No. 19-5582

IN THE SUPREME COURT OF THE UNITED STATES

TUAN DUC LAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by a search of his wallet when probable cause existed to arrest him, he was handcuffed, and he was formally informed that he was under arrest shortly thereafter.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

United States v. Lam, No. 16-cr-532 (June 6, 2018)

United States Court of Appeals (9th Cir.):

United States v. Lam, No. 18-10221 (May 22, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 770 Fed. Appx. 805.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2019. The petition for a writ of certiorari was filed on August 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of California, petitioner was convicted of fraudulent use of an unauthorized access device, in violation of 18 U.S.C. 1029(a)(2), and aggravated identify theft, in violation of 18 U.S.C. 1028A(a)(1). Judgment 1. He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-4a.

1. In August 2016, petitioner purchased a Rolex watch for approximately $14,000 from a jewelry store in Corte Madera, California, using a credit card and driver's license with a false name. C.A. E.R. 109; Pet. App. 2a. The store owner copied the license and credit card for the store's files. C.A. E.R. 109. The manager instructed petitioner to return the next day to have the watch sized. Id. at 153-154. Petitioner did come back the next day, but he did not bring back the watch and instead sought to purchase another Rolex watch "for [his] wife" that cost $13,000. Ibid. The manager found this suspicious, asked petitioner to come back in half an hour, and called the police. Id. at 110.

Two officers arrived at the store, discussed the situation with the manager, and inspected the photocopies of the license and credit card. C.A. E.R. 109-110. The license listed a birth date of 1976 and showed a picture of a man approximately 40 years old, but a records check revealed that that license had been issued to

a 70-year-old man, indicating to the officers that the license had been altered or forged. Id. at 110. One of the officers told the manager "that the ID card was most likely fraudulent, but without the actual card, [the officer] could not verify its validity." Id. at 118. In a sworn declaration, that officer explained that by "verify its validity" he meant that he could not tell how the license was fraudulent -- whether it "was an altered but otherwise valid California driver's license, or whether it was a counterfeit or fake." Id. at 111.

The officers awaited petitioner's return, and when he did return and saw them, he "began to back away * * * as if he were going to flee." C.A. E.R. at 111. At that point, one officer handcuffed petitioner and frisked him, removing his wallet from his pocket. Id. at 112. Meanwhile, the other officer worked with the dispatcher to contact the person whose name was on the license and credit card, who verified that he did not authorize anyone to use his credit card. Id. at 112, 119. While this call occurred, petitioner told the first officer that his real name was "Tuan," thereby admitting that he was not the person whose name was on the license and credit card. Id. at 112. That officer then opened petitioner's wallet, found the credit card and license, and confirmed that the license was counterfeit. Ibid. The officer advised petitioner of his Miranda rights, which petitioner waived, and petitioner then admitted that he had received the credit card and license from an unnamed third party. Ibid. The questioning

lasted about eight minutes before the officers took petitioner to their police car, at which time they searched him again to remove any non-clothing items for inventory at the jail. Id. at 112-113.

2. A federal grand jury returned an indictment charging petitioner with fraudulent use of an unauthorized access device, in violation of 18 U.S.C. 1029(a)(2), and aggravated identify theft, in violation of 18 U.S.C. 1028A(a)(1). Indictment 1-2. The district court denied petitioner's motion to suppress the evidence seized from his wallet at the jewelry store, taking the view that the search of the wallet was not a valid search incident to petitioner's arrest, but finding the resulting evidence admissible because it would have inevitably been discovered. Pet. App. 6a-7a. The court found it "clear that [petitioner] was going to be arrested" and that "the wallet would have been inventoried and searched at that point." Id. at 7a. After a bench trial on stipulated facts, petitioner was convicted on both counts charged in the indictment. Judgment 1; Pet. App. 1a; C.A. E.R. 87.

The court of appeals affirmed in a unanimous unpublished memorandum disposition, finding that the officers "seized the license and credit card during a valid search incident to arrest." Pet. App. 2a; see id. at 1a-4a. The court observed that the officers had probable cause to arrest petitioner at the time of the search, because the store manager had said "it was unusual" for someone to purchase two expensive watches on consecutive days, petitioner looked like he was going to flee when he saw the

officers, and they "had strong evidence that [petitioner] had used a fake license to purchase the watch." Id. at 2a. The court then observed that "the arrest followed during a continuous sequence of events." Id. at 3a (quoting United States v. Johnson, 913 F.3d 793, 799 (9th Cir. 2019) (brackets, citation, and ellipsis omitted), cert. granted and judgment vacated on other grounds, No. 19-5181, 2019 WL 5300895 (Oct. 21, 2019)). The court declined to determine precisely when petitioner was arrested, but found that the arrest occurred no later than when he "was handcuffed and read his Miranda rights," ibid., which was "less than two minutes after the search and without intervening acts," and accordingly found that the search was lawful, id. at 3a-4a. Because the court of appeals found that the search was permissible, the court declined to address the district court's alternative determination that the contents of the wallet would have inevitably been discovered. Id. at 4a.

