No. 08-2

IN THE

Supreme Court of the United States

PAUL B. MARTIN,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

BRIEF IN OPPOSITION

STEVE SIX
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record
JARED S. MAAG
Deputy Solicitor General
120 S.W. 10th Street
2nd Floor
Topeka, KS 66612
Telephone: (785) 296-2215

Counsel for the State of Kansas

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the discovery of an outstanding arrest warrant for a defendant stopped by police, which leads to the discovery of illegal drugs following a search incident to arrest, dissipates any "taint" from any alleged illegality regarding the initial stop of the defendant?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT

Petitioner fails to demonstrate that the Kansas Supreme Court decided an important federal issue in a way that conflicts with decisions on the same issue by state courts of last resort or federal circuits. Nor does Petitioner demonstrate that the Kansas Supreme Court's judgment is incorrect or inconsistent with this Court's decisions; instead, like virtually all other state supreme courts and federal circuits, the Kansas court followed and applied the Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975). The factbound application of settled law by a state supreme court in a run-of-the-mill, minor, criminal case does not warrant an exercise of this Court's plenary jurisdiction.

Even a cursory reading of the facts as set forth in the lower court opinions reveals that this was not a case of the police randomly stopping someone on the street to run a warrant check. Nor does this case involve any sort of "sweep" with police stopping all pedestrians to run warrant checks with no basis for suspecting any particular individual of anything. Instead, even if the stop here in some way violated constitutional requirements, it was not without basis (Petitioner was one of two men the police encountered, one of whom admitted his intent to urinate on a church). Nor is there any evidence of police abuse or flagrant misconduct. Rather, the officers arrested and searched Petitioner based on a valid outstanding warrant, a warrant the officers discovered based on information obtained from what

even Petitioner's counsel below conceded was a *voluntary* encounter. App. 20a. Petitioner's purported fear of a police-state run amok is simply fantasy. The petition should be denied.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILS TO DEMONSTRATE A CONFLICT OF AUTHORITY WARRANTING AN EXERCISE OF THIS COURT'S PLENARY JURISDICTION.

Supreme Court Rule 10(b) makes clear that a grant of the writ of certiorari to review a state supreme court is warranted only when such a court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Petitioner completely fails to satisfy that standard.

Petitioner cites only three cases as even potentially conflicting with the Kansas Supreme Court's decision in this case. Even a quick reading of those cases reveals that they fail to create a genuine and significant conflict of authority with the decision at issue here.

First, in *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000), the Tennessee Supreme Court never even decided the question Petitioner raises. Rather, in a *footnote*, the court observed that the "State concedes, and *we accept for purposes of this decision* . . . that, if a seizure took place, the drugs found in Daniel's pocket must be suppressed as tainted 'fruit of the poisonous tree.'" *Id.* at 422 n.2 (emphasis added).

Indeed, the Tennessee Supreme Court was clear in the first sentence of its opinion that

> [t]he dispositive issue in this appeal is whether a 'seizure' within the meaning of the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution occurred when a police officer approached the defendant, Brian Daniel, in the parking lot of a convenience store, asked Daniel to produce some identification, and retained Daniel's identification to run a computer check for outstanding warrants.

Id. at 422. The Tennessee Supreme Court never decided the issue Petitioner now presents; instead that court *assumed* the conclusion Petitioner seeks here, and did so after the state in *Daniel* apparently conceded the question. *Daniel* is no basis for a grant of certiorari in this case.

Second, *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973), is a *three paragraph per curiam* opinion (two paragraphs describing the case, one paragraph of "analysis") issued thirty-five years ago, predating by two years the Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975), which sets forth the proper framework for analyzing the issue in this case. The Kansas Supreme Court here followed and applied *Brown*; the Ninth Circuit in *Luckett* did not do so, could not have done so, and in any event did not discuss or analyze the factors *Brown* later recognized as governing. *Luckett* is no basis for a grant of certiorari here.

