MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus curiae National Association of Police Organizations, Inc., respectfully moves for leave of Court to file the accompanying brief[*] under Supreme Court Rule 37.2. Counsel for petitioner has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for respondent has withheld consent.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action and education.

Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 2,000 police unions and associations, 238,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

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[*] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

The decision of the Arizona Supreme Court, holding that officers violate the Fourth Amendment by conducting a vehicle search incident to the lawful custodial arrest of a criminal suspect if they first take the safety precaution of securing the arrested person in a police car, adversely affects the interests of our members by establishing a precedent that compromises safety procedures and eliminates clear and unequivocal guidelines for law enforcement officers on the streets.

For these reasons, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

November, 2007

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

SUMMARY OF ARGUMENT

I. The Arizona Supreme Court has misread this Court's precedents, which allow vehicle searches incident to the lawful, custodial arrest of a recent occupant, without regard to the inability of the arrested person to gain access to the interior of the vehicle.

II. The Arizona Supreme Court's ruling unreasonably forces arresting officers to choose between two risks—jeopardizing their own safety, or jeopardizing the prosecution of the arrested person.

ARGUMENT

I. THE DECISION OF THE ARIZONA SUPREME COURT IS IRRECONCILABLE WITH THIS COURT'S PRECEDENTS.

Basing its ruling exclusively on the Fourth Amendment and this Court's search decisions, the Arizona Supreme Court said that Tucson officers could not search the vehicle recently occupied by respondent after he had been locked in the back of a police car. The court thought that this Court's decisions in *New York v. Belton*, 453 U.S. 454 (1981) and *Thornton v. United States*, 541 U.S. 615 (2004) merely defined the *scope* of a vehicle search incident to arrest, but "[did] not purport to address" the question of whether such searches could even be conducted. *State v. Gant,* 216 Ariz. 1, ¶ 12, 162 P.2d 640, 643 (2007).

These conclusions of the Arizona Supreme Court are at odds with the plain language used by this Court in its decisions: "[W]e hold 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." *New York v. Belton, supra*, 453 U.S. at 460. (Emphases added.) "So long as the arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers *may search* that vehicle incident to arrest." *Thornton, supra,* at 623-24 [upholding a vehicle search after the arrestee was handcuffed and placed into the back seat of the patrol car, as was respondent]. (Emphasis added.) "*Belton* allows police *to search* the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants'." *Id.,* at 622. (Emphasis added.)

The Arizona Supreme Court also thought that neither *Belton* nor *Thornton* eliminated the need to conduct a case-by-case assessment of the arrestee's access to destructible evidence or weapons, as discussed in *Chimel v. California*, 395 U.S. 752 (1969) [involving the scope of search incident to arrest within a residence]. This conclusion is also inconsistent with this Court's pronouncements regarding the substitution of a general, "workable" rule in all instances of vehicle searches incident to arrest, in place of *Chimel*'s fact-specific inquiry as to the area within the arrestee's immediate control, and the likelihood that evidence or weapons might be found there.

Because "'[A] single, familiar standard is essential 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'," *New York v. Belton, supra,* 453 U.S. at 458, quoting *Dunaway v. New York,* 442 U.S. 200, 213-14 (1979), this Court generalized that the passenger compartment of the vehicle would be an area inherently within the arrestee's control, and said, "In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization." *New York v. Belton, supra,* 453 U.S. at 460.

> "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and preserve evidence by searching the entire passenger compartment."

Thornton v. United States, supra, 541 U.S at 623.

The Arizona Supreme Court has misapplied this Court's controlling precedents, returning officers in that State to the pre-*Belton* situation of excessive "second-guessing" and *"post hoc* evaluation of police conduct" *United States v. Sharpe*, 470 U.S. 675, 686 (1985), this Court expressly rejected. "Fourth Amendment rules 'ought to be expressed in terms that are readily applicable by police in the context of the law enforcement activities in which they are necessarily engaged,' and not 'qualified by all sorts of

ifs, ands and buts'." *Atwater v. City of Lago Vista, Texas,* 532 U.S. 318, 347 (2001), quoting *Belton*.

Requiring police officers and reviewing courts to determine, in each individual case, the extent to which the passenger compartment of an arrestee's vehicle was or was not within his physical control is neither practical nor faithful to this Court's rulings.

II. OFFICERS SHOULD NOT BE PUT TO THE GAMBLE OF CONDUCTING VEHICLE SEARCHES INCIDENT TO ARREST WHILE LEAVING POTENTIALLY-DANGEROUS ARRESTEES UNSECURED.

This Court has long recognized the dangerous nature of law enforcement work and the need to allow officers to take reasonable precautions for their safety. *Terry v. Ohio,* 392 U.S. 1 (1968) [weapons frisk of detainee based on reasonable suspicion the person is armed and dangerous]; *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) [ordering driver out at traffic stop because of inherent dangers]; *Maryland v. Wilson,* 519 U.S. 408 (1997) [same for passengers]; *Washington v. Chrisman,* 455 U.S. 1 (1982) [reasonable for officers to monitor the movement of arrested persons]; *Michigan v. Long,* 463 U.S. 1032 (1983) [protective "vehicle frisk" based on perceived dangers]; *Maryland v. Buie,* 494 U.S. 325 (1990) [safety sweep of premises based on articulable suspicion of danger].

The decision of the Arizona Supreme Court means that officers must try to calculate the potential dangerousness of each person arrested at a vehicle stop and decide whether to risk a surprise attack by leaving the arrestee unrestrained while conducting a

search of the vehicle incident to arrest, or whether to reduce the risks to his or her own safety by handcuffing and securing the arrestee in the patrol car, thereby forfeiting the ability to search the vehicle for weapons, contraband or other fruits, instrumentalities or evidence after doing so. Making the wrong calculation in a seemingly-non-threatening case could obviously prove fatal for an unsuspecting officer who was unaware that the arrestee was, for example, an escapee or a fugitive from more serious charges.

As the Court has noted, "Every arrest must be presumed to present a risk of danger to the arresting officer. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger." *Washington v. Chrisman, supra,* 455 U.S. at 7. The bright line rule of *Belton* and *Thornton* sensibly accommodates the legitimate needs of officers to take steps to restrain arrestees before turning their attention to a search of the interior of a vehicle, a task which generally places officers in a disadvantageous position in case of surprise attack.

Under the paradoxical ruling of the court below, the privacy rights of an arrestee in the passenger compartment of his stopped vehicle could be legitimately infringed if he were standing nearby without restraint; however, this same search would somehow violate his privacy rights under the Fourth Amendment if he were handcuffed and seated in a nearby patrol car. This dichotomy makes the violation or non-violation of the Constitution dependent not on the lawfulness of a contemporaneous custodial arrest,

but solely on the decision of an officer to take, or not to take, standard precautions for his or her personal safety after it has already been determined that an arrest is going to occur.

In order to conduct a vehicle search incident to arrest, law enforcement officers in the State of Arizona are now forced to assume an unnecessary risk of violent confrontation. This is neither a tolerable nor a reasonable requirement. "Certainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry v. Ohio, supra,* 392 U.S. at 23.

Application of the firmly-established exception allowing warrantless searches incident to arrest should not be made to depend on an officer's forbearance of legitimate safety precautions. Yet under the Arizona ruling, officers are put to a choice between "potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble." *Thornton v. United States, supra,* 541 U.S. at 622.

CONCLUSION

The petition for writ of certiorari should be granted and the judgment of the Arizona Supreme Court should be reversed.

November, 2007

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