No. 19-5596

IN THE SUPREME COURT OF THE UNITED STATES

ERIC T. LATHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

ERIC T. LATHAM,
As Pro Se Litigate

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QUESTION PRESENTED

Is whether this Court's ruling in Arizona v. Gant, 556 U.S. 332 (2009), permitted police officers to conduct a "search incident to arrest" for **only** "**probable cause**" to arrest the individual for a minor traffic offense, then **bootstrap** the evidence found in the search to a "search incident to arrest" exception.

ANSWER

The answer to the question presented is **no.** The answer has always been a straight forward **NO!** If its close now, "its because the District Courts keep moving the 'Goal-Posts.'"

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U.S.C.S., Constitution, Amendment 4

1 Criminal Constitutional Law § 3.03 (Matthew Bender)

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ANNOTATION REFERENCES

Validity, Under Federal Constitution, of warrantless search of motor vehicle-Supreme Court cases. 142 L. Ed. 2d 993.

Constitutionality of searching premises without warrant as incident to valid arrest-Supreme Court Cases. 108 L. Ed. 2d 987.

Supreme Court's views as to federal legal aspects of the right of privacy. 43 L. Ed. 2d 871.

The Supreme Court and Pretextual Traffic Stops, 87 Crim. L. & Criminology 544 (1997).

PROCEDURAL BACKGROUND

The petition for a writ of certiorari was filed on June 18, 2019, and the government had until September 16, 2019 to respond to the petition. The government requested an extension of time on September 10, 2019, and the request for the extension of time was from the September 16, 2019 date to and include October 16, 2019, and that extension of time was granted on September 11, 2019.

The government filed for an additional extension of time from the response due date of October 16, 2019 to and including November 15, 2019, on October 4, 2019, and "because petitioner is an incarcerated federal prisoner proceeding pro se, the government did not obtain his consent to this request." The request for the extension of time was granted and the government filed its "brief to opposition to the writ of certiorari" on November 15, 2019.

Petitioner's reply brief goes as follow:

THE GOVERNMENT MISSTATED THE FACTS OF THE CASE

The government asserted that petitioner was arrested for the original offense of "drunk-driving," but that assertion is not based on what the officers alleged happened prior to the search and or arrest of Petitioner. The government's argument attempts to buttress the basis for the search by relying upon evidence that was discovered after Petitioner was lodged in jail, but in doing so, the government ignores the fundamental principle that **probable cause and reasonable suspicion are judged by looking at the facts and circumstances that existed before the search.** See, e.g., Ornelas v. United States, 517 U.S. 690, 701 (1996). Thus, the court should disregard that a tequila bottle and **unopened can of beer** were found in the vehicle as part of the search.

Furthermore, the Court should disregard the government's assertion of

Petitioner looking intoxicated because, as stated by Detective ("Det.") O'Jerio at the suppression hearing, "he did **not** observe Petitioner's signs of intoxication **until** they were both at the jail," (Hearing on Mot. to Suppress, RE 46, Page ID # 240-41) and though Officer ("Ofc.") Lenamen allegedly saw signs Petitioner was intoxicated at the traffic stop, Ofc. Lenamen did **not** testify and it is unknown when these signs were observed. Likewise Ofc. Freeman testified "she did **not** observe any signs of Petitioner "drunk-driving." (Id. at 216-224).

The Application of Mich. Comp. Law § 257.624(a) to This Case

Mich Comp Laws § 257.624(a) ("M.C.L. § 257.624(a)"), which goes as followed:

> "M.C.L. § 257.624(a)(1) Except as provided in subsections (2) and (5), a person who is an operator or occupant shall not transport or possess **alcoholic liquor** in a container that is open or uncapped or upon which the seal is broken within the passenger area of the vehicle upon a highway, or within the passenger area of a moving vehicle in any place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, in this state."

Pet. App. A5, at 1-2.

Det. O'Jerio alleged to have observed an "open container" violation, and as he took possession, the beer can was open, it was approximately half full, and it was still cold to the touch, and he believe it had some sweat on it too from condensation. (Id. at 232). But NONE of the officers testified to there being "**alcoholic liquor** in the open container," that the Det. alleged was "handed to him." It can be asserted that Petitioner handed the Detective a "returnable container." A returnable container is defined in M.C.L. § 445.571(d) which provides:

> M.C.L. § 445.571(d) "returnable container" means a beverage container upon which a deposit of at least 10 cents has been paid, or is required to be paid upon the removal of the container from the sale or consumption area, and for which a refund

of at least 10 cents in cash is payable by every dealer or distributor in this state of that beverage container.

