No. 19–_____

In the
Supreme Court of the United States

Amoire Dupree,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the warrantless search of a person be justified as incident to arrest where, at the time of the search, no arrest has been made and none would have occurred but for the results of the search?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS AND ORDERS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is reported at 767 F. App'x 181 and appears at Pet. App. 1a–8a. The opinion and order of the United States District Court for the Eastern District of New York is reported at 2016 WL 10703796 and appears at Pet. App. 9a–19a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. §3231 and entered judgment on June 9, 2017. The Court of Appeals had jurisdiction under 28 U.S.C. §1291 and affirmed the District Court's judgment on April 24, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

STATEMENT OF THE CASE

Like the pending petition in *McIlwain v. United States*, No. 18–9393 (pet. for cert. filed May 21, 2019), this petition presents an acknowledged split between the Second Circuit and the New York Court of Appeals (not to mention dozens of other federal courts of appeals and state high courts) on an important, recurring question of Fourth Amendment law: Can the warrantless search of a person be justified as

incident to arrest where, at the time of the search, no arrest has been made and none would have occurred but for the results of the search?

The search-incident-to-arrest exception to the Fourth Amendment's warrant requirement is the most common justification for unconsented-to warrantless searches. 3 W. LaFave, *Search & Seizure* § 5.2(b), at 132 (5th ed. 2016). Indeed, "the label 'exception' is something of a misnomer," as "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." *Riley v. California*, 573 U.S. 373, 382 (2014). The exception permits, in the case of a lawful custodial arrest, a full search of the arrestee's person and the area within his immediate control, that is, "the area from which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969). The exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). Accordingly, an incident search requires an actual arrest, not just probable cause to make one: "[I]t is the fact of custodial arrest which gives rise to the authority to search." *United States v. Robinson*, 414 U.S. 218, 236 (1973). See also, e.g., *Thornton v. United States*, 541 U.S. 615, 630 (2004) (Scalia, J., concurring) ("The fact of prior lawful arrest distinguishes the arrestee from society at large.").

Despite the clarity and simplicity of this rule, many courts have gone badly astray. Like the Court of Appeals below, these courts uphold as "incident to arrest" searches based on mere probable cause, as long as an arrest—even one triggered by the fruits of the search—follows. Typically, in these cases, a police officer observes a

minor criminal offense (public drinking, a traffic infraction) most often handled with a citation rather than an arrest. The officer elects to search the person and discovers evidence of a more serious crime (drugs, a gun). Prompted by that discovery, the officer then places the person under arrest. Unlawful when made (because untethered to an actual arrest), the search is retroactively transformed into a permissible "search incident to arrest"—even though the arrest would never have occurred but for the search. As one court has correctly and concisely observed, in these circumstances, "to say that the search was incident to the arrest does not make sense." *People v. Reid*, 26 N.E.3d 237, 239 (N.Y. 2014). Yet most courts follow this approach. See *United States v. Johnson*, 913 F.3d 793, 803–04 (CA9 2019) (Watford, J., concurring) (citing J. Deahl, *Debunking Pre-Arrest Incident Searches*, 106 Cal. L. Rev. 1061, 1086–87 (2018)).

The culprit is a single sentence, in dictum, buried at the end of *Rawlings v. Kentucky*: "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." 448 U.S. 98, 111 (1980). When read in context, this dictum (not necessary to the disposition of any claim in the case, as explained below) does not disturb the longstanding principle that an incident search requires an arrest at the time of the search. Nor does it contemplate the use of a post-search arrest to authorize the search itself. Any doubts on this score should have been resolved by *Knowles v. Iowa*, 525 U.S. 113 (1998), which established that, where it is clear that no arrest is to take place (there, because the

officer had already issued a citation), probable cause to arrest does not permit an incident search. Nonetheless, confusion persists.

This petition frames the conflict in stark terms. Police officers saw Petitioner jaywalking on a Brooklyn street. As the District Court found below, the officers did not intend to arrest or even ticket Petitioner for that offense. But, because they harbored the inchoate suspicion that he was "up to something," the officers stopped and frisked Petitioner, revealing a firearm in his jacket pocket. Only after they found the gun (and only because they found the gun) did the officers place Petitioner under arrest. The Court of Appeals affirmed the search on the basis of *United States v. Diaz*, 854 F.3d 197 (CA2 2017), *cert. denied*, ___ U.S. ___ (2018), which holds that an officer with probable cause to arrest may search a person incident to arrest, as long as a formal arrest follows the search. This holding, the Second Circuit has acknowledged, stands in direct conflict with the decision of the New York Court of Appeals in *Reid*, which had invalidated an incident search under *Knowles* on identical facts: an officer with probable cause to arrest but no intent to do so searched a suspect, found a weapon, and arrested him.

The split between the Second Circuit and the New York Court of Appeals is reason enough to grant certiorari. E.g., *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). But the conflict implicated here runs much wider, dividing dozens of federal courts of appeals and state courts of last resort. Several state high courts split with their regional circuit: among others, California and Idaho (both going

Petitioner's way) split with the Ninth Circuit; Wisconsin (going Respondent's way) with the Seventh. This widespread, intractable conflict requires intervention.

This petition is an acceptable vehicle to review the *Diaz*/*Reid* split. Candidly, however, the pending petition in *McIlwain* is a superior vehicle. Here, the District Court observed that Respondent had a "strong argument" that the search of Petitioner's person was justified under *Terry v. Ohio*, 392 U.S. 1 (1968), based on reasonable suspicion that Petitioner was armed. To be clear, the District Court expressly declined to reach that issue, Respondent did not defend the search under *Terry* on appeal, and the Court of Appeals resolved this case on the basis of *Diaz* alone. Thus, nothing would prevent this Court from resolving the search-incident-to-arrest split, vacating, and remanding for consideration of reasonable suspicion by the courts below in the first instance. See, e.g., *Collins v. Virginia*, ___ U.S. ___, ___ (2018) (slip op., at 14). But, as explained in the *McIlwain* petition (at 22–23), that case offers a cleaner vehicle: There, Respondent conceded that the challenged search was invalid under *Reid*, and there is no alternative ground for affirmance.

On the merits, the Second Circuit is wrong. A search must be incident to an actual arrest, not just probable cause to make one, because only an arrest implicates the historical and doctrinal rationales for the exception. Only an arrestee, not a mere suspect, has been subjected to the "physical dominion" of the law, the intrusion that authorizes the lesser intrusion of a search. *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1928) (Cardozo, J.). And only a custodial arrest implicates the interests in officer safety and evidence preservation with sufficient

force to sustain the exception. See *Robinson*, 414 U.S. at 234–35; *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Moreover, the Second Circuit's rule—that probable cause authorizes an incident search, as long as an arrest follows—contravenes the bedrock Fourth Amendment principle that the lawfulness of a search is judged "at its inception." *Terry*, 392 U.S., at 20. No case from this Court supports the proposition that an illegal search can be salvaged by an after-the-fact arrest. The question presented merits review, either in *McIlwain* or in this case.

