No. 06-827

In the Supreme Court of the United States

ZACHARY HRASKY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

DANIEL S. GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the discovery of two firearms in petitioner's vehicle resulted from an invalid search incident to arrest under *New York* v. *Belton*, 453 U.S. 454 (1981), because of petitioner's distance from his vehicle at the time of arrest.

2. Whether this Court should overrule its decision in *Belton* or limit it by precluding the search of a car incident to an arrest for a traffic violation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statute:

Miscellaneous:

In the Supreme Court of the United States

No. 06-827

ZACHARY HRASKY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 453 F.3d 1099. The memorandum and order of the district court (Pet. App. 17a-18a) and the report and recommendation of the Magistrate Judge (Pet. App. 19a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2006. A petition for rehearing was denied on September 13, 2006 (Pet. App. 35a). The petition for a writ of certiorari was filed on December 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 2, 2004, Nebraska state police received a tip from an informant that petitioner might be driving a specific green Chevrolet pick-up truck without a valid driver's license. Pet. App. 20a. The informant also indicated that petitioner might be involved in the distribution of methamphetamine. *Ibid.* Based on that tip, State Trooper Jeff Wallace stopped petitioner as he was driving the truck in question in Scotts Bluff County, Nebraska. *Id.* at 2a, 20a-21a. Trooper Wallace determined that petitioner was driving with a suspended license and that he had two prior offenses for driving with a suspended license. *Id.* at 2a, 21a. Because of those two prior offenses, Trooper Wallace told petitioner that he would not be released with only a citation. *Ibid.* Rather, Trooper Wallace handcuffed petitioner and placed him in the back of the patrol car. *Ibid.*

When petitioner learned that he would not be released with a citation, he asked to speak to a narcotics investigator about his knowledge of drug crimes in the area. Pet. App. 2a. Trooper Wallace agreed and summoned Investigator Cody Enlow, a narcotics officer, to the scene. *Ibid.* Investigator Enlow talked to petitioner for approximately 45 minutes about becoming a confidential informant, but ultimately concluded that petitioner was unwilling or unable to commit to assisting law enforcement. *Id.* at 2a, 6a. Trooper Wallace then conducted a search of petitioner's truck incident to the arrest. *Id.* at 2a-3a. In a cubby hole of the truck's passenger area, the officers discovered two loaded handguns. *Id.* at 3a, 23a. Following that search, petitioner was taken to jail, and the truck was towed away. *Id.* at 3a.

2. On October 20, 2004, a federal grand jury indicted petitioner on one count of being a convicted felon in possession of firearms, in violation of 18 U.S.C. 922(g)(1). Gov't C.A. Br. 1. Petitioner moved to suppress the evidence seized from his truck. Pet. App. 1a.

A Magistrate Judge recommended that petitioner's motion be granted. Pet. App. 19a-34a. After rejecting the government's argument that the firearms were seized during a valid inventory search of petitioner's truck, *id.* at 23a-25a, the Magistrate Judge addressed whether the warrantless search of the truck was a valid search incident to petitioner's arrest under *New York* v. *Belton*, 453 U.S. 454 (1981), Pet. App. 25a-33a. The Magistrate Judge determined that "the area beneath the rear seat 'cubby hole' was within the vehicle's passenger compartment and [petitioner]'s 'immediate control' at the time of his arrest, and the officers' search permissibly extended to this 'container' as incident to [petitioner]'s arrest." *Id.* at 27a. Citing *Thornton* v. *United States*, 541 U.S. 615 (2004), the Magistrate Judge added that "the passenger compartment of a vehicle may be searched as an incident to the defendant's arrest even after the defendant is no longer within the vehicle, and is handcuffed and in police custody." Pet. App. 27a. Consequently, the Magistrate Judge reasoned, "the fact that [petitioner] had been removed from the vehicle and was secured in the back of a cruiser does not take this search outside the scope of a search incident to arrest." *Id.* at 28a.

