No. _____

In the

Supreme Court of the United States

Waymon Scott McLaughlin,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment permits officers to search objects carried by an arrestee without a warrant even after they have eliminated any realistic means for the arrestee to access them?

PARTIES TO THE PROCEEDING

Petitioner is Waymon Scott McLaughlin, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Waymon Scott McLaughlin seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The written judgment convicting the defendant and imposing sentence on four counts of bank robbery is reprinted as Appendix A. The 18-page unpublished *per curiam* opinion of the Court of Appeals is available as *United States v. McLaughlin*, 739 Fed. Appx. 270 (5th Cir. October 2, 2018) (unpublished). It is reprinted in Appendix B to this Petition.

JURISDICTION

The opinion and judgment order of the Court of Appeals affirming the conviction and sentence was issued October 2, 2018. *See* [Appx. B]. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Without first obtaining a warrant, police officers searched Petitioner's prominently marked envelope of medical records as he sat handcuffed and out of reaching distance. The court below held the search compatible with the Fourth Amendment solely because he carried that envelope at the moment of his arrest. *See* [Appx. B, at p.12]. Over dissent, the Supreme Courts of Washington and Illinois have recently held to like effect. *See State v. MacDicken*, 319 P.3d 31, 34 (Wash. 2014); *People v. Cregan*, 10 N.E.3d 1196, 1201 (Ill. 2014). But the Ninth Circuit holds that the legality of searches incident to arrest is evaluated at the time of the search, not the time of arrest. See *United States v. Maddox*, 614 F.3d 1046, 1048-1049 (9th Cir. 2010). This Court should address this direct and important conflict regarding the scope of our Fourth Amendment protections.

A. District Court Proceedings

On May 27, 2016, Fort Worth police arrested Petitioner Waymon Scott McLaughlin on suspicion of bank robbery after he walked out of an area convenience store. *See* [Appx. C, at p.9]. At the moment of arrest, he carried a prominently marked hospital envelope. *See* [Appx. C, at p.9]; [Appx. E]. The officers took him to the ground, cuffed him, and removed the envelope from him. *See* [Appx. C, at p.9]. After thus securing both Petitioner and the envelope, they searched it. *See* [Appx. C, at pp.9-10]. Nested inside the medical records envelope was a Fed Ex envelope. See [Appx. C, at p.54]. When an arresting officer searched that envelope, they found a bank robbery note later admitted against Petitioner at his trial for six bank

robberies. *See* [Appx. C, at p.20-21].

The government obtained an indictment for six counts of bank robbery, and the defense moved to suppress the search of Mr. McLaughlin's medical envelope, invoking the Fourth Amendment. Evidence at the suppression hearing showed that officers had an arrest warrant, but no search warrant for the medical envelope or documents. *See* [Appx. C, at p.8].

At the suppression hearing, the arresting officer repeatedly testified that he and the other officers moved the envelope out of Petitioner's reaching distance before going through it. *See* [Appx. C, at pp.26, 33, 52-53, 55]. Further, he admitted that Mr. McLaughlin was already handcuffed when the search of the envelope occurred. *See* [Appx. C, at pp.26-27]. Inside the envelope, he saw and read a demand note that said: "This is bank Robber give me Twenties Fifties hundreds." [Appx. B, at p.9, n.3]. That note, again, had been tucked away inside a Fed Ex envelope, itself tucked like a *Matryoshka* doll inside the larger medical records envelope. [Appx. C, at p.47].

The arresting officer described any inventory search as merely "hypothetical." [Appx. C, at p.37]. Nonetheless, the government defended the search as both a search-incident-to-arrest and an inventory search. It produced a Fort Worth Police Department Policy which authorized searches incident to arrest for contraband and weapons. *See* [Appx. D, at p.1]. Another policy said that "[a]ny personal property of the prisoner not submitted at the time of arrest shall be submitted to the Property Room using the appropriate form." [Appx. D, at p.3]. Neither of these policies said anything about reading an arrested person's papers. *See* [Appx. D].

The district court held that the search was appropriate as both a search incident to arrest and as an inventory search. *See* [Appx. C, at pp.66-67]. It denied the motion to suppress. *See* [Appx. C, at pp.66-67].