1. On January 15, 2016, NYPD Officers David Ardolino and William Schumacher, and a third officer, Quattrocchi, were on patrol, in plainclothes and in an unmarked car, in East New York, Brooklyn. Pet. App. 9a–10a, 25a–26a, 97a–98a. The officers were canvassing for a motor vehicle that had fled from a marked patrol car. Pet. App. 9a–10a, 97a. At about 1:35 a.m., the officers' car was stopped at a red light at the intersection of Twin Pines Drive and Pennsylvania Avenue, in the vicinity of the Starrett City complex of high-rise residential apartment buildings. Pet. App. 10a, 25a–26a, 59a. Ardolino and Schumacher testified that this was a "high-crime area" where they had made arrests for prostitution, drugs, weapons, assaults, and robberies. Pet. App. 9a, 25a–26a, 97a–98a.

While stopped at the red light facing east on Twin Pines, Ardolino saw two men (Petitioner and Rashad Harvey) enter the building at 1325 Pennsylvania Avenue, walk through the lobby, then exit. Pet. App. 10a, 29a–31a. Petitioner and Harvey attracted the officers' attention because the neighborhood was otherwise quiet: there was little vehicle traffic and there were no other people on the street.

Pet. App. 10a, 29a, 31a, 66a, 119a. Ardolino speculated that Petitioner and Harvey might have been trespassing (but had no evidence of that, and had not received any reports of trespassing in the building). Pet. App. 76a. Schumacher, for his part, thought that Petitioner and Harvey had been "lingering" in the lobby, which was "suspicious," and might have been the people who had fled from the marked patrol car. Pet. App. 10a, 100a.

As the officers' car turned left onto Pennsylvania Avenue, the officers saw the two men walking down the building's ramp toward the sidewalk. Pet. App. 31a, 100a. Harvey was holding a clear bottle with a dark brown liquid inside, which Ardolino surmised was alcohol. Pet. App. 10a, 32a, 36a–37a, 100a. Petitioner's hands were in his pockets (not unusual, Ardolino conceded, on this cold January night), and he was not holding a weapon in plain view. Pet. App.77a–78a. Ardolino testified that Petitioner "looked in my direction," "stopped abruptly," exchanged words with Harvey, then continued to walk. Pet. App. 33a–34a, 37a. In Ardolino's view, Petitioner appeared "nervous." Pet. App. 35a. Ardolino inferred that, although he and his partners were in plainclothes and their car was unmarked, Petitioner had identified the group as police. Pet. App. 35a. As clues, Ardolino cited the car's model (an Impala), the officers' exposed shields inside their car, and the car's open windows and emergency light package. Pet. App. 35a–36a. Similarly, Schumacher testified that Petitioner looked in the officers' direction, made a "fearful face," and stopped, as if "he wanted to go back to the lobby." Pet. App. 101a. Schumacher, too, deduced that Petitioner had made the group as police: the officers were "three white

individuals in a car driving around in East New York," which didn't "fit the demographics of the area." Pet. App. 10a, 102a. Schumacher thought that Petitioner was "up to something." Pet. App. 10a, 101a.

Harvey "ushered" Petitioner to keep moving, and the pair stepped off the sidewalk and into Pennsylvania Avenue, about 15–20 feet north of the crosswalk and directly in front of the officers' car, which was travelling about four miles per hour. Pet. App. 11a, 38a–39a, 102a–103a, 119a. The car had to stop to avoid hitting Petitioner and Harvey, who continued to walk diagonally across Pennsylvania to the center median. Pet. App. 11a, 40a–42a, 103a. After seeing Petitioner and Harvey jaywalk, the officers decided "to stop the two males and talk to them" on the center median—but not to arrest or cite them for jaywalking. Pet. App. 11a, 41a–42a, 103a. As the District Court found: "[T]he officers' testimony implies that they stopped [Petitioner] not because they intended to arrest him or even issue him a citation for jaywalking, but because his behavior prior to his jaywalking aroused their suspicions." Pet. App. 14a, n. 2.

Ardolino and Schumacher (along with Quattrocchi) got out of the car, identified themselves as police officers, and ordered Petitioner and Harvey to stop. Pet. App. 11a, 42a–43a, 78a, 103a. Harvey stopped, and after taking a few steps, Petitioner, who looked "visibly nervous," did too. Pet. App. 43a–44a, 78a–79a, 104a, 122a. Ardolino approached Petitioner while Schumacher approached Harvey. Pet. App. 11a, 105a. Ardolino saw that Petitioner's hands were still in his pockets. Pet. App. 44a. However, neither officer could see into Petitioner's pockets, and neither

saw a gun, the outline of a gun, or a bulge. Pet. App. 80a–81a, 122a, 126a. Ardolino did not ask Petitioner what was in his pockets or whether he had a gun. Pet. App. 82a. Fearing nonetheless that Petitioner might be hiding a weapon, Ardolino ordered him several times to take his hands out of his pockets. Pet. App. 11a, 46a, 94a, 105a. Petitioner didn't, so Ardolino approached him and frisked the outside of his jacket. Pet. App. 11a, 46a–47a. Through the jacket's "very soft" material, Ardolino felt Petitioner's hand holding "a hard L–shaped object" in his right pocket. Pet. App. 11a, 47a, 53a, 84a. As Ardolino frisked him, Petitioner began to "tense up," dig the object deeper into his pocket, and turn the right side of his body away. Pet. App. 11a, 48a, 52a–53a. Ardolino also saw a chrome metal object in Petitioner's hand, and concluded that Petitioner was armed. Pet. App. 11a, 47a.

Ardolino "bear-hugged" Petitioner "so he wasn't able to run away from me," and the two struggled, falling into the officers' patrol car. Pet. App. 11a, 48a, 85a. Schumacher, who had been occupied with Harvey, heard a loud thud and saw the two men wrestling in the patrol car. Pet. App. 105a, 122a. To alert them that Petitioner had a gun, Ardolino told his partners: "he's got it." Pet. App. 11a, 49a, 105a. Schumacher and Quatrocchi came to Ardolino's assistance, and after a five-minute struggle, subdued Petitioner. Pet. App. 11a–12a, 49a–50a, 106a. The officers handcuffed Petitioner, Pet. App. 51a, and retrieved a Raven Arms model MP–25, .25 caliber handgun, a "relatively small gun," from his right pocket. Pet. App. 12a, 53a, 84a. When completing Petitioner's "prisoner pedigree card," Ardolino, the arresting officer, wrote that Petitioner had been arrested for criminal possession of a weapon

and resisting arrest, but not for jaywalking. Pet. App. 70a–72a. Nor, when completing the "complaint report," did Ardolino note the jaywalking infraction. Pet. App. 73a–75a. Petitioner was never issued a summons for jaywalking, vehicle obstruction, or anything else. Pet. App. 79a.

