No. 16-467

In The
Supreme Court of the United States

EFRAIN TAYLOR,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIAN E. FROSH
Attorney General of Maryland

CARRIE J. WILLIAMS*
BENJAMIN A. HARRIS
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
cwilliams@oag.state.md.us
(410) 576-7837

Attorneys for Respondent

Counsel of Record

QUESTION PRESENTED

When an officer arrests a motorist for driving under the influence, is it "reasonable to believe," under *Arizona v. Gant*, 556 U.S. 332 (2009), that evidence relevant to the crime of arrest might be found in the vehicle?

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STATEMENT OF THE CASE

At 1:00 a.m. on March 1, 2013, Officer Chad Mothersell watched as a gray Ford, driven by Efrain Taylor, sped past him and turned without stopping at a stop sign. (Pet. App. 43-46). The officer pursued and signaled for Taylor to stop; he did so without incident. (Pet. App. 45).

Officer Mothersell approached Taylor, and smelled alcohol on his breath and his person. (Pet. App. 46). Taylor's speech was slurred and his eyes were bloodshot and glassy. (Pet. App. 46). He told Officer Mothersell that he had just been at a bar. (Pet. App. 47).

Officer Mothersell instructed Taylor to step out of the car and perform a series of field sobriety tests, all of which Taylor attempted and failed. (Pet. App. 47). Mothersell arrested Taylor for driving under the influence, and a second police officer searched the car. (Pet. App. 48). The officer discovered a clear plastic baggy of cocaine in the armrest. (Pet. App. 48).

Before trial, Taylor – citing *Arizona v. Gant*, 556 U.S. 332 (2009) – moved to suppress the cocaine as the product of an unlawful search. (Pet. App. 61). Officer Mothersell testified, describing the events of March 1, and explaining that he had "had several DUI arrests where there's plenty of open containers left in the vehicle," and he "want[ed] to make sure there [was] no other alcohol in the vehicle." (Pet. App. 58). The trial judge denied the motion, observing that, under the circumstances of the case before it, "the search of the vehicle incident to the arrest . . . could

have revealed a pint of whiskey in the glove compartment, who's to say." (Pet. App. 64).

A jury convicted Taylor of possession of cocaine with the intent to distribute. He appealed the trial court's suppression ruling, which the Court of Special Appeals affirmed. (Pet. App. 37).

The Court of Appeals of Maryland granted Taylor's petition for certiorari. That court framed the issue as follows:

> [W]hether Officer Mothersell reasonably could have believed that evidence relevant to the crime of driving under the influence of alcohol – the crime for which petitioner was arrested – might be found in the vehicle.

(Pet. App. 7).

The court surveyed decisions from other jurisdictions and found that they "have sustained passenger compartment searches, under *Gant,* following an arrest for driving under the influence or driving while intoxicated, on the premise that there is reason to believe that other evidence of that offense may be found in the vehicle." (Pet. App. 9). The court applied the "reasonable suspicion" standard, both (1) rejecting that it was applying a "*per se* right to search founded solely on the nature of the offense," and (2) holding that "[i]n this case there was, and, we suspect, in most cases of an arrest for driving under the influence, there is likely to be, a basis in fact" supporting an officer's inference that evidence of the offense of arrest may be in the car. (Pet. App. 9-10).

REASONS FOR DENYING THE WRIT

In *Gant*, this Court held that a police officer may search a car incident to the arrest of one of its occupants if "it is reasonable to believe the vehicle contains evidence of the offense of arrest." 556. U.S. at 346. This Court made clear that the offense of arrest could be determinative: "In many cases," such as those involving "a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." *Id.* at 343. Conversely, in other cases, including those involving drug possession, "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Id.* at 344.

Taylor claims that this case presents "a Fourth Amendment question left open" by *Gant* "that has been answered three different ways by a multitude of courts." (Pet. 6). Specifically, he contends that lower courts are divided on whether *Gant*'s "reasonable-to-believe" standard is equivalent to reasonable suspicion or probable cause, and that the courts in the reasonable-suspicion camp are further divided in how they apply that standard. (Pet. 7-9). Taylor thus asks this Court to consider whether a search pursuant to the offense-of-arrest prong of *Gant* must be "supported by, at least, reasonable suspicion, and, if so, what type of evidence adequately establishes that suspicion?" (Pet. 9).

Neither question warrants this Court's review. Federal appellate courts and state courts of last resort have understood "reasonable to believe" to correspond

with the "reasonable suspicion" standard, and have understood that the nature of the offense is a significant, often dispositive, factor in the subsequent analysis.

A. The federal courts of appeal and state high courts to address the issue agree that *Gant*'s "reasonable to believe" standard means reasonable articulable suspicion.