Petitioner proceeded to trial, where the note was admitted as evidence against him. He sustained convictions on four counts of bank robbery, including two that pertained to robberies that occurred on the day of his arrest. *See* [Appx. B, at p.1]. The jury acquitted him of two robberies. *See* [Appx. B, at p.1]. The district court imposed concurrent sentences of 188 months on each remaining count. *See* [Appx. A].

B. Proceedings on Appeal

Petitioner appealed, contending, *inter alia*, that the district court erred in denying his motion to suppress. *See* [Appx. B, at p.1]. He argued that this Court's decisions in *Chimel v. California*, 395 U.S. 752 (1969), and *Arizona v. Gant*, 556 U.S. 332 (2009), forbid warrantless searches incident to arrest when the arrestee cannot realistically access the searched items. And he argued that the search was not actually performed as an inventory search. Further, he maintained that neither the constitution nor the policies produced by the government permitted arresting officers to *read* an arrestee's papers pursuant to an inventory.

The government defended the search as both a search incident to arrest and an inventory search. As one judge of the court of appeals observed, however, it "sort of backed off the inventory search" when pressed at oral argument. Oral Argument in *United States v. McLaughlin*, 17-10915 at 35:12 et seq. (July 11, 2018)(so

observing), *available at http://www.ca5.uscourts.gov/OralArgRecordings/17/17-10915_7-11-2018.mp3, last visited December 31, 2018.*

The court of appeals affirmed. *See* [Appx. B, at p.2]. It found the search lawful on the sole grounds that Petitioner had been carrying the searched envelope at the moment of his arrest. *See* [Appx. B, at p.12]. In its view, this created a lawful search incident to arrest even if the envelope was fully secured from Petitioner's potential access at the moment of the search. *See* [Appx. B, at p.12].

REASONS FOR GRANTING THIS PETITION

The courts are divided as to whether the search incident to arrest exception to the warrant requirement extends to items that the arrestee cannot realistically access at the moment of the search. The rule applied below sanctions unreasonable searches, irrationally distinguishes between items found in and outside of vehicles, and will prove impossible to apply consistently.

A. The courts are divided.

The Fourth Amendment prohibits unreasonable searches and seizures. *See* U.S. Const. IV. "[A] search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)(internal citations omitted). Exceptions to the warrant requirement are "jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958).

One such exception involves the officer's right to conduct warrantless searches during an arrest. When effectuating a lawful arrest, an officer may conduct a "search of the arrestee's person and the area within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 762-763 (1969)(internal citations omitted). Such searches serve two purposes: they permit the officer to gain control of weapons and they ensure that the arrestee cannot destroy evidence. *See Chimel*, 395 U.S. at 762-763.

When conducting a search incident to arrest, officers need not engage in "case-by-case adjudication" to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful

arrest." *United States v. Robinson*, 414 U.S. 218, 235 (1973). Rather, "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, 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 upon the person of the suspect." *Robinson*, 414 U.S. at 235.

Even so, the twin rationale for the exception have caused this Court to acknowledge several important limits on its scope. Officers may not search an arrestee's cell phone, even if it is unquestionably on his or her person at the time of arrest. *Riley v. California*, __U.S.__, 134 S.Ct. 2473, 2494-2495 (2014). They may not search items in the arrestee's possession hours and miles after the arrest. *See United States v. Chadwick*, 433 U.S. 1, 15 (1977). And, except when it is reasonable to believe that a vehicle will contain evidence of the offense of arrest, they may not search the passenger compartment of an arrestee's vehicle after he or she is secured in the back of a police car. *See Arizona v. Gant*, 556 U.S. 332, 342 (2009). In each of these scenarios, the warrantless search is manifestly unnecessary to preserve evidence or protect the officer. As such, this Court has placed each of these scenarios outside the boundaries of a search incident to arrest. *See Riley*, 134 S.Ct. at 2485; *Chadwick*, 433 U.S. at 15; *Gant*, 556 U.S. at 342.

