *Dean*.

This Court denied review without comment. No stay was granted and the State ultimately dismissed the pending case without prejudice.

Petitioner State of Arizona filed a *Petition for Writ of Certiorari* to the United States Supreme Court. The Petition was granted on April 21, 2003, and a briefing schedule set.

On September 15, 2003, the Arizona Supreme Court decided ***State v. Dean***, 206 Ariz. 158, 76 P.3d 429 (2003).

Subsequently, this Court ordered the parties to submit additional briefing regarding the impact of the Arizona Supreme Court's opinion in *Dean* on Mr. Gant's case.

On October 20, 2003, this Court vacated the opinion of the Arizona Court of Appeals in *State v. Gant*, supra., and remanded the case to the Arizona Court of Appeals with instructions to reconsider their decision in light of *Dean*.

On April 30, 2004, the Arizona Court of Appeals remanded the matter to the Pima County Superior Court for further proceedings in order to develop an additional evidentiary record to address the factors set forth in *Dean*, and with instruction to the trial court to reconsider its decision upon the Motion to Suppress in light of *Dean*.

On November 2 & 9, 2004, evidentiary hearings were held before the Hon. Barbara Sattler. At the conclusion of the hearings, Judge Sattler denied the Motion to Suppress. Respondent again appealed. Ultimately, the Arizona Court of Appeals reversed the trial court's ruling, and the Arizona Supreme Court affirmed the reversal on July 25, 2007. *Appendix A, Petition for Writ of Certiorari*.

In its opinion, the Arizona Supreme Court acknowledged the holding of this Court in ***United States v. Robinson***, 414 U.S. 218, 94 S.Ct. 467 (1973), which addressed permissive warrantless searches of persons under arrest. Citing ***Preston v. United States***, 376 U.S. 364, 84 S.Ct. 881 (1964), the court held that the exigency presumed to exist in every arrest situation, temporarily relieving police of the Fourth Amendment's proscription against warrantless searches, does not persist such that police may

continue to ignore Fourth Amendment protections against warrantless searches and seizures after the factors underlying the exigency are not loner present. Simply put, the court held that, once the arrest is complete, and absent some other exception to the Fourth Amendment requirements, a warrant is required before a search may be conducted. *Preston, supra*., citing ***Chambers v. Maroney***, 399 U.S. 42, 47, 90 S.Ct. 1975, 1978 (1970).

REASONS TO DENY THE PETITION

A. Summary of the Argument

The Arizona Supreme Court correctly applied *Chimel*, *Belton* and *Thornton* to the facts in this case. In doing so, the court correctly recognized what Justice Sanda O'Conner aptly noted in her concurring opinion in *Thornton*: the exigent circumstances recognized by the court in the case of the arrest of a recent occupant of a motor vehicle create a temporary exception to the Fourth Amendment's prohibition against warrantless searches and seizures, *but do not create an absolute and continuing right of law enforcement to conduct a search of the vehicle*. This decision is not contrary to *Belton* and *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127 (2004), and is consistent with the constitutional principles affirmed in ***Chimel v. California***, 395 U.S. 752, 89 S.Ct. 2034 (1969), and distinguished on its facts from *Belton* (as this Court anticipated in that case by limiting that decision to its facts).

Petitioner argues that this Court decided this issue in *Thornton*. However, as the Arizona Supreme Court observed in it's Decision, *Thornton* specifically did not reach the question at issue in this case. See *footnote 2, infra*., citing Concurring Opinions of Justice O'Conner and Justice Scalia, *Thornton, supra*.

The Arizona Supreme Court correctly interpreted and applied its own decision in ***State v. Dean***. 206 Ariz. 158, 76 P.3d 429, *en banc* (2003), holding that warrantless automobile searches *may* be conducted pursuant to the exception announced in *Belton*. *Dean* was consistent with *Belton*, and held that,

in determining whether such searches are *reasonable* (and therefore constitutional), the court must first determine two things: 1) whether the arrestee was a recent occupant, and, if so, 2) whether the *search* was substantially contemporaneous with the *arrest*.

The analysis of recent occupancy requires that the court determine the amount of time passed since the arrestee last occupied the vehicle prior to arrest, and also the physical distance between the arrestee and the vehicle at the time of the arrest.

Once it is determined that an arrestee was a recent occupant of an automobile, which is not at issue in this case, the court must determine *whether the search of that vehicle was "substantially contemporaneous" with the arrest*. This analysis requires a determination whether, under the "totality of the facts," the twin concerns of officer safety and preservation of evidence initially posed by the arrestee's recent occupancy of his vehicle are still present when the search is ultimately conducted. If those concerns are not present, and there is otherwise no probable cause to search the vehicle, a warrant is required.