Hence making the understanding that Petitioner did **not** violate the Michigan Law of having **alcoholic liquor in the returnable container.**

The officers had the open container **prior** to the search of the vehicle, and "should have searched the contents of the alleged open container" that Det. O'Jerio was handed and made sure that it was "**alcoholic liquor**" in that container. The officer did **not** preserve the evidence of the "traffic offense/ citation." Knowles v. Iowa, 525 U.S. 113, 116-19, 142 L. Ed. 2d 492, 119 S. Ct. 484 (1998)(the rule's underlying twin rationales of officer safety and evidence preservation were only minimally present and **not** present at all, respectfully, in the context of a traffic citation).

Sixth Circuit Interpretation Of An Open Container Violation And This Court's Ruling On The Mission Of Issuing A Ticket

The Sixth Circuit Court of Appeals has made it clear that and "open container" violation is the type of violation that would **only** result in the "issuance of a citation." See. United States v. Jackson, 684 F.3d 448, 452 (6th Cir. 2012); Thomas v. Plummer, 489 Fed. App'x 116, 118 (6th Cir. 2012); **United States v. Gross, 662 F.3d 393, 413 (6th Cir. 2011)**; United States v. Sweeney, 402 Fed. App'x 37, 38 (6th Cir. 2010); United States v. Copeland, 321 F.3d 582, 591 (6th Cir. 2002). According to former 6th Cir. R. 206(c), one panel could **not** overrule another panel's decision, absent intervening inconsistent opinion from this Court of which there is **none.**

This Court has made it even more clear that, "a seizure justified **only** by a police-observed traffic violation thus became **unlawful** if prolonged beyond the time reasonably required to complete the mission of issuing a ticket." See. Rodriguez v. United States, U.S. , 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015).

Search Must Be Incident To Arrest, Not Merely Just Probable Cause To Arrest

In Arizona v. Gant, 556 U.S. 332 (2009), this Court set out to address a problem in the Fourth Amendment doctrine that stemmed from its decision in New York v. Belton, 453 U.S. 454 (1981). In Belton, the Court applied Chimel to the automobile context and held that when the police have lawfully arrested a recent occupant of a car they may search the passenger compartment "as a contemporaneous incident to arrest." Id. at 460. Applying the principles of Chimel, this Court predicated its decision on the "generalization" that articles in the passenger compartment "are in fact generally, even if not enevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary items.'" Id. (quoting Chimel, 395 U.S. at 763). Although this Court in Belton cautioned that its holding "in no way altered the fundamental principles established in the Chimel case regarding the basic scope of the searches incident to a lawful custodial arrests," id. at n.3, this Court in Gant acknowledged that in practice Belton searches had come to exceed their permissible scope under Chimel and were being conducted solely for investigative purpose, Gant, 556 U.S. at 341-43. On this expansive reading of Belton, vehicle searches would be authorized incident to every recent occupant's arrest even if the passenger compartment were not in the arrestee's reach at the time of the search. Id. at 343. The Lower courts, in construing Belton so broadly, were "treating the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of Chimel." Id. at 342 (quoting Thornton, 541 U.S. at 624 (O'Connor, J., concurring in part)).

In seeking to curtail these investigative searches under Belton, this Court in Gant began by reaffirming the axiom that a warrantless search is

"per se unreasonable" absent justification under one of the "few specifically established and well-delineated exceptions" to the warrant requirement. Id. at 338 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). One such exception, established by Chimel, is for searches of a suspect that are incident to the suspect's arrest and that are intended to ensure that the suspect does not have the ability to access weapons or destroy evidence. Id. (citing Chimel, 395 U.S. at 763). The Gant Court held that this Chimel exception, which had been impermissibly broadened for vehicle searches under Belton, authorized the searches of a car incident to a recent occupant's arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Id. at 343. With this holding, this Court made it clear that Chimel **cannot** be construed to authorize the investigative vehicle searches then being conducted under Belton. Id. at 347 ("Construing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis."). This Court also held that separate and apart from Chimel's two traditional justifications for the warrant exception, "circumstances unique to the vehicle context justify a search incident to a **lawful** arrest when it is 'reasonable to believe evidence relevant to the **crime of arrest** might be found in the vehicle.'" Id. at 343 (quoting Thornton, 541 U.S. at 632 (Scalia, J., Concurring in judgment). In many cases, as when a recent occupant is arrested for a **traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.** Gant, 556 U.S. at 343.