In one area, however, some lower courts continue to extend the search incident to arrest exception beyond its foundations. Specifically, some courts have held that officers conducting an arrest outside a vehicle may search any item found on the arrestee's person, even after it has been removed the arrestee and the arrestee has

been secured. *See* [Appx. B, at p.12][concluding that no showing of the distance between Petitioner and the searched envelope was necessary because "McLaughlin was carrying the unsealed envelope under his arm at the time of his arrest."]; *State v. MacDicken*, 319 P.3d 31, 34 (Wash. 2014)(bags moved "a car's length away" from the defendant after he was handcuffed could be searched without warrant, solely because they "were in MacDicken's actual and exclusive possession at the time of his arrest"); *People v. Cregan*, 10 N.E.3d 1196, 1201 (Ill. 2014)(holding that objects actually possessed by the arrestee may be searched following a lawful arrest even if he or she could not realistically access them at the time of the search); *but see MacDicken,* 319 P.3d at 36 (McCloud, J., dissenting)(arguing that the presumption of danger to an officer "applies only where police could reasonably have believed that the area searched was in fact accessible to the arrestee or a confederate at the time of the search.")(emphasis in original); *Cregan*, 10 N.E.3d at 1220 (Burke, J., dissenting)(concluding that the search of the luggage was improper extension of search incident to arrest because "The Luggage Bag Was Not In Defendant's Area of Control" at the time of the search).

In these courts, such a warrantless search must be reasonably proximate to the arrest and may not occur hours later in a stationhouse. *See* [Appx. B, at 10][citing *Chadwick*, 433 U.S. at 15]; *MacDicken*, 319 P.3d at 34; *Cregan*, 10 N.E.3d at 1204 (acknowledging *Chadwick*). Nonetheless, the search need not occur at a time when the arrestee could realistically access the searched object. *See MacDicken*, 319 P.3d at 34; *Cregan*, 10 N.E.3d at 1201. The Supreme Courts of Illinois and Washington

have limited the items that may be searched after cuffing the suspect those items in his or her actual possession at the time of arrest. *See Cregan*, 10 N.E.3d at 1207. The Seventh Circuit has extended this authority to items "so closely associated with the person that they are identified with and included within the concept of one's person." *United States v. Graham*, 638 F.2d 1111, 1114 (7th Cir. 1981).

This expansive view of the search incident to arrest doctrine is not universally shared, as the dissents in *Cregan* and *MacDicken* reflect. Further, it is not shared by all federal circuits. In *United States v. Maddox*, 614 F.3d 1046 (9th Cir. 2010), the Ninth Circuit held that a vial attached to the defendant's key chain, and taken by an officer upon arrest, could not be searched without warrant after the defendant was secured in the back of the police car. *See Maddox*, 614 F.3d at 1048-1049. The defendant in that case was stopped for reckless driving, and then arrested for driving with a suspended license. *See id.* at 1047. During the arrest, the officer removed a keychain from the defendant's possession and threw it onto the front seat of the defendant's vehicle. *See id.* He then secured the defendant in the back of his patrol car. *See id.* Because it was "undisputed that, at this point, Maddox posed no threat to officer safety and there was no danger of evidence destruction," the court held that officers could not return to the defendant's car and open a vial attached to the keychain without a warrant. *Id.* In the view of the Ninth Circuit, "[m]ere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the delay." *Id.* at 1049.

A dissenting judge in that case adopted the view of the court below: that the Fourth Amendment does not require "an instantaneous assessment of those items seized upon a search incident to arrest." *Id.* at 1052 (N.R. Smith, J., dissenting). As the dissent in *Maddox* pointed out, the search followed an indisputably lawful custodial arrest, and involved a container (vial) that was physically "removed … from Maddox's hand as Officer Bonney was attempting to handcuff Maddox." *Id.* at 1050 (N.R. Smith, J., dissenting). As such, the rule of the Ninth Circuit is quite clear: even objects taken directly from the arrestee's immediate, actual possession may not be searched without a warrant after he or she is secured. The Ninth Circuit and the court below (as well as Supreme Courts of Illinois and Washington) have thus reached precisely opposite conclusions about the scope of constitutional protections on indistinguishable facts. This conflict exists despite recent opinions from this Court attempting to clarify the scope of the search incident to arrest. See *Gant*, *supra*, *Riley*, *supra*. Further, the issue has produced dissents in at least three cases (*Maddox*, *MacDicken* and *Cregan*). This reflects widespread disagreement on the issue and a need for the intervention of this Court.

