NO. 19-5181

IN THE SUPREME COURT OF THE UNITED STATES

LAMAR JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO PETITION FOR A WRIT OF CERTIORARI

STEVEN G. KALAR
Federal Public Defender
ROBIN PACKEL
Assistant Federal Public Defender
Office of the Federal Public Defender
for the Northern District of California
Oakland Branch
1301 Clay Street, Suite 1350N
Oakland, CA 94612
(510) 637-3500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

INTRODUCTION

The government does not dispute that the search-incident issue is ripe for this Court's attention, that it is important or that it arises frequently. It acknowledges both that state and federal courts have reached different results on this issue and that the issue has been presented to the Court numerous times, including in other pending cert petitions. Brief for the United States ["US"] at 9 & n.1; *see also Lam v. United States*, petition for cert. filed (U.S. Aug. 9, 2010) (No. 18-10221). The government does not address Judge Watford's opinion below that "the doctrinal underpinnings of the search-incident-to-arrest exception" establish that "the authority to conduct such a search does not arise until an arrest is actually made." Appendix ["App."] 18. It does not address the tensions Mr. Johnson outlined between this Court's decisions in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), and *Knowles v. Iowa*, 525 U.S. 113 (1998). Petition ["Pet."] 19-25.

The government's focus on arguing that courts may not consider whether or not an officer intends to arrest, US 16-18, is misplaced. Mr. Johnson framed and argued the issue based on temporality: whether a search incident to arrest may precede the arrest. The government thus is wrong in claiming that Mr. Johnson concedes "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." US at 18. Like Judge Watford's, App. 18, his position is that, under this Court's precedents, a warrantless

search may be justified as incident to an arrest only when the arrest precedes the search.

As discussed below and in Mr. Johnson's petition, the government's contrary rule is logically inconsistent and defies the spirit and the letter of this Court's search-incident precedents. Contrary to the government's claim, US 24-26, the search in this case cannot be upheld as a pat-search for weapons, a justification the government has not previously argued. The search-incident issue is recurrent and disputed, and this case is a good vehicle for this Court to address it.

I. There is no other basis for upholding the warrantless search in this case

The government is wrong that this case is not a suitable vehicle because the challenged search "was valid as a limited protective pat-down under *Terry*." US 24-25. The government admits that it has never before sought to justify the search here as a pat-search for weapons. US 25. Neither of the courts below addressed the government's new justification. *Id.* In fact, neither court's decision even mentioned the officer-safety warning, which is the basis for the government's new argument. *Cf.* App. 5, 26. Nonetheless, the government suggests that the Ninth Circuit could affirm the denial of suppression because the pat-search justification was "'fairly supported by the record.'" US 25 (quoting *United States v. Koshnevis*, 979 F.2d 691, 695 (9th Cir. 1992)). The government is wrong legally and factually.

The Ninth Circuit generally refuses to consider arguments raised for the first time on appeal absent exceptional circumstances. *Carrillo v. Cty of Los Angeles*, 798 F.3d 1210, 1223 (9th Cir. 2015); *see, e.g., United States v. Williams,* 419 F.3d

1029, 1034 (9th Cir. 2005); *ALLTEL Info. Servs. v. FDIC*, 194 F.3d 1036, 1043 n.9 (9th Cir. 1999). The Ninth Circuit will review an issue raised for the first time on appeal only to prevent a miscarriage of justice, when the law has changed while the appeal was pending or when the issue is purely legal. *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). None of these limited circumstances applies here: Denying suppression would *create* a miscarriage of justice; the law has not changed; and the issue is a mixed question of law and fact. *See United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014) (stating that whether investigatory pat-search for weapons was justified is mixed question of law and fact); *Fed. Ins. Co. v. Union Pac. R. Co.*, 651 F.3d 1175, 1178 (9th Cir. 2011) (stating that purely legal issue does not depend on factual record developed by parties and will not prejudice opposing party).

Moreover, the record would not support a finding that the warrantless search of Mr. Johnson was lawful as a pat-search for weapons. The Fourth Amendment allows such a search only "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is *armed and presently dangerous* to the officer or to others." *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (emphasis added.) "[F]acts merely establishing that *if* an individual were armed he would be dangerous are insufficient if there was no reason to believe that the individual actually *was* armed." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1022 (9th Cir. 2009) (emphases in original); *see Thomas v. Dillard*, 818 F.3d 864, 877 (9th Cir. 2016) (listing facts that may suggest reasonable suspicion supporting

pat-search for weapons). "There must be adequate reason to believe the suspect *is* armed." *Thomas*, 818 F.3d at 876.

The record does not support a finding that Mr. Johnson was, at the time of the search, armed or dangerous. Although Simmont's police report, declaration and testimony indicated that dispatch had told him of an "officer safety warning" because Mr. Johnson "was a suspect in the attempted homicide of an East Palo Alto police officer," App. 57, 111, there is no further information in the record about the warning.[1] For example, the record does not indicate when the alleged incident occurred or anything about the circumstances. Notably, there is no indication in the record that Simmont was concerned about or took any action in response to the warning. Mr. Johnson was cooperative, US 3, and there was nothing about his behavior before the search that suggested he was then armed or dangerous. The record thus lacks factual support for the government's new justification.