2. A grand jury in the Eastern District of New York returned a one-count indictment charging Petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. §922(g)(1). Petitioner moved to suppress the firearm, arguing that Ardolino's warrantless search of his person violated the Fourth Amendment. See, e.g., D. Ct. Dkt. No. 16, at 3–4 ¶ 8. As relevant, Petitioner contended that the search could not be justified as incident to arrest because, at the time of the search, Ardolino had not arrested him or begun the process of arresting him for jaywalking. See, e.g., D. Ct. Dkt. No. 27, at 5 ("Of critical importance here, a search incident to arrest requires an actual arrest, not just probable cause to make one."). See also, e.g., D. Ct. Dkt. No. 27, at 3–9; D. Ct. Dkt. No. 31, at 1–3.

Petitioner acknowledged *United States v. Ricard*, 563 F.2d 45 (CA2 1977). There, the Second Circuit had held that probable cause to arrest a driver for speeding permitted a warrantless incident search of his person, even though the officer had not arrested the driver, and only decided to do so after finding cocaine on his person. D. Ct. Dkt. No. 27, at 6 ("[T]he fact that [the officer] had cause to arrest [the driver] for speeding, even if he initially determined not to do so, was a sufficient predicate for a full search.") (quoting 563 F.2d, at 49). But Petitioner argued that *Ricard* had been abrogated by this Court's intervening decision in

Knowles, which "established that the Fourth Amendment forbids an incident search, notwithstanding probable cause to arrest, where but for the search there was to be no arrest." D. Ct. Dkt. No. 27, at 5. The New York Court of Appeals, Petitioner noted, had adopted this reading of *Knowles*: "A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not." D. Ct. Dkt. No. 27, at 6 (quoting *Reid*, 24 N.Y.3d, at 619). Respondent countered that the search could be justified as incident to arrest under *Ricard*. D. Ct. Dkt. No. 28, at 10–11.

The District Court (Ross, J.) denied the motion. Pet. App. 9a–19a. First, crediting the officers' testimony, the Court found that Petitioner crossed Pennsylvania Avenue outside the crosswalk, and therefore concluded that "the officers had a legally valid basis to stop him" for jaywalking. Pet. App. 14a. As noted above, the Court acknowledged that "the officers' testimony implies that they stopped [Petitioner] not because they intended to arrest him or even issue him a citation for jaywalking, but because his behavior prior to his jaywalking aroused their suspicions." Pet. App. 14a, n. 2. But the Court deemed the officers' "actual motivations" irrelevant, reasoning that "as long as the officers *could* have stopped [Petitioner] because he was jaywalking," it could not "consider whether his commission of this minor offense was the actual basis for the stop." *Ibid.* (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

Next, the Court determined that Ardolino's search of Petitioner's person was a permissible search incident to arrest under *Ricard*: "Just as the officer in *Ricard*

'had cause' to arrest the defendant for speeding but chose not to do so, so the officers in this case had cause to arrest [Petitioner] for jaywalking. *Ricard* is unambiguous that as long as the officers had probable cause to make an arrest, a search incident to arrest is permissible even if an arrest would not have taken place but for the preceding search." Pet. App. 15a. The Court further concluded that "while *Ricard* and *Knowles* are certainly in tension with each other, this court cannot find that it is so clear that *Ricard* has been overruled by *Knowles* that district courts in this circuit are no longer obligated to follow it." Pet. App. 17a. In particular, the Court distinguished *Knowles* on the ground that there, the officer had already issued a citation. Pet. App. 17a–18a.[1]

Finally, the Court observed that, although it "need not reach the issue, ... there is a strong argument that [Ardolino's] patdown of [Petitioner's] clothing ... was lawful under *Terry*" because the officer had reasonable suspicion to believe that Petitioner was armed. Pet. App. 18a, n. 4. Specifically, "the officers could reasonably have concluded that [Petitioner's] refusal to remove his hands coupled with his and Harvey's presence in a high crime area late at night at a time when the streets were otherwise empty gave rise to the requisite 'reasonable suspicion.'" *Ibid.*

[1] After the District Court denied Petitioner's motion to suppress, the Second Circuit reaffirmed *Ricard* in *United States v. Diaz*, holding: "[A]n officer ... who has probable cause to believe that a person has committed a crime... may lawfully search that person pursuant to the search-incident-to-arrest doctrine, provided that a 'formal arrest follow[s] quickly on the heels of' the frisk." 854 F.3d, at 209 (quoting *Rawlings*, 448 U.S., at 111).

Petitioner proceeded to a bench trial. The parties stipulated that Petitioner "crossed Pennsylvania Avenue outside of the crosswalk and directly in front of a moving police vehicle, forcing the moving police vehicle to avoid hitting him." C.A. App. 166 ¶ 1. Petitioner's actions, the parties agreed, "constituted traffic infractions in violation of applicable law, including The Rules of the City of New York, Title 34, Sections 4–04(b)(2) and 4–04(c)(2), and New York Vehicle and Traffic Law Section 1800(a)." C.A. App. 166 ¶ 1. And the parties further agreed that Ardolino observed those infractions, stopped Petitioner, and removed a firearm from his jacket pocket. C.A. App. 166–67 ¶¶ 2–4. Finally, the parties stipulated that Petitioner had knowingly possessed the firearm, and that he had two prior New York state felony convictions. C.A. App. 167 ¶¶ 5–7. Based on the parties' stipulation, the District Court found Petitioner guilty. C.A. App. 179.

3. The Court of Appeals (Walker and Jacobs, JJ., joined by Shea, J. (Conn, by designation)) affirmed. Pet. App. 1a–8a. The Court agreed that because the officers had probable cause to arrest Petitioner for jaywalking, the search was permissible under *Diaz*, "which held that a search incident to arrest may be lawful 'regardless of whether or not the officer intended to [make an arrest] prior to the search.'" Pet. App. 3a (quoting 854 F.3d, at 207).

