No. 18-9393

IN THE SUPREME COURT OF THE UNITED STATES

TARELL McILWAIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by a frisk while he was lawfully detained by a police officer, probable cause existed to arrest him, and the officer arrested him immediately after the frisk.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. McIlwain, No. 17-cr-385 (Mar. 19, 2018)

United States Court of Appeals (2d Cir.):

United States v. McIlwain, No. 18-778 (Feb. 20, 2019)

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OPINION BELOW

The summary order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2019. The petition for a writ of certiorari was filed on May 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of

possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 21 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-2a.

1. Shortly after midnight on April 16, 2017, Officers Melissa Davis and Daniel Wadolowski of the New York City Police Department were on patrol in an unmarked car in Manhattan. Gov't C.A. Mot. 2-3. They observed a woman urinate inside a bus stop, and got out of the car. Id. at 3. As Officer Davis attended to the woman, petitioner was nearby and Officer Wadolowski observed him drop on the sidewalk a plastic cup containing liquid. Ibid. Officer Wadolowski approached petitioner, who stated, "You got me" and "I was drinking." Ibid. Officer Wadolowski smelled alcohol as he approached petitioner. Ibid. Officer Wadolowski asked petitioner to walk back with him to his unmarked police car by the bus stop. Ibid.

While Officer Wadolowski was running a check for petitioner's criminal history, petitioner spontaneously said, "I got nothing; I got nothing." Gov't C.A. Mot. 3. In response to those spontaneous denials, Officer Wadolowski became concerned that petitioner "might be having some type of weapon on him," and "for [his] safety and [petitioner's] safety and the public safety," decided to "make sure that he didn't have any weapons on him." Pet. App. 43a. Officer Wadolowski accordingly asked petitioner if

he could pat him down. See ibid. Petitioner declined to consent, saying something like, "You're not going to search me." Id. at 7a. Officer Wadolowski then decided to pat down petitioner's waistband area. Ibid. He pushed back petitioner's jacket about an inch and saw a pistol in his pants. Ibid. Upon seeing the gun, Officer Wadolowski took petitioner into custody. Id. at 7a-8a. After placing petitioner in handcuffs, Officer Wadolowski did a more thorough search and found a live cartridge in petitioner's pants. Ibid. Officer Wadolowski also retrieved the cup that petitioner had dropped on the sidewalk. Id. at 8a.

2. A federal grand jury returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1.

The district court denied petitioner's motion to suppress the pistol. Pet. App. 3a-24a. The court determined that the pistol was permissibly obtained in a search incident to a lawful arrest for littering or public consumption of alcohol, both of which are offenses under New York law. Id. at 10a-12a; see id. at 23a-24a. The court found that Officer Wadolowski had probable cause to believe petitioner had committed those offenses, which in turn gave Officer Wadolowski a lawful basis for arresting petitioner and searching him incident to that arrest. Id. at 23a; see id. at 10a-12a. The court further explained that a search incident to an arrest can occur before or after the arrest, so long as it is

"substantially contemporaneous with the arrest" and "confined to the immediate vicinity of the arrest." Id. at 11a (citing Rawlings v. Kentucky, 448 U.S. 98, 111 (1980), and Shipley v. California, 395 U.S. 818, 819 (1969)). And relying on United States v. Diaz, 854 F.3d 197 (2d Cir. 2017), cert. denied, 138 S. Ct. 981 (2018), the court further explained that "the Officer need not have formed the subjective intent to arrest at the time the search is conducted," and that it is instead "enough that facts amounting to probable cause were known to the officer at the time of the arrest." Pet. App. 11a.

After a bench trial on stipulated facts, petitioner was convicted on the felon-in-possession count and sentenced to 21 months of imprisonment. Judgment 1-2.

3. The court of appeals affirmed by summary order. Pet. App. 1a-2a. Relying on Diaz, the court determined that the search was a lawful search incident to an arrest because the officer had probable cause to arrest petitioner for littering and petitioner was arrested shortly after the search. Id. at 1a. The court rejected petitioner's argument that Diaz was wrongly decided, finding no basis to revisit circuit precedent. Id. at 1a-2a. Petitioner did not seek rehearing en banc.

ARGUMENT

Petitioner renews his contention (Pet. 10-31) that Officer Wadolowski's search was not a valid search incident to arrest

because the officer conducted the search before he arrested petitioner or intended to arrest him. This Court has repeatedly denied review of petitions for a writ of certiorari raising the same issue. See Diaz v. United States, 138 S. Ct. 981 (2018) (No. 17-6606); Heaven v. Colorado, 137 S. Ct. 2297 (2017) (No. 16-1225); Powell v. United States, 552 U.S. 1043 (2007) (No. 07-5333). The same result is warranted here.