B. Argument

The Arizona Supreme Court was correct in its application of *Chimel*, *Belton* and *Thornton*. Petitioner erroneously clings to outdated Fourth Amendment dogma by suggesting that *Belton*'s "bright line" permits warrantless searches of vehicles, without probable cause, based upon the arrest of a recent occupant, even after the arrest has been completed and all exigent circumstances presumed by *Chimel* to exist have been addressed and neutralized.

Petitioner's interpretation of our Constitutional Fourth Amendment requirements abandons fundamental Fourth Amendment protections by relieving police of any obligation to demonstrate that the exigent circumstances presumed to arise out of every arrest situation continue to persist once the arrest has been completed. This Court should deny Petitioner's application for Writ of Certiorari because Petitioner's argument is based upon a misapprehension of Fourth Amendment law.

I. PETITIONER'S ANALYSIS ABANDONS FOURTH AMENDMENT PROTECTIONS BY MISAPPLYING *CHIMEL* AND *BELTON*.

Petitioner's analysis first overlooks the fact that warrantless searches are presumptively unreasonable, and will be deemed improper absent a valid exception based upon exigency. ***Chimel v. California***, 395 U.S. 752, 89 S.Ct. 2034 (1969). The Courts in *Chimel* and in ***New York v. Belton***, 453 U.S. 454, 101 S.Ct. 2860 (1981), specifically addressed the practical exigency related to preservation of evidence from destruction *by the arrestee* and protection of officers from weapons *in the arrestee's possession or reasonably within the arrestee's immediate reach*. *Belton* at 460, 101 S.Ct. 2862; *Chimel*, 395 U.S. at 768, 89 S.Ct. 2034. The cautionary remarks in *Belton* emphasize that, by recognizing these exigencies, the Court did not intend to eviscerate Constitutional protections against unreasonable searchs:

> "Our holding today does no more than determine the meaning of *Chimel*'s

> principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrest. *Id.* at 460, n. 3.

The analysis applied by the Arizona Supreme Court in the instant case was an extension of the sound logic applied by the court in ***State v. Dean***, 206 Ariz. 158 (2003).[2] It is important to understand the court's decision in that case, since the case at bar presented the Arizona Supreme Court with two competing interpretations of *Dean*'s holding. *Dean* examined the specific question of when a vehicle search may be deemed "incident to arrest." *Dean*, 206 Ariz. 158 at 160 & 161. The Court relied heavily upon citation to *Chimel*, *supra.*, emphasizing that 1) *"[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,"* (citing *Chimel*, 395 U.S. 752 at 762, 89 S.Ct. 2034 at 2034) and 2) that the whole basis for the warrant exception in this circumstance was *the practical need to prevent access to weapons or evidence within an arrestees immediate control*. Id., 206 Ariz. 158 at 161-162. The Court also emphasized Justice Stewart's cautionary remark in *Belton* that "the Court was not retreating from *Chimel,* but rather simply applying its principles to the particular problem before it."

The *Dean* court began its analysis by emphasizing the need for reasonable searches of

[2] This Court previously remanded this case for reconsideration by the Arizona Court of Appeals in light of *Dean*.

persons under arrest and the area within the arrestee's immediate control, clearly defining the purpose of the exception:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."

206 Ariz. at 162. Next, the court acknowledged that *Belton*, *supra*., defined only the scope of a permissible search of a vehicle when the arrestee is a "recent occupant," so that courts and officers in the field would not be burdened with the difficult task of determining precisely what areas of a vehicle were accessible to the occupant. Id. The court observed that *Belton*'s holding "did not undertake to define recent occupancy, other than to note in the case before it that the search occurred immediately after the arrest and that Belton was a passenger in the car "just before he was arrested." *Id*. at 163.

After stating the test for recent occupancy (which was the same analysis later adopted by this Court in *Thornton*), the court next addressed the critical determination whether a search is substantially contemporaneous with the arrest. The court ultimately held that Dean was not a recent occupant because he had not been in his vehicle for 2 ½ hours preceding his arrest. The court further noted that Dean was arrested in his house, not in close proximity to the vehicle. The court therefore concluded that "[U]nder the circumstances of this case, neither of the justifications for the warrantless search of the vehicle – protection of the arresting officers and preservation of evidence – is present." Id., at 166.