The parties in this case agree with the overwhelming majority of courts that *Gant*'s "reasonable to believe" standard is the equivalent of reasonable suspicion. Nearly all of the federal courts of appeal and state courts of last resort – to the extent they have expounded upon the subject – applied the "reasonable suspicion" standard.

The leading cases on this point are *United States v. Vinton*, 594 F.3d 14 (D.C. Cir. 2010),[1] and *People v. Chamberlain*, 229 P.3d 1054 (Colo. 2010).[2] Both apply

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[1] *See*, *e.g.*, *United States v. Donahue*, 764 F.3d 293, 300 (3d Cir. 2014) (citing *Vinton* for its analysis of *Gant* and adopting its reasoning), *United States v. Washington*, 670 F.3d 1321, 1325 (D.C. Cir. 2012) (same), *State v. Fischer*, 873 N.W.2d 681, 690 (S.D. 2016) (same), *State v. Mbacke*, 721 S.E.2d 218, 222 (N.C. 2012) (same), *United States v. Taylor*, 49 A.3d 818, 823 (D.C. 2012) (same), *State v. Price*, 986 N.E.2d 553, 563 (Ohio Ct. App. 2013) (same), *Powell v. Com.*, 701 S.E.2d 831, 835 (Va. Ct. App. 2010) (same).

[2] *See*, *e.g.*, LaFave, § 7.1(d), p.713 (quoting *Chamberlain* at length and observing that there is "much to be said" for its analysis of the evidence-gathering prong of *Gant*); *see also Taylor*, 49 A.3d at 824 (citing *Chamberlain*'s review of *Gant* with

the "reasonable suspicion" standard, comparable to the investigatory stops authorized by *Terry v. Ohio*, 392 U.S. 1 (1968). *Vinton*, 594 F.3d at 25; *Chamberlain*, 229 P.3d at 1057. As the court wrote in *Chamberlain*, "[t]he nature of the offense of arrest is clearly intended to have significance, and in some cases it may virtually preclude the existence of real or documentary evidence[.]" 229 P.3d at 1057. *See also Vinton*, 594 F. 3d at 25-26 ("Vinton was arrested for the unlawful possession of a weapon, *an offense* that resembles narcotics-possession offenses far more closely than it resembles a traffic violation." (emphasis added)).

Taylor argues that two courts have applied the "probable cause" standard associated with the automobile exception: "*United States v. Williams*, 616 F.3d 760, 764-65 (8th Cir. 2010); [and] *United States v. Grote*, 629 F.Supp. 2d 1201, 1203-04 (E.D. Wash. 2009)." (Pet. 15). These two cases do not, however, create a split of authority, when compared with *Vinton*, *Chamberlain*, and the rest of the authorities that apply the "reasonable suspicion" standard.

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approval), *People v. Evans*, 133 Cal. Rptr. 3d 323, 335 (Ct. App. 2011) (same); *cf. Johnson v. United States*, 7 A.3d 1030, 1035 (D.C. 2010) (citing *Chamberlain* and LaFave for the argument that standard is "a lesser degree of suspicion commensurate with that sufficient for limited intrusions, like investigatory stops").

Williams cited *Gant* and applied the "automobile exception"[3] to the search of a car, finding that "police had probable cause to believe that evidence relevant to the drug crime would be found in the vehicle." 616 F.3d at 764-65. *Williams* did not analyze *Gant* and apply the "probable cause" standard because of it; rather, *Williams* applied the automobile exception, found probable cause in support of it, and without explanation cited the unrelated *Gant*. *Williams* did not analyze *Gant* or purport to interpret the standard for searches for evidence of the offense of arrest, and no court has cited it as persuasive authority on that point.

The second authority Taylor cites for the proposition that courts have applied the "probable cause" standard when reviewing the evidence-gathering prong of *Gant* is *Grote*. A district court opinion is not relevant authority when assessing whether there is a split of authority suitable for certiorari. Sup. Ct. R. 10. Regardless, *Grote*'s application of the probable cause standard was not endorsed by the Ninth Circuit on appeal. *United States v. Grote*, 408 F. App'x 90, 91 (9th Cir. 2011).[4]

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[3] *See California v. Acevedo*, 500 U.S. 565, 579 (1991) ("the police may search [a car] without a warrant if their search is supported by probable cause").

[4] The *Grote* trial court's reasoning was not based upon *Gant* or other cases involving searches of cars; rather, it cited a line of cases analyzing police entries into homes in pursuit of people with open warrants. *See* 629 F. Supp. 2d at 1203 (applying "reasonable to believe" standard as discussed in *United States v. Gorman,* 314 F.3d 1105 (9th Cir. 2002), in which "police had

Williams does not present the settled law of the Eighth Circuit, insofar as it cites *Gant* in support of its application of the automobile exception, and its treatment of *Gant* is without progeny. *Grote* may have applied probable cause at the trial court level, but that interpretation was not followed on appeal.