The search here also exceeded the scope of a lawful pat-search for weapons because Simmont "searched [Mr. Johnson's] pockets." US 4; App. 112 (Simmont declaration stating that he took $454 from Mr. Johnson's front pants pockets and $200 from his wallet); *see Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (holding that search exceeded scope of *Terry* pat-search for weapons because it went "beyond

[1]Simmont acknowledged that the CAD report did not reflect any information about the warning. App. 112. The information Simmont received from dispatch that Mr. Johnson's driver's license was suspended was incorrect. *See* App. 74-75 (referring to DMV document in evidence showing that license was not suspended). The warning information Simmont received from dispatch would have been challengeable as unreliable.

what is necessary to determine if the suspect is armed."). An officer's removal of even contraband from a person's pocket does not fall within the exception because it does not serve to "protect[] . . . the officer by disarming a potentially dangerous man." *Sibron v. New York*, 392 U.S. 40, 65 (1968); *see United States v. Miles*, 247 F.3d 1009, 1013-14 (9th Cir. 2001) (holding that manipulation of item in suspect's pocket exceeded scope of pat-search for weapons). Because the challenged search of Mr. Johnson was neither justified at its inception nor properly limited in scope, the Ninth Circuit could not uphold it as a pat-search for weapons.

II. The government's proposed search-incident rule is inconsistent with this Court's precedent and unworkable

The government advocates for a rule that it describes as "sensible," "clear, objective" and "readily applicable by the police": A pre-arrest search is lawful "if (i) police have probable cause to make the arrest before the search, and (ii) the officer makes the arrest shortly thereafter." US 11-12. There are several problems with the government's proposed rule.

First, the government's rule fails to account for the "doctrinal underpinnings" of the search-incident exception in this Court's precedents. As Mr. Johnson discussed, all the Court's cases applying the search-incident exception, with the possible exception of *Rawlings*, do so in the context of searches that follow arrests. Pet. 10. As Judge Watford explained, this is because an arrest both "triggers two important government interests that create the need for an immediate search" and "results in a reduction in the arrestee's Fourth Amendment privacy interests." App. 17-18.

The government's rule, by contrast, would allow police to conduct searches before the justifications for them arise.

The only authority from this Court that the government cites to support its position that a search may precede the arrest necessary to justify it is the paragraph in *Rawlings* that this Court has never cited. US 14. In addition to the very different factual context in which the issue arose in *Rawlings*, the Court there emphasized that it was applying the exception to a search that occurred immediately before "petitioner's *formal* arrest." 448 U.S. at 111 (emphasis added); *see also id.* ("Where the *formal* arrest followed quickly on the heels of the challenged search of petitioner's person . . . ." (emphasis added)). The government has not offered an explanation of what *Rawlings*' emphasis on a "formal arrest" might mean. The only Supreme Court case *Rawlings* cited for its search-incident holding was *Cupp v. Murphy*, which used "formal[] arrest" to mean "'the taking of a person into custody so that he may be held to answer for a crime.'" 412 U.S. 291, 294 n.1 (1973) (quoting Oregon statute). Consistent with this definition, Judge Watford read *Rawlings* to mean that the defendant "had plainly been subjected to a Fourth Amendment seizure amounting to an arrest" before the search, and "the search was not invalidated by the fact that the 'formal arrest' (handcuffing, etc.) occurred shortly after the search took place, rather than before." App. 22. The government's rule, and courts like the ones below that apply it, extend *Rawlings* far beyond its context of allowing searches incident to de facto but not yet "formal" arrests.

Another problem with the government's rule is that both its predicate facts -- pre-search probable cause and post-search arrest, 525 U.S. at 114-16 -- were present

in *Knowles*, yet this Court rejected the search-incident justification. To conform the government's rule to *Knowles*, it at least would have to require that the encounter not have been "completed" in some way. *Cf.* US 19 (distinguishing this case from *Knowles* because Simmont "had not completed the encounter at the time of the search").

Finally, the government fails to explain how an officer will know at the time of a pre-arrest search that it will be promptly followed by a custodial arrest. The government does not challenge the well-established principle that a search must be "justified at its inception." *City of Ontario v. Quon*, 560 U.S. 746, 761 (2010); *United States v. Montoya De Hernandez*, 473 U.S. 531, 541 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985); *Sibron v. New York*, 392 U.S. 40, 65 (1968); *Terry*, 392 U.S. at 20. It has not pointed to any Fourth Amendment warrant-requirement exception to which this principle does not apply. Consistent with this principle, the government acknowledges that it cannot use the fruits of a search to justify the search. US 12 n.2.

Yet for the pre-arrest searches at issue here, by definition the arrest will not yet have been made at the time of the search. The government agrees that it is the "fact of the arrest" that justifies the search-incident exception, Opp. 10, but does not explain how a pre-arrest search can be "justified at its inception" when this "fact" has not yet occurred. How will an officer know (or a court determine) -- as of the time of a pre-arrest search -- that there ultimately will be a custodial arrest?