This Court in Gant then applied Chimel and the new vehicle exception to the facts of the case, in which Mr. Gant, after getting out of a parked car, was arrested for driving with a suspended license, handcuffed, and placed

in the back seat of a police cruiser before officer searched his car and found a gun and cocaine. Id. at 336. In this Court's view, the officers' search was unreasonable. Id. at 344. The two Chimel rationales for a search incident to arrest did not apply because Mr. Gant was handcuffed and secured in the back of a police car. Id. The rationales underlying the vehicle exception also did not apply, as there was no chance of finding evidence of the "crime of arrest" -Driving without a License- in Mr. Gant's car. Id

No one can dispute that the officers did **not** make an arrest for the violations of M.C.L. § 257.624(a)(1). (See. Hearing on Mot. To suppress RE 46, Page ID # 220, 246), nor did the officers arrest Petitioner for any other crime prior to the search of Petitioner vehicle. Id. What can be disputed is here that Petitioner did **not** violated the Michigan open container Law as defined in M.C.L. § 257.624(a)(1). (See. Page 2 and 3 of this reply brief.). Yet unlike in Gant itself, which explicitly allows only a search of a car for evidence "incident to a **lawful** arrest" for the "**crime of arrest,**" 556 U.S. at 343 (emphasis added), the Sixth Circuit Court of Appeals and the government concludes that a Gant car search has a broader investigatory rationale that is implicated simply by **probable cause** to believe the suspect has committed an arrestable offense, **not the fact of arrest itself.**

At the outset, the government's argument for expanding the Gant exception to searches incident to **probable cause** to arrest FORGETS the fundamental context in which Gant arose. This Court in Gant was intent on reining in the purely investigative searches that had been occurring under Belton, and to that end this Court expressly rejected the notice of a "police entitlement" to search a car whenever a recent occupant is arrested. Gant, 556 U.S. at 342 (citation omitted). By permitting a search of a vehicle incident to **probable cause** to arrest as part of a Gant vehicle search, the government interprets

Gant as authorizing law enforcement to conduct a broad investigatory search of the vehicle "before" making the decision to arrest. This reading of Gant EVISCERATES the limits this Court sought to impose on Belton, car searches, and in fact would give the police more latitude to search than they under lower court's pre-Gant reading of Belton, which authorized a search incident to arrest only if there had been "**a lawful custodial arrest**" and the search was "a contemporaneous incident to arrest." Belton, 453 U.S. at 460. This Court **cannot** fairly read Gant as professing to scale back Belton's investigatory searches while at the same time authorizing a search-incident-to-**probable-cause**-to-arrest exception that by definition **invites such investigatory searches.**

The government justifies allowing pre-Gant searches "under Rawlings, therefore, police may conduct a search incident to arrest before making a formal arrest when they (1) have probable cause to make the arrest; (2) do not use the fruits of that search to establish the requisite probable cause; and (3) make the arrest shortly after the search. 448 U.S. at 111.(See Gov. Response at Page # 7).

The language in Rawlings reflects a commsense acknowledgment that where a formal arrest is under way at the time a suspect's wingspan is searched, as it surely was on the facts of Rawlings, a hypertechnical insistence upon excluding evidence uncovered in such a search would unnecessarily constrain the discretion of law enforcement. The government casts this reading of Rawlings as reflecting an "implicit critique" of the case, ante at 24, but the opposite is true. Rawlings reaches the right result. The objective circumstances there -Mr. Rawlings was detained by four police officers for forty-five minutes while two officers went to get a warrant- were such that there was **never** any question that Mr. Rawlings was going to be arrest at the time of the search, and given that fact, this Court sensibly did not believe it "particularly

important" that the search preceded the "formal arrest," because such an arrest had already been set in motion. Read in light of these facts, Rawlings **cannot** be construed as endorsing pre-arrest Chimel searches where an arrest is **not** at least under way. See Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944)("reminding counsel that words of the Court's opinions are to be read in light of the facts of the case under discussion" and that "general expressions transposed to other facts are often misleading").[2] And while the government suggests that it is unclear what such an "underway" arrest means, the meaning is **not** ambiguous. **If the arrest has not begun, there is no reasonable dispute that it is about to begin. It is imminent and inevitable. The concept of an "underway" arrest distills, in a word, the concern at the end of Rawlings.**

In any event, Petitioner arrest was **not** under way- under any definition of that term- When the police searched Petitioner's vehicle. Id. at 216, 246). Unlike in Rawlings, the circumstances here show that Petitioner was unlikely to be arrested before officer Vaughn found the gun at the end of his search. The officer's investigatory search of the vehicle, with **no** arrest of Petitioner imminent or inevitable, bear **no** resemblance to the search incident to an underway arrest in Rawlings.

