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

REPLY BRIEF FOR PETITIONER

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The government acknowledges that the circuits are in conflict on the issue presented here: whether the discovery of an outstanding arrest warrant is an intervening circumstance that dissipates the taint of an illegal search or seizure. It does not deny that the issue is one of enormous importance, arising with great frequency. And the rule applied below has significant implications for law enforcement, encouraging police officers to engage in constitutionally questionable stops. The question whether that rule is correct should be resolved by this Court.

A. The Circuits Are In Conflict On The Question Presented

To begin with, the government does not deny the existence of a conflict in the circuits on the question in this case. Opp. 12. It hardly could: Just last year, renewing its petition for rehearing in *United States* v. *Gross*, 624 F.3d 309 (6th Cir. 2010), which presented the precise question at issue here, the government informed the Sixth Circuit that the case "involve[d] a question of exceptional importance" because the Sixth Circuit's holding in *Gross* "conflicts with authoritative decisions of two other U.S. Courts of Appeal." Pet. For Reh'g En Banc 1, *United States* v. *Gross*, No. 08-4051 (6th Cir. Nov. 2, 2010) ("U.S. *Gross* Pet."). Because the Sixth Circuit denied the government's petition for rehearing, only this Court's intervention can resolve the conflict.

Although that in itself is enough to warrant further review, it bears mention that the government is wrong in contending that, "aside from *Gross*," the decisions cited in the petition do not conflict with the ruling below. Opp. 14. The government evidently re-

cognizes that the cited decisions involve facts indistinguishable from those at issue here; by suppressing the challenged evidence, the courts in those cases necessarily concluded, at least implicitly, that discovery of an outstanding warrant does not purge the taint of an unlawful search or seizure. And that is how the Sixth Circuit in *Gross* read the decisions in *United States* v. *Lopez*, 443 F.3d 1280 (10th Cir. 2006), and *United States* v. *Luckett*, 484 F.2d 89 (9th Cir. 1973) (cited at Pet. 12-13). It explained that each "applied the exclusionary rule despite the discovery of an outstanding arrest warrant during the course of an illegal search," and that the decisions stand for the proposition that, "where there is a stop with no legal purpose, the discovery of a warrant during that stop may be a relevant factor in the intervening circumstance analysis, but it is not by itself dispositive." *United States* v. Gross, No. 08-4051, slip op. 14 (6th Cir. 2011), amending 624 F.3d 309 (2010). See also *State* v. *Daniel*, 12 S.W.3d 420, 428 (Tenn. 2000) (state conceded lack of reasonable suspicion for stop and, notwithstanding discovery of warrant, "no intervening event or other attenuating circumstance purged the taint of the initial illegal seizure"). If that reasoning is incorrect, it is this Court that will have to say so.

B. The Conflicting Rules Will Lead To Divergent Outcomes In Many Cases

Having conceded that the courts of appeals are in conflict, the government's principal contention is that the "conflict does not warrant review by this Court at this time" because the circuits all "apply the same *Brown* factors in cases of this type," no court applies "a categorical rule," and it "is not clear that the analytical tension among the circuits will pro-

duce different outcomes in a significant number of cases." Opp. 13. For several reasons, this argument is wrong.

First, that all circuits purport to apply the *Brown* factors is beside the point; the conflict, of course, is over *what those factors mean* when the intervening circumstance is the discovery of an outstanding arrest warrant. As we explained in the petition (at 5-6, 8), the Eighth Circuit applies an essentially per se rule that discovery of a warrant resolves the first and second *Brown* inquiries in the government's favor.[1] So do other courts that have adopted the same approach: "The following rule emerges from these cases: * * * the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant." *McBath* v. *State*, 108 P.3d 241, 248 (Alaska Ct. App. 2005); see *id.* at 244 (citing cases).