The government does not claim that probable cause to arrest always results in a custodial arrest; as this Court recently acknowledged, it does not. *See Nieves v.*

Bartlett, 139 S. Ct. 1715, 1727 (2019) ("For example, at many intersections, jaywalking is endemic but rarely results in arrest."). The government also rejects consideration of officers' testimony about whether, at the time of the search, they intended to arrest. US 16-18. When the challenged search comes after a substantial investigation, a long detention and the lawful discovery of evidence supporting serious criminal charges, as in *Rawlings*, it may be reasonable to infer that a formal arrest is inevitable. But that was not the case here or in many of the other cases in which lower courts have relied on *Rawlings* to uphold pre-arrest searches. Indeed, courts have applied the government's rule to situations where the police officers "did not initially intend to arrest" the person searched, but "only to issue him a summons." *United States v. Diaz*, 854 F.3d 197, 200 (2d Cir. 2017). The government can claim that its rule is "sensible," "clear" and "readily applicable by the police" only because it, like the courts that have upheld pre-arrest searches, ignored the "justified at its inception" principle.

Adding the "justified at its inception" principle to the government's rule leads to the conclusion that the pre-arrest search here violated the Fourth Amendment. There was no finding or basis for finding that, when the search was initiated, there would be a custodial arrest. The courts below instead upheld the search based on the pre-search possibility of arrest and/or post-search fact of arrest. App. 8, 10, 11, 34, 37. These rationales fail to show that the search was justified at its inception by an arrest.

The government claims that Mr. Johnson's arrest-first rule would require courts to engage in the "vexing task of determining in each case precisely when an arrest

occurred," pointing to this case as an example of the "confusion and indeterminacy" such an inquiry entails." US 15. But there has never been any dispute that Mr. Johnson was arrested only after Simmont searched him and found the bulletproof vest. App. 6, 26-27, 78-79, 151. Although there may be close cases, this Court has repeatedly distinguished between brief investigatory detentions and other seizures that "eventuate in a trip to the station house and prosecution for crime -- 'arrests' in traditional terminology." *Terry*, 392 U.S. at 16; *see also, e.g.*, *Knowles*, 525 U.S. at 117 (distinguishing the "relatively brief encounter" of a traffic stop from a formal, "custodial arrest" that entails "the taking of a suspect into custody and transporting him to the police station" (internal quotation marks omitted)); *accord Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015).

In short, it is much easier for police and courts to determine whether, as of the time of the search, a custodial arrest *had* occurred than whether such an arrest *was going to* occur. This former context is the one in which this Court has applied the search-incident exception in every case, with the possible exception of *Rawlings*. The Court should grant certiorari in this case to restore that easily applicable and eminently reasonable limitation.

III. Police have other lawful ways of managing risks before arrests

The government complains that limiting the search-incident exception to searches conducted during or after arrests will require courts to "micromanage" the police. US 12, 15. Police have leeway, within the law, to manage risk during searches and seizures: They can, for example, remove people from cars during

traffic stops without any justification or pat-search them for weapons with reasonable suspicion that they are armed and dangerous. *Arizona v. Johnson*, 555 U.S. 323 (2009); *Maryland v. Wilson*, 519 U.S. 408 (1997). But this Court has a strong responsibility to uphold the Fourth Amendment's protections against unreasonable searches. *See, e.g.*, *Terry*, 392 U.S. at 13 ("Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered government use of the fruits of such invasions."). Limiting the search-incident exception to searches conducted during or after arrests strikes the appropriate balance.

The government's claim that "the concerns underlying the search-incident-to-arrest doctrine . . . may be even 'greater before the police have taken a suspect into custody than they are thereafter'" is inconsistent with this Court's decisions. US 12 (quoting *United States v. Powell*, 483 F.3d 836, 841 (D.C. Cir. 2007) (en banc)). As this Court said in explaining the reason for the bright-line search-incident rule: "It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which *follows the taking of a suspect into custody and transporting him to the police station* than in the case of the relatively fleeting contact resulting from the typical Terry-type stop." *United States v. Robinson*, 414 U.S. 218, 234-35 (1973) (emphasis added); *see also Cupp*, 412 U.S. at 296 ("Where there is no formal arrest . . . a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person."). And as Judge Watford pointed out, "the arrestee's perception that he has

been placed under arrest is what triggers the need for an immediate search." App. 23. The government's contrary claim conflicts with this Court's precedent.

CONCLUSION

For the reasons stated above and in his petition for a writ of certiorari, Mr. Johnson respectfully asks this Court to issue the writ.

Dated: September 25, 2019

STEVEN G. KALAR
Federal Public Defender
ROBIN PACKEL
Assistant Federal Public Defender

/s/ Robin Packel
Counsel of Record
Office of the Federal Public Defender
for the Northern District of California
Oakland Branch
1301 Clay Street, Suite 1350N
Oakland, CA 94612
(510) 637-350