No. 19-5343

IN THE SUPREME COURT OF THE UNITED STATES

AMOIRE DUPREE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by a police officer's frisk where petitioner refused to remove his hands from his coat pockets during a lawful stop, probable cause existed to arrest him, and the officer arrested him immediately after the frisk.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Dupree, No. 16-cr-84 (June 9, 2017)

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

United States v. Dupree, No. 17-1846 (Apr. 24, 2019)

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is reprinted at 767 Fed. Appx. 181. The opinion and order of the district court denying petitioner's motion to suppress (Pet. App. 9a-19a) is not published in the Federal Supplement but is available at 2016 WL 1070796.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2019. The petition for a writ of certiorari was filed on July 23,

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 Eastern District of New York, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1; Pet. App. 2a. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. In the early morning hours of January 15, 2016, Officer Michael Ardolino and two fellow officers of the New York City Police Department were on patrol in Brooklyn. Pet. App. 9a-10a, 25a; Presentence Investigation Report (PSR) ¶ 2. They were in plainclothes and driving an unmarked car, canvassing the area in response to a report about a vehicle that had fled a police encounter. Pet. App. 9a-10a. While stopped at a red light, they saw petitioner and another man, later identified as Rashad Harvey, enter and then immediately leave a building while Harvey was carrying a clear bottle of what appeared to be alcohol. PSR ¶¶ 2-3. After looking in the officers' direction, petitioner came to an abrupt stop on the sidewalk. Pet. App. 10a; PSR ¶ 3. Harvey ushered him forward, and the pair jaywalked across the street immediately in front of the officers' moving vehicle, forcing the

officers to stop short to avoid hitting the men. Pet. App. 11a; PSR ¶ 3.

The officers exited their car, identified themselves as police, and ordered the men to stop. Pet. App. 11a; PSR ¶ 3. Petitioner, appearing nervous, backed away with his hands in his coat pockets. Ibid. Officer Ardolino repeatedly ordered petitioner to remove his hands from his pockets, but petitioner refused. Ibid. To see if petitioner was concealing something in his pocket, Officer Ardolino placed his hands on the outside of petitioner's jacket and felt petitioner's hand holding "a hard, L-shaped object" in the right pocket. Ibid. (citation omitted). As petitioner turned away, Officer Ardolino was able to see that the object in petitioner's pocket was a firearm. Ibid. After a struggle in which the officers sought to obtain control of the firearm, Officer Ardolino and his partners were able to subdue petitioner, retrieve a loaded .25 caliber semiautomatic pistol from his pocket, and place him under arrest. Pet. App. 11a-12a; PSR ¶ 3.

2. A federal grand jury in the Eastern District of New York returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1.

The district court denied petitioner's motion to suppress the pistol. Pet. App. 9a-19a. The court first determined that the initial stop was justified based on reasonable suspicion that

petitioner and Harvey had jaywalked. Id. at 12a-14a. The court then determined that the pistol was permissibly obtained in the subsequent encounter as a search incident to a lawful arrest. Id. at 14a-18a. The court found that Officer Ardolino had probable cause to believe that petitioner had jaywalked, which in turn gave Officer Ardolino a lawful basis for arresting petitioner and searching him incident to that arrest. Id. at 14a. The court explained that a search incident to arrest based on probable cause is permissible regardless whether an arrest is ultimately effected, at least where the officer at the time of the search has not already issued a citation for the offense. Id. at 17a-18a (citing Knowles v. Iowa, 525 U.S. 113 (1998), and United States v. Ricard, 563 F.2d 45 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978)).

The district court also identified a possible alternative basis for denying the motion to suppress: that Officer Ardolino's frisk of petitioner's clothing was lawful under Terry v. Ohio, 392 U.S. 1 (1968). Pet. App. 18a n.4. The court explained that the officers witnessed petitioner and Harvey commit the offense of jaywalking and approached to speak with them. And although the officers repeatedly ordered petitioner to remove his hands from his pockets, he refused to do so. Ibid. "[T]he officers could have reasonably 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 where the streets were otherwise empty

gave rise to the requisite 'reasonable suspicion' for [O]fficer Ardolino to perform the patdown of [petitioner's] pockets." Ibid. (citing Illinois v. Wardlow, 528 U.S. 119, 124 (2000), and United States v. Simmons, 560 F.3d 98, 109 (2d Cir.), cert. denied, 558 U.S. 1008 (2009)). Under these circumstances, the court stated, "it is difficult to imagine that the officers were not permitted to take the further step of patting down the outside of [petitioner's] pocket to ensure their safety when he refused their directive to remove his hands." Ibid. The court thus found a "strong argument" that the frisk was lawful under Terry, although it ultimately declined to decide the question. Ibid.