ARGUMENT

Petitioner contends (Pet. 11-27) that the officer's initial search of his wallet was not a valid search incident to arrest because the officer conducted the search before he arrested petitioner. The court of appeals' decision is correct, and this Court has repeatedly denied review of petitions for a writ of certiorari raising the same issue. See Dupree v. United States, No. 19-5343, 2019 WL 5686520 (Nov. 4, 2019); McIlwain v. United States, No. 18-9393, 2019 WL 4921943 (Oct. 7, 2019); Diaz v. United

States, 138 S. Ct. 981 (2018) (No. 17-6606); Heaven v. Colorado, 137 S. Ct. 2297 (2017) (No. 16-1225); Powell v. United States, 552 U.S. 1043 (2007) (No. 07-5333). The same result is warranted here. Furthermore, this case would be an unsuitable vehicle to consider that question because, as the district court found, the evidence discovered during the search was alternatively admissible under the inevitable discovery rule.

1. The court of appeals correctly determined that the search of petitioner's wallet was a valid search incident to arrest.

a. Under the search-incident-to-arrest doctrine, when police officers make an arrest, they may search the arrestee's person and the area "within his immediate control" without obtaining a warrant. Chimel v. California, 395 U.S. 752, 763 (1969). That rule is justified by the need "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the "concealment or destruction" of evidence. Ibid.

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

the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." Id. at 234 n.5.

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

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

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

As the court of appeals recognized, 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, the officers had probable cause to arrest him for burglary and identity theft. See Pet. 10; Pet. App. 3a-4a. 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.

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

9-10. The court of appeals thus correctly held that the search was a lawful search incident to arrest.

b. Petitioner challenges the decision below on two distinct grounds. First, and more broadly, he asserts (Pet. 22-26) that an incident search requires an arrest at the time of the search and thus may not precede the arrest. Second, he advances (Pet. 26-27) the narrower argument that a valid incident search may precede the arrest only if the record indicates that the arrest was "intended" when the search commenced. Both of those arguments lack merit.

i. Petitioner acknowledges (Pet. 14) this Court's statement in Rawlings that "[w]here the formal arrest follow[s] quickly on the heels of the challenged search," it is not "particularly important that the search preceded the arrest rather than vice versa." 448 U.S. at 111. This Court upheld the search at issue in Rawlings "as incident to [the defendant's] formal arrest," ibid., and specifically considered the significance of the fact that "the search preceded the arrest." Ibid. The Court cited with approval decisions holding that "[e]ven though a suspect has not formally been placed under arrest, a search of his person can be justified as incident to an arrest if an arrest is made immediately after the search." United States v. Brown, 463 F.2d 949, 950 (D.C. Cir. 1972) (per curiam); see Rawlings, 448 U.S. at 111 (citing Brown, 463 F.2d at 950, and Bailey v. United States, 389 F.2d 305, 308 (D.C. Cir. 1967)). And the Court held, in agreement with those decisions, that it was not "particularly

important that the search preceded the arrest rather than vice versa." Rawlings, 448 U.S. at 111. That "holding was no mere dictum," Green v. Brennan, 136 S. Ct. 1769, 1779 (2016), but was necessary to the Court's ultimate conclusion that the search at issue was a valid search "incident to [the defendant's] formal arrest," Rawlings, 448 U.S. at 111.

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

[2] See, e.g., Johnson, 913 F.3d at 799 (9th Cir.), cert. granted and judgment vacated on other grounds, No. 19-5181, 2019 WL 5300895 (Oct. 21, 2019); 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

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

Petitioner asserts (Pet. 27) that, under a rule that the search may precede the arrest, police would have "unfettered discretion as to whom to target for searches." (quoting Johnson, 913 F.3d at 807 (Watford, J., concurring)). But that is not correct. Under Rawlings, a police officer in a situation like the one at issue here would know that a search of a suspect will be a valid search incident to arrest if (i) the officer has probable cause to arrest before the search, and (ii) an arrest follows quickly after the search. See 448 U.S. at 111. That clear, objective rule is "readily applicable by the police," Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (citation omitted), and petitioner identifies no sound reason to question the rule adopted by this Court in Rawlings and uniformly followed by the courts of appeals.

ii. Petitioner alternatively contends (Pet. 26-27) that a search incident to arrest may precede the arrest only if "the government proves the arrest was already going to occur before the search." That argument lacks merit, and in any event it does not help petitioner. "The reasons for looking to objective factors, rather than subjective intent," in the Fourth Amendment, "are

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that an arrest "may justify an immediately preceding incidental search"), cert. denied, 484 U.S. 1068 (1988).