Of course, this case involves a Gant vehicle search, and it is not clear that Rawlings applies at all in this context. Recognizing that applying the literal language of Rawlings to a routine traffic stop creates the risk of abuse by law enforcement officers. Arguably, under the literal language of Rawlings, an officer could search a suspect's vehicle during a routine traffic stop, arrest the suspect after finding contraband, and then validate the search by testifying that he arrested the suspect for the misdemeanor traffic offense, Petitioner does not believe that to be the holding of Rawlings, nor the law of the Fourth Amendment.[3] The reasonableness of the search **depends**

on what the officers actually did, not what they had the authority to do. See. Knowles, 525 U.S. at 114 (holding that despite an officer's statutory authority to arrest a suspect for the commission of a traffic offense, an officer may **not** conduct a search incident to arrest based on that authority unless he actually conducts an arrest).

The government contends that Petitioner argues that "the officers were required formally to state, as he sat handcuffed in the patrol car, that he was under arrest before conducting a search incident to arrest under Gant," (see. Gov. Response at P. 6), but the government forgets that in Gant, this Court concluded that a search of the vehicle incident to arrest is permissible **only** if "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of offense of arrest." Id. at 351. Thus, neither one of those justification apply here.

The first set of circumstances that would warrant a search of the vehicle incident to arrest, would be if the Petitioner was unsecured and within reaching distance of the passenger compartment at the time of the search. He was not. (See. Hearing on Mot. To Suppress. RE 46, Page# 219-20). At the time of the search, Petitioner was handcuffed and secured in the back of the patrol vehicle. (Id).

The second set of circumstances that would warrant a search of the vehicle incident to an arrest, is if it were a "reasonable to believe the vehicle contains evidence of the offense of arrest." This too does **not** apply to this case. Petitioner was **not** under arrest. Moreover, the officers had all the relevant evidence needed for the "issuance of the citation(s) before conducting the searching of the vehicle."(Id).

In this way, the search of Petitioner's car was **not** a "search incident to arrest" as this Court has ever conceived of that exception to the warrant requirement. The search had **nothing** to do with disarming an arrestee or preventing him from destroying evidence related to an offnse of arrest, see. Chimel, 395 U.S. at 763, and it was **only** after the search turned up a gun that the officers decided to arrest Petitioner. To put it another way, the officers in this case engaged in the search to satisfy their unparticularized hunches.

The investigative search in this case, disconnected from an actual arrest, runs contrary to the basic Fourth Amendment principle that "conducting a Chimel search is **not** the government's right; it is an exception-justified by the necessity-to a rule that would otherwise render the search unlawful." Thornton, 541 U.S. at 627 (Scalia, J., concurring). The police officers' decision to search the car before arresting Petitioner involved the type of "rummag[ing] at will" against which the Fourth Amendment protects. See. Chimel, 395 U.S. at 767.

Allowing the search "incident to **probable cause** to arrest" for minor traffic offenses **eviscerates** the limits this Court has placed upon the "warrantless" searches of vehicles in its rulings in Gant and Knowles. This was **not** an "search incident to arrest, but a search incident to a citation/ probable cause to arrest," and the evidence obtained from that search should have been suppressed for it violating Petitioner Fourth Amendment right to be free for illegal searches and seizures.

The Government Incorrectly Cited Case-Law In This Case

The government cites; United States v. Powell, 483 F.3d 836, 838-842 (D.C. Cir.)(enbanc), cert. denied, 552 U.S. 1043 (2007); United States v.

Bizier, 111 F.3d 214, 217 (1st Cir. 1997); United States v. Hernandez, 825 F.2d 846, 852 (5th Cir. 1987), cert. denied, 484 U.S. 1068 (1998); United States v. Torres-Castro, 470 F.3d 992, 997 (10th Cir. 2006), cert. denied, 550 U.S. 949 (2007); United States v. Banshee, 91 F.3d 99, 102 (11th Cir. 1996), cert. denied, 519 U.S. 1083 (1997).

First of all; these cases are pre-Gant cases from the Circuits, but as discussed, **Gant and Justice Scalia concurrence from Thornton demand some form of an arrest requestment.** (See Def. Princ. Br. For App. at 21).

The Government cites; United States v. Patiutka, 804 F.3d 684, 688 (4th Cir. 2015), but this case is **not** similar to Petitioner's case. In Patiutka, the troop got "consent to search the vehicle, and the troops believe Patiutka was involved in 'criminal activity.'" Patiutka, 804 F.3d at 688. The facts of Petitioner's case is; Petitioner was **only** being detained in the back of the patrol car for the allegely committing the traffic offense, (See. Id at Page ID# 216, 246), see Muehler v. Mena, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005)(This Court found that a hancuuffed woman was **not** arrested during a search pursuant to a warrant, but was merely reasonably detained).