After a bench trial on stipulated facts, petitioner was convicted and sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2a; Judgment 1-2.

3. The court of appeals affirmed by summary order. Pet. App. 1a-8a. As relevant here, petitioner argued that Officer Ardolino's search of his jacket was unlawful notwithstanding that he had probable cause to arrest him for jaywalking, because Officer Ardolino had no intention of arresting petitioner for that crime. Id. at 3a. Petitioner acknowledged, however, that the Second Circuit's intervening decision in United States v. Diaz, 854 F.3d 197 (2017), cert. denied, 138 S. Ct. 981 (2018), foreclosed his argument. Pet. App. 3a. Petitioner did not seek rehearing en banc.

ARGUMENT

Petitioner renews his contention (Pet. 13-34) that Officer Ardolino's search 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 a writ of certiorari raising the same issue. See Diaz v. United States, 138 S. Ct. 981 (2018) (No. 17-6606); Heaven v. Colorado, 137 S. Ct. 2297 (2017) (No. 16-1225); Powell v. United States, 552 U.S. 1043 (2007) (No. 07-5333).[1] The same result is warranted here. Indeed, even if the question presented otherwise warranted this Court's consideration, this case would be a poor vehicle in which to consider it, because Officer Ardolino's protective frisk was independently justified under Terry v. Ohio, 392 U.S. 1 (1968). Petitioner accordingly would not be entitled to relief even if he prevailed on the question presented.

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

[1] Two other petitions raising the same issues are currently pending. See Johnson v. United States, No. 19-5181 (filed July 12, 2019); McIlwain v. United States, No. 18-9393 (filed May 21, 2019).

rule is justified by the need "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the "concealment or destruction" of evidence. Ibid.

In United States v. Robinson, 414 U.S. 218 (1973), this Court held that the search-incident-to-arrest doctrine is a bright-line rule authorizing a search incident to any arrest. Id. at 235. The Court explained that the authority to search should not "depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." Ibid. The Court also reasoned that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." Id. at 234 n.5.

In Rawlings v. Kentucky, 448 U.S. 98 (1980), this Court held that a search may qualify as a search incident to arrest even if it precedes the arrest. In that case, a group of suspects were detained in a house during the execution of a search warrant. Id. at 100-101. After one suspect acknowledged ownership of drugs found in the house, an officer "searched [the suspect's] person and found $4,500 in cash in [his] shirt pocket and a knife in a sheath at [his] side." Id. at 101. The officer "then placed [the suspect] under formal arrest." Ibid. This Court had "no difficulty upholding this search as incident to [the suspect's] formal arrest." Id. at 111. The Court 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 (1) police have probable cause to make the arrest before the search, and (2) 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

[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.

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, Officer Ardolino had probable cause to arrest him for violating New York's jaywalking law. See Pet. 14. Petitioner also does not dispute that, as in Rawlings, "formal arrest followed quickly on the heels of the challenged search," 448 U.S. at 111; see Pet. 14-15. 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. 3) that "an incident search requires an arrest at the time of the search" and thus may not precede the arrest. Second, he advances (Pet. 4, 26-27) the narrower argument that a valid incident search may precede the arrest only if the arrest was "intended" when the search commenced. Both of those arguments lack merit and, contrary to petitioner's suggestion, neither finds support in this Court's decision in Knowles v. Iowa, 525 U.S. 113 (1998).

a. Petitioner acknowledges (Pet. 3, 31-33) this Court's statement in Rawlings that "[w]here the formal arrest follow[s] quickly on the heels of the challenged search," it is not "particularly important that the search preceded the arrest rather than vice versa." 448 U.S. at 111. But petitioner asserts (Pet.

