No. 19-5181

IN THE SUPREME COURT OF THE UNITED STATES

LAMAR JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. 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.

2. Whether the courts below erred in failing to recognize that the mens rea of knowledge under 18 U.S.C. 922(g) and 924(a)(2) applies "both to the defendant's conduct and to the defendant's status," Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 913 F.3d 793. The order of the district court (Pet. App. 25-38) is reported at 224 F. Supp. 3d 881.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2019. A petition for rehearing was denied on April 16, 2019 (Pet. App. 39). The petition for a writ of certiorari was filed on July 12, 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 Northern District of California, petitioner was convicted on two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); four counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of using, carrying, and possessing a firearm in connection with a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Judgment 1. He was sentenced to 94 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-24.

1. a. In August 2015, petitioner was driving alone when Sergeant Clint Simmont of the East Palo Alto Police Department stopped petitioner's car for failing to stop at a stop sign. Pet. App. 5, 25. When Sergeant Simmont approached the car and began speaking to petitioner, he smelled a combination of burnt and fresh marijuana, odors that he recognized from his experiences as a law-enforcement officer. Ibid. Petitioner gave his driver's license to Sergeant Simmont, and Sergeant Simmont provided the license information to a police dispatch agent, who informed Sergeant Simmont that petitioner had a suspended driver's license and was the subject of an "officer safety warning" for being a suspect in the attempted homicide of an East Palo Alto police officer. Id.

at 57, 111; see id. at 25. The agent also told Sergeant Simmont that petitioner had been arrested for parole violations, which indicated to Sergeant Simmont that petitioner had a felony conviction. Id. at 5, 26.

Sergeant Simmont asked petitioner for the registration and proof of insurance for his car, and petitioner stated that he was borrowing the car and did not have its registration or insurance information. Pet. App. 5, 26. When Sergeant Simmont asked petitioner if he was sure that he did not have the documentation, petitioner opened the car's glove box as if he were checking for the documents. Ibid. Sergeant Simmont saw that the glove box contained empty plastic bags and pill bottles, and he noticed that petitioner moved his hand around on the items inside the glove box without "'actually manipulat[ing] any items,'" which was "inconsistent with the way someone would genuinely search for paperwork." Id. at 26 (citation omitted); see also id. at 5.

Sergeant Simmont asked petitioner to step out of the car and spread his feet with his hands on his head. Pet. App. 5, 26, 112. Petitioner complied, and Sergeant Simmont "patted him down to search for evidence of the marijuana" that Sergeant Simmont had smelled emanating from the car. Id. at 112. During that "initial pat-down," Sergeant Simmont discovered that petitioner was wearing a bulletproof vest. Ibid.; see id. at 5-6, 26, 64-65, 76. Petitioner attempted to pivot away from Sergeant Simmont, but

another officer who had arrived on the scene prevented petitioner from moving away, and Sergeant Simmont and the other officer restrained petitioner in handcuffs. Id. at 112; see id. at 65, 78. Sergeant Simmont then searched petitioner's pockets and discovered that petitioner was carrying approximately $650 in cash. Id. at 26, 65, 112. After Sergeant Simmont confirmed petitioner's felony record with a police dispatch agent, the officers placed petitioner in the back of Sergeant Simmont's police car. Id. at 26, 78-79, 112. At that point, Sergeant Simmont considered petitioner to be under arrest for possession of body armor by a felon. Id. at 26, 79, 112.

Once petitioner was secured in the patrol car, Sergeant Simmont turned his attention to petitioner's car, which was parked in the street in a traffic lane and thus could not be safely left at the scene. Pet. App. 65-66, 112-113. Before the car was towed, Sergeant Simmont and another officer searched the car and inventoried its contents in accordance with East Palo Alto Police Department procedure. Id. at 27, 66-67, 97-98. During the search, the officers discovered a loaded Ruger handgun, a bottle containing acetaminophen/hydrocodone pills, a syringe of concentrated cannabis, plastic bags, and scales. Id. at 6, 27. After transporting petitioner to a police station, Sergeant Simmont searched petitioner's person and discovered cocaine base,

marijuana, oxycodone hydrochloride pills, and a substance that he suspected was heroin, hidden in petitioner's pants. Id. at 6, 27.

b. The following year, a separate investigation in San Mateo County uncovered evidence that petitioner was distributing controlled substances. Pet. App. 6-7. Based on that evidence, a state judge issued a warrant to search petitioner's home, in addition to other locations. Id. at 6. The search of petitioner's home uncovered a firearm, ammunition, scales, plastic bags, pills in bottles, and cocaine base. Id. at 7.