Petitioner further argued "that the vehicle search was not contemporaneous to his arrest and therefore was not justified as incident to his arrest." Pet. App. 28a. The Magistrate Judge found that the search of petitioner's truck was not "remote in place" from the site of

petitioner's arrest. *Id.* at 29a. But, while calling it a "close question," the Magistrate Judge found that the search of petitioner's truck was "remote in time" from his arrest. *Id.* at 29a-33a. In that regard, the Magistrate Judge determined that "[t]he vehicle search did not occur within a few minutes of [petitioner]'s arrest." *Id.* at 30a. The Magistrate Judge found the facts to be "blurr[y]" because petitioner prompted delay by asking to speak with officers about becoming a confidential informant. *Id.* at 31a. The Magistrate Judge also acknowledged that he had found no comparable cases in which the temporal delay between arrest and search "might reasonably be 'charged against the defendant,'" and that he was likewise "unable to find any case in which the issue of who caused the delay made any difference in deciding the issue of 'contemporaneousness.'" *Ibid.* (citation omitted). Nonetheless, the Magistrate Judge found the delay unreasonable. *Id.* at 32a.

In a short Memorandum and Order dated April 4, 2005, the district court adopted the Report and Recommendation of the Magistrate Judge. Pet. App. 17a-18a.

3. On interlocutory appeal, the court of appeals reversed. Pet. App. 1a-16a. The court found it "significant that during the sixty minutes that [petitioner] was in the patrol car, the officers were unsure whether he would be transported to the police station for booking, or released at the scene with only a citation." *Id.* at 6a. The court explained that "[i]t was only after [petitioner] was deemed unable or unwilling to assist law enforcement that the trooper determined to make a 'full custodial arrest' in the sense that underlies the doctrine of searches incident to arrest." *Id.* at 6a-7a (citation omitted). In contrast to the district court's determination that the search was temporally remote from the arrest, the court

of appeals believed that "[t]he search of [petitioner]'s truck certainly was contemporaneous with this decision to proceed with a full custodial arrest." *Id.* at 7a. Noting that this case presents "an unusual situation in which the arrestee initiated discussions with officers in an effort to persuade them to issue a citation in lieu of carrying out a full custodial arrest," the court added that once "the officers determined to make a full custodial arrest, the search of [petitioner]'s vehicle was conducted immediately." *Id.* at 8a.

Judge Gibson dissented. Pet. App. 9a-16a. Because he concluded that the "warrantless search of [petitioner]'s truck * * * occurred more than one hour after [petitioner]'s arrest for driving with a suspended license," Judge Gibson thought that the search was unconstitutional. *Id.* at 9a. Noting his disagreement with the majority about when the relevant arrest occurred, Judge Gibson asserted that petitioner "was subject to a lawful custodial arrest for driving while suspended at the point when he was handcuffed and placed in the patrol car," and that the search of his truck "more than one hour later" was not "a contemporaneous incident of that arrest." *Id.* at 11a (quoting *Belton*, 453 U.S. at 460). At the same time, Judge Gibson acknowledged that the search did "not run afoul of the geographical" or spatial limitation to searches incident to arrest, because the search was conducted at the scene of the arrest. *Id.* at 12a. "However," Judge Gibson reiterated, "the greater than one-hour delay here between the arrest and the search does run afoul of the temporal limitation." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-7) that this Court should grant a writ of certiorari to address (1) whether a search under *New York* v. *Belton*, 453 U.S. 454 (1981), may take place when the occupant of the vehicle is arrested beyond "reaching distance" of the vehicle, and (2) whether *Belton* should be reconsidered. Further review is not warranted, particularly in the context of this interlocutory decision of the court of appeals remanding the case for further proceedings.

1. This Court typically awaits final judgment before exercising certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). Lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

Indeed, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if a defendant's conviction and sentence ultimately are affirmed on appeal. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). That approach promotes judicial efficiency because the issue that petitioner raises, concerning the admissibility of evidence, may be rendered moot by further proceedings concerning petitioner's guilt or innocence on remand. If the suppression issue remains live following further proceedings on remand, petitioner

could raise that issue, along with any other issues, in a single petition following entry of final judgment. See *Hamilton-Brown Shoe*, 240 U.S. at 258.

