No. 09-402

In the Supreme Court of the United States

MARKICE LAVERT MCCANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOHN M. PELLETTIERI
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule applies when a law-enforcement officer conducted a vehicle search incident to arrest consistent with then-longstanding court of appeals precedent holding that such a search complies with the Fourth Amendment, but, after the search, that precedent was overturned by *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Arizona v. *Gant*, 129 S. Ct. 1710 (2009) 3, 7, 8
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 9
Groh v. *Ramirez*, 540 U.S. 551 (2004) 8
Herring v. *United States*, 129 S. Ct. 695 (2009) 4, 6, 7, 9
Illinois v. *Gates*, 462 U.S. 213 (1983) 9
Illinois v. *Krull*, 480 U.S. 340 (1987) 7
Malley v. *Briggs*, 475 U.S. 335 (1986) 8
New York v. *Belton*, 453 U.S. 454 (1981) 2, 7
Thornton v. *United States*, 541 U.S. 615 (2004) 3, 7
United States v. *Brunette*, 256 F.3d 14 (1st Cir. 2001) . . . 12
United States v. *Crawley*, 837 F.2d 291 (7th Cir. 1988) . . 11
United States v. *Curzi*, 867 F.2d 36 (1st Cir. 1989) 12
United States v. *Gonzalez*, 578 F.3d 1130 (9th Cir. 2009) 10
United States v. *Humphrey*, 208 F.3d 1190 (10th Cir. 2000) 3, 7
United States v. *Johnson*, 457 U.S. 537 (1982) 9
United States v. *Leon*, 468 U.S. 897 (1984) 5, 6
United States v. *Real Prop. Located at 15324 County Highway E.*, 332 F.3d 1070 (7th Cir. 2003) 11

Case—Continued Page

United States v. *Syphers*,426 F.3d 461 (1st Cir. 2005), cert. denied, 547 U.S. 1158 (2006) 12

Constitution and statutes:

U.S. Const.:
Amend. IV 2, 4, 5, 7, 8, 9
18 U.S.C. 922(g)(1) 2

Miscellaneous:

3 Wayne R. LaFave, *Search & Seizure* 7.1(c) (4th ed. 2004) 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 573 F.3d 1037. The opinion of the district court (Pet. App. 30-39) is not published in the Federal Supplement but is available at 2008 WL 2740926.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2009. The petition for a writ of certiorari was filed on October 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of possessing a firearm after having been

convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 63 months of imprisonment. The court of appeals affirmed. Pet. App. 1-29.

1. On April 18, 2007, Oklahoma City Police Officer Aaron Ulman observed a vehicle with two passengers straddling the center line between two lanes, had reason to believe the driver might be intoxicated, and executed a traffic stop. Petitioner, who was driving, told the officer that his license was suspended. Officer Ulman then requested that petitioner accompany him to his patrol car and, when petitioner complied, conducted a pat-down search and had petitioner sit in the patrol car's rear seat. Pet. App. 3.

A records check confirmed that petitioner's license was suspended and revealed that the car that petitioner was driving was not registered in petitioner's name. Officer Ulman promptly arrested petitioner for driving on a suspended license, placed petitioner in handcuffs, and returned petitioner to the rear seat of the patrol car. Officer Ulman then asked the other occupant in the stopped vehicle to exit and sit with petitioner in the patrol car's rear seat. The passenger acceded to that request. Officer Ulman searched the passenger compartment of the car and discovered a loaded handgun. Pet. App. 3-4.

2. The district court denied petitioner's pre-trial motion to suppress the handgun, holding that Officer Ulman's search did not violate the Fourth Amendment. Pet. App. 30-39. The court concluded that the warrantless search of the car's passenger compartment was a lawful search incident to arrest under binding court of appeals precedent interpreting this Court's decision in *New York* v. *Belton*, 453 U.S. 454 (1981). Pet. App. 38-

39. The court explained that, under such precedent, officers may conduct such a search "even when the arrestee has been restrained." *Id.* at 38.

3. While petitioner's appeal from his conviction was pending, this Court issued its decision in *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009). *Gant* explained that lower courts across the nation had "widely understood" *Belton* to permit vehicle searches incident to the lawful arrest of the vehicle's recent occupant in circumstances where "there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 1718. The Court specifically recognized that the cases upholding searches conducted after the vehicle's occupant had been arrested, handcuffed, and placed in a squad car "are legion." *Ibid.* (quoting *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment, and citing as among that legion, *inter alia*, *United States* v. *Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000)).