Gant did not adopt the "probable cause" standard for a search authorized by its offense-of-arrest prong. As Taylor notes in his petition, application of the probable cause standard would duplicate the automobile exception. (Pet. 15) (citing *Vinton*, 594 F.3d at 25). The leading cases applying *Gant* have all applied the "reasonable suspicion" standard, and – the unclear *Williams* opinion aside – all federal appellate courts and state courts of last resort have followed suit. There is no meaningful split of authority.

B. **Nearly all courts agree that the nature of the offense is a dominant, sometimes decisive, factor in the calculation of reasonable suspicion.**

Gant provided that sometimes "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." 556 U.S. at 344. Jurisdictions across the country have consistently applied *Gant* with an understanding that, as *Chamberlain* and

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'reason to believe' that an individual for whom they had an arrest warrant was present in a third party's residence, justifying entry into that residence without a search warrant or consent.").

Vinton explain, the offense itself may provide – or decline to provide – the reasonable suspicion justifying the search. For instance, *Gant* noted that minor traffic offenses would ordinarily be insufficient to justify a search incident to arrest. 556 U.S. at 335, 347. Following suit, courts have held that arrests for various minor traffic offenses have not justified searches of a car incident to the arrest of its occupant.[5]

Taylor characterizes a number of these cases as jurisdictions adopting a "*per se*" approach, and "require[] no particularized suspicion." (Pet. 16). He therefore asserts that these cases applied a standard different from the "reasonable suspicion" standard applied by *Chamberlain* and *Vinton*. They did not. Rather, they simply declined to independently revisit *Gant*'s observation that it was not reasonable to believe evidence of minor traffic offenses would be found in the arrestee's vehicle.

Some offenses will, or will not, by their nature satisfy the "reasonable suspicion" standard applied by

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[5] *United States v. Ruckes*, 586 F.3d 713, 718 (9th Cir. 2009), *Meister v. State*, 933 N.E.2d 875, 878 (Ind. 2010), *Commonwealth v. Perkins*, 989 N.E.2d 854, 858 (Mass. 2013), *People v. Bridgewater*, 918 N.E.2d 553, 558 (Ill. 2009), *Baxter v. State*, 238 P.3d 934, 936 (Okla. Crim. App. 2010); *see also United States v. Madden*, 682 F.3d 920, 926 (10th Cir. 2012) (holding search of a car was unlawful following execution of arrest warrant for misdemeanor traffic offenses), *People v. Lopez*, 208 Cal. Rptr. 3d 838, 847 (Cal. App. 2016) (distinguishing *Gant*, in the context of a minor traffic violation, because state law authorized a police search for documentation of driver's identity).

Vinton and *Chamberlain*. It is long-established that an offense, by its nature, can supply particularized suspicion. As Justice Harlan wrote in his concurring opinion in *Terry*, when a stop is reasonable, "the right to frisk must be immediate and *automatic* if the reason for the stop is, as here, an articulable suspicion of a crime of violence." *Terry*, 392 U.S. at 33 (emphasis added) (Harlan, J., concurring). In other words, the reasonable suspicion for a *Terry* frisk can be supplied solely by the nature of the offense for which a suspect is stopped. As suspicion for a weapons offense automatically supports reasonable, articulable suspicion for a frisk, so, too, does a stop for some offenses automatically support reasonable, articulable suspicion for a search of the car incident to arrest.

Courts have been quick to cite *Gant* for the proposition that it is reasonable for an officer to believe that evidence of driving under the influence may be found in the vehicle. *People v. Nottoli*, 130 Cal. Rptr. 3d 884, 903 (Ct. App. 2011), *State v. Cantrell*, 233 P.3d 178, 184 (Idaho Ct. App. 2010), *Cain v. State*, 373 S.W.3d 392, 397 (Ark. Ct. App. 2010); *see also United States v. Phillips*, 9 F. Supp. 3d 1130, 1137 (E.D. Cal. 2014), (holding that, following an arrest "for driving under the influence and drug-related offenses, the officers conducted a valid search of the vehicle, as they had reason to believe the vehicle 'contain[ed] evidence related to the crime of arrest'") (citing *Gant*, 556 U.S. at 343, modification in *Phillips*).