B. The rule applied below results from a misunderstanding of this Court's precedent, does not produce logical results, and does not comport the Fourth Amendment.

1. This Court's precedent does not support the rule applied below.

The view of the court below has not only failed to command universal support among the circuits and state courts of last resort, it has also failed to articulate a persuasive reading of this Court's precedent. The court below cited *United States v.*

Robinson, 414 U.S. 218 (1973), for the proposition that objects on an arrestee's person may be searched even after he or she is secured. *See* [Appx. B, at p.10]. But *Robinson* does not support that conclusion. In *Robinson*, an officer lawfully arrested the defendant for driving without a license, then found a crumpled up cigarette package during a frisk of his outer clothing. *See Robinson*, 414 U.S. at 220-223. The officer opened the package and found heroin. *See id.* This Court held that the search constituted a lawful search incident to arrest, which need not be confined to a brief pat down for weapons. *See id*. at 227-229.

Robinson, however, does not support the notion that all objects taken from the person of the arrestee may be searched even after he or she is cuffed. Simply put, the opinion does not make clear whether the cigarette pack searched in that case had been removed from reaching distance at the time it was actually searched. *See Robinson*, 414 U.S. at 219-224. Indeed, the *Robinson* opinion strongly suggests the contrary, that the pack had *not* been removed from the defendant's area of potential control when searched. The arresting officer in *Robinson* had not yet finished searching the arrestee's body at the time he looked into the cigarette pack. *See id.* at 223 (recounting that "the officer then opened the cigarette pack and found 14 gelatin capsules of white powder which he thought to be, and which later analysis proved to be, heroin. [The officer] then continued his search of respondent to completion, feeling around his waist and trouser legs, and examining the remaining pockets."). *Robinson* thus likely amounts to a case where the search took place in reaching distance of the arrestee.

To be sure, *Robinson* provides a *per se* rule of sorts: an arresting officer need not decide in each case whether a search is necessary to secure evidence or find weapons. *See id.* at 235. But that rule is limited to items near the arrestee *at the time of the search*. To hold otherwise would unmoor the search incident to arrest doctrine from both its rationale and the known facts of *Robinson*. Given the exigencies of arrest, an officer need not decide whether a search is justified of any given item within the arrestee's potential control. *See id.* at 235. But once the item is taken from the arrestee's area of potential control, the exigency has dissipated and a search is unreasonable without probable cause and a warrant.

This understanding of *Robinson* is confirmed by this Court's subsequent holding in *Arizona v. Gant*, 556 U.S. 332 (2009). *Gant* held that the interior of a recently occupied vehicle is not automatically considered within the area of the arrestee's control for the purposes of a search incident to arrest. *See Gant*, 556 U.S. at 335. The Court's unqualified holding was that "police may search incident to arrest only the space within an arrestee's immediate control, meaning the area from within which he might gain possession of a weapon or destructible evidence." *Id.* (quoting *Chimel,* 395 U.S. at 763)(internal quotations omitted). Notably, this formulation contains no exception for items that were once carried by the arrestee if they are not within lunging distance at the time of the search.

Riley v. California, __U.S.__, 134 S.Ct. 2473 (2014), likewise shows that there is little meaningful difference between an item seized on the arrestee's person and one seized nearby. The phones in *Riley* were taken from the defendant's person. But

this Court's Fourth Amendment analysis focused on the moment of the search, not the happenstance of the searched item's origin. Searches incident-to-arrest are permitted to prevent the destruction of evidence and ensure officer safety. The search of items removed from the arrestee's reaching distance does not support that rationale.

2. The rule applied below is difficult to administer and produces irrational results.

Two of the courts adopting the position of the opinion below have taken distinct positions about precisely which objects may be searched without a warrant after a suspect is secured. The Seventh Circuit has understood *Robinson* to mean that officers enjoy an unfettered right to search all items "so closely associated with the person that they are identified with and included within the concept of one's person." *Graham*, 638 F.2d at 1114. More recently, the Supreme Court of Illinois rejected this standard. *See Cregan*, 10 N.E.3d at 1207. It held instead that officers may search, without a warrant, and without regard to whether the arrestee is secured, all items in the arrestee's "actual, physical possession." *Id*.