3, 31) that the Court's statement was mere "dictum." That is incorrect.

This Court upheld the search at issue in Rawlings "as incident to [the defendant's] formal arrest." 448 U.S. at 111. Although petitioner contends (Pet. 32-33) that the issue was not raised by the defendant, the Court specifically considered the significance of the fact that "the search preceded the arrest." Rawlings, 448 U.S. at 111. The Court cited with approval decisions holding that "[e]ven though a suspect has not formally been placed under arrest, a search of his person can be justified as incident to an arrest if an arrest is made immediately after the search." United States v. Brown, 463 F.2d 949, 950 (D.C. Cir. 1972) (per curiam); see Rawlings, 448 U.S. at 111 (citing Brown, 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 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. 30-31) that, under a rule that the search may precede the arrest, the lawfulness of Officer Ardolino's conduct would be "impossible" to assess at the moment the frisk began. But that is not correct. Under Rawlings, a police officer in Officer Ardolino'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

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[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 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).

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 occurred. As petitioner's own efforts (Pet. 31-32) to distinguish Rawlings illustrate, any such effort invites confusion and indeterminacy.

b. Petitioner alternatively contends (Pet. 15, 26-27) 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. That argument lacks merit. "The reasons for looking to objective factors, rather than subjective intent," in the Fourth Amendment, "are clear." Kentucky v. King, 563 U.S. 452, 464 (2011). "Legal tests based on reasonableness are generally objective, and this Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" Ibid. (citation omitted). Thus, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." Whren v. United States, 517 U.S. 806, 814 (1996).

Consistent with that principle, this Court has "repeatedly" held that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify the action.'" Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (brackets and citation omitted). For example, a search that is objectively justified based on exigent circumstances may not be challenged on the ground that the officers' subjective motive was to "gather evidence," not to respond to the exigency. Id. at 405. A traffic stop that is objectively supported may not be challenged on the ground that the officers' actual motive was to investigate other criminal activity, not to enforce the traffic laws. Whren, 517 U.S. at 813. An arrest that is objectively supported by probable cause cannot be challenged on the ground that the officer's "subjective reason for making the arrest" is something other than "the criminal offense as to which the known facts provide probable cause." Devenpeck v. Alford, 543 U.S. 146, 153 (2004). And an otherwise valid boarding of a vessel by customs officials cannot be challenged on the ground that the officials' actual motive was to investigate suspected marijuana trafficking, not to inspect the vessel's documentation. United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983).

This Court's repeated rejection of a subjective approach to Fourth Amendment analysis forecloses petitioner's suggestion for an intent-based approach here. The objective circumstances of the

search at issue here fall squarely within Rawlings: Officer Ardolino 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 Officer Ardolino's position could have taken exactly the same actions without violating the Fourth Amendment, so long as he planned to arrest him at the time of the search. Instead, petitioner would invalidate the actions taken by Officer Ardolino in particular on the ground (Pet. 26) that he did not "intend to arrest" petitioner when he began the search.

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

c. Petitioner is incorrect to argue (Pet. 3-4, 33-34) 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 a police officer to conduct a full-scale search of a car and driver whenever he elected to issue a citation rather than to make a custodial arrest. Id. at 115. This Court found that the law thus purported to authorize a "search incident to citation." Ibid. The Court declined to extend the search-incident-to-arrest doctrine to that circumstance, holding that the officer-safety and evidence-preservation justifications for the doctrine do not apply when an officer resolves an encounter with a suspect by issuing a citation rather than making an arrest. Id. at 117-118.