2. A federal grand jury returned an indictment charging petitioner with two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); four counts of possession with intent to distribute a Schedule II controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); two counts of possession with intent to distribute a Schedule IV controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(E); and one count of using, carrying, and possessing a firearm in connection with a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Indictment 1-3. One of the felon-in-possession counts and the Section 924(c) count charged petitioner with possessing and carrying the Ruger firearm recovered during the August 2015 search of petitioner's car, and three of the Schedule II drug counts charged petitioner with possessing controlled substances recovered during the same vehicle search and the subsequent search

of petitioner's person at the police station following his arrest. Indictment 1-2; see Pet. App. 5-6, 26-27; D. Ct. Doc. 56, at 1-2 (Feb. 7, 2017). The remaining counts charged petitioner with offenses committed in March 2016. Indictment 3.

The district court denied petitioner's motion to suppress the evidence seized from his person and car following the August 2015 traffic stop. Pet. App. 25-38. The court determined that, before the initial pat-down of petitioner, Sergeant Simmont had probable cause to believe that petitioner both had committed a drug-related crime and was driving with a suspended license, either of which gave Sergeant Simmont a lawful basis for arresting petitioner and searching him incident to that arrest. Id. at 28-33. The court further explained that a search incident to an arrest can occur before or after the arrest, so long as it is "roughly contemporaneous with the arrest." Id. at 33 (quoting United States v. McLaughlin, 170 F.3d 889, 892-893 (9th Cir. 1999)).

The district court determined that the initial search of petitioner's person was lawful because it "occurred quickly after * * * probable cause arose, and the arrest occurred immediately after the search." Pet. App. 33. Although "Sergeant Simmont subjectively understood the arrest to have been related to the crime of [petitioner's] possession of body armor," the court found that "Sergeant Simmont never abandoned the possibility of arresting [petitioner] based on the initial probable cause to

arrest." Id. at 34-35. The court further observed that "an officer's 'subjective reason for making [an] arrest need not be the criminal offense as to which the known facts provide probable cause.'" Id. at 35 (quoting Devenpeck v. Alford, 543 U.S. 146, 153 (2004)) (brackets in original).

With respect to the subsequent search of petitioner's car, the district court determined that Sergeant Simmont had probable cause to believe that the car was likely to contain evidence of marijuana possession and distribution, which justified a search of the car both incident to petitioner's arrest and pursuant to the automobile exception to the warrant requirement. Pet. App. 37-38. The court also explained that it did not matter that "Sergeant Simmont subjectively viewed [petitioner's] arrest as relating to the more pressing violation of being a felon in possession of body armor." Id. at 38.

After a bench trial on stipulated facts, petitioner was convicted on the felon-in-possession counts, the Schedule II drug counts, and the Section 924(c) count, and the government dismissed the two remaining drug counts. Judgment 1; Pet. App. 7.

3. The court of appeals affirmed. Pet. App. 1-24. As relevant here, the court determined that Sergeant Simmont's initial search of petitioner's person was a valid search incident to arrest. Id. at 8-12. The court explained that a search incident to a lawful arrest may precede the arrest, so long as probable

cause to arrest exists at the time of the search and the arrest follows "during a continuous sequence of events." Id. at 8 (quoting United States v. Smith, 389 F.3d 944, 951 (9th Cir. 2004) (per curiam), cert. denied, 544 U.S. 956 (2005)). The court also observed that, when the facts known to the arresting officer provide probable cause to arrest a suspect for an offense, an arrest is lawful irrespective of whether "the arresting officer's subjective crime of arrest" was in fact "the crime for which probable cause existed." Id. at 10; see id. at 9-10. Here, the court found that the combination of the smell of marijuana in petitioner's car, the plastic bags in the glove compartment, and petitioner's "unusual search" of the glove compartment provided probable cause that petitioner was transporting marijuana in violation of California law, which in turn allowed a search of petitioner's person incident to an arrest. Id. at 12.

In addition, the court of appeals determined that the search of petitioner's car was lawful under the automobile exception to the Fourth Amendment's warrant requirement, because the smell of marijuana gave Sergeant Simmont probable cause to search the car for that drug. Pet. App. 12-13. The court also found that the search of petitioner's car "cannot have been the fruit of an illegal search" because the initial search of petitioner's person comported with the Fourth Amendment, which meant that "no poisonous tree" existed. Id. at 13.