Third, Petitioner points to *People v. Mitchell*, 355 Ill. App. 3d 1030, 824 N.E.2d 642 (2005), an *intermediate state appellate court* decision which, by definition under Rule 10(b), has no bearing on whether an exercise of this Court's certiorari jurisdiction is warranted. That said, *Mitchell* actually supports the proposition that the Kansas Supreme Court applied the correct analysis in this case. The *Mitchell* court applied the three factors the Court articulated in *Brown v. Illinois*, just as the Kansas Supreme Court did here. In deciding to suppress evidence, the *Mitchell* court acknowledged that many courts had rejected "fruit of the poisonous tree" claims in outstanding warrant cases, including the Seventh Circuit in *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), but it distinguished those cases *on their facts*, not on the law. See *Mitchell*, 355 Ill. App. 3d at 1036–37. Indeed, all of the post-1975 cases Petitioner cites rely upon and apply *Brown v. Illinois*, as did the Kansas court here. *Mitchell* is no basis for certiorari review in this case.

Finally, even Petitioner acknowledges that no less than four state supreme courts and the Eighth Circuit likely would reach the same outcome as the Kansas Supreme Court in this case, with four of those decisions coming within the last five years, and all of them within the last ten years. Pet. 8–9. Moreover, Petitioner fails to cite or discuss the many other decisions that have held that any "taint" has been dissipated when police discover and rely upon a valid, outstanding arrest warrant. In particular, Petitioner fails to cite the Seventh Circuit's decision

in *United States v. Green*, *supra*, a case frequently relied upon and followed in subsequent cases from many jurisdictions. Nor does Petitioner cite the many state cases that predate *United States v. Green* and apply the *Brown v. Illinois* analysis. "Other courts around the nation have also held that outstanding arrest warrants supply probable cause to arrest, and thereby, provide an intervening circumstance under *Brown* [*v. Illinois*] which dissipates the taint of an initial illegal encounter." *State v. Hill*, 725 So. 2d 1282, 1285 (La. 1998) (citing cases from Colorado, Nebraska, Texas and Washington, as well as the Seventh Circuit's decision in *Green*). Simply put, there is no conflict of authority warranting certiorari review.

II. THIS CASE DOES NOT INVOLVE POLICE MISCONDUCT OR ABUSE OF POWER.

Petitioner's purported concerns about a police-state run amok are simply misplaced. This case presents no such scenario. Reading the lower court opinions, it is clear that this was not a case of the police randomly stopping someone on the street and running a warrant check to see if they might find something. As the Kansas Supreme Court declared, "[t]here is nothing to suggest that the officers' ultimate goal in making contact with [Petitioner], who was in the immediate vicinity of the urinator, was to search his person for drugs." App. 16a.

To the contrary, police had already stopped a man who appeared likely to be a companion of Petitioner's and who admitted his intent to engage in unlawful

conduct when stopped. Petitioner was nearby ("about 20 feet", App. 3a) and, like the urinator, had a bicycle. Further, Petitioner's counsel conceded that the officers' initial encounter with Petitioner was voluntary. These facts fail to present an example of flagrant or abusive misconduct by police. App. 16a ("[W]e do not perceive the conduct to be flagrant.").

Moreover, on the merits, Petitioner's arguments fly in the face of common sense and many lower court decisions. "Where a lawful arrest pursuant to a warrant constitutes the 'intervening circumstance' (as in this case), it is an even more compelling case for the conclusion that the taint of the original illegality is dissipated." *United States v. Green*, 111 F.3d at 522. That is because "where a lawful arrest due to an outstanding warrant is the intervening circumstance, consent (or any act for that matter) by the defendant is not required. Any influence the unlawful stop would have on the defendant's conduct is irrelevant." *Id.* Thus, in cases involving outstanding warrants, "there is less 'taint' than in the cases already recognized by the Supreme Court and this and other circuits as fitting within the intervening circumstances exception." *Id.*

CONCLUSION

The Kansas Supreme Court's decision not to suppress the illegal drugs discovered in Petitioner's pocket in a search incident to his arrest on a valid, outstanding warrant is correct and raises no issues meriting certiorari review. The petition should be denied.

Respectfully submitted,

STEVE SIX
Attorney General of Kansas

STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record

JARED S. MAAG
Deputy Solicitor General
120 S.W. 10th Street
2nd Floor
Topeka, KS 66612
Telephone: (785) 296-2215

Counsel for the State of Kansas

August 2008