REASONS FOR GRANTING THE WRIT

The Second Circuit stands in open conflict with the New York Court of Appeals on a basic Fourth Amendment question that affects countless police-citizen encounters every day. There is a wider, entrenched split on the question whether a

search may be justified as incident to arrest where the search prompts the arrest, and not the reverse. This petition offers a suitable vehicle to resolve the conflict, although *McIlwain* may be preferable. On the merits, as Judge Watford has explained, see *Johnson*, 913 F.3d at 803–07 (concurring op.), the Second Circuit's rule invites discriminatory policing and contravenes bedrock Fourth Amendment principles. This petition, or *McIlwain*, should be granted.

I. The Second Circuit (*Diaz*) And The New York Court Of Appeals (*Reid*) Are In Direct Conflict.

Diaz acknowledged that it created a square split with *Reid*. 854 F.3d, at 208. Commentators have noted the split. See, e.g., 3 W. LaFave, *Search & Seizure* § 5.4(a), at 44, n. 18 (5th ed. Supp. 2017) (*Diaz* "reject[s] *Reid*"); Hon. B. Kamins, *Court of Appeals and Second Circuit Disagree on Searches Incident to an Arrest*, N.Y. State Bar Ass'n, N.Y. Criminal Law Newsletter, Summer 2017, at 7 (*Diaz* "squarely conflicts with" *Reid*), *available at* goo.gl/9LD6aY. This petition presents the *Diaz*/*Reid* split: below, the Second Circuit affirmed in light of *Diaz*.

The conclusion is inescapable. *Diaz*, this case, and *Reid* all involve analogous facts. In all three cases, a police officer developed probable cause to arrest a person for a criminal offense (in *Diaz*, public drinking; in this case, jaywalking; in *Reid*, driving while intoxicated). In *Diaz* and *Reid*, the officers testified that, notwithstanding probable cause, they did not intend to arrest the offenders, only to issue summonses. Here, the officers did not even intend to ticket Petitioner—only to investigate their suspicion that he was "up to something." Nonetheless, in each case, officers searched the person, resulting in the discovery of a weapon. Only after

discovering those weapons (and only because they discovered those weapons) did the officers arrest. That is, in all three cases, at the time of the challenged search, there was probable cause to arrest, but no actual or impending arrest. Compare *Diaz*, 854 F.3d, at 200–01 with Pet. App. 9a–12a and *Reid*, 26 N.E.3d, at 238. In *Diaz* and in this case, the search was upheld; in *Reid*, the search was held unlawful.

The conflict arises from the courts' disparate interpretations of *Knowles*. *Reid* read *Knowles* to mean that "the 'search incident to arrest' doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the 'search incident' exception is to be applied." 26 N.E.3d, at 240. In sharp contrast, *Diaz* expressly rejected this analysis: "[W]e conclude that, contrary to the *Reid* court's interpretation, *Knowles* does not require case-by-case determinations as to whether or not an arrest was impending at the time of the search." 854 F.3d, at 208. Rather, *Diaz* held, a search is permissible if probable cause to arrest precedes it, and an actual arrest closely follows, regardless of the officer's intent. Thus, on identical facts, the Second Circuit and the New York Court of Appeals have reached conflicting holdings on a question of federal constitutional law based on incompatible readings of *Knowles*.

This Court has several times granted certiorari to resolve conflicts between a federal circuit court and a state supreme court within the same circuit. E.g., *Wos v. E.M.A.*, 568 U.S. 627, 632 (2013) (Fourth Circuit and North Carolina Supreme Court); *Seling v. Young*, 531 U.S. 250, 260 (2001) (Ninth Circuit and Washington

Supreme Court); *Hagen v. Utah*, 510 U.S. 339, 409 (1994) (Tenth Circuit and Utah Supreme Court); *Walton v. Arizona*, 497 U.S. 639, 647 (1990) (Ninth Circuit and Arizona Supreme Court); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) (Sixth Circuit and Michigan Supreme Court). See this Court's Rule 10(a). Indeed, this Court has previously granted certiorari to resolve a split between the Second Circuit and the New York Court of Appeals. *Allen*, 442 U.S. 140.

The conflict between the opinion below and *Reid* cries out for review. Until this Court acts, the scope of New Yorkers' Fourth Amendment rights will vary according to the courthouse in which their case proceeds, sowing confusion, encouraging forum-shopping, and promoting disparate treatment of identically-situated arrestees. A defendant subject to a pre-arrest incident search will win a suppression motion in state court under *Reid* but lose in federal court under *Diaz*, a scenario that creates undesirable prosecutorial incentives. Or consider a criminal defendant who wins a suppression motion under *Reid* in state court, then brings a 42 U.S.C. §1983 suit against the officer for an unlawful search. If that suit is filed in (or removed to) federal court, the officer will prevail under *Diaz*, even though a state court has already held the search unconstitutional. See *Kamins*, *supra*, at 9.

The problem is not theoretical. New York's lower courts must follow the New York Court of Appeals, not the Second Circuit, in the event of a conflict between the two. *People v. Lugo*, 233 A.D.2d 197, 198 (1st Dep't 1996). Panels of the Appellate Division thus apply *Reid*, including in post-*Diaz* cases. E.g., *People v. Simmons*, 151 A.D.3d 628, 628–29 (1st Dep't 2017); *People v. Mangum*, 125 A.D.3d 401, 401–03

(1st Dep't 2015). Conversely, the Second Circuit and the New York federal District Courts apply *Diaz*. E.g., *United States v. McIlwain*, No. 18–778 (CA2 Feb. 20, 2019) (upholding pre-arrest incident search based on probable cause to arrest for littering); *United States v. Witty*, 2017 WL 3208528, at *10 (E.D.N.Y. July 26, 2017) (same, based on probable cause to arrest for unlawful presence in park after dark).

II. *Diaz* Deepens The Entrenched Split On The Question Whether A Search May Be Justified As Incident To Arrest Where, But For The Search, There Would Have Been No Arrest.

If this petition presented only a conflict between the Second Circuit and the New York Court of Appeals, that would be reason enough to grant review. In fact, the question presented is the subject of a deep, entrenched split among the federal and state courts. See, e.g., J. Deahl, *supra*, at 1086–87; M. Perry, *Search Incident to Probable Cause: The Intersection of* Rawlings *and* Knowles, 115 Mich. L. Rev. 109, 110 (2016); W. Logan, *An Exception Swallows A Rule: Police Authority to Search Incident to Arrest*, 19 Yale L. & Pol'y Rev. 381, 406 (2001).

In the federal courts, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, relying on *Rawlings*, all adopt the position that an incident search may precede and prompt an arrest. See *United States v. Bizier*, 111 F.3d 214, 217 (CA1 1997) ("whether a formal arrest occurred prior to or followed 'quickly on the heels' of the challenged search does not affect the validity of the search"); *United States v. Lawlor*, 406 F.3d 37, 41, n. 4 (CA1 2005) (relying on *Bizier* post-*Knowles*); *United States v. Miller*, 925 F.2d 695, 698 (CA4 1991) ("[defendant's] formal arrest occurred almost immediately after [officer] searched her belongings ...