Gant ultimately read *Belton* more narrowly than the courts of appeals. *Gant* held that the search of a vehicle incident to a lawful arrest may include the vehicle's passenger compartment only if the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or if "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)).

4. The court of appeals subsequently affirmed in this case. Pet. App. 1-39.

The court did not dispute petitioner's contention that *Gant*'s holding should apply retroactively to determine whether the pre-*Gant* search in this case comported

with the Fourth Amendment, Pet. App. 16 n.5, and explained that the parties agreed that the search was indeed unconstitutional in light of *Gant*. *Id.* at 6. The court, however, concluded that "[t]he issue before us * * * is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy," *i.e.*, whether the exclusionary rule should apply to foreclose the admission of evidence of petitioner's guilt. *Id.* at 16 n.5.

The court of appeals explained that "[t]he fact that a Fourth Amendment violation occurred * * * does not necessarily mean that the exclusionary rule applies" because, unlike the Fourth Amendment, "[t]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." Pet. App. 10 (quoting *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009)). The cost of applying that rule, the court continued, is "letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system"—and the "costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." *Ibid.* (quoting *Herring*, 129 S. Ct. at 701). The court surveyed the decisions of this Court concerning the good-faith exception, *id.* at 11-15, and concluded that they embody two central principles that "build[] upon the underlying purpose of the exclusionary rule": "First, the exclusionary rule seeks to deter objectively unreasonable police conduct," and, second, its purpose "is to deter misconduct by law enforcement officers, not other entities" or institutions. *Id.* at 15.

Based on those principles, the court held that the good-faith exception applies "to a search justified under the settled case law of a United States Court of Appeals,

but later rendered unconstitutional by a Supreme Court decision." Pet. App. 15. In that context, the court explained, the exclusion of evidence would produce "no deterrent effect" because "there is no basis for believing that excluding evidence resulting from an error of the court will 'have a significant deterrent effect on the * * * judge[s]'" whose decisions law-enforcement officers must follow, and because following settled decisional law of the court of appeals "certainly qualifies as objectively reasonable law enforcement behavior." *Id.* at 16-18 (quoting *United States* v. *Leon*, 468 U.S. 897, 916 (1984)).

The court applied that holding by explaining that its prior decision in *Humphrey*, *supra*, "is factually indistinguishable from the instant case" and concluding that several other of its pre-*Gant* decisions "are consistent with *Humphrey*." Pet. App. 8-9 & n.3. The court accordingly held that "[t]he search in this case was wholly consistent with and supported by [its] precedent prior to *Gant*," *id.* at 9, and, for that reason, that "[t]he district court * * * properly denied [petitioner's] motion to suppress." *Id.* at 18.

ARGUMENT

Petitioner contends (Pet. 8-16) that the courts of appeals are in conflict over the applicability of the good-faith exception to conduct that appellate courts considered valid at the time it took place, but is held to be unlawful by a later decision. He also contends (Pet. 16-21) that the Tenth Circuit's decision conflicts with this Court's holding that new Fourth Amendment rules apply to cases pending on direct review. The court of appeals correctly held that, as a remedial matter, the good-faith exception to the exclusionary rule applies where, as

here, a law-enforcement officer conducts a search based on then-settled case law of the court of appeals, which subsequently is overturned by this Court. Although a recent decision by the Ninth Circuit has created a division of authority on the question presented, the government has sought rehearing en banc in that case and that request remains pending. In the government's view, review by this Court would be premature at the present time.

1. a. The exclusionary rule does not apply when law-enforcement officers conduct a search in good faith under settled court of appeals precedent that (at the time) would have upheld the search as lawful. Although that precedent may later be overturned, as in this case, excluding evidence from such a search by officers who comply with the settled jurisprudence of a court of appeals would have no appreciable deterrent effect on law-enforcement conduct. The court of appeals correctly concluded that the evidence of petitioner's guilt was admissible under good-faith exception to the exclusionary rule.