The Sixth Circuit and the courts that agree with it follow the contrary approach, holding that discovery of a warrant is *not* the sort of intervening circumstance that dissipates the taint of an illegal stop or search. Thus, although the Sixth Circuit expressly

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[1] The government's assertion that the Eighth Circuit "did not foreclose the possibility that the amount of time elapsed since the initial stop could be material in an outstanding-warrant case" (Opp. 9, citing Pet. App. 9a-10a) disregards the plain import of the court's decision. The Eighth Circuit's only discussion of the point at the cited pages of its opinion is the statement that, "if the discovery of an outstanding arrest warrant is the second [*Brown*] factor's intervening circumstance[,] in analyzing the first factor, much of the taint of an illegal seizure is purged."

found in *Gross* that the stop in that case was neither flagrantly nor purposefully unconstitutional under the third *Brown* factor (slip op. at 15-16), the court held that the second *Brown* factor required suppression notwithstanding the discovery of an outstanding warrant during the unlawful stop. *Id.* at 11-15. Indeed, the government had a far stronger attenuation argument in *Gross* than it does in the present case, because in *Gross* police officers did not recover the incriminating evidence immediately at the scene of the illegal stop; the evidence was found some time later, after the suspect had been transported to the sheriff's department. *Id.* at 2-3. The government's assertion that it "is not clear that the analytical tension among the circuits will produce different outcomes in a significant number of cases" therefore could be correct only if the first two prongs are read out of the *Brown* test in discovery-of-arrest-warrant cases—and whether that should be done is the question presented here.

Second, use of the Eighth Circuit's rule (under which discovery of an outstanding warrant settles the first two *Brown* inquiries in the government's favor) rather than the Sixth Circuit's contrasting approach will determine the outcome of the vast majority of warrant-discovery cases. As a practical matter, establishing "flagrancy" under the third prong of *Brown* in the sense of that term used by the Eighth Circuit—which looks to whether "the impropriety of the misconduct was obvious or whether the official knew that his misconduct was improper but engaged in it anyway" (Pet. App. 10a)—is virtually impossible. The government has not identified, and we have not discovered, *any* federal warrant-discovery case in

which a court suppressed evidence under the third *Brown* factor.[2] As a consequence, use of the Eighth Circuit's approach will lead almost inevitably to the introduction of evidence found after arrest on an outstanding warrant that was discovered during an illegal stop; as the outcome in *Gross* demonstrates, the conflicting Sixth Circuit standard often will lead to a different outcome.

Third, the government's contention that the question presented is of limited significance is belied by its own filings in *Gross*. As the government acknowledges (Opp. 12), in *Gross* it *twice* sought rehearing on the precise issue presented here, informing the Sixth Circuit of the issue's "exceptional importance." U.S. *Gross* Pet. 1. It also argued in its renewed petition for en banc rehearing that, in conflict with the panel's holding in *Gross*, the Seventh and Eighth Circuits have "found a valid arrest warrant to be an intervening circumstance sufficient to dissipate the taint caused by an illegal automobile stop" (U.S. *Gross* Pet. 2)—a rule reaffirmed by the holding below. The government's argument to this Court here is not consistent with what it told the Sixth Circuit in *Gross*.

C. The Issue Is A Recurring One Of Great Practical Importance

Finally, although it does not bear directly on the circuit conflict presented in the petition, we note that

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[2] We are aware of two state-court decisions that found police misconduct sufficiently "flagrant" to negate the presumption that "[e]xistence of the warrant was an intervening circumstance." *State* v. *Grayson*, 336 S.W.3d 138, 147-48 (Mo. 2011); *People v. Mitchell*, 824 N.E.2d 642, 649-50 (Ill. App. Ct. Ill. 2005).

the government is incorrect in suggesting that suppression of illegally obtained evidence in the circumstances of this case "will have greater social costs than deterrence benefits." Opp. 11. To be sure, the Court's decisions in this area have "focused on the efficacy of the [exclusionary] rule in deterring Fourth Amendment violations in the future." *Herring* v. *United States*, 555 U.S. 135, 141 (2009). But the Eighth Circuit's warrant-discovery rule affirmatively *encourages* constitutionally questionable police activity by providing assurance that, in all but the most patent cases of police misconduct, discovery of an outstanding warrant will permit introduction of unlawfully obtained evidence. As Justice Sotomayor recently emphasized, such a rule means that, "'in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior.'" *Davis* v. *United States*, 131 S. Ct. 2419, 2435 (2011) (Sotomayor, J., concurring in the judgment) (quoting *United States* v. *Johnson*, 457 U.S. 537, 561 (1982)). In particular, the Eighth Circuit's rule "create[s] perverse incentives" for officers to make stops in hopes of discovering that a detainee has a pending warrant. *Gross*, No. 08-4051, slip. op. at 14-15.[3]