While *Dean* emphasized that two critical factors in the analysis of "recent occupancy" are time and distance, the court went on to explicitly include in its holding a requirement that trial courts engage in a further analysis whether the exigencies permitting a vehicle search upon arrest of an occupant (or recent occupant) persist when the search is conducted:

> "Because, as *Chimel* and *Belton* teach, the Constitution requires a warrant except under those exigencies that allow otherwise, the issue is not whether the defendant has "evaded" a search by departing the vehicle, but rather *whether the totality of the facts still presents the kind of situation that justifies dispensing with the warrant requirement*." (emphasis added)

Dean, 206 Ariz. 158 at 166.

Like the holding in *Dean*, the Arizona Supreme Court's holding in this case adopts a practical, totality of the facts approach emphasizing fundamental Constitutional principles, which is consistent with prior Arizona holdings and prior decisions of this Court. See **State v. Madden**, 105 Ariz. 383, 384, 465 P.2d 363, 364, en banc (1971), citing **Preston v. United States**, 376 U.S. 364, 366, 84 S.Ct. 881, 883 (1964)(arrestees in custody in police car, already removed from scene of arrest, had no access to vehicle, and search improper even though arrestees were in vehicle when seized). Once more emphasizing fundamental Constitutional principles, the **Madden** Court went on to hold that in all situations searches of automobiles made incident to arrest are limited by the principle that police must, whenever practicable, obtain a judicial warrant. Id. See, e.g., **State v. Snyder**, 12 Ariz.App. 103, 467 P.2d 943 (App.1970)(arrestees outside of vehicle and in the custody of other police officers had no control over it, and there was sufficient time to obtain a warrant and no overriding necessity to search the vehicle without a warrant).

II. PETITIONERS' INTERPRETATION OF *BELTON* IS FUNDAMENTALLY FLAWED, IMPUTING A "BRIGHT LINE" RULE WHERE NONE EXISTS.

Petitioner argues that the Arizona Supreme Court's decision in this case would dismantle the "bright line" rule fashioned in *Belton*. Petitioner's argument misapprehends *Belton*'s intent, and advocates an exception that would swallow the rule.

The misapprehension is a fundamental flaw in Petitioner's argument.

As the Arizona court explained in this case, *Belton*'s "bright line rule" is that of the *scope of the search*, not the threshhold question whether the search is permissible; a fact that is always subject to judicial review. *Appendix to Petition for Certioari*, A-6. ¶12. Under *Belton*'s holding, once a person is determined to be a recent occupant of a motor vehicle, law enforcement officers affecting an arrest of that person may search the passenger compartment and containers located inside the passenger compartment of the motor vehicle, without making a specific showing that there is a likelihood that either contraband or weapons may be located therein, and without having to determine exactly *what portion of the passenger compartment* was actually within the reach of the arrestee. *C.f.* ***United States v. Osife***, 398 F.3d 1143 (CA9 2005). However, ever since *Belton* was decided, courts have routinely analyzed 1) whether police correctly determined that a person was a recent occupant of a motor vehicle, and 2) whether a search was substantially contemporaneous with the arrest of a recent occupant. See, e.g., *Madden, Preston* and *Snyder*, *supra*.; ***State v. Eckel***, 185 N.J. 523, 540 888 A.2d 1266, 1276 (N.J. Sup.Ct. 2004)(Criticizing broad construction of *Belton* as contrary to Constitutional protections); ***State v. Dunlap***, 185 N.J. 543, 888 A.2d 1278 (N.J. Sup. Ct. 2006)(Holding that, under New Jersey's Constitution, twin concerns of officer safety and evidence preservation insufficient to justify search where there was no objective threat to support either concern). It is this latter factor that is the focus of this case.

The Arizona Supreme Court's decision in this case is consistent with *Belton* in every respect. It is Petitioner's overreaching analysis that seeks to "overrule" *Belton*'s rationale. Petitioner further misapplies this Court's holding in *Thornton* by implying a conflict with that decision. As the Arizona Supreme Court specifically observed, *Thornton* did not reach the issue whether the search in that case was contemporaneous with the arrest. *App.Pet.Cert*., A9-A10, ¶18 & 19. The *dicta* in *Thornton* cited by Petitioner suggests only that police need not demonstrate that the passenger compartment of an arrestee's vehicle is actually accessible to the arrestee such that the scope of the search should be narrowed. *Belton*, of course, specifically resolved this issue by defining the scope of the permissible search, so that police would not have to guess at what might be reached by an arrestee in a fluid arrest situation. *Belton* in no way authorized a continued warrantless search that was not contemporaneous with the arrest. Thus, once the arrest is complete, and the exigency dissipated, *Belton* no longer applies, and (absent probable cause) a warrant is required.