2. Petitioner argues (Pet. 8-14) that the search of his vehicle was not a valid search incident to arrest under *Belton*. Petitioner does not, however, raise the issue on which the district court suppressed the fruits of the search of his truck, and on which Judge Gibson would have ruled in his favor—whether there was sufficient *temporal* proximity between petitioner's custodial arrest and the search of his truck to satisfy *Belton*. Rather, petitioner contends (Pet. 8-14) that there was insufficient *spatial* proximity between him and his vehicle.

a. That contention is not well presented in this case. In the court of appeals, petitioner argued only that the search was not temporally proximate to his arrest; not, as he now argues, that he was not arrested within reaching distance of his vehicle. See Pet. C.A. Br. 6-24. While the court of appeals' decision contains some background statements of law culled from other decisions, see Pet. App. 3a-5a, it focuses on the temporal question raised by petitioner in that court, see *id.* at 5a-9a, not the reaching-distance question on which petitioner now relies.

b. In any event, petitioner's contention lacks merit. It is well established that when police make an arrest, they may search the arrestee's person and the area "within his immediate control" without obtaining a warrant. *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969). That rule is justified by the need "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the "concealment or destruction" of evidence. *Id.* at 763. Accord *Thornton* v. *United States*, 541 U.S. 615, 620 (2004); *Knowles* v. *Iowa*, 525 U.S. 113, 116-117 (1998).

In *United States* v. *Robinson*, 414 U.S. 218, 235 (1973), this Court held that a search incident to arrest is per se reasonable, and accordingly permissible under the Fourth Amendment, regardless of whether the circumstances of the particular case involve one of the twin rationales for such a search, *i.e.*, a threat to officer safety or a risk of evidence destruction. The Court explained that the authority to search incident to arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." *Ibid.* The Court reasoned that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for the arrest." *Id.* at 234 n.5.

In *Belton*, the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460 (footnote omitted). Reaffirming its holding in *Robinson* that a search incident to a custodial arrest is permissible even if the officer is not searching for weapons or attempting to prevent the destruction of evidence, the Court explained that, in this "particular and problematic context," a bright-line rule is "essential" to provide "[a] single, familiar standard * * * to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 458, 460 n.3, 461 (quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979)).

Recently, in *Thornton*, the Court held that "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle." 541 U.S. at

617. "In all relevant respects," the Court explained, "the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and destruction of evidence as the arrest of one who is inside the vehicle." *Id.* at 621. Thus, the Court upheld the search of a vehicle where the police first made contact with an individual after he had left his vehicle, and where the police conducted the search when the defendant was handcuffed in the back seat of a patrol car. See *id.* at 618.

Under those precedents, petitioner's contentions lack merit. The police first made contact with petitioner when he was not only within reaching distance of his car, but was actually in his car, which is more than *Thornton* requires. See Pet. App. 2a. And the police arrested petitioner at the scene, and searched his vehicle while he was handcuffed in a police car, just as in *Thornton*. See *id.* at 2a-3a.

The disagreement among the lower court judges in this case concerned the *temporal* proximity between the arrest and search, and turned in large part on when petitioner was subject to a custodial arrest. See Pet. App. 7a, 11a. Petitioner does not raise that issue here, and for good reason: it is too factbound to warrant this Court's review, especially considering the "unusual" facts of this case, where petitioner sought to forestall a custodial arrest, and was thus responsible for any delay. *Id.* at 8a.

c. Petitioner erroneously alleges (Pet. 9-12) that "[t]here is a deep division among the federal and state courts as to whether the Fourth Amendment permits officers to search an arrestee's vehicle when he is arrested beyond reaching distance from it." Pet. 9. Significantly, the cases cited by petitioner are all cases in

which arresting officers first encountered defendants some distance away from their vehicles—not cases, like this one and *Belton*, where an officer first confronted a defendant when he was in a vehicle, and then ordered him out of the vehicle before making the arrest and conducting the search. In addition, all of the federal court of appeals and state supreme court cases relied on by petitioner as the basis for the circuit split predate *Thornton*.

Petitioner's contention (Pet. 9) that the Seventh Circuit acknowledged a circuit split in *United States* v. *Pittman*, 411 F.3d 813 (2005), only underscores those points. In *Pittman*, the police first made contact with the car's former passenger in the basement of a house half a block from the car, and all of the cases cited for the asserted disagreement concerning the application of *Belton* in that distinguishable circumstance predate *Thornton*. See *id.* at 815.