1. The court of appeals correctly determined that the search at issue here was a valid search incident to arrest.

a. Under the search-incident-to-arrest doctrine, when police officers 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, 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. Ibid.

In United States v. Robinson, 414 U.S. 218 (1973), this Court held that the search-incident-to-arrest doctrine is a bright-line rule authorizing a search incident to any arrest. Id. at 235. The Court explained that the authority to search should 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 also 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 arrest." Id. at 234 n.5.

In Rawlings v. Kentucky, 448 U.S. 98 (1980), this Court held that a search may qualify as a search incident to arrest even if it precedes the arrest. In that case, a group of suspects were detained in a house during the execution of a search warrant. Id. at 100-101. After one suspect acknowledged ownership of drugs found in the house, an officer "searched [the suspect's] person and found $4,500 in cash in [his] shirt pocket and a knife in a sheath at [his] side." Id. at 101. The officer "then placed [the suspect] under formal arrest." Ibid. This Court had "no difficulty upholding this search as incident to [the suspect's] formal arrest." Id. at 111. The Court explained that "[o]nce [the suspect] admitted ownership of [a] sizable quantity of drugs," "the police clearly had probable cause to place [him] under arrest." Ibid. And the Court added that "[w]here the formal arrest followed quickly on the heels of the challenged search of [the suspect's] person," it was not "particularly important that the search preceded the arrest rather than vice versa." Ibid.

Under Rawlings, a search incident to arrest can be conducted before the arrest if (i) police have probable cause to make the arrest before the search, and (ii) the officers make the arrest

shortly thereafter. 448 U.S. at 111.[1] That rule is eminently sensible. Courts are rightly "reluctant to micromanage the precise order in which officers who have probable cause to arrest conduct searches and arrests," especially "given the safety and other tactical considerations that can be involved." United States v. Lewis, 147 A.3d 236, 240 (D.C. 2016) (en banc). Indeed, the concerns underlying the search-incident-to-arrest doctrine -- officer safety and preservation of evidence -- may be even "greater before the police have taken a suspect into custody than they are thereafter." United States v. Powell, 483 F.3d 836, 841 (D.C. Cir.) (en banc), cert. denied, 552 U.S. 1043 (2007). "By searching the suspect before they arrest him, the officers can secure any weapon he might otherwise use to resist arrest or any evidence he might otherwise destroy." Ibid.

b. The search in this case was valid under Rawlings. Petitioner does not challenge the court of appeals' determination that, at the time of the search, Officer Wadolowski had probable cause to arrest him for violating New York's littering law. See Pet. 11; see also Pet. App. 23a (district court further finding probable cause to arrest petitioner for the open-container

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[1] "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." Sibron v. New York, 392 U.S. 40, 63 (1968). In upholding the search in Rawlings, this Court thus emphasized that "[t]he fruits of the search of [the suspect's] person were * * * not necessary to support probable cause to arrest [him]." 448 U.S. at 111 n.6.

violation). Petitioner also does not dispute that, as in Rawlings, "formal arrest followed quickly on the heels of the challenged search," 448 U.S. at 111; see Pet. 11. The court of appeals thus correctly determined that the search was a lawful search incident to arrest.

2. Petitioner challenges that determination on two distinct grounds. First, and more broadly, he asserts (Pet. 3) that "an incident search requires an arrest at the time of the search" and thus may not precede the arrest. Second, he advances (Pet. 3-4, 22-23) the narrower argument that a valid incident search may precede the arrest only if the arrest was "intended" when the search commenced. Both of those arguments lack merit and, contrary to petitioner's suggestion, neither finds support in this Court's decision in Knowles v. Iowa, 525 U.S. 113 (1998).

a. Petitioner acknowledges (Pet. 3, 28-30) this Court's statement in Rawlings that "[w]here the formal arrest follow[s] quickly on the heels of the challenged search," it is not "particularly important that the search preceded the arrest rather than vice versa." 448 U.S. at 111. But petitioner asserts (Pet. 3, 28-30) that the Court's statement was mere dictum. That is incorrect.