The result in Knowles thus turned on the fact that, at the time of the search, the officer had already completed the encounter by issuing a citation. Here, in contrast, Officer Ardolino 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. 14-25) that the court of appeals' decision conflicts with decisions of the Seventh Circuit and several state courts of last resort. That greatly overstates the extent of the disagreement.

a. In Ochana v. Flores, 347 F.3d 266 (2003), the Seventh Circuit stated that a search incident to arrest must occur after the arrest. Id. at 270. But that statement was dictum, because the court ultimately upheld the search. Id. at 270-271. And, as the D.C. Circuit has observed, the Seventh Circuit's opinion, "like the briefs then before it, betrayed no awareness of [this] Court's holding in Rawlings." Powell, 483 F.3d at 839. And 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. Coleman, 676 Fed. Appx. 590, 592 (2017); United States v. Ochoa, 301 Fed. Appx. 532, 535 (2007); Duncan v. Fapso, 216 Fed. Appx. 588, 590, 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. 21-24) 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, New York law authorized an arrest for petitioner's jaywalking violation. Pet. App. 12a & n.1.[4]

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, Officer Ardolino did not tell petitioner that he would receive only a summons before frisking him.

Petitioner additionally errs in asserting (Pet. 24-25) that the decision below conflicts with decisions of the highest state courts in Maryland, Massachusetts, and Tennessee. Each of the

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[4] In Virginia v. Moore, 553 U.S. 164 (2008), this Court held that, "when an officer has probable cause to believe a person committed even a minor crime in his presence," "[t]he arrest is constitutionally reasonable" even if it would violate state law. Id. at 171. But Lovelace preceded this Court's decision in Moore, and the 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.

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

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 238-239. The court recognized that, under Rawlings, the search "was not unlawful solely because it preceded the arrest." Id. at 239. But the court concluded that the search was

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

The shallow, recent conflict created by the divided decision in Reid does not warrant this Court's intervention. 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, that court may well reconsider its outlier approach -- particularly now that the Second Circuit has squarely rejected it in United States v. Diaz, 854 F.3d 197 (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 question presented 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. As the district court suggested, see Pet. App. 18a n.4, Officer Ardolino's frisk was valid as a limited protective pat-down under Terry. Although the district court did not squarely decide whether the search was justified under Terry and the court of appeals did not address the question, Terry would provide an alternative ground for upholding the search. See Pet. 26 (recognizing the possibility that "the frisk might be sustained under Terry" on remand).

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. Officer Ardolino and his partners stopped petitioner after he had jaywalked directly in front of their moving car, late at night in a high crime area, where the streets were otherwise empty, with another man who appeared to be carrying alcohol. Pet. App. 9a-10a; PSR ¶ 3. At that point, Officer Ardolino had “a reasonable and articulable suspicion that the person seized is engaged in criminal activity,” Reid v. Georgia, 448 U.S. 438, 440 (1980) (per curiam), namely, jaywalking. Then, during the stop, Officer Ardolino developed a reasonable basis to believe that petitioner might be armed and dangerous, as petitioner appeared nervous and repeatedly refused to take his hands out of his jacket pockets, which indeed ultimately was holding a firearm. Pet. App. 11a; PSR ¶ 3.

Under those 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; see Pennsylvania v. Mimms, 434 U.S. 106, 111-112 (1977) (per curiam); cf. Pet. App. 46a (Officer Ardolino testifying that he was concerned for his safety and that of his fellow officers). Presence in a high crime area and “nervous, evasive behavior” are “pertinent factor[s]” in the reasonable suspicion analysis. Illinois v. Wardlow, 528 U.S. 119, 124 (2000). And, as the courts of appeals have repeatedly

held, officers may conduct a Terry frisk based on indications that a suspect may have a weapon concealed in a pocket or waistband. See, e.g., United States v. Hurd, 785 F.3d 311, 315 (8th Cir. 2015) (suspect "place[d] his hands in his pockets" and "refus[ed] to remove them"); United States v. Hayden, 759 F.3d 842, 847 (8th Cir.) (suspect "put his hand into his pocket as though reaching for a weapon"), cert. denied, 135 S. Ct. 691 (2014); United States v. Briggs, 720 F.3d 1281, 1287-1288 (10th Cir. 2013) (suspect "grabb[ed] at his waistline"); United States v. Oglesby, 597 F.3d 891, 895 (7th Cir. 2010) (suspect "repeatedly lowered his right hand toward the right pocket of his pants"); United States v. Ellis, 501 F.3d 958, 962 (8th Cir. 2007) (suspect "act[ed] nervously and reach[ed] toward his pocket"). The Terry standard was likewise satisfied here, and thus provides an independent basis for the use of the firearm as evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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