For example, in *United States* v. *Edwards*, 242 F.3d 928 (10th Cir. 2001), police who arrived in response to a bank's silent alarm found the defendant "standing outside the bank with a parking lot attendant." *Id.* at 931. Subsequently, the police located a car that the defendant's girlfriend had rented (*id.* at 931-932), approximately "100-150 feet away" from the place where they had encountered and arrested the defendant. *Id.* at 938. The Tenth Circuit held that the search of that rental car was not a valid search incident to the defendant's arrest, because "there is no evidence whatsoever that Edwards had any control over the rental car immediately preceding or at the time of his arrest." *Ibid.* Nothing in *Edwards* suggests that the police would not have been permitted to search the car incident to an arrest had the

police first encountered the defendant in the car and subsequently removed him from the vehicle.[1]

Similarly, in *United States* v. *Strahan*, 984 F.2d 155 (6th Cir. 1993) (cited at Pet. 10), the defendant was "apprehended * * * outside the doorway of [a] lounge, approximately thirty feet from defendant's automobile." *Id.* at 156-157. Although the Sixth Circuit invalidated the search, it explained that "*Belton* governs when the arrestee is removed from the car prior to the time of the search." *Id*. at 159. The Sixth Circuit correctly noted that in *Belton* itself, "the officer removed the defendant from his vehicle prior to making the search of the vehicle." *Id.* at 159 n.5. Indeed, the defendant in *Belton* was removed from the car before his arrest, as well. See *Belton*, 453 U.S. at 456 (trooper "directed the men to get out of the car, and placed them under arrest"). Because the officer in this case first encountered petitioner when he was inside his vehicle, cases like *Strahan* are inapposite. Cf. *United States* v. *Fafowora*, 865 F.2d 360, 362 (D.C. Cir.) (the police "c[a]me upon the arrestees outside of an automobile"), certified question dismissed, 489 U.S. 1002 (1989).

Moreover, as this Court recently held in *Thornton*, "*Belton* governs even when an officer does not make contact until the person has left the vehicle." *Thornton*, 541 U.S. at 617. Thus, the statement in *Strahan* that *Belton* and similar cases "appl[y] only where the police initiate contact while the defendant is within his automobile, but subsequently remove the arrestee" (*Strahan*,

---

[1] Far from disagreeing with the decision below, the Tenth Circuit recently cited that decision with approval in a search- incident-to-arrest case involving temporal proximity. *United States* v. *Torres-Castro*, 470 F.3d 992 (2006).

984 F.2d at 159), is contrary to this Court's subsequent decision in *Thornton*.

3. Petitioner further contends (Pet. 14-26) that this Court should overrule or limit *Belton*, perhaps by exempting custodial arrests for traffic violations from its scope, or by confining it to searches in which an officer reasonably believes that a motor vehicle contains evidence of the crime of arrest. See Pet. 23. Petitioner's claim lacks merit.

a. There is no support for limiting *Belton* based on the nature of an arrestee's criminal offense. This Court has long recognized that "[t]he danger to the police officer flows *from the fact of the arrest*, and its attendant proximity, stress, and uncertainty, and *not from the grounds for arrest*." *Robinson*, 414 U.S. at 234 n.5 (emphases added); accord *Thornton*, 541 U.S. at 621. Thus, concerns for officer safety as well as preservation of evidence are generally present regardless of the nature of the crime of arrest. In *Robinson*, for instance, the Court upheld a search of an arrestee's person incident to an arrest for driving with a revoked operator's permit. 414 U.S. at 220-221, 223, 234-235. Similarly, in this case, a threat to officer safety was presented by the loaded firearms that petitioner carried in his truck, even though he was arrested for driving without a valid permit.[2]

---

[2] Contrary to petitioner's suggestion (Pet. 25), there is no "disconnect between the *Belton* doctrine and this Court's decision in *Knowles* [v. *Iowa*, 525 U.S. 113 (1998)]." Rather, *Knowles* held that the Fourth Amendment does not permit a search incident to a traffic stop in which a citation is issued but no custodial arrest occurs. *Id.* at 118-119. The Court explained that traffic citations do not present the same concerns for officer safety and the destruction of evidence that are generally, but not always, present in custodial arrests. *Ibid*. The Court in *Knowles*