This Court upheld the search at issue in Rawlings "as incident to [the defendant's] formal arrest." 448 U.S. at 111. Although petitioner contends (Pet. 29) that the issue was not raised by the

defendant, the Court specifically considered the significance of the fact that "the search preceded the arrest." Rawlings, 448 U.S. at 111. The Court cited with approval decisions holding that "[e]ven though a suspect has not formally been placed under arrest, a search of his person can be justified as incident to an arrest if an arrest is made immediately after the search." United States v. Brown, 463 F.2d 949, 950 (D.C. Cir. 1972) (per curiam); see Rawlings, 448 U.S. at 111 (citing Brown and Bailey v. United States, 389 F.2d 305, 308 (D.C. Cir. 1967)). And the Court held, in agreement with those decisions, that it was not "particularly important that the search preceded the arrest rather than vice versa." Rawlings, 448 U.S. at 111. "This holding was no mere dictum," Green v. Brennan, 136 S. Ct. 1769, 1779 (2016), but was necessary to the Court's ultimate conclusion that the search at issue was a valid search "incident to [the defendant's] formal arrest." Rawlings, 448 U.S. at 111.

Consistent with that understanding, every court of appeals that has considered the issue in light of Rawlings has recognized that "the police may search a suspect whom they have probable cause to arrest if the 'formal arrest follows quickly on the heels of the challenged search.'" Powell, 483 F.3d at 838 (brackets and citation omitted).[2] Any other rule would endanger police officers

[2] See, e.g., United States v. Patiutka, 804 F.3d 684, 688 (4th Cir. 2015) ("A search may begin prior to an arrest, and still be incident to that arrest."); United States v. Leo, 792 F.3d 742,

and require courts to "micromanage the precise order in which officers who have probable cause to arrest conduct searches and arrests." Lewis, 147 A.3d at 240; see Powell, 483 F.3d at 841.

Petitioner asserts (Pet. 27) that, under a rule that the search may precede the arrest, the lawfulness of Officer Wadolowski's conduct "would have been unknown to the officer himself." But that is not correct. Under Rawlings, a police officer in Officer Wadolowski's situation knows that a search of a suspect will be a valid search incident to arrest if (i) the officer has probable cause to arrest before the search, and (ii) an arrest follows quickly after the search. See 448 U.S. at 111. That clear, objective rule is "readily applicable by the police," Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (citation

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748 n.1 (7th Cir. 2015) ("[E]ven a search that occurs before an arrest may be deemed lawful as incident to that arrest."); United States v. Chartier, 772 F.3d 539, 546 (8th Cir. 2014) (upholding a "search incident to arrest that precede[d] the arrest"); United States v. McCraney, 674 F.3d 614, 619 (6th Cir. 2012) ("[A] formal custodial arrest need not precede the search."); United States v. Torres-Castro, 470 F.3d 992, 997 (10th Cir. 2006) ("[A] search may precede an arrest and still be incident to that arrest."), cert. denied, 550 U.S. 949 (2007); United States v. Bizier, 111 F.3d 214, 217 (1st Cir. 1997) ("[W]hether a formal arrest occurred prior to or followed 'quickly on the heels' of the challenged search does not affect the validity of the search so long as the probable cause existed prior to the search."); United States v. Banshee, 91 F.3d 99, 102 (11th Cir. 1996) (upholding a search incident to arrest where "there was probable cause for the arrest before the search and the arrest immediately followed the challenged search"), cert. denied, 519 U.S. 1083 (1997); United States v. Hernandez, 825 F.2d 846, 852 (5th Cir. 1987) (explaining that an arrest "may justify an immediately preceding incidental search"), cert. denied, 484 U.S. 1068 (1988).

omitted), and petitioner identifies no sound reason to question the rule adopted by this Court in Rawlings and uniformly followed by the courts of appeals.

b. Petitioner alternatively contends (Pet. 12, 23) that a search incident to arrest may precede the arrest only if the arrest is intended at the time of the search. That argument lacks merit. "The reasons for looking to objective factors, rather than subjective intent," in the Fourth Amendment, "are clear." Kentucky v. King, 563 U.S. 452, 464 (2011). "Legal tests based on reasonableness are generally objective, and this Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" Ibid. (citation omitted). Thus, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." Whren v. United States, 517 U.S. 806, 814 (1996).