[t]he search of [defendant's] bag, therefore, was incident to her formal arrest"); *United States v. Patiutka*, 804 F.3d 684, 688 (CA4 2015) (relying on *Miller* post-*Knowles*); *United States v. Hernandez*, 825 F.2d 846, 852 (CA5 1987) ("it is immaterial that the arrest occurred later in time than the search incident to that arrest"); *United States v. McGruder*, 2001 WL 563889, at *1, n. 1 (CA5 2001) (unpub.) (relying on *Hernandez* post-*Knowles*); *United States v. Montgomery*, 377 F.3d 582, 586 (CA6 2004) ("the search-incident-to-a-lawful-arrest rule ... permits an officer to conduct a full search of an arrestee's person *before* he is placed under lawful custodial arrest"); *United States v. Chartier*, 772 F.3d 539, 546 (CA8 2014) (rejecting argument that "drugs found after the search could not retroactively justify the search" because "probable cause for arrest existed even before the search, and ... 'the formal arrest followed quickly on the heels of the challenged search'"); *United States v. Smith*, 389 F.3d 944, 951 (CA9 2004) ("A search incident to arrest need not be delayed until the arrest is effected. ... So long as an arrest that follows a search is supported by probable cause independent of the fruits of the search, the precise timing of the search is not critical."); *United States v. Lugo*, 170 F.3d 996, 1003 (CA10 1999) ("A legitimate 'search incident to arrest' need not take place after the arrest."); *United States v. Banshee*, 91 F.3d 99, 102 (CA11 1996) ("because there was probable cause for the arrest before the search and the arrest immediately followed the challenged search, the fact that [defendant] was not under arrest at the time of the search does not render the search incident to arrest doctrine inapplicable"); *United States v. Goddard*, 312 F.3d 1360, 1364 (CA11 2002) (relying

on *Banshee* post-*Knowles*); *United States v. Powell*, 483 F.3d 836, 839–42 (CADC 2007) (*en banc*) (rejecting defendant's argument that custodial arrest must precede incident search).

In the state courts, the highest courts of Alabama, Connecticut, the District of Columbia, Florida, Iowa, Kentucky, Louisiana, New Jersey, North Carolina, North Dakota, South Carolina, South Dakota, Vermont, and Wisconsin likewise interpret *Rawlings* to authorize pre-arrest incident searches. See *Adams v. State*, 815 So. 2d 578, 582 (Ala. 2001) ("Because [officer], before conducting the search, had probable cause to arrest [defendant], and because the search and the arrest were sufficiently contemporaneous, [officer's] search of [defendant's] front pants pocket was a valid search incident to an arrest."); *State v. Clark*, 764 A.2d 1251, 1268, n. 41 (Conn. 2001) ("A formal arrest need not always chronologically precede the search incident to lawful arrest in order for the search to be valid."); *United States v. Lewis*, 147 A.3d 236, 243 (D.C. 2016) (*en banc*) (*Gant* incident search of vehicle "can be lawful even if the search precedes arrest"); *Jenkins v. State*, 978 So. 2d 116, 126 (Fla. 2008) ("it is permissible for a search incident to arrest to be conducted prior to the actual arrest"); *State v. Horton*, 625 N.W.2d 362, 364 (Iowa 2001) (although defendant "was not formally arrested until after the 'pat down' search that revealed the bag of unsmoked marijuana," "the timing" was "not fatal" because "a search incident to an arrest need not be made *after* a formal arrest"); *Williams v. Commonwealth*, 147 S.W.3d 1, 8 (Ky. 2004) ("it is immaterial that a search of the person without a search warrant may precede his arrest"); *State v. Surtain*, 31 So. 3d 1037, 1046 (La.

2010) (officer "was authorized to conduct a full search of the defendant's person incident to the arrest for which probable cause existed, even though the defendant had not yet been formally placed under arrest"); *State v. O'Neal*, 921 A.2d 1079, 1087 (N.J. 2007) ("The fact that the police searched and removed the drugs before placing defendant under arrest does not alter the outcome. ... It is the right to arrest rather than the actual arrest that must pre-exist the search."); *State v. Bone*, 550 S.E.2d 482, 488 (N.C. 2001) ("a search may be made before an actual arrest and still be justified as a search incident to arrest"); *State v. Linghor*, 690 N.W.2d 201, 204 (N.D. 2004) ("In certain circumstances, [an incident] search can even precede an arrest."); *State v. Freiburger*, 620 S.E.2d 737, 740 (S.C. 2005) ("A warrantless search which precedes a formal arrest is valid if the arrest quickly follows."); *State v. Smith*, 851 N.W.2d 719, 725–26 (S.D. 2014) (affirming search that preceded arrest by 27 minutes because "[t]he arrest ... does not need to occur prior to the search"); *State v. Guzman*, 965 A.2d 544, 550–51 (Vt. 2008) ("It is of no significance that police did not formally arrest defendant before conducting the search."); *State v. Sykes*, 695 N.W.2d 277, 283 (Wis. 2005) ("A search may be incident to a subsequent arrest if the officers have probable cause to arrest before the search.").

In contrast, the Seventh Circuit and the highest state courts of California, Idaho, Maryland, Massachusetts, New York, Tennessee, and Virginia all hold that an arrest must precede an incident search, or at least be impending.

For example, in *Ochana v. Flores*, the Seventh Circuit held that in order to conduct an incident search of an arrestee's vehicle, "the occupant of the vehicle

must actually be held under custodial arrest." 347 F.3d 266, 270 (CA7 2003). There, police observed Ochana asleep at the wheel of his car at an intersection and ordered him to step to the rear of the car. *Id.*, at 268. While one officer questioned Ochana, the other searched the car, found a bag containing a white powdery substance inside a backpack, concluded that the bag contained a controlled substance, and handcuffed Ochana, placing him under arrest. *Id.*, at 268–69. In Ochana's subsequent §1983 action alleging an unlawful search, the Seventh Circuit held that the search of Ochana's car could not be justified as incident to arrest because there was "insufficient evidence that Ochana was under custodial arrest at the time of the search. ... He was not told that he was under arrest; he was not handcuffed or frisked; and no sobriety test was conducted." *Id.*, at 270. Consequently, even though there was probable cause to arrest Ochana for obstructing traffic, *id.*, at 271, and he was arrested, the search was not incident.