Belton and *Thornton* establish a bright-line rule in order to provide workable standards in highly volatile and potentially dangerous situations involving custodial arrests of occupants and recent occupants of motor vehicles. That goal would be undermined by any requirement that "there must be litigated in each case" the question whether the circumstances of the particular custodial arrest implicated one of the underlying purposes of the search-incident-to-arrest doctrine. *Thornton*, 541 U.S. at 620 (quoting *Robinson*, 414 U.S. at 235). Similarly, it would undermine the purposes of *Belton* if officers were required to make snap decisions about whether vehicles were reasonably likely to contain evidence of specific crimes of arrest (as opposed to evidence of other crimes or weapons that might be used to injure the officers or to effectuate an escape).[3]

Petitioner mistakenly claims (Pet. 20-22) that the bright-line rule of *Belton* is unworkable. Even if there are still some close cases, *Belton* has effectively resolved

---

also recognized that officers are entitled to "conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest." *Id.* at 118.

[3] It would also make little sense to limit "*Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Pet. 23 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)). If it is "reasonable to believe" that a car contains evidence of a crime, a search of the car is permissible for that evidence under the automobile exception to the warrant requirement. See, *e.g.*, *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) (search is permitted upon probable cause—a "reasonable ground for belief"—that the car may contain evidence of a crime) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949)). The proposed rule would thus appear to be subsumed within the existing justifications for a search, and, if so, would serve no independent purpose (except, perhaps, as a source of confusion).

the vast majority of cases, and as discussed above, alternative approaches present their own problems. This case hardly shows any difficulty with the *Belton* framework, because the officer first confronted petitioner in his car and never removed petitioner from the scene until after the search, and petitioner has abandoned the temporal proximity argument on which he relied in the court of appeals.

Contrary to petitioner's suggestion (Pet. 14), not even the dissenting opinion in *Thornton* supports petitioner's proposals to limit *Belton* to searches for evidence related to the crime of arrest (Pet. 23) and to eliminate *Belton* searches incident to custodial traffic arrests (Pet. 25). Justice Stevens dissented in *Thornton* on the ground that "[t]he bright-line rule crafted in *Belton* is not needed for cases"—unlike this one—"in which the arrestee is first accosted when he is a pedestrian." 541 U.S. at 636. That dissent nowhere suggests that *Belton* should apply only when the search is relevant to the crime for which the defendant was arrested. Rather, it makes clear that, when the police first accost an individual in an automobile, *Belton* establishes an appropriate bright-line rule for searches incident to custodial arrest. See *id.* at 634, 635-636.

b. Since *Thornton* was decided, this Court has on at least two occasions denied petitions seeking to revisit *Belton*. See *United States* v. *Osife*, 398 F.3d 1143 (9th Cir.), cert. denied, 126 S. Ct. 417 (2005); *Rainey* v. *Commonwealth*, 197 S.W.3d 89 (Ky. 2006), cert. denied, 127 S. Ct. 1005 (2007). There is no reason for a different result here. Contrary to petitioner's suggestion (Pet. 24 n.6), this case does not present a better vehicle than *Rainey* to revisit *Belton*. Petitioner asserts (Pet. 24) that the officers in this case could not have found evi-

dence of the crime for which petitioner was arrested, driving with a suspended license. Yet the officers could well have found a suspended license, or even a facially valid but counterfeit license. Moreover, when an officer conducting a *Belton* search finds loaded firearms in the vehicle, as in this case, the officer safety concern of *Belton* and *Robinson* is clearly implicated, even if the preservation of evidence rationale is not.

In any event, this case is a poor vehicle for revisiting the bright-line rule of *Belton* in light of its "unusual" facts. Pet. App. 8a. As discussed, any delay in the search incident to arrest "might reasonably be 'charged' against the defendant" (*id.* at 31a), and there is considerable confusion as to when petitioner was arrested (compare, *e.g.*, *id.* at 2a (Trooper "Wallace informed [petitioner] that he would not be released with a citation"), with *id.* at 6a ("the officers were unsure whether he would be * * * released at the scene with only a citation")).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

DANIEL S. GOODMAN
Attorney

MARCH 2007