But neither of these tests provide much guidance to officers in the field or reviewing courts. As the Illinois Supreme Court observed, it is nearly impossible to predict which items will be regarded as so closely connected to the body of the arrestee as to constitute part of "the person":

> A learned treatise on search and seizure suggests that only those items that have an "intimate connection with a person" can be considered "immediately associated" with him. 3 Wayne R. LaFave, *Search and Seizure* § 5.5, at 283 (5th ed. 2012). Professor LaFave refers specifically to "small" items, but the size of an object does not necessarily determine

> its connection to an individual. One can hypothesize any number of scenarios where a large object has an intimate connection to an individual — a prosthetic limb, a wheelchair, a stuffed animal, or a musical instrument being carried in a case. In any event, the professor's analysis of existing law is descriptive, not prescriptive. We conclude no principled distinction can be found in the size difference between a purse and the bag at issue, or in a more subjective notion like its intimate connection to the defendant.
>
> Likewise, the length of time the defendant has spent with a possession cannot adequately mark the line of immediate association. This is information that arresting officers generally will not know. In the present case, the officers had no way of knowing whether the bag was in defendant's possession during his entire trip or whether he left it in the baggage corral in the train car. Even if available, such information would be irrelevant to whether the object was immediately associated with the defendant at the time of his arrest.
>
> Such analysis would leave law enforcement officers, prosecutors, and judges wondering whether it is the size, shape, materials, function, or some other attribute of an object, its proximity to the defendant, or some combination of these factors that determines whether it is "immediately associated" with the defendant's person.

Cregan, 10 N.E.3d at 1205-1207.

As the dissent in *Cregan* pointed out, however, it is also difficult to apply the "actual possession" standard without contradicting this Court's holdings in *Chadwick* (which required a warrant for the search of a large footlocker possessed by the defendant) or *Gant* (which required a warrant for searches of a vehicle actually occupied – and hence possessed -- by the arrestee, absent probable cause):

> The Majority's Possession Rule is Vague
>
> In certain respects, the majority opinion is quite clear. The "nature" and "character" of an object are legally irrelevant in determining whether an object is part of an arrestee's person. Further, the arrestee need not be

literally in physical contact with an object at the time of arrest for the object to be part of the arrestee's person and any "inquiry into degree of attachment" is "reject[ed]". In addition, "the length of time the defendant has spent with a possession" plays no role in determining whether the object is part of his person.

In other respects, however, the majority opinion is unclear. The majority states that objects may be searched incident to arrest when they are "in close proximity to the individual at the time of his arrest." But "close proximity" is an inherently indeterminate phrase and the majority never explains what it means or how a police officer in the field is to know when an object is in close proximity to an arrestee.

***

Other parts of the majority opinion only further the confusion. For example, the majority emphasizes that the size and physical characteristics of an object are irrelevant in determining whether an object is part of an arrestee's person, but the majority also states that, because of "the size, weight, and location" of the footlocker in *Chadwick* it would have been fruitless to argue that it was part of the defendants' persons. Elsewhere, the majority states in passing that the question presented in this case is whether an "item of moveable personal property" should be analyzed as a search of the person or a search of the area within his control. Assuming that the majority means for the word "movable" to have legal significance, how is a police officer or judge to determine if an object is "movable," and therefore within the possession rule, if its size, shape, and other physical attributes are all legally irrelevant?

The vagueness of the majority's opinion undoubtedly stems, in part, from its decision to create a new rule defining the person of an arrestee based on the idea of "possessing" objects. As the Supreme Court has observed, "there is no word more ambiguous in its meaning than possession." *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 67, 34 S. Ct. 209, 58 L. Ed. 504 (1914).

