No. 08-02

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

REPLY BRIEF FOR PETITIONER

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The State does not dispute that the question presented regarding the attenuation doctrine arises with great frequency. Nor could it: as we discuss in the petition (at 9-11), police officers today routinely seize citizens in a variety of settings for the purpose of conducting a warrant check—even though the officers lack any particularized basis to justify the seizure—and then arrest and search the individual if an outstanding warrant is discovered. The question whether evidence discovered in that search may be admitted even though it is the product of the unlawful seizure is one that lower courts face in a large number of cases.

The State also does not argue that the issue is unimportant. Indeed, the Fourth Amendment was adopted in large part to prevent random detentions of citizens by government authorities, but that is the precise law enforcement technique that is encouraged by the decision below.

The opposition to certiorari instead rests on two grounds: the alleged absence of a conflict among the lower courts and the supposed lack of proof here of "police misconduct or abuse of power" (Opp. 5). Neither argument provides any basis for denying review. To the contrary, the State's contentions confirm that review by this Court is plainly warranted.

First, the State's efforts to explain away the conflicting decisions are unavailing. In *State* v. *Daniel*, 12 S.W.3d 420 (Tenn. 2000), the prosecution's concession (see Opp. 2-3) related only to the absence of the individualized suspicion necessary to justify a seizure, and not to whether the evidence should have been suppressed. That is why the Tennessee Su-

preme Court in its opinion did not analyze the issue of individualized suspicion but did provide an explanation of the reason why suppression was appropriate: "since no intervening event or other attenuating circumstance purged the taint of the initial illegal seizure." *Id*. at 428.

Indeed, the admission of the evidence in *Daniel* had been upheld by the Tennessee intermediate appellate court solely on grounds of attenuation; it is inconceivable that the State would have conceded that issue in the state supreme court. *State* v. *Daniel*, 1998 Tenn. Crim. App. LEXIS 611, *6 (June 10, 1998) ("we find that the 'degree of attenuation here was sufficient to dissipate the connection between' the purported illegal seizure and the discovery of the" evidence), rev'd, 12 S.W.3d 420 (2000); see also *State* v. *McKenzie*, 2003 Tenn. Crim. App. LEXIS 1009, *21 n.2 (Dec. 3, 2003) (subsequent decision citing *Daniel*'s attenuation holding).

Moreover, the State is wrong in asserting (Opp. 4) that the holding in *People* v. *Mitchell*, 824 N.E.2d 642 (Ill. App. Ct. 2005), rests on the particular facts of the case. To the contrary, it rests on facts that are common to all of these cases: officers illegally seized a citizen for the purpose of running a warrant check and then arrested and searched the individual on the basis of the warrant discovered pursuant to the check. As the *Mitchell* court observed, "the purpose of the stop"—to run a warrant check—"was directly related to the arrest of defendant, which then led directly to the search of defendant." 824 N.E.2d at 649.

Mitchell's facts are replicated here. The officer seized petitioner in order to run a warrant check. When the warrant was discovered, the officer conducted a search. The issue, as in *Mitchell*, is whether the evidence discovered in that search should be

suppressed. The conflict among the lower courts is clear.

Second, the State argues (Opp. 5-6) that certiorari is not appropriate because (a) the initial detention of petitioner was voluntary; (b) the seizure of petitioner was not random; and (c) the officers' purpose was not to search petitioner for illegal drugs. These attempts to defend the officers' conduct on the merits have little relevance to the Court's certiorari decision. To the extent they are relevant, they provide further justification for review by this Court.

Although the initial detention of petitioner was voluntary, that is true in virtually all of these cases: the officer typically approaches an individual and asks a question. The interaction is transformed into a seizure when the officer retains the individual's identification for the purpose of conducting the warrant check—indeed, the State here did not even seek review of the intermediate appellate court's holding that petitioner was illegally seized. Pet. 4-5.

The claim that petitioner was not selected at random is also irrelevant. The practice of law enforcement officers is to conduct a warrant check of virtually everyone with whom they interact. The officer here testified that he did so "90-plus percent of the time when we stop someone." Supp. Tr. 10.

Officers generally are able to say that they approached a particular individual on the basis of some "hunch" short of individualized suspicion sufficient to seize the individual—after all, officers cannot approach everyone and they therefore must decide who they wish to stop. If such a hunch were sufficient to sever the link between the illegal detention and the discovery of the evidence, law enforcement officers would have a very strong incentive to engage in unconstitutional random seizures—precisely what the

exclusionary rule is designed to prevent. *Brown* v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring) ("[t]he notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost")

Finally, in none of the warrant check cases is the purpose of the seizure to conduct a search for contraband. The purpose is to conduct the warrant check. That direct link between the purpose and the search necessitates suppression, because "the answer to the question, whether the evidence was obtained by exploiting the original illegality, is undeniably yes." *Mitchell*, 824 N.E.2d at 650. Suppressing the evidence is "the only way to deter the police from randomly stopping citizens for the purpose of running warrant checks" because under the contrary rule adopted by the court below "there would be no reason for the police not to stop whomever they please to check for a warrant." *Ibid.*

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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