Judge Watford filed a concurring opinion. Pet. App. 17-24. Although he recognized that the court of appeals' decision correctly applied circuit precedent, Judge Watford stated that he disagreed with that precedent and believed that the Fourth Amendment requires that "a custodial arrest occur before an officer may conduct a search incident to arrest." Id. at 23; see id. at 17-24.

ARGUMENT

Petitioner contends (Pet. 10-31) that Sergeant Simmont's initial search of petitioner's person was not a valid search incident to arrest on the theory that the officer conducted the search before he arrested petitioner or intended to arrest him. This Court has repeatedly denied review of petitions for writs 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).[1] The same result is warranted here, particularly because Terry v. Ohio, 392 U.S. 1 (1968), would independently justify the frisk that petitioner challenges.

Petitioner also argues (Pet. 31-32) that his convictions for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), are infirm because the courts below did

[1] Two other petitions raising the same issue are currently pending. See Dupree v. United States, No. 19-5343 (filed July 23, 2019); McIlwain v. United States, No. 18-9393 (filed May 21, 2019).

not recognize that knowledge of status is an element of that offense. As to that claim, this Court should grant the petition, vacate the decision below, and remand the case for further consideration in light of Rehaif v. United States, 139 S. Ct. 2191 (2019).

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

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. Id. at 763.

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 observed 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 explained 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.[2] 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.

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, Sergeant Simmont had probable cause to arrest him for transporting marijuana in violation of California law. See Pet. 31; Pet. App. 12. Petitioner also does not dispute that, as in Rawlings, "formal arrest followed quickly on the heels

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[2] "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.

of the challenged search," 448 U.S. at 111; see Pet. 4-6, 31. The court of appeals thus correctly held that the search was a lawful search incident to arrest.

2. Petitioner appears to challenge the decision below on two different grounds. First, and more broadly, he asserts (Pet. 10-18, 22-30) that an incident search requires an arrest at the time of the search and thus may not precede the arrest. Second, he advances (Pet. 19-22) the narrower argument that a valid incident search may precede the arrest only if the record indicates that 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. 11-12) 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. This Court upheld the search at issue in Rawlings "as incident to [the defendant's] formal arrest" and specifically considered the significance of the fact that "the search preceded the arrest." Ibid. 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, 463 F.2d at 950, 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. That "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).[3] Any other rule would endanger police officers

[3] 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, 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

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. 29) that, under a rule that the search may precede the arrest, police would have "unfettered discretion as to whom to target for searches." But that is not correct. Under Rawlings, a police officer in Sergeant Simmont'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 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. Petitioner's own rule, moreover, would itself assign courts the vexing task of determining in each case precisely when an arrest

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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).

occurred. As the circumstances of petitioner's own case illustrate, see Pet. App. 112, any such effort invites confusion and indeterminacy.

b. Petitioner alternatively contends (Pet. 19-22) that a search incident to arrest may precede the arrest only if the officer "intended," at the time of the search, to arrest the suspect based on probable cause that existed before 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) (emphasis omitted).

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 argument for an intent-based approach here. The objective circumstances of the search at issue here fall squarely within Rawlings: Sergeant Simmont had probable cause to arrest petitioner before he frisked him, and he did in fact arrest him shortly thereafter. See 448 U.S. at 111. In suggesting an intent-based approach, petitioner

does not dispute that a reasonable officer in Sergeant Simmont's position could have taken exactly the same actions without violating the Fourth Amendment, so long as he planned to arrest petitioner at the time of the search. Instead, petitioner would invalidate the actions taken by Sergeant Simmont in particular on the ground (Pet. 20, 22) that the record does not indicate that he intended to arrest petitioner when he began the search.

That approach would place dispositive weight on Sergeant Simmont'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 Sergeant Simmont subjectively lacked a particular "state of mind." Ibid.

c. Petitioner is incorrect to argue (Pet. 12-13, 21-23) 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 held 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, Sergeant Simmont 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. 15-17) 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 dicta, 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 th[is] 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); accord United States v. Paige, 870 F.3d 693, 700-701 (7th Cir. 2017); 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). The Ochana dictum 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. 16-17) on decisions from California, Idaho, and Virginia. Although aspects of the reasoning of those decisions may be 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, petitioner does not challenge the court of appeals' finding that, before the initial pat-down, Sergeant Simmont had probable cause to arrest petitioner for transporting marijuana in violation of California law. See Pet. App. 11-12.[4] To the contrary, petitioner acknowledges that Sergeant Simmont "had probable cause to arrest [him] for a marijuana offense before the search." Pet. 31.