Petitioner cites several cases from various jurisdictions that have analyzed this issue, both before and after *Thornton*. Petitioner cites these cases in support of the proposition that most state and federal courts support Petitioner's position. However, the citation of these authorities is not helpful.

The Arizona Supreme Court acknowledged that many courts have upheld searches in cases factually similar to Gant's, but expressed an intent to adhere to basic Fourth Amendment principles, without specifically addressing the applicability of

the cited authorities to the issue under review. *App.Pet.Cert.* A-11, ¶19. An analysis reveals that most of the cited cases did not directly address the issue at bar.[3] Others proposed different factual scenarios and lacked a record establishing a secure arrest scene at the time the search was conducted.[4] Furthermore, many of those courts cited to cases that have at times upheld, and at times held as unlawful vehicle searches conducted varying amounts of time after an arrest,

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[3] *See, e.g.* ***United States v. Mapp***, 476 F.3d 1012 (D.C. Cir. 2007) (addressing recent occupancy issue, and upholding vehicle search 10 minutes after arrest, noting courts have upheld searches 10 - 15 minutes after arrest as lawful, while other courts have held searches 30 minutes after arrest unlawful); ***United States v. Osife***, 398 F.3d 1143 (9th Cir.2005)(defendant/appellant conceded search was incident to arrest, but argued that *Thornton* limited searches to cases where weapons or contraband might reasonably be expected to be found in vehicle); ***United States v. Herndon***, 393 F.3d 665 (6th Cir. 2005) (addressing only issue whether defendant was recent occupant if he was outside his vehicle when arrested); ***United States v. Barnes***, 274 F.3d 601 (8th Cir.2004)(deciding only that *Belton*'s bright line rule precludes need to demonstrate arrestee could reach items in passenger compartment at the time of his arrest in order to permit search; not addressing contemporaneous nature of search); ***United States v. Karlin***, 852 F.2d 968 (7th Cir.1988)(same); ***Northrop v. Trippett***, 265 F.3d 372 (6th Cir.2001)(same); ***United States v. McCrady***, 774 F.2d 868 (8th Cir.1985)(same); ***United States v. Cotton***, 751 F.2d 1146 (10th Cir.1985)(same); ***United States v. White***, 871 F.2d 41 (6th Cir.1989)(upholding search under *Belton* even where arrestee was no longer within reach of vehicle; distinguishing cases where exigency may be demonstrated no longer to exist. *C.f.* ***United States v. Vasey***, 834 F.2d 782 (9th Cir.1987)(applying case-by-case analysis of exigencies when search is conducted and finding no exigency existed to support search after arrestee removed from scene).

[4] *See, e.g.* ***United States v. Weaver***, 433 F.3d 1104 (9th Cir. 2006)(Upholding search 15 minutes after arrest when arrestee was handcuffed in patrol car, but other vehicle occupants were nearby seated on curb; officer waited to summon sufficient backup officers for a "safe search," discussing only time of delay and not exigencies).

suggesting that lower courts are already acknowledging and applying a case-by-case analysis, examining the circumstances of each arrest and search, where Petitioner erroneously suggests a "bright line" rule already exists.[5]

III. THE RECORD IN THIS CASE CLEARLY DEMONSTRATES THAT THERE WAS NO EXIGENCY PRESENT AT THE TIME OF THE SEARCH, SUCH THAT ANY PERSON POSED A REASONABLE RISK OF (A) ENDANGERING AN OFFICER'S SAFETY BY GAINING ACCESS TO ITEMS IN THE VEHICLE OR (B) DESTROYING EVIDENCE IN THE VEHICLE.

Petitioner's interpretation of *Belton*'s "bright line" rule would create a perpetual exigency, extending from the time of arrest until police conduct a search of the arrestee's vehicle. In effect, Petitioner argues that the arrest of a vehicle occupant (or recent occupant) creates a right vested in law enforcement to conduct a search, and that such right exists for an indefinite period. However, authorities cited by Petitioner demonstrate that every jurisdiction has placed limitations upon the period of time during which a Belton search may be conducted. When imposing this limitation, our courts are consistently mindful of one thing: whether the circumstances of

[5] *See e . g .* ***United States v. Hrasky***, 453 F.3d 1099 (8th Cir. 2006) (Upholding search onehour after arrest, and holding that focus should be "not strictly on the timing of the search but its relationship to (and reasonableness in light of) the circumstances of arrest."); ***Weaver***, *supra*, (upholding search 15 minutes after arrest where officer waited for backup to conduct "safe search").

the arrest, when viewed together with the circumstances of the search itself manifest an exigency as required by the Fourth Amendment. *See, e.g., Mapp, Hrasky and Weaver, supra*.