***

To summarize my concerns, in adopting its rule that every item in the possession of an arrestee is part of his person, the majority squarely

> contradicts the United States Supreme Court's decision in *Chadwick*; negates the Court's decision in *Gant*; overrules our own decision in *Hoskins* with no mention of stare decisis; dismisses one of the leading fourth amendment scholar's description of fourth amendment law (without ever finding that description inaccurate); and adopts a vague, unworkable rule that finds no support in any caselaw, including the cases that the majority cites in support.

Cregan, 10 N.E.3d at 1219-1220 (Burke, J., dissenting).

However it is applied, the rule applied below will necessarily promote an irrational distinction between vehicle and non-vehicle searches when it is juxtaposed with this Court's holding in *Gant*. After *Gant*, police may search the interior of a vehicle incident to arrest (assuming the absence of a warrant or probable cause) only when the arrestee has a realistic means of access its interior. *See Gant*, 556 U.S. at 335. As a consequence, jurisdictions that follow the rule below recognize a curious distinction: when officers secure a suspect, they lose the right to search certain objections following a vehicle stop. But they do not lose that right when the arrestee is a pedestrian. *See People v. Glasper*, 2016 IL App (3d) 130971-U, P21-P22 (Il. 3rd Dist. 2016)("Guided by the analysis in *Cregan*, we conclude *Gant* governs propriety of the search in this case because the defendant was in a vehicle when he was apprehended and his bag remained in the automobile during his arrest."). Even putting aside the potential for economic discrimination engendered by this state of affairs (for vehicles cost money), it is not rational. Vehicles are thought to diminish a suspect's expectations of privacy, not to expand them. *See New York v. Class*, 475 U.S. 106, 112-113 (1986).

3. The rule applied below does not comport with the Fourth Amendment.

Most importantly, the rule applied below simply does not do what the Fourth Amendment demands: insist that all searches be reasonable. *See* U.S. Const. Amend. IV; *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)(holding that the "touchstone of the Fourth Amendment is reasonableness."). It is eminently reasonable for arresting officers to protect themselves by searching objects and containers that the arrestee might access. *See Chimel*, 395 U.S. at 762-763. It is reasonable that they protect potential evidence from the risk of destruction by the arrestee. *See id*. It is not reasonable that they rummage through all objects at the scene of an arrest merely because a suspect happened to be carrying them. Certainly, it is not reasonable to distinguish between vehicle and non-vehicle searches in this context, while providing greater protection to objects in a vehicle.

Notable early authorities would have condemned the expansive rule adopted below. Bishop, for example, advocated for a right to search the arrested person only when there was "special reason" to fear escape:

> The officer should safely keep an arrested prisoner until lawfully discharged; and if from violent conduct or other reason he fears an attempt to escape, he may search the person and take away any implements helpful therein. But this right is limited; for example, it does not exist where the arrest is for mere disorderly drunkenness, and it is submitted to, and there is no ground to fear an attempt at escape. In the absence of any special reason, the officer should not take anything from the prisoner's custody . . . .

Joel Prentiss Bishop, NEW CRIMINAL PROCEDURE § 210, at 118 (4th ed. 1895); *see also Leigh v. Cole*, 6 Cox Crim. Cas. 329, 332 (1853)("Even when a man is confined for

being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such person must depend on all the circumstances of the case.").

This is little surprise given the founding generation's manifest hostility to the discretionary search authority of the officer. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 580-582 (1999)(citing 2 Legal Papers of John Adams 140-143 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); Oliver M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in The Era of the American Revolution 60-61, 64, 69 (Richard B. Morris ed., 1939); William Henry Drayton*, A Letter from Freeman*, Aug. 10, 1774, *reprinted in* I Documentary History of the American Revolution 11, 15 (R.W. Gibbes ed., 1855, reprinted 1972, and 3); The Debates in the Several State Conventions on the Adoption of the Federal Constitution 587-88 (Jonathan Elliot ed., 2d ed. 1838, reprinted in facsimile 1937)). It is difficult to imagine that the Founders would have accepted the prospect of arresting officers deciding without the benefit of a warrant which items could be searched in the absence of an immediate need.

C. The instant case is an excellent vehicle to resolve the conflict of authority and examine Fourth Amendment protections in an arrested person's effects.