The Idaho Supreme Court's decision in State v. Lee, 402 P.3d 1095 (2017), likewise involved circumstances different 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, Sergeant Simmont did not

[4] In Virgina 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 Supreme Court of California'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.

tell petitioner before frisking him that the encounter would be resolved in a manner that did not involve an arrest.

Petitioner additionally errs in asserting (Pet. 16 & n.5) 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 this one 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. Id. at 576. He was instead issued a summons, allowed to drive away, and charged "[a]pproximately two months later." Id. at 572, 576; see 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. Ingram, 331 S.W.3d 746, 759 (Tenn. 2011) (explaining that "the police officers did not take the [suspect] into custody until his indictment more than four months after the searches").

The decision below also does not conflict with the Supreme Court of Washington's decision in State v. O'Neill, 62 P.3d 489 (2003) (en banc). In O'Neill, the court relied on the Washington state constitution, not the Fourth Amendment, to determine that a

search of a defendant's car was not a proper search incident to arrest. Id. at 500-502. In so doing, the court explained that the state constitution "provides greater protection of a person's right to privacy than the Fourth Amendment" and permits warrantless searches incident to arrest in "narrower" circumstances than the Fourth Amendment would allow. Id. at 500. And although the court found that the state constitution required "a valid custodial arrest" as "a condition precedent to a search incident to arrest as an exception to the warrant requirement," id. at 502, the court did not hold that the Fourth Amendment imposes the same requirement, see id. at 501.

b. 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. 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. The New York Court of Appeals has not itself had occasion to apply, clarify, or revisit Reid since that case was decided in 2014. If the issue arises again, the 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 (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.

4. Even if the Fourth Amendment question otherwise warranted this Court's review, this case would not be a suitable vehicle in which to consider it, because petitioner would not be entitled to relief even if he prevailed on the question presented. Sergeant Simmont's initial frisk of petitioner, which uncovered the bulletproof vest that supplied Sergeant Simmont's subjective

reason for making an arrest, was valid as a limited protective pat-down under Terry, supra. Although the government did not argue below that the search was justified under Terry and the courts below did not address the question, Terry would provide an alternative ground for upholding the search. See, e.g., United States v. Koshnevis, 979 F.2d 691, 695 (9th Cir. 1992) ("[W]e may affirm the district court's denial of a motion to suppress on any ground fairly supported by the record.").

Under Terry, an officer who has lawfully stopped a suspect may conduct a limited protective frisk for weapons if he has reason to believe that the suspect "may be armed and presently dangerous." 392 U.S. at 30. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27. This Court has emphasized that, in applying that standard, "due weight must be given" to "the specific reasonable inferences [an officer] is entitled to draw from the facts in light of his experience." Ibid. The standard for an officer-safety frisk is "less demanding" than the standard "for the initial stop." 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.6(a), at 849 (5th ed. 2012). "Thus, assuming grounds for a stop, a certain suspicion that the person is armed might well warrant a search

even though that suspicion, standing alone, would not justify a stop[].” Id. at 849 n.43.

The Terry standard was satisfied here. Sergeant Simmont not only had authority to stop petitioner for running a stop sign, but once he smelled marijuana emanating from petitioner’s car, Pet. App. 5, 25, he had “a reasonable and articulable suspicion that the person seized [wa]s engaged in [other] criminal activity,” Reid v. Georgia, 448 U.S. 438, 440 (1980) (per curiam), namely, the transportation of marijuana. Sergeant Simmont then learned that petitioner was the subject of an “officer safety warning” for being a suspect in the attempted homicide of a fellow police officer. Pet. App. 57, 111. Petitioner does not challenge the stop or its duration, and under the circumstances, “a reasonably prudent man” would have been “warranted in the belief that his safety or that of others was in danger,” Terry, 392 U.S. at 27, during the lawful detention. See Pennsylvania v. Mimms, 434 U.S. 106, 111-112 (1977) (per curiam).

5. Petitioner contends (Pet. 31-32) that his convictions for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), are infirm because the courts below did not recognize that knowledge of status is an element of that offense. In Rehaif, supra, this Court held that the mens rea of knowledge under Sections 922(g) and 924(a)(2) applies “both to the defendant’s conduct and to the defendant’s status.” Id. at 2194.

Accordingly, the appropriate course is to grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of Rehaif.

CONCLUSION

With respect to the second question presented, the Court should grant the petition, vacate the decision below, and remand the case for further consideration in light of Rehaif v. United States, 139 S. Ct. 2191 (2019). In all other respects, the petition should be denied.

Respectfully submitted.

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