No. 11-235

In the Supreme Court of the United States

JAMES ANTOINE FAULKNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 15.8, petitioner submits this supplemental brief to call the Court's attention to the decision in *State* v. *Gardner*, 2011 WL 5328637 (Ohio Ct. App. Nov. 4, 2011), an authority that was not available at the time of petitioner's last filing.[1]

This case involves the question whether discovery of an outstanding arrest warrant is an intervening circumstance that dissipates the taint of an illegal search or seizure. We argue in the petition that the federal courts of appeals and state courts of last resort are in conflict on this question. Several courts, including the Eighth Circuit in this case, have held that discovery of a warrant is such an intervening circumstance and resolves the first two inquiries under *Brown* v. *Illinois*, 422 U.S. 590 (1975), in the government's favor. Other courts, including the Sixth Circuit in *United States* v. *Gross*, 2011 WL 5456694 (June 15, 2011), amending 624 F.3d 309 (6th Cir. 2010), have rejected that approach. The choice between these approaches frequently will determine whether illegally obtained evidence is admissible at trial. See Pet. 8-15.

In *Gardner*, the Ohio Court of Appeals confirmed the existence of this conflict. That court noted that "[s]ome courts have held that discovery of a warrant after an arrest is fruit of the poisonous tree; others

[1] Although petitioner filed his reply brief in support of certiorari on November 8, 2011, four days after the Ohio court's decision in *Gardner*, petitioner's counsel did not become aware of the decision until November 10, when it was included in the Westlaw database.

have held that the warrant is an intervening and attenuating circumstance; and others have held that the flagrancy of the police conduct and/or the foreseeability of the discovery of a warrant should control the applicability of the rule." 2011 WL 5328637, at *8 (internal footnote omitted).

In *Gardner* itself, the Ohio Court of Appeals rejected the approach taken by the Eighth Circuit in this case, instead applying the Sixth Circuit's rule. 2011 WL 5328637, at *6 (citing *Gross*, 624 F.3d at 320). It also pointed to decisions of the Ninth and Tenth Circuits in support of that approach. *Ibid.* (citing *United States* v. *Lopez*, 443 F.3d 1280 (10th Cir. 2006), and *United States* v. *Luckett*, 484 F.2d 89 (9th Cir. 1973)). The Ohio court accordingly held that, "if the warrant was discovered as a result of an unlawful stop or seizure (unless its discovery was unconnected to and attenuated from the illegality), then any evidence seized in the search incident to the arrest must be suppressed." *Id.* at *9.

Because the courts are in conflict on the question presented, that question is an important and recurring one, and the choice of rule frequently will determine whether evidence is admissible—all points confirmed by the decision in *Gardner*—the petition for a writ of certiorari should be granted.

Respectfully submitted.

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