No. 08-17

# In the Supreme Court of the United States

LAURA MERCIER,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of Ohio**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

This case addresses whether the Fourth Amendment permits police to search a purse worn or carried by a vehicle's passenger as part of a lawful search of that vehicle, in the absence of probable cause to search the passenger or the purse. As we demonstrated in the petition, and as numerous courts have recognized, the state courts of last resort are irreconcilably split on this question.

Respondent does not dispute the existence of this conflict. Nor does it deny that this case squarely presents an issue of fundamental national importance, determining the rights of vehicle occupants and the authority of police officers during routine and frequent roadside encounters. Instead, respondent's brief is devoted entirely to defending the decision below. Those arguments, addressed in the petition (at 17-22), provide no basis for denying review.

Respondent recognizes that "'[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.'" Br. in Opp. at 7-8 (citation omitted). There is no better illustration of that proposition than the clear, persisting conflict among the state supreme courts on the question presented here. Review by this Court is warranted.

### A. This Case Squarely Presents A Recurring Question Of Fourth Amendment Law That Has Sharply Divided State Courts Of Last Resort

Respondent does not deny the intractable split among the state courts of last resort on whether the

search of a purse worn or carried by a passenger incident to the lawful search of a vehicle violates the Fourth Amendment. As we show in the petition (at 8-12), a majority of the state supreme courts to address the issue, adopting the position of the concurring opinion in *Wyoming* v. *Houghton*, 529 U.S. 295, 308 (1999) (Breyer, J., concurring), have held that a purse that is worn or carried by its owner may not be searched incident to the search of an automobile in which the owner is a passenger. *State* v. *Boyd*, 64 P.3d 419 (Kan. 2003); *State* v. *Tognotti*, 663 N.W.2d 642 (N.D. 2003); *State* v. *Newsom*, 979 P.2d 100 (Idaho 1998). A minority, including the court below, has reached the contrary conclusion, holding that a purse being worn by its owner should be treated like any other container located in the automobile and therefore is subject to lawful search. Pet. App. at 1a; *State* v. *Steele*, 613 N.W.2d 825 (S.D. 2000). The brief in opposition makes no attempt to reconcile – in fact, fails even to mention – these conflicting lines of authority.

The conflicting positions of the state supreme courts are irreconcilable because the factual scenario presented in each of these cases is identical: A passenger, wearing or holding a purse, attempts to exit an automobile that is subject to police search. Police officers, who lack any probable cause or articulable suspicion with respect to the passenger or the purse, order the passenger to relinquish possession of the purse and leave it behind in the car. The officers then search the purse as part of the search of the vehicle. See Pet. at 8-13. The instant case presents just this recurring situation. Pet. App. at 4a, 9a. Respondent does not deny that state supreme courts are divided on how to interpret *Houghton* in these circumstances. The brief in opposition further does

not deny that this case presents an opportunity to resolve the conflict amongt the state courts on a significant constitutional issue. For this reason alone, review of the decision below is warranted.[1]

### B. Respondent Erroneously Relies Upon *New York* v. *Belton*

Respondent's extensive reliance on this Court's decision in *New York* v. *Belton*, 453 U.S. 454 (1981), is entirely misplaced. See Br. in Opp. at 8-10, 15, 17. *Belton* applied the "search incident to arrest" exception to the warrant requirement to the search of an automobile, permitting the search of the jacket of a person who had been arrested. 453 U.S. at 457-62. As the Court explained in *Belton*, "the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." *Id.* at 461 (emphasis supplied). *Belton* examined the rights of arrested individuals, and has no application to passengers not under suspicion. Numerous state courts addressing the question presented in this case accordingly have concluded that *Belton* "does not authorize a search of the passenger based solely on the arrest of the

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[1] Respondent offers a post-hoc justification for the search, namely that petitioner "tacitly knew of the sale of the drugs, if she was not a confederate in the drug sale" perpetrated by the driver of the vehicle in which she was a passenger. Br. in Opp. at 16. But this claim not only lacks support in the opinions below; it also flatly contradicts testimony that petitioner was not a suspect of any crime when police officers asked her to exit the car. Pet App. 4a, 9a. In the end, respondent's justification for the search boils down to petitioner's mere presence near a person subject to search, a position this Court has repeatedly rejected. See *United States* v. *Di Re*, 332 U.S. 581, 586-87 (1948); *Sibron* v. *New York*, 392 U.S. 40, 62-64 (1968).

driver." *Newsom*, 979 P.2d at 102; *Boyd*, 64 P.3d at 425-27; *Tognotti*, 663 N.W.2d at 648-49 (N.D. 2003).

Respondent points to ten lower court decisions that it claims "have applied *Belton* to authorize the search of a passenger's personal effects incident to the arrest of the driver of the vehicle." See Br. in Opp. at 10 & n. 14. These cases are wholly inapposite. As explained in the petition, there is a sharp split among the state courts of last resort on the meaning of this Court's decision in *Houghton*. The decisions respondent cites all pre-date *Houghton*; they have no bearing whatsoever on the persisting conflict over the proper interpretation and application of *Houghton*. None of the cases respondent cites involves the legal issue or factual scenario presented here.[2] Those decisions accordingly do not detract from the need for review of the issue presented by the petition.

As for respondent's contention that this issue was settled by *Houghton* (see Br. In Opp. 2, 12-14), that argument would seem to be belied by Justice

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[2] Contrary to respondent's description of the cited cases, five of them do not even involve non-arrested vehicle occupants. See *State* v. *Flabedo*, 779 P.2d 707, 709 (Wash. 1989); *State* v. *Clarke*, 822 P.2d 138, 138 (Or. Ct. App. 1991); *United States* v. *Morales*, 923 F.2d 621, 622 (8th Cir. 1991); *Johnson* v. *Grub*, 928 F. Supp. 889, 894 (W.D. Mo. 1996); *Staten* v. *United States*, 562 A.2d 90, 90-91 (D.C. 1989). The other cases involve either passengers who voluntarily left a container in a vehicle subject to search or are silent as to whether the police ordered the passenger to leave the container in the car. See *State* v. *Moore*, 619 So. 2d 376, 377 (Fla. Dist. Ct. App. 1993); *State* v. *Loftis*, 568 So. 2d 121, 122 (Fla. Dist. Ct. App. 1990); *People* v. *McMillon*, 892 P.2d 879, 880 (Colo. 1995); *People* v. *Prance*, 277 Cal. Rptr. 567, 569 (Cal. Ct. App. 1991); *People* v. *Mitchell*, 42 Cal. Rptr. 2d 537, 538 (Cal. Ct. App. 1995).

Breyer's analysis: he both *joined* the majority opinion in *Houghton and* opined that a purse being held by its owner "amount[s] to a kind of outer clothing which under the Court's cases would properly receive increased protection." 526 U.S. at 308 (Breyer, J., concurring). Respondent's reading of *Houghton* also has been rejected by the numerous state courts (and, for that matter, the several dissenting state-court justices) who have concluded, post-*Houghton*, that a purse being held by its owner is not subject to suspicionless search. The decision below, which contributes to a growing conflict about the meaning of an important holding of this Court, accordingly should be subject to further review.

## CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2008