This Court recently emphasized that "the exclusionary rule is not an individual right" and "applies *only* where it 'result[s] in appreciable deterrence.'" *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009) (emphasis added; brackets in original) (quoting *United States* v. *Leon*, 468 U.S. 897, 909 (1984)). Because applying the exclusionary rule in any given case both imposes a "costly toll upon truth-seeking and law enforcement objectives" and "offends basic concepts of the criminal justice system" by "letting guilty and possibly dangerous defendants go free," the Court has made clear that "the benefits of deterrence must outweigh the costs" in order to warrant the exclusion of evidence obtained in viola-

tion of the Fourth Amendment. *Id.* at 700-701 (citations omitted). It is insufficient that exclusion would have some deterrent effect. *Id.* at 702 n.4. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 702. As a result, "evidence should be suppressed '*only* if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 701 (emphasis added) (quoting *Illinois* v. *Krull*, 480 U.S. 340, 348-349 (1987)).

Applying the exclusionary rule in this case would have no such deterrent effect. This Court in *Gant* recognized that (until April 2009) the court of appeals decisions that had interpreted *New York* v. *Belton*, 453 U.S. 454 (1981), and upheld materially identical searches "are legion." *Arizona* v. *Gant*, 129 S. Ct. 1710, 1718 (2009) (quoting *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment)). Justice Scalia's concurring opinion in *Thornton*, which *Gant* quotes, specifically identifies the Tenth Circuit's decision in *United States* v. *Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000), as amongst that "legion." See *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment). And, as the court of appeals explained here, *Humphrey* "is factually indistinguishable from the instant case" and is consistent with other Tenth Circuit precedent that, at the time of the search, reflected binding decisional law for Officer Ulman. See Pet. App. 8-9.

It follows that excluding evidence obtained from the officer's search of petitioner's vehicle would not serve any appreciable deterrent function. The court of ap-

peals' pre-*Gant* understanding of the *Belton* rule accorded with the "widely understood" interpretation of *Belton* amongst the courts of appeals before April 2009, and that understanding "ha[d] been widely taught in police academies" for over a quarter century and had been followed by law-enforcement officers in the field "in conducting vehicle searches during [that period]." See *Gant*, 129 S. Ct. at 1718, 1722; cf. 3 Wayne R. LaFave, *Search & Seizure* 7.1(c) at 517 & n.89 (4th ed. 2004) ("[U]nder *Belton* a search of the vehicle is allowed * * * even after the defendant was removed from it, handcuffed, and placed in the squad car.") (collecting cases). Thus, before *Gant*, an objectively reasonable officer would have done exactly what Officer Ulman did. Relying on settled court of appeals authority to conduct a search "certainly qualifies as objectively reasonable law enforcement behavior" and it is not the mission of the exclusionary rule to deter such behavior. Pet. App. 16-18 (noting that because the exclusionary rule is not designed to deter judges, "excluding evidence based on judicial error would serve no deterrent purpose").

Gant confirms that conclusion. As petitioner notes (Pet. 20), the Court has "explained that 'the same standard of objective reasonableness that [it] applied in the context of [the good-faith exception to suppression] in *Leon*" also "defines the qualified immunity accorded an officer" in the Fourth Amendment context. *Groh* v. *Ramirez*, 540 U.S. 551, 565 n.8 (2004) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986)) (citation omitted). *Gant*'s conclusion that qualified immunity will protect from liability those officers who conducted unconstitutional vehicle searches before *Gant* in reasonable reliance on the prevailing pre-*Gant* understanding of *Belton,* see *Gant*, 129 S. Ct. at 1722 n.11, should therefore

compel the conclusion that the good-faith exception to the exclusionary rule also applies and permits the admission of the evidence obtained from such searches.

b. Petitioner contends (Pet. 16-21) that the court of appeals' decision conflicts with this Court's decisions in *United States* v. *Johnson*, 457 U.S. 537 (1982), and *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which hold that Fourth Amendment decisions by this Court govern the constitutionality of searches in cases that, at the time, are still pending on direct review. Petitioner is incorrect. Those decisions reflect the principle that, on direct review, judicial evaluation of the constitutionality of a search must accurately resolve that constitutional question by recourse to all authoritative decisions of this Court, including those issued after the search in question. See *Griffith*, 479 U.S. at 322-323 (explaining similarly situated defendants should all benefit from the same understanding of the Fourth Amendment). That retroactivity jurisprudence does not speak to the good-faith exception to the exclusionary rule. Unlike the Fourth Amendment, "the exclusionary rule is not an individual right." *Herring*, 129 S. Ct. at 700. And "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983).