The government cites: United States v. McCraney, 674 F.3d 614, 619 (6th Cir. 2012), but McCraney had to do with "officer safety," and the officer did **not** state that "they had officer safety" concerns with Petitioner being handcuffed and secured in the back of a patrol car. (See. Id at Page ID# 220). Thus, this case is **not** similar to Petitioner's and or issues.

The Government cites: United States v. Leo, 792 F.3d 742, 748 n.1 (7th Cir. 2015), but the government in Leo "has **never** suggested, for example, that the police officers searched Leo's backpack 'incident to arrest.'" Leo,

792 F.3d at 748 n.1.

The government finally cites; United States v. Chartier, 772 F.3d 539, 546 (8th Cir. 2014), and this case is **not** similar to Petitioner case, due it involving a "drug investigation and the dog alerting to the officers that there was drugs in the vehicle." Chartier, 772 F.3d at 545.

Furthermore, the government asserted that it "provided Petitioner with a copy the government's opposition to the petition for writ of certiorari in Diaz v. United States, cert. denied, 138 S. Ct. 981 (2018)(No. 17-6606)", but in fact, the government did **not** provided Petitioner with that copy.

Probable Cause Has A Higher Standard Then Reasonable Suspicion

The government asserted in its argument that, "the search of Petitioner's car independently was lawful under the automobile exception to the warrant requirement. See. Gov. Argument on page 10, # 3). But the government forgets that "reasonable suspicion has been defined by most courts as some level of cause greater then merely a suspicion or a hunch, but **less** then 'probable cause.'" With this Court's ruling in Gant, , " as to when a recent occupant is arrested for a **traffic violation**, there will be **no reasonable** basis to believe the vehicle contains relevant evidence." Gant, 556 U.S. at 343. Thus, if its "no reasonable suspicion" for a search of a vehicle for evidence of the traffic offense, then there is **no way** there could have been "probable cause" to search the vehicle with its higher requirements. The government's argument is **without** merit.

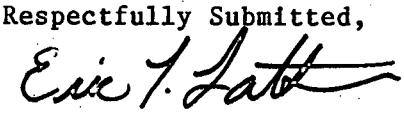
CONCLUSION

Petitioner respectfully request this Honorable Court to Grant the writ of certiorari, because Petitioner has made a prima facie case, and this petition is with merit. Or for this Honorable Court to; Grant, Reverse, and Remand ("GVR"),

with instructions to "suppress the evidence" obtained from Petitioner's vehicle, because the search of violated Petitioner's clearly established Fourth Amendment right, through this Court's ruling in Arizona v. Gant and Knowles v. Iowa.

November 22, 2019

Respectfully Submitted,



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FOOTNOTES

2. In suggesting otherwise, the government observes that Rawlings "relied on a number of decisions holding that a search incident to arrest can lawfully precede the arrest." Ante at 7-9. But the cases cited in Rawlings do **not** endorse a "search-incident-to-probable-cause-to-arrest" exception to the warrant requirement, and they were wrongly decided if they do. The officers involved in those cases were conducting the searches with a conditional intent to arrest for the offense for which they had probable casue if the search was fruitful. See, e.g., United States v. Brown, 463 F.2d 949, 950 (D.C. Cir. 1972)(where the officer's search was clearly intended to confirm or dispel that the envelope "protruding from appellate's shirt pocket" contained narcotics-as the appellate's eyes were "glassly," he was behaving suspiciously in an area where the officers had "frequently observed" narcotics transactions, and the envelope was "of the type in which [the officer] had found narcotics on previous occasions"- the court upheld the search even though the suspect had "not formally been placed under arrest" at the time of the officer seized the envelope). For this reason, and because the circumstances of this case triggered no concerns about pretextual searches, the case also does **not** control Petitioner's case. See Wayne R. LaFave, Search and Seizure § 5.4 (a)(5th ed. 2012)(noting that it is "particularly **unsettling**" to interpret Rawlings to permit pre-arrest searches where probable cause was so trivial that it otherwise would likely have been ignored"). See. Page # 8 of Pet. Reply Br.)

3. It is clear, however, that a search which precedes an arrest, and which serves as part of the justification for the arrest **cannot** be characterized as a search incident to arrest. See. for example, Sibron v. New York (1968) 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889, 44 Ohio Ops 2d 402; and Smith v. Ohio (1990) 494 U.S. 541, 108 L. Ed. 2d 464, 110 S. Ct. 1288. (See. Page, 8).