Moreover, the government makes no effort to deny either the recurring nature or the enormous practical importance of the issue presented in this case. As described in the *amicus* brief filed on behalf of fourteen of the Nation's leading scholars in the field of police enforcement practices, empirical studies

[3] We do not contest the government's statement that "[s]omeone who is wanted on an arrest warrant has no legitimate interest in continuing to avoid arrest." Opp. 11. The question here is a different one: whether *evidence* discovered as a consequence of the unlawful stop leading to the arrest is admissible.

have documented "a large number of unlawful stops like the one giving rise to this case, almost certainly in the hundreds of thousands each year." Br. *Amici Curiae* of Dr. Ian Ayres, *et al.*,[4] at 5; *see also id.* at 6-8 (describing studies showing rates of unlawful stops between 15%-30% in Richmond, Virginia and New York City). Moreover, there are millions of outstanding arrest warrants listed in police databases across the Nation, some dating to the 1970s and many for trivial offenses such as unpaid parking tickets. *Id.* at 9-13. Pennsylvania alone had more than 1.4 million pending warrants in 2007—"enough to account for 11.3 percent of the state's population"—and "1.2 million of Pennsylvania's backlog of 1.4 million warrants were for lesser offenses, including traffic violations." *Id.* at 9, 12. This undisputed confluence of vast numbers of illegal police stops and the huge nationwide backlog of unserved warrants makes it essential that courts apply the proper rule in cases like this one.

In fact, the need for further clarity in the controlling rule is illustrated by the circumstances of this case. The government devotes much attention to whether the misconduct of the officer who made the illegal stop here was "flagrant" (*Brown*'s third factor), asserting that he stopped petitioner "in good faith." Opp. 11. In fact, as we demonstrated in the

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[4] The scholars include Professors Ian Ayres and Tracey Meares of Yale University, Jeffrey Fagan and Andrew Gelman of Columbia University, Bernard Harcourt of the University of Chicago, Christopher Winship of Harvard University, Anthony Thompson and David Greenberg of New York University, Geoffrey Alpert of the University of South Carolina, David Rudovsky and Justin Wolfers of the University of Pennsylvania, Richard Rosenfeld of the University of Missouri-St. Louis, Peter Siegelman of the University of Connecticut, and Robert Crutchfield of the University of Washington.

petition (Pet. 6 & n.3), the district court never concluded that Lieutenant Stange acted in "good faith"; it made no finding *at all* about Lieutenant Stange's actual reason for stopping petitioner, stating only that it was a "close call" whether the traffic light was red when petitioner entered the intersection where he was stopped. Pet. App. 11a.[5] If such a finding precludes suppression of unconstitutionally obtained evidence even on a proper application of the first and second *Brown* factors—a conclusion that would effectively read those factors out of the test stated by this Court—it is, again, this Court that should say so.

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[5] Initially, Lieutenant Stange stated that he made the contested stop because petitioner ran a red light. When this claim was disproved by video from the officer's patrol car, Lieutenant Stange offered as a *new* reason for the stop (also rejected by the district court) that petitioner acted unsafely by entering a crowded intersection. See Pet. 6-7 n.3. The government muddies this picture now by stating that "Lieutenant Stange intended only to warn petitioner about his 'unsafe maneuver,' not to issue a citation.'" Opp. 2. But if that were true, there would have been no (proper) reason at all for Lieutenant Stange to ask petitioner for identifying information and to prolong the detention so that he could run a warrants check. In these circumstances, it surely cannot be said that "[a]bout all that exclusion would deter in this case is conscientious police work" (*Davis*, 131 S. Ct. at 229), and there is no basis to conclude that Lieutenant Stange's conduct was merely an act of isolated negligence, as opposed to the kind of deliberate or reckless misconduct that this Court has concluded remains subject to the exclusionary rule. See *id.* at 2427-2428.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2011