Petitioner also errs in his contention (Pet. 20) that the Court's disposition in *Gant* reflects the Court's understanding that the good-faith exception does not apply in this context. As noted, *Gant*'s treatment of the qualified-immunity question is inconsistent with petitioner's reading of the Court's silence on this point. See

pp. 8-9, *supra*. Indeed, *Gant* had no occasion to (directly) address whether the good-faith exception should apply because the State in *Gant* focused entirely on the constitutionality of the search and failed to argue as an alternative that the good-faith exception would warrant reversal. The Court's silence on a point not argued does not preclude the government from advancing, and the court of appeals from accepting, the good-faith exception as a basis for affirming petitioner's conviction.

2. Petitioner's assertion of a three-way division of authority (Pet. 8-16) is greatly overstated. The Ninth Circuit's recent decision in *United States* v. *Gonzalez*, 578 F.3d 1130 (2009), is the only decision that petitioner cites that conflicts with the decision in this case. In the government's view, the Court's plenary review is unwarranted at the present time because that newly developed conflict may be eliminated by the court of appeals on rehearing.

One month after the Tenth Circuit issued its decision in this case, a panel of the Ninth Circuit held that the good-faith exception to the exclusionary rule does not apply to a pre-*Gant* vehicle search found unconstitutional under *Gant*, even if that search was conducted by law-enforcement officers in good faith pursuant to the then-prevailing understanding of *Belton*. See *Gonzalez*, 578 F.3d at 1132. The panel's brief analysis, which spans barely more than one page in the Federal Reporter, neither cites or otherwise acknowledges the Tenth Circuit's decision in this case and, thus, fails to address the Tenth Circuit's good-faith analysis. The government filed a petition for rehearing en banc in *Gonzalez*, the Ninth Circuit called for a response, and the petition and opposition are currently pending before the court of appeals. If the Ninth Circuit grants either

panel or en banc rehearing and aligns itself with the Tenth Circuit, its decision will eliminate the current conflict on the question presented in this petition.

Petitioner fails to identify any other division of authority warranting review. Although petitioner asserts that the Seventh and First Circuits have issued decisions in conflict with the decision below, Pet. 12-16, none of those decisions reflect a conflict of authority. The Seventh Circuit, for instance, held that the good-faith exception to the exclusionary rule *applied* to the unconstitutional search before it in *United States* v. *Real Property Located at 15324 County Highway E.*, 332 F.3d 1070 (2003), because law-enforcement agents acted in good-faith reliance on a search warrant. *Id.* at 1075-1076. Although the court stated in dicta that it "decline[d] to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon subsequently overruled case law," *id.* at 1076, its decision to "decline" to rest its judgment on those grounds did not definitively reject the possibility that the court might accept such an interpretation in the future in a case involving a warrantless search. Indeed, the court was not presented with the question, and it properly held the good-faith exception applicable on narrower grounds appropriate to searches conducted pursuant to a judicial warrant. Cf. *United States* v. *Crawley*, 837 F.2d 291, 292-293 (7th Cir. 1988) (declining to follow dictum in a previous panel decision).

The First Circuit decisions that petitioner cites (Pet. 15) likewise fail to reflect a division of authority. None of the cases addresses circumstances where an officer conducts a good-faith search that would have been found lawful under court of appeals precedent that was settled

when the search was performed. And two of those decisions appear to provide some support for the reasoning of the Tenth Circuit in this case by holding that officers reasonably relied on a defective warrant in light of then-existing law. See *United States* v. *Syphers*, 426 F.3d 461, 467-468 (1st Cir. 2005) (applying good-faith exception where law enforcement officers who relied on a defective warrant had an "objectively reasonable belief" that the warrant was valid "[u]nder then-prevailing caselaw"), cert. denied, 547 U.S. 1158 (2006); *United States* v. *Brunette*, 256 F.3d 14, 19-20 (1st Cir. 2001) (applying good-faith exception to reliance on defective warrant where "the uncertain state of the law at the time made reliance on the warrant objectively reasonable"); see also *United States* v. *Curzi*, 867 F.2d 36, 38, 44 (1st Cir. 1989) (finding unreasonable a warrantless search of a defendant's home where "[n]o endeavor was made to procure a search warrant" despite "ample time" to do so; rejecting invocation of the good-faith exception where officers did not rely on subsequently overtured precedent or act pursuant to an "error [that] was attributable * * * to some errant judicial officer").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOHN M. PELLETTIERI
Attorney

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