Applying this type of analysis, the Arizona Supreme Court and Arizona Court of Appeals both determined that there was insufficient evidence before the trial court to support a finding that Respondent Gant, or any other person at the scene, posed a reasonable risk of endangering the officers' safety by accessing items in the vehicle, or destroying evidence in the vehicle. Therefore, the search of Gant's vehicle was not reasonable, because it had to be predicated upon a warrant exception *specifically designed to address those concerns*.

Respondent exited his vehicle, closed the door, and met Officer Griffith in the middle of an open area 8 – 12 feet behind the vehicle, where he was immediately arrested and secured in a patrol vehicle under the supervision of attending TPD officers. Officers then held Gant in custody until a patrol vehicle arrived so that they could secure him in the vehicle. Two other individuals, Mr. White and Ms. Porras, were already in custody when Gant arrived on the scene and was arrested, and Mr. White was secured in a patrol vehicle at the time Gant was arrested. Ms. Porras was secured in Officer Ambrose's vehicle.

The search of Gant's vehicle was conducted after Gant, and two other arrestees, were already *handcuffed and secured in patrol vehicles*. Gant was placed in Officer Nolan's patrol vehicle before the search, approximately six (6) minutes after he was arrested. He was handcuffed, placed in the back of the

patrol vehicle and the door was closed and locked from the outside *such that Gant could not exit*. At that point in time, there were *four or five officers on scene*, and *three people handcuffed and secured* in patrol vehicles. The search commenced approximately one (1) minute after Gant was placed in a patrol vehicle. The scene was deemed secure at that time, in that there were enough officers present to maintain security of the officers in the area, and to control the area. Two arresting officers admitted candidly that, at the time of the search, Gant had no access to anything in his vehicle and was not a threat to that officer or anyone else.

It requires no deep analysis to conclude that the warrantless search in this case was not justified under the *Belton* exception. Two officers candidly admitted that Gant was no threat to them at the time of the search as he was secured in a locked police vehicle. Those same officers stated that the scene was secure when the search was conducted, since the other two arrestees were likewise handcuffed and secured in vehicles, and several officers were present to secure the area. Since there was no chance of anyone obtaining a weapon or evidence from Gant's vehicle at the time of the search, there was no exigency and a warrant was required.

Based upon the foregoing facts, Gant's close proximity to his vehicle when arrested is of no moment. Neither is the fact that the search was conducted 5 – 6 minutes after the arrest was effected. Considering the twin concerns of officer safety and preservation of evidence, and applying a totality of the circumstances" or "totality of the facts" test to this case, distance and time become irrelevant because the

State's own officers present on the scene themselves acknowledged that there was no exigency. Where there is no reasonable threat, there is no exigency, and the warrantless search must be deemed invalid as pretextual..

At the evidentiary hearing on November 9, 2004, the Petitioner presented evidence intended to establish that no crime scene is ever "secure" such that a vehicle search conducted pursuant to the *Belton* exception would be unwarranted. See TR 11/9/04, pp.18-20. In this case, the Petitioner's examination suggested that the possibility of return of the property resident, or sudden and unexpected appearance of unknown civilians presented a constant threat to officer safety. The testimony elicited was almost rehearsed, and contradicted the testimony of officers on scene that described the scene as secure at the time of the search, and denied any threat to officer safety or evidence. A finding that every crime scene presents inherent danger, and thus justifies a vehicle search incident to arrest of a recent occupant would eviscerate decades of holdings that support the Constitutional principles recognized by this Court in *Chimel* and *Belton*.

It is worth recalling that *Belton* involved a situation wherein a single officer detained six individuals by the side of the road. Having arrested the driver of the vehicle for a drug offense, the officer searched the passenger compartment of the vehicle. The search was permissible since 1) there were six detainees and only one officer at the scene, 2) the officer had only one set of handcuffs and could not secure all detainees, and 3) all detainees practically had access to the vehicle since the single officer could

not hope to control them all.