Likewise, in *People v. Macabeo*, the California Supreme Court held that the search of a person's cell phone was not incident to arrest because the person was not under custodial arrest at the time of the search, even though the officers had probable cause to arrest before the search, and did in fact arrest afterward. 384 P.3d 1189, 1195–97 (Cal. 2016).[2] Police officers stopped Macabeo for riding his bicycle through a stop sign, an infraction under California law. *Id.*, at 1191. During the stop, they seized and searched Macabeo's cell phone. *Id.*, at 1192. After the

[2] *Riley*, 573 U.S. 373, which holds that the Fourth Amendment prohibits a warrantless search of a cell phone incident to arrest, was not dispositive in *Macabeo* because the State had asserted good-faith reliance on pre-*Riley* precedent.

officers found child pornography, they arrested Macabeo. *Ibid.* The California Supreme Court held that the search of the cell phone could not be justified as incident to arrest because "Macabeo was not under arrest when officers searched his phone." *Id.*, at 1195. *Macabeo* rejected the state's argument, based on *Rawlings*, that "the officers *could have* arrested defendant for failing to stop his bicycle at a stop sign, and then searched his phone incident to that arrest." *Id.*, at 1195. That "expansive understanding of *Rawlings*, that probable cause to arrest will always justify a search incident so long as an arrest follows," was "inconsistent" with *Chimel* and "in tension with the reasoning in" *Knowles*. *Macabeo*, 384 P.3d, at 1195–96. *Rawlings*, the court cautioned, "does not stand for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows." Rather, *Macabeo* correctly understood *Rawlings* to mean only that "[w]hen a custodial arrest is made, and that arrest is supported by independent probable cause, a search incident to that custodial arrest may be permitted, even though the formalities of the arrest follow the search." *Id.*, at 1196. Because there were no "objective indicia" to suggest that the officers would have arrested Macabeo for the stop-sign infraction, *Knowles* controlled: "once it was clear that an arrest was *not* going to take place, the justification for a search incident to arrest was no longer operative." *Id.*, at 1197.

The Idaho Supreme Court's decision in *State v. Lee*, 402 P.3d 1095 (2017), is in accord. There, a police officer developed probable cause to arrest Lee for driving with a suspended license and, after Lee parked his car and began to walk, stopped

Lee to question him. *Id.*, at 1098–99. During questioning, the officer frisked Lee's pockets and felt a large bulge consisting of several cylindrical items and a longer object that felt like a pocketknife. *Id.*, at 1099. After removing the cylindrical containers and what was indeed a pocketknife, the officer handcuffed and detained Lee (but did not arrest him), telling Lee that he would be issued a citation for driving without privileges. *Ibid.* The officer then opened the cylindrical containers, found marijuana and a powdery residue, and arrested Lee for possessing a controlled substance. *Ibid.*

Relying on *Reid* and *Macabeo*, the Idaho Supreme Court held that the search of the cylindrical containers could not be justified as incident to arrest because, at the time of the search, Lee was not under arrest and the officer had determined only to issue him a citation for driving without privileges: "[A] search incident to arrest is not reasonable when an arrest is not going to occur." 402 P.3d, at 1105. *Lee* explained that a court should determine "if an arrest is going to occur based on the totality of the circumstances," "including the officer's statements." 402 P.3d, at 1105. "While the subjective intent of an officer is usually not relevant in Fourth Amendment analysis, statements made by the officer of his intentions along with other objective facts are relevant in the totality of circumstances as to whether an arrest is to occur." *Ibid.* Because the officer's statement that Lee would receive only a citation for the vehicular offense established that no arrest would have occurred but for the discovery of the narcotics, the search that yielded the narcotics could not be sustained as incident to arrest. *Id.*, at 1105–06.

And in *Lovelace v. Commonwealth*, following a GVR in light of *Knowles*, the Virginia Supreme Court held that a search could not be sustained as incident to arrest where, at the time of the search, the defendant had been detained for an open-container violation, but had not been placed under custodial arrest. 522 S.E.2d 856 (Va. 1999). There, an officer saw Lovelace drinking from a liquor bottle in public, detained him, patted him down, and discovered a bag of crack. *Id.*, at 857. The officer "acknowledged that he had not arrested Lovelace and did not have him in custody when he searched Lovelace," and "did not actually arrest Lovelace until after he retrieved the bag from the defendant's pocket. *Ibid.* The court concluded that *Knowles* controlled. Because (as in *Macabeo*) state law permitted only the issuance of a summons for the offense, not an arrest, the court rejected the state's argument "that existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [the officer] to search him." *Id.*, at 860, After *Knowles*, the court explained, "an 'arrest' that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search." *Ibid.*

Other state-court decisions from Maryland, Massachusetts, and Tennessee embrace the same reasoning. See, e.g., *Bailey v. State*, 987 A.2d 72, 95 (Md. 2010) ("It is axiomatic that when the State seeks to justify a warrantless search incident to arrest, it must show that the arrest was lawfully made prior to the search."); *Belote v. State*, 981 A.2d 1247, 1252 (Md. 2009) ("Where there is no custodial arrest," the "underlying rationales for a search incident to arrest do not exist.");

State v. Funkhouser, 782 A.2d 387, 408 (Md. Ct. Spec. App. 2001) ("[N]o decision to arrest Funkhouser had been made and ... the seizure and search of the 'fanny pack' was no mere incident of an arrest already in motion .... It was, rather, the finding of suspected drugs in the 'fanny pack' that was the precipitating or catalytic agent for Funkhouser's arrest .... This was an arrest incident to search."); *Commonwealth v. Craan*, 13 N.E.3d 569, 575 (Mass. 2014) ("Where no arrest is underway, the rationales underlying the exception do not apply with equal force. Indeed, to permit a search incident to arrest where the suspect is not arrested until much later, or is never arrested, would sever this exception completely from its justifications and effectively create a wholly new exception for a search incident to probable cause to arrest."); *State v. Crutcher*, 989 S.W.2d 295, 301, n. 8 (Tenn. 1999) ("We decline to hold that a search may be upheld as a search incident to arrest merely because a lawful custodial arrest 'could have' been made.").

In sum, petitioner has identified a deep, entrenched split. This Court has repeatedly recognized a need for uniform Fourth Amendment doctrine. See, e.g., *Riley*, 573 U.S., at 398; *Thornton*, 541 U.S., at 623. Without this Court's intervention, confusion over the proper interpretation and application of *Knowles* will persist, with officers and people in the nation's two most populous states (New York and California), among others, subject to divergent rules in their federal and state courts. This Court's action is necessary.