Consistent with that principle, this Court has "repeatedly" held that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify the action.'" Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (brackets and citation omitted). For example, a search that is objectively justified based on exigent circumstances may not be challenged on

the ground that the officers' subjective motive was to "gather evidence," not to respond to the exigency. Id. at 405. A traffic stop that is objectively supported may not be challenged on the ground that the officers' actual motive was to investigate other criminal activity, not to enforce the traffic laws. Whren, 517 U.S. at 813. An arrest that is objectively supported by probable cause cannot be challenged on the ground that the officer's "subjective reason for making the arrest" is something other than "the criminal offense as to which the known facts provide probable cause." Devenpeck v. Alford, 543 U.S. 146, 153 (2004). And an otherwise valid boarding of a vessel by customs officials cannot be challenged on the ground the officials' actual motive was to investigate suspected marijuana trafficking, not to inspect the vessel's documentation. United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983).

This Court's repeated rejection of a subjective approach to Fourth Amendment analysis forecloses petitioner's suggestion for an intent-based approach here. The objective circumstances of the search at issue here fall squarely within Rawlings: Officer Wadolowski had probable cause to arrest petitioner before he frisked him, and he did in fact arrest him immediately thereafter. See 448 U.S. at 111. In suggesting an intent-based approach, petitioner does not dispute that a reasonable officer in Officer Wadolowski's position could have taken exactly the same actions

without violating the Fourth Amendment, so long as he planned to arrest him at the time of the search. Instead, petitioner would invalidate them on the ground (Pet. 23) that Officer Wadolowski's actions did not "intend to arrest petitioner" when he began the search.

That approach would thus place dispositive weight on Officer Wadolowski's subjective intent. But this Court has "held that the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 128, 138 (1978). Here, "the circumstances, viewed objectively," ibid., justified a search of petitioner's person as an incident to his arrest, which immediately followed. Petitioner thus cannot seek to invalidate that action by arguing that Officer Wadolowski subjectively lacked a particular "state of mind," ibid.

c. Petitioner is incorrect to argue (Pet. 3, 29-31) that Knowles, supra, supports his position. In Knowles, the defendant was stopped for speeding, and although the officer could have arrested him for that infraction, the officer instead issued a citation -- and only thereafter conducted the search. 525 U.S. at 114. At the time, state law authorized the police to conduct a full-scale search of a car and driver whenever they elected to

issue a citation rather than to make a custodial arrest. Id. at 115. This Court found that the law thus purported to authorize a "search incident to citation." Ibid. The Court declined to extend the search-incident-to-arrest doctrine to that circumstance, holding that the officer-safety and evidence-preservation justifications for the doctrine do not apply when an officer resolves an encounter with a suspect by issuing a citation rather than making an arrest. Id. at 117-118.

The result in Knowles thus turned on the fact that, at the time of the search, the officer had already completed the encounter by issuing a citation. Here, in contrast, Officer Wadolowski had not completed the encounter at the time of the search. Knowles does not apply where, as here, "the officer has not yet issued a citation [at the time of the search] and ultimately does subject the individual to a formal arrest." United States v. Pratt, 355 F.3d 1119, 1125 n.4 (8th Cir. 2004).

3. Petitioner asserts (Pet. 11-22) that the court of appeals' decision conflicts with decisions of the Seventh Circuit and several state courts of last resort. That greatly overstates the extent of the disagreement.

a. In Ochana v. Flores, 347 F.3d 266 (2003), the Seventh Circuit stated that a search incident to arrest must occur after the arrest. Id. at 270. But that statement was dictum, because the court ultimately upheld the search. Id. at 270-271. And, as

the D.C. Circuit has observed, the Seventh Circuit's opinion, "like the briefs then before it, betrayed no awareness of [this] Court's holding in Rawlings." Powell, 483 F.3d at 839. The Seventh Circuit's subsequent decisions illustrate its understanding that, under Rawlings, "even a search that occurs before an arrest may be deemed lawful as incident to that arrest." United States v. Leo, 792 F.3d 742, 748 n.1 (2015).[3] The erroneous Ochana dicta thus is not the law in the Seventh Circuit and does not indicate the existence of any conflict warranting this Court's review.