In the case of Mr. Gant, there were four officers on scene and three individuals under arrest. All arrestees were handcuffed and secured in police vehicles before the search commenced. At the time of the search, six minutes after Gant was arrested, the scene was secure and there was no objective threat presented by Gant or any others present at the scene. There was no justification for the warrant exception created by *Belton*. In fact, there was no reason by officers could not have requested a warrant, excepting that they had no probable cause to obtain one.[6] This case is strikingly similar to the case of *State v. Dunlap* case, *supra*., in which the New Jersey Court of Appeals and New Jersey Supreme Courts reached identical conclusions, and found that an unreasonably broad application of *Belton* turns Fourth Amendment protection on its head and causes the warrant exception to swallow the rule.

IV. CONCLUSION

Belton created a "bright line" rule addressing the permissible scope of vehicle searches under *Chimel*. Neither case removed from judicial review the threshold question whether a search is permissible in the first place. The Arizona Supreme Court's decision in this in no way impinges upon the holding in *Belton*, and is entirely consistent with both *Chimel* and *Belton*.

The Arizona courts correctly applied a totality of the facts/circumstances approach to the *Belton*

[6] The parties agree that there was no probable cause to search Gant's vehicle.

exigency analysis. This analysis focuses on the twin concerns of officer safety and preservation of evidence, and requires that the trial court consider all of the facts available, not merely those pertaining to distance of an arrestee from the vehicle searched at the time of arrest, or the passage of time between the arrest and the search. This straight forward application of Fourth Amendment principles addresses the concerns expressed by Justices Scalia and O'Conner in their concurring opinion in *Thornton*, *supra*.

Application of the totality of the facts/circumstances analysis to the present case results in only one possible conclusion: no exigency existed to invoke either the *Chimel* or *Belton* exceptions to the Fourth Amendment's warrant requirement. When the search was conducted, the arrest scene was secure, several officers were present and did not themselves believe they were in any danger, and no one had any chance of accessing Gant's vehicle, or its contents, other than the officers themselves. Simply put, at the time police conducted their search, the arrest was complete, and the scene secure. The process has moved to an investigative stage, and police sought not to protect themselves or any evidence, but instead to discover evidence under the guise of an exigency that no longer existed. The search was therefore unreasonable under the Fourth Amendment.

There is no "right" to search that is created by exigency; only a temporary exception to the general rule. "It is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se*

unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.'" ***Mincey v. Arizona***, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (quoting ***Katz v. United States***, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). One such exception permits the warrantless search of a vehicle's passenger compartment "as a contemporaneous incident" of the arrest of that vehicle's occupant or recent occupant. *Belton*, 453 U.S. at 460-61, 101 S.Ct. 2860. Although "[s]uch searches have long been considered valid because of the need 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence," *id.* at 457, 101 S.Ct. 2860 (quoting ***Chimel v. California***, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)), it is equally well-established that "[s]earches incident to arrests are not limitless." ***United States v. Pratt***, 355 F.3d 1119, 1121-22 (CA8 2004). Instead, they are to be treated as the *exception* to Constitutional norms that they are, lest officers in the field treat them as a "police entitlement." ***Thornton v. United States***, 541 U.S. 615, 624, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (O'Connor, J., concurring); ***United States v. Barnes***, 374 F.3d 601, 605 (8th Cir.2004) (Smith, J., dissenting), *cert. denied*, 543 U.S. 1079, 125 S.Ct. 938, 160 L.Ed.2d 822 (2005); *see also Thornton*, 541 U.S. at 627, 124 S.Ct. 2127 (Scalia, J., joined by Ginsburg, J., concurring) ("But conducting a *Chimel* search is not the Government's right; it is an exception-justified by necessity-to a rule that would otherwise render the search unlawful."). Although the Supreme Court has

made it clear that courts are not to determine on a case-by-case basis whether or not one of the *Chimel* justifications was present, *Belton*, 453 U.S. at 459, 101 S.Ct. 2860 (quoting ***United States v. Robinson***, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)), it nonetheless remains the government's burden to establish its entitlement to the search incident to arrest exception; if the government fails to make such a showing, the evidence must be suppressed. *See* ***Coolidge v. New Hampshir****e,* 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Based upon the record in this case, there was insufficient evidence to conclude that, at the time of the search, either the Respondent or any other person at the scene (other than the officers themselves) posed a reasonable risk to officer safety by accessing items in the vehicle, or destroying evidence in the vehicle. The Arizona courts were correct in their decisions, and this Court should deny Petitioner's application for Writ of Certiorari.

Respectfully Submitted,

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