III. This Is A Suitable Vehicle And The Question Presented Is Important.

This petition offers a suitable vehicle to resolve the division in the lower courts, although, as acknowledged above, the petition in *McIlwain* is likely superior. Petitioner has preserved his objection to the warrantless search of his person at each stage of the litigation, raising *Reid* and arguing that an incident search requires a completed or ongoing arrest. Although the District Court mentioned the possibility that the frisk might be sustained under *Terry*, the Court expressly declined to reach that issue. Pet. App. 18a, n. 4. Respondent did not argue *Terry* on appeal, and the Court of Appeals resolved this case under *Diaz*. In this situation, this Court's standard practice is to grant review on the question presented and, if petitioner prevails, remand for the courts below to address this alternative ground for decision in the first instance. E.g., *Collins*, ___ U.S., at ___ (slip op., at 14); *Maples v. Thomas*, 565 U.S. 266, 290 (2012); *Bullcoming v. New Mexico*, 564 U.S. 647, 668, n. 11 (2011). The possibility that respondent might win on a different ground on remand poses no obstacle to review.

Moreover, the facts tee up the question with clarity. The District Court found that at the time of the search, the officers did not intend to arrest or even cite Petitioner for jaywalking. Pet. App. 14a, n. 2. Indeed, the facts here allow this Court to explore all aspects of the conflict. Within the larger split on the timing of an incident search is a nested sub-split concerning the relevance of an officer's intent to arrest or not. Compare *Lewis*, 147 A.3d, at 239, 243–45 (holding that officer intent is irrelevant and collecting similar cases from the Tenth Circuit, the Wisconsin Supreme Court, and several state intermediate appellate courts) with *Reid*, 26

N.E.3d, at 240 ("Where no arrest has yet taken place, the officer must have intended one if the 'search incident' exception is to be applied.") and *Lee*, 402 P.3d, at 1105 ("While the subjective intent of an officer is usually not relevant in Fourth Amendment analysis, statements made by the officer of his intentions along with other objective facts are relevant in the totality of circumstances as to whether an arrest is to occur."). This Court will have the freedom to craft a rule that accommodates consideration of officer intent or not.

Further percolation is unnecessary. Almost all of the federal courts of appeals and almost half of the state courts of last resort have weighed in, and the issue has received extended treatment in several cases, including the divided *en banc* opinions of the D.C. Court of Appeals (*Lewis*) and the D.C. Circuit (*Powell*). Nor, absent this Court's intervention, will the conflict between the Second Circuit and the New York Court of Appeals dissipate. The Second Circuit denied rehearing in *Diaz*. Subsequently, the federal courts have continued to apply *Diaz* and the state courts have continued to apply *Reid*. See *ante* § I.

And the question is important. Incident searches abound, and far outnumber searches pursuant to warrant. *Riley*, 573 U.S., at 382. Moreover, the majority position creates perverse outcomes in the many cases of low-level criminal offenses most often handled with citations rather than arrests. Take New York City: between 2001 and 2013, police officers issued 7.3 million petty offense summonses, most for crimes such as public drinking, public urination, bicycling on the sidewalk, and so on. S. Ryley *et al.*, *Daily News Analysis Finds Racial Disparities in*

Summonses for Minor Violations in "Broken Windows" Policing, N.Y. Daily News (Aug. 4, 2014), *available at* nydn.us/1zNnMAe. Arrests for such offenses are rare. (Indeed, criminal enforcement of these laws is disfavored. *See* N.Y.C. Admin. Code §14–155.) But under the Second Circuit's rule, New York City police officers may search any of these millions of people "incident to arrest"—even though, as here, no actual arrest is ever contemplated—and, if the search yields contraband, arrest for the more serious offense. That is an invitation to discriminatory policing. See Ryley, *supra* (noting that 81 percent of those receiving summonses between 2001 and 2013 were African-American or Latino); NYC Dep't of Investigation, Office of Inspector General for the NYPD, *An Analysis of Quality-of-Life Summonses, Quality-of-Life Arrests, and Felony Crime in New York City, 2010–2015*, at 37 (2016) ("Precincts with higher proportions of black and Hispanic residents, males aged 15–20, and [public housing] residents had generally higher rates of quality-of-life enforcement."), *available at* goo.gl/enpLSn. Judge Watford has made the same point. *Johnson*, 913 F.3d, at 807 (Watford, J., concurring) (noting "the serious potential for abuse that ... exists when officers possess unfettered discretion as to whom to target for searches," and observing that "'people of color are disproportionate victims of this type of scrutiny'") (quoting *Utah v. Strieff*, ___ U.S. ___, ___ (2016) (slip op., at 12) (SOTOMAYOR, J., dissenting)).

IV. *Diaz* And The Order Below Are Wrongly Decided.

On the merits, *Diaz* and the order below are incorrect, as Judge Watford's thorough *Johnson* concurrence explains. 913 F.3d, at 803–07. In holding that

probable cause to arrest justifies an incident search, as long as a formal arrest follows, *Diaz* disregarded two fundamental Fourth Amendment rules.

First, *Diaz* ignored that an incident search requires an actual arrest, not mere probable cause to make one: "It is the fact of the lawful arrest which establishes the authority to search." *Robinson*, 414 U.S., at 235. That precept has deep historical and doctrinal roots. As then-Judge Cardozo summarized the common-law rule: "Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion." *Chiagles*, 142 N.E., at 584. See also, e.g., *Carroll v. United States*, 267 U.S. 132, 158 (1925) ("When a man is legally arrested for an offense, whatever is found upon his person or within his control which it is unlawful for him to have and which may be used to prove the offense may be seized."). That is, the incident search has been understood, as an historical matter, as permissible in light of the greater intrusion of arrest. Moreover, the interests advanced by the exception—officer safety and evidence preservation, see *Chimel*, 395 U.S., at 762–63—have weight sufficient to sustain *Robinson*'s categorical rule (any arrest supports an incident search) only in the context of a custodial arrest. As to officer safety, "a custodial arrest involves 'danger to an officer' because of 'the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.'" *Knowles*, 525 U.S., at 117 (quoting *Robinson*, 414 U.S., at 234–35). As to evidence preservation, "[w]here there

is no formal arrest," "a person might well be ... less likely to take conspicuous, immediate steps to destroy incriminating evidence." *Cupp*, 412 U.S., at 296.

Diaz muddled the point, confusing the *fact* of an arrest with the *grounds* for an arrest. For example, *Diaz* "assumed" that the *Chimel* interests were "present whenever an officer is justified in making an arrest." 854 F.3d, at 205. Not so: "[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." *Robinson*, 414 U.S., at 234, n. 5. That is why *Knowles* invalidated a search notwithstanding grounds to arrest: "Once it was clear that an arrest was *not* going to take place, the justification for a search incident to arrest was no longer operative." *Macabeo*, 384 P.3d, at 1197. Put another way, "[i]t is irrelevant that, because probable cause existed, there *could* have been an arrest without a search. A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not." *Reid*, 26 N.E.3d, at 239.