Petitioner relies (Pet. 18-21) on decisions from California, Idaho, and Virginia. Although aspects of the reasoning of those decisions are inconsistent with the decision below, each of them involved circumstances unlike those present here. In the California and Virginia cases, the courts rejected the contention that a search could be justified as incident to an arrest in part because "state law precluded officers from arresting [the suspect]" for the relevant offense. People v. Macabeo, 384 P.3d 1189, 1197 (Cal. 2016) (emphasis omitted); see Lovelace v. Commonwealth, 522 S.E.2d 856, 860 (Va. 1999) (observing that "the officers could have issued only a summons"). Here, in contrast, New York law authorized an arrest both for petitioner's littering

[3] Accord United States v. Coleman, 676 Fed. Appx. 590, 592 (7th Cir. 2017); United States v. Ochoa, 301 Fed. Appx. 532, 535 (7th Cir. 2007); Duncan v. Fapso, 216 Fed. Appx. 588, 590 (7th Cir.), cert. denied, 552 U.S. 834 (2007).

violation and for his open-container violation. Pet. App. 1a, 12a. And Officer Wadolowski testified that he did not issue petitioner a summons for committing those offenses. Id. at 47a.[4]

The Idaho Supreme Court's decision in State v. Lee, 402 P.3d 1095 (2017), likewise involved circumstances distinguishable from those here. In that case, an officer detained a driver for a traffic violation and explicitly "told [the driver] that he would issue him a citation" instead of making an arrest. Id. at 1104. The court deemed that statement critical, emphasizing that "the historical rationales underlying the search incident to arrest exception" did not apply because the officer had "already said that he would issue [the driver] a citation" before he conducted the search. Ibid. Here, in contrast, Officer Wadolowski did not tell petitioner that he would receive only a summons before frisking him.

Petitioner additionally errs in asserting (Pet. 21-22) that the decision below conflicts with decisions of the highest state courts in Maryland, Massachusetts, and Tennessee. Each of the decisions on which he relies differs in critical respects from the

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[4] In Virginia v. Moore, 553 U.S. 164 (2008), this Court held that, "when an officer has probable cause to believe a person committed even a minor crime in his presence," "[t]he arrest is constitutionally reasonable" even if it would violate state law. Id. at 171. But Lovelace preceded this Court's decision in Moore, and the California Supreme Court's decision in Macabeo deemed the absence of state-law authorization relevant to the search-incident-to-arrest analysis notwithstanding Moore. See Macabeo, 384 P.3d at 1197.

one below because the officers lacked probable cause, did not actually arrest the defendant after the search, or both. In Commonwealth v. Craan, 13 N.E.3d 569 (Mass. 2014), for example, the court determined that "the trooper lacked probable cause" of any offense before the search began -- and the defendant was not arrested even after the search. He was instead issued a summons, allowed to drive away, and charged "[a]pproximately two months later." Id. at 572, 576; see Bailey v. State, 987 A.2d 72, 88 (Md. 2010) (explaining that officer "did not have probable cause to believe that the petitioner had committed or was committing a crime"); Belote v. State, 981 A.2d 1247, 1249 (Md. 2009) (explaining that officer "never made a custodial arrest" and suspect was not taken into custody until months later); State v. Crutcher, 989 S.W.2d 295, 302 n.12 (Tenn. 1999) (explaining that "police did not take custody of [the suspect] until several hours after the search").

Petitioner's claimed conflict thus reduces to the New York Court of Appeals' decision in People v. Reid, 26 N.E.3d 237 (2014). In that case, a police officer who had probable cause to arrest a driver for driving while intoxicated patted him down, discovered a switchblade knife in his pocket, and then arrested him. Id. at 238-239. The court recognized that, under Rawlings, the search "was not unlawful solely because it preceded the arrest." Id. at 239. But the court concluded that the search was invalid because

the officer did not intend to arrest the defendant when the search began. Id. at 240. The court stated that "[w]here no arrest has yet taken place [at the time of the search], the officer must have intended to make one if the 'search incident' exception is to be applied." Ibid. As the dissent in Reid explained, the majority contravened this Court's precedents by making "the police officer's subjective intent" determinative of the search's validity. Ibid. (Read, J.). Under such an approach, cases involving searches incident to arrest "would inevitably devolve into difficult-to-resolve disputes about motive." Id. at 241.

The shallow, recent conflict created by the divided decision in Reid does not warrant this Court's intervention now. The New York Court of Appeals has not had occasion to apply Reid since that case was decided in 2014. If the issue arises again, that court may well reconsider its outlier approach -- particularly now that the Second Circuit has squarely rejected it in United States v. Diaz, 854 F.3d 197 (2d Cir. 2017), cert. denied, 138 S. Ct. 981 (2018). Cf. People v. Kin Kan, 574 N.E.2d 1042, 1045 (N.Y. 1991) (explaining that although the court is not bound by the Second Circuit's decisions, "the interpretation of a Federal constitutional question by the lower Federal courts may serve as useful and persuasive authority"). This Court's review would thus be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2019