No. 02-1019

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

RODNEY JOSEPH GANT,

Respondent.

On Writ of Certiorari to the Arizona Court of Appeals Division Two

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Respondent files this supplemental brief pursuant to Supreme Court Rule 25.5[1] to address the Arizona Supreme Court's decision in *State* v. *Dean*, No. CR-02-0427-PR, 2003 WL 22120722 (Ariz. Sept. 15, 2003), which was issued after the close of briefing in this case. As demonstrated below, in *Dean*, the Arizona Supreme Court unequivocally repudiated the legal test adopted by the Arizona Court of Appeals that is petitioner's sole basis for seeking this Court's review of the decision below. Thus, the legal test that petitioner challenges as erroneous is no longer good law in Arizona. Accordingly, there is no reason for the Court to decide the question presented in the State's petition, and it would be appropriate for the Court to dismiss the writ of certiorari as improvidently granted. See Robert L. Stern et al., *Supreme Court Practice* 330-31 (8th ed. 2002) (dismissal of writ is appropriate when "[a]n intervening court decision . . . may eliminate the issue") (citing cases); *Piccirillo* v. *New York*, 400 U.S. 548 (1971) (per curiam) (dismissing writ as improvidently granted when intervening decision of New York Court of Appeals resolved the question that prompted the Court to grant the writ); see also *Cook* v. *Hudson*, 429 U.S. 165 (1976) (per curiam) (dismissing writ as improvidently granted when intervening decision of this Court and enactment of state statute resolved question at issue); *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 73 (1955) (dismissing writ as improvidently granted where state statute "bar[red]" question presented "from again arising" in the state).

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[1] Supreme Court Rule 25.5 states:

> [a] party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument.

The judgment of the Arizona Court of Appeals in this case was that petitioner failed to meet its burden of proving that the warrantless search of respondent's vehicle was reasonable under the Fourth Amendment.[2] In its opinion, the court reasoned that *New York* v. *Belton*, 453 U.S. 454 (1981), applies "only when 'the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation … while the defendant is still in the automobile.'" Pet. App. A-6 (omission in original). Petitioner sought review in this case solely to challenge the court of appeals' adoption of the so-called "initial contact rule": "The Arizona Court of Appeals erred by holding in *State v. Gant* that *Belton* is inapplicable absent evidence of the suspect's actual or constructive awareness of the police before getting out of the vehicle." Cert. Pet. 7. See also Pet. Br. 6 ("The court of appeals misconstrued *Belton* by adding subjectivity to the straightforward *Belton* rule. Contrary to the *Gant* court's view … the arrestee's actual or constructive awareness of the police before exiting the vehicle is irrelevant.… The *Gant* rule contravenes *Belton*'s purposes by requiring police to 'signal confrontation' before an individual alights."); Pet. Reply Br. 2 ("The question presented concerns the validity of the initial contact rule. There is only one question presented in Arizona's petition for certiorari: whether *Belton* is limited by the initial contact rule imposed by the Arizona Court of Appeals.") (capitalization omitted).

As petitioner acknowledges (Pet. Supp. Br. 2), in *Dean*, the Arizona Supreme Court unequivocally repudiated the initial contact rule, making specific reference to the decision below:

> The analytic approach taken by the court of appeals in … *Gant*, under which the applicability of the *Belton*

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[2] Respondent's position is that the *judgment* of the Arizona Court of Appeals is correct and that this Court need not reach the issue of whether the particular *test* employed by that court is correct. *See* Resp. Br. 1-2, 7-9, 11, 20-23.

> rule turns entirely on whether the police initiated contact with the arrestee while he was still in the vehicle, is not supported by the rationale of either *Belton* or *Chimel* ….
>
> ….
>
> … [A] number of courts have found initiation of contact by the police irrelevant to the determination whether an arrestee was a recent occupant of a vehicle under *Belton*. We agree with the general analytical approach taken in [those] decisions.

Pet. Supp. App. 13-15 (citations omitted). Thus, the Arizona Supreme Court has squarely rejected the rule adopted by the court of appeals that petitioner seeks to have this Court review. Whether or not there remains a split of authority among state and federal courts as to the validity of the initial contact rule, Pet. Supp. Br. 4, it is undisputed that the initial contact rule is no longer the law in Arizona. Accordingly, the decision below is not a proper vehicle for resolving that split.

Petitioner also contends that while the *Dean* decision is "consistent with the State's argument in the instant case," it nonetheless does not resolve this case, and is "only minimally instructive because its facts are so unusual." *Id*. at 2, 3, 4. Indeed, petitioner devotes much of its supplemental brief to arguing that *Dean* does not control this case because it is factually distinguishable. *Id*. at 3-7. Petitioner's strained attempt to limit the scope of *Dean* is beside the point. The fact remains that because *Dean* overruled *Gant*'s adoption of the initial contact test, the sole question that this Court undertook to review is no longer presented by this case.

Petitioner is asking this Court to undertake an entirely academic exercise: whatever this Court's judgment might be on the initial contact rule, it cannot have any effect in Arizona

since that rule is no longer followed in that state.[3] Indeed, there could be no suggestion that the Court would have granted review of the question posed by petitioner if the *Dean* decision had been on the books at the time the petition was filed. Therefore, there is no reason for the Court to decide the question presented in the petition, and it would be appropriate for the Court to dismiss the writ of certiorari as improvidently granted.

CONCLUSION

As the question presented in the petition has been resolved by the Arizona Supreme Court, the Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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[3] The academic nature of any review by this Court of the initial contact rule is underscored by the fact that the rule is not defended by any party before the Court.