To be sure, *Diaz* requires a "formal arrest," which may "follow quickly on the heels of" the search. 854 F.3d, at 209. Hence *Diaz*'s second deviation from fundamental Fourth Amendment jurisprudence: the constitutionality of a search turns on whether it was justified "at its inception," *Terry*, 392 U.S., at 20, not on subsequent events. See also, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). The rationale for that rule is self-evident. Fourth Amendment doctrine guides officers' primary conduct, see, e.g., *New York v. Belton*, 453 U.S. 454, 458 (1981), but officers cannot tailor their behavior to events that they cannot foresee. Yet *Diaz*

compels officers to do just that. Take this case. At the moment when Ardolino began to frisk Petitioner, was the search lawful? Applying *Diaz*, it is impossible to say. If Ardolino would go on to arrest Petitioner, then it was; but if not, then not. A decisional rule unable to ascertain the legality of a search at its inception is defective for that reason alone. "Fourth Amendment rules 'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (quoting *Belton*, 453 U.S., at 458). This one is not. Nor is there any support for the premise that a search, illegal at its inception, can be retroactively transformed into a permissible search incident to arrest when an officer, motivated by the fruits of the search, decides to arrest.

Diaz erred (as have many courts) by misreading cursory dictum in *Rawlings* that "[w]here the formal arrest followed quickly on the heels of the challenged search ... , we do not believe it particularly important that the search preceded the arrest, rather than vice versa." 448 U.S., at 111; see 854 F.3d, at 205. That statement must be understood in light of the facts and posture of the case.

In *Rawlings*, officers entering a home to execute an arrest warrant for an absent resident on drug trafficking charges saw and smelled marijuana. Some officers left to obtain a search warrant, while others detained the occupants (including Rawlings) in the home's living room. Forty-five minutes later, the officers returned with a search warrant, read the occupants their *Miranda* rights, then ordered Rawlings's companion to empty her purse onto a coffee table. She did so,

disclosing "1,800 tablets of LSD and a number of smaller vials containing benzphetamine, methamphetamine, methprylan, and pentobarbital" which Rawlings "immediately claimed" were his. *Id.*, at 101. Officers then searched Rawlings, finding a knife and cash, before placing him "under formal arrest." *Ibid.*

There is no doubt that, at the time of that search, Rawlings "had plainly been subjected to a Fourth Amendment seizure amounting to an arrest, based on probable cause that existed beforehand." *Johnson*, 913 F.3d, at 806 (Watford, J., concurring). Officers executing a drug warrant, who had detained Rawlings and read him his *Miranda* rights, had just heard him admit ownership of a "sizable quantity of drugs." *Rawlings*, 448 U.S., at 111. Indeed, Rawlings's admission of ownership "clearly" supplied probable cause to arrest him. *Ibid.* For Fourth Amendment purposes, his arrest had occurred, which explains the Court's repeated use of the term "formal arrest" to describe what happened after the search. *Id.*, at 101, 111. Thus, "*Rawlings* merely establishes that when an arrest is supported by probable cause, after-acquired evidence need not be suppressed because an otherwise properly supported arrest was subsequently made more formal." *Macabeo*, 384 P.3d, at 1196. But it "does not stand for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows." *Id.*, at 1197.

Moreover, in this Court, Rawlings did not contend that the last search was unlawful because it preceded his "formal arrest." Rather, he argued (in Point IV of his brief, which consumed pages 82 and 83 of an 84-page filing) that "probable cause

for the arrest was predicated on the fruits of a prior illegal search and seizure of contraband drugs." Brief for Petitioner 82–83, *Rawlings v. Kentucky*, No. 79–5146 (U.S. Feb. 6, 1980), *available at* 1980 WL 339599. This Court's statement regarding the timing of the search was unnecessary to the disposition of the case, *Lewis*, 147 A.3d, at 242, and lacks binding force, *Smith v. Robbins*, 528 U.S. 259, 273 (2000).

Knowles confirms that the Fourth Amendment forbids an incident search, notwithstanding probable cause to arrest, where but for the search there was to be no arrest. In that case, an Iowa police officer stopped Knowles for speeding and "issued a citation to Knowles, even though under Iowa law he might have arrested him." 525 U.S., at 114. The officer then searched Knowles's car and, after finding marijuana, arrested Knowles for a controlled substance offense. *Ibid.* The Iowa Supreme Court upheld the search under a "'search incident to citation'" exception to the Fourth Amendment, reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest." *Id.*, at 115–16. This Court reversed. Noting the "two historical rationales" for the search-incident-to-arrest exception—"the need to disarm the suspect in order to take him into custody" and "the need to preserve evidence for later use at trial"—this Court concluded that "neither" was "sufficient to justify the search in the present case." *Id.*, at 117. As to officer safety, a lawful basis to arrest does not by itself authorize a search because "'the danger to the police officer flows from the fact of the arrest, ... and not from the grounds for the arrest.'" 525 U.S., at 117 (quoting *Robinson*, 414 U.S., at 234, n. 5) As to evidence preservation, at the time of the

search, "all the evidence necessary to prosecute that offense had been obtained." *Id.*, at 118. Thus, the Court declined to extend the exception because "the concern for officer safety [was] not present to the same extent and the concern for destruction or loss of evidence [was] not present at all." *Id.*, at 119.

Diaz distinguished *Knowles* on the ground that there, the officer had issued a citation before searching Knowles's car. 854 F.3d, at 206. But that is immaterial: "[T]he critical fact in *Knowles* was not the officer's issuance of the citation, but rather than absence of an arrest" at the time of the search. *Johnson*, 913 F.3d, at 805 (Watford, J., concurring). "That absence is key because ... the exigency that justifies a warrantless arrest in this context arises from the *fact* of arrest, ... not from the existence of probable cause to arrest." *Ibid.* (citing *Robinson*, 414 U.S., at 236). Moreover, if *Diaz* were correct, *Knowles* would have come out the other way. See *Reid*, 26 N.E.3d, at 240. After all, in *Knowles*, there was probable cause to arrest before the search, and a formal arrest shortly thereafter. See *Diaz*, 854 F.3d, at 208 (stating these two requirements for a pre-arrest incident search). But this Court in *Knowles* concluded otherwise, confirming that what matters is the existence, or not, of an actual arrest at the time of an incident search.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition in *McIlwain* should be granted and this petition should be held.

Respectfully submitted,

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