1. The sole ground for decision below was the issue that divides the lower courts.

The instant case squarely presents the issue that has divided lower courts. The court below relied exclusively on Petitioner's possession of the envelope at the time of the arrest to justify the search. *See* [Appx. B, at p.12]. The court below offered no

suggestion of harmlessness in the district court's decision to admit the robbery note. *See* [Appx. B, at pp. 9-13]. Nor would any such suggestion be plausible given the its profoundly incriminating nature, the number of counts to which it might be relevant, and the burden of the government to show constitutional error harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967)

2. Petitioner had no realistic means of accessing the search envelope at the time of the search, so the instant case squarely presents the controversial Fourth Amendment issue.

The search was conducted without warrant, and the record conclusively demonstrates that Petitioner had no realistic means of accessing the envelope at the time of the search. Two undisputed facts show this to be the case. *First*, Petitioner was already handcuffed when the envelope was searched. *Second*, and perhaps more importantly, the envelope had already been taken out of his reaching distance.

As to the first fact – that Petitioner was already handcuffed when the search was performed -- the record is clear:

> Q. Describe again what happened after that.
>
> A. He was placed in handcuffs. ... And then either I picked up or Officer Addie picked up and handed me the envelope.

[Appx. C, at p.26].

The officer made the same point in rebuttal testimony:

> THE COURT: When did you first find the note, the bank robbery note?
>
> THE WITNESS: When I first started gathering all the property, pretty quick within a few minutes of him being placed in handcuffs. He was still on the ground. He was not in the patrol car yet.

[Appx. C, at pp.52-53].

As to the reaching distance, the record is also clear that Petitioner could not have accessed the envelope. The following exchange makes this fact quite plain:

> Q. Describe again what happened after that.
>
> A. He was placed in handcuffs. At that point, officers – and I'm not sure which officer -- checked his waistband, pockets. We were looking for any type of weapons. That's the most important thing. And then either I picked up or Officer Addie picked up and handed me the envelope. *We were basically getting things out of his reach*, *the bag that he had from the convenience store, moved everything out of his reach*. Those are all general practices –
>
> Q. Why were you getting things out of his reach?
>
> A. Officer safety issues. At that point, we don't know what's inside of it. So we have to use every precaution to make sure that there was not any kind of weapons and that we have control of the situation.
>
> Q. So because of those precautions and because of officer safety, *you removed you said the envelope in the bag that he had when he came out of the convenience store to prevent him from reaching for those items*?
>
> A. *Yes*, or -- I mean, that's just what we do. That way you're preserving everything. You're controlling the situation.
>
> Q. So what happened next? *You removed the envelope and the bag from his reach*. Other officers had searched him at this point, and then what happened?
>
> A. We had taken his ball cap off his head. I took possession of that.

[Appx. C, at pp. 26-27][emphasis added].

This exchange shows the same point with equal clarity:

> Q. Again, *after he had been handcuffed, it was not within reach* because you were concerned for officer safety?
>
> A. *Right*.
>
> Q. *So that is the first time* in your mind that it was not sealed *and you can look into it?*
> A. *Correct.*

[Appx. C at p.33][emphasis added].

Finally, the officer gave the same testimony in cross-examination after rebuttal:

> Q. You previously said that when you opened the envelope the first time, you opened it the first time, you had made sure that the defendant was not within reach because you were concerned about officer safety, correct?
>
> A. That's always a concern no matter what we're doing.
>
> Q. My question is you previously said that *you had made sure he was not within reach because you were concerned about officer safety, correct?*
>
> A. *Yes*.

[Appx C. at p.55][emphasis added].

The record thus conclusively establishes that the envelope was outside a cuffed suspect's reaching distance at the time of the search. Certainly, it cannot be said that the government met its burden to show that the envelope fell within the searchable area. Indeed, the government conceded that it failed to show the distance between Petitioner and the envelope. *See* [Appx. C at p.65]["Now, we didn't talk about feet, and *I apologize to the Court for not bringing out whether it was three feet away from the defendant or ten feet away from the defendant*, but I believe that the lunge area,

the courts afford officers a wide degree of latitude in determining where the lunge area is, and this search was conducted just minutes from the time the handcuffs were placed on him."][emphasis added]. Accordingly, the case presents the relevant question exactly: whether an item may be searched without a warrant following a custodial arrest merely because the arrestee possessed it before he was secured.