Because of the close temporal connection between alcohol and the operation of the car in arrests for

drunk driving, courts have held that evidence of the offense of arrest may be found in the vehicle, and therefore a search of the vehicle is permitted based on the offense itself. As one court noted, "an open container of alcohol could have been found in appellant's vehicle." *Cain*, 373 S.W.3d at 397.

The Court of Appeals of Maryland was within this national trend in its analysis. It held that the search incident to arrest was permissible, "not on the basis of any *per se* right to search founded solely on the nature of the offense," but because of a "basis in fact" supporting a search. (Pet. App. 10). This basis in fact would be that an officer, through his or her own knowledge and experience or that of fellow officers, can reasonably believe that the vehicle may contain "open containers or other evidence related to the offense inside the passenger compartment." *Id.*[6]

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[6] Taylor argues that the court's reference to "the arresting officer's experience" elevated that factor to a place of some special significance in its analysis, separating it from other cases addressing *Gant*. (Pet. 21). The court's reference to the experience of the arresting officer and to the experience of that officer's colleagues, however, appears to have been simply to make the point that, for the purpose of reasonable suspicion, the facts are evaluated through the lens of an officer's experience. This treatment of an officer's experience is no different from other applications of the reasonable-suspicion standard, which all call upon an officer to exercise judgment based upon experience. *See Terry*, 392 U.S. at 27 ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific

Two courts have approached driving under the influence differently from the Court of Appeals of Maryland and from *Nottoli*, *Cantrell*, and *Cain*. Neither case creates a split of authority suitable for a grant of certiorari.

In *United States v. Taylor*, 49 A.3d 818, 826 (D.C. 2012) ("*Taylor*"), a panel of the District of Columbia Court of Appeals found that a police officer did not have authority to search the interior of a car, following an arrest for driving under the influence. The court held that suspicion must be "particularized" *beyond* the offense of arrest, giving the offense itself little weight in evaluating whether a search was lawful. *Id.* But the *en banc* court recently, in *dicta*, cast some doubt upon that analysis, without reference to *Taylor* itself:

> [I]n explaining the basis for *Gant* evidence searches, the Court states that in some cases "the offense of arrest" – not . . . the fact of arrest – "will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein."

United States v. Lewis, 147 A.3d 236, 248 (D.C. 2016) (quoting *Gant*, 556 U.S. at 344). In the District of Columbia, therefore, *Taylor*'s requirement for "particularity" beyond the nature of the offense is in

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reasonable inferences which he is entitled to draw from the facts *in light of his experience*.") (emphasis added).

doubt, because *Lewis* noted that offenses alone will be sufficient, at least sometimes, to yield a lawful search.

The only jurisdiction in which driving under the influence has been found inadequate to support a search, in a case that has not been cast in some doubt by subsequent decisions from the same jurisdiction, is the Eastern District of Tennessee. In *United States v. Reagan*, 713 F. Supp. 2d 724, 733 (E.D. Tenn. 2010), that court held that "it is not reasonable to believe that evidence of DUI is inside the passenger compartment of a vehicle based solely upon the nature of the charge or the existence of evidence that the vehicle's driver is intoxicated." This finding of law by an isolated federal trial court does not present a substantial split of authority, suitable for a grant of certiorari. *See gen.* Sup. Ct. R. 10.

Other than *Taylor* and *Reagan*, every court considering the matter has held that the facts establishing probable cause to arrest for drunk driving also provided justification for a search of the car under *Gant*.

Gant did leave some questions open, such as how it might be applied when a driver is arrested pursuant to an arrest warrant.[7] In the present case, however,

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[7] *See Megginson v. United States*, 556 U.S. 1230 (2009) (noting that the application of *Gant* is unclear during an arrest for an open warrant, without the context of underlying criminal charge) (Alito, J., dissenting); *Grooms v. United States*, 556 U.S. 1231 (2009) (noting a difficulty in applying *Gant* to arrest for open warrant, when other reasons for arrest may have been present as well) (Alito, J., dissenting); 3 W. LaFave, *Search and Seizure* § 7.1(d), p.712 (2012) (illustrating, with an example, the

the parties, the Court of Appeals of Maryland, and authority from across the country agree that the standard is "reasonable suspicion." Consistently with *Gant* and its progeny in the federal courts of appeal and state courts of last resort, the court below resolved Taylor's appeal by recognizing that the facts establishing probable cause to arrest for drunk driving also established reasonable suspicion to search the car.

There is not a significant split of authority on the application of *Gant* in the context of an arrest for driving under the influence. Certiorari is not warranted.

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challenge of applying *Gant* during an arrest for an open warrant).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

CARRIE J. WILLIAMS*
BENJAMIN A. HARRIS
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
cwilliams@oag.state.md.us
(410) 576-7837

**Counsel of Record*

Attorneys for Respondents

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