3. The search cannot be affirmed as an inventory search.

Finally, while the government argued in briefing that the search could be affirmed as an inventory search, this contention was abandoned at oral argument. *See* Oral Argument in *United States v. McLaughlin*, 17-10915 at 35:12 et seq. (July 11, 2018)(so observing), *available at* , *http://www.ca5.uscourts.gov/OralArgRecordings/17/17-10915_7-11-2018.mp3*, *last visited December 31, 2018.* It is in any case unsupported by the law or facts.

Simply put, the incriminating note was not discovered pursuant to an inventory search. The arresting officer said the search was actually conducted under Fort Worth Policy 314.02(a)(1), which governs searches incident to arrest, not inventory searches. [Appx. C, at pp.36-37]. Any reference to 314.02(e)(1), which governs inventory searches, the officer said, would have been merely "hypothetical." [Appx. C, at p.37]. All indications thus suggest that the search which *actually* turned up the note was not conducted pursuant to the inventory search policy of the Department.

"Inventory search" is not a mere *post hoc* label to be slapped belatedly on an evidentiary search. *See Florida v. Wells*, 495 U.S. 1, 4 (1990)(cautioning that an

inventory search may not be used as "a ruse for a general rummaging in order to discover incriminating evidence."); *see also Colorado v. Bertine*, 479 U.S. 367, 372 (1987), *New York v. Burger*, 482 U.S. 691, 716 (1987), and *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976). As the government commendably conceded in district court, "[c]ourts have declined to characterize searches as permissible inventory searches ... where there was no evidence that officers actually were animated by such regulations when they conducted the search." That principle controls the outcome here.

In any case, the search conducted here could not be performed under the Department's inventory policy or the constitution. The only Fort Worth Police Department Policy describing the inventory of an arrestee's personal effects is Policy 314.02(e)(1), which states that:

> [a]ny personal property of the prisoner not submitted at the time of arrest shall be submitted to the Property Room using the appropriate form.

[Appx. D, at p.1]. Again, the arresting officer explicitly denied that the search was not conducted pursuant to this policy. *See* [Appx. C, at p. 37].

Furthermore, the Fort Worth Police inventory policy did not authorize the search. The text of that policy, set out above, hardly gives officers any discretion to read an arrestee's papers. Rather, it simply tells them to use the right form when submitting items to the property room. It does not purport to cabin officer discretion regarding the decision to read an arrestee's papers in a prominently marked[1] medical envelope.

[1] *See* [Appx. E].

And if the policy is read to permit reading an arrestee's papers, it is contrary to the opinion of five Justices in *South Dakota v. Opperman*, 428 U.S. 364, 370 (1976). There, Justice Powell joined a five vote majority to uphold an inventory search in that case. *See Opperman*, 428 U.S. at 364. Yet he made clear that his vote depended on an important condition: that the police did not examine the contents of papers found in the defendant's car. He said:

> As part of their inventory search the police may discover materials such as letters or checkbooks that "touch upon intimate areas of an individual's personal affairs," and "reveal much about a person's activities, associations, and beliefs." California Bankers Assn. v. Shultz, 416 U.S. 21, 78-79 (1974) (POWELL, J., concurring). See also Fisher v. United States, 425 U.S. 391, 401 n. 7 (1976). In this case the police found, inter alia, "miscellaneous papers," a checkbook, an installment loan book, and a social security status card. There is, however, no evidence in the record that in carrying out their established inventory duties the Vermillion police do other than search for and remove for storage such property without examining its contents.

Id. (Powell, J., concurring)(record citation omitted). The four dissenting Justices likewise made clear that they would not have approved of such conduct. *Id*. at 3106, n.6 (Marshall, J., dissenting).

Because both the legality of the search and the rationale of the decision below turn precisely on the legality of searches incident to arrest after the arrestee has been fully secured, this Court should grant *certiorari*.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument. He then requests that it vacate the judgment below, and remand with instructions to grant a new trial on each count of conviction, or for such relief as to which he may be justly entitled.

Respectfully submitted this 31st day of December, 2018.

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