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

Consistent with that principle, this Court has "repeatedly" held that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify the action.'" Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (brackets and citation omitted). For example, a search that is objectively justified based on exigent circumstances may not be challenged on the ground that the officers' subjective motive was to "gather evidence," not to respond to the exigency. Id. at 405. A traffic stop that is objectively supported may not be challenged on the ground that the officers' actual motive was to investigate other criminal activity, not to enforce the traffic laws. Whren, 517 U.S. at 813. An arrest that is objectively supported by probable cause cannot be challenged on the ground that the officer's "subjective reason for making the arrest" is something other than

"the criminal offense as to which the known facts provide probable cause." Devenpeck v. Alford, 543 U.S. 146, 153 (2004). And an otherwise valid boarding of a vessel by customs officials cannot be challenged on the ground the officials' actual motive was to investigate suspected marijuana trafficking, not to inspect the vessel's documentation. United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983).

This Court's repeated rejection of a subjective approach to Fourth Amendment analysis forecloses petitioner's argument for an intent-based approach here. The objective circumstances of the search at issue here fall squarely within Rawlings: the officers had probable cause to arrest petitioner before they looked in his wallet, and petitioner either was already under arrest -- because he was handcuffed, on the basis of probable cause, and not free to leave, see Pet. App. 3a -- or he was under arrest shortly thereafter, when the officer formally informed him that he was under arrest, id. at 3a-4a. See Rawlings, 448 U.S. at 111. In suggesting an intent-based approach, petitioner does not dispute that a reasonable officer in these circumstances could have taken exactly the same actions without violating the Fourth Amendment, so long as he planned to arrest petitioner at the time of the search. Instead, petitioner would invalidate the search on the asserted ground (Pet. 26-27) that the record does not indicate that the officer intended to arrest petitioner when he began the search. But the record demonstrates, as the district court found,

that the officers did subjectively intend to arrest petitioner before the search. Pet. App. 5a. Petitioner provides no meaningful reason to overturn that finding.

In any event, petitioner's approach would improperly place dispositive weight on an officer's subjective intent. 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 incident to his arrest. Petitioner thus cannot seek to invalidate that action by arguing that the officers subjectively lacked a particular "state of mind." Ibid.

c. Contrary to petitioner's suggestion (Pet. 15), his approach is not supported by this Court's decision in Knowles v. Iowa, 525 U.S. 113 (1998). 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. Id. at 114. At the time, state law authorized the police to conduct a full-scale search of a car and driver even when the officer elected to issue a citation rather than to make a custodial arrest. Id. at 115. This Court held that the law thus purported to authorize a "search incident to

citation." Ibid. The Court declined to extend the search-incident-to-arrest doctrine to that circumstance, holding that the officer-safety and evidence-preservation justifications for the doctrine do not apply when an officer resolves an encounter with a suspect by issuing a citation rather than making an arrest. Id. at 117-119.

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, by contrast, the officers 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).

2. Petitioner asserts (Pet. 11-21) that the court of appeals' decision conflicts with decisions of the Seventh Circuit and several state courts of last resort. That substantially overstates the extent of the disagreement.

a. In Ochana v. Flores, 347 F.3d 266 (2003), the Seventh Circuit stated that a search incident to arrest must occur after the arrest. Id. at 270. But that statement was dicta, because the court ultimately upheld the search. Id. at 270-271. And as the D.C. Circuit has observed, the Seventh Circuit's opinion, "like the briefs then before it, betrayed no awareness of [this] Court's holding in Rawlings." Powell, 483 F.3d at 839. The Seventh

Circuit's subsequent decisions illustrate its understanding that, under Rawlings, "even a search that occurs before an arrest may be deemed lawful as incident to that arrest." United States v. Leo, 792 F.3d 742, 748 n.1 (2015); accord United States v. Paige, 870 F.3d 693, 700-701 (7th Cir. 2017); United States v. Coleman, 676 Fed. Appx. 590, 592 (7th Cir. 2017); United States v. Ochoa, 301 Fed. Appx. 532, 535 (7th Cir. 2007); Duncan v. Fapso, 216 Fed. Appx. 588, 590 (7th Cir.), cert. denied, 552 U.S. 834 (2007). The Ochana dictum thus is not the law in the Seventh Circuit and does not indicate the existence of any conflict warranting this Court's review.

b. Petitioner relies heavily (Pet. 11-17) on a decision from the California Supreme Court, People v. Macabeo, 384 P.3d 1189 (2016). Although aspects of the reasoning in Macabeo are inconsistent with the decision below, it involved materially different circumstances from those present here. In Macabeo, the court 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 (failing to stop at a stop sign while driving a motor vehicle). Id. at 1197 (emphasis omitted). Here, by contrast, California law authorized an arrest for the felonies of burglary and identity theft. See C.A. E.R. 110-111. Accordingly, Macabeo does not conclusively demonstrate that a California court would have suppressed the license and credit card found in petitioner's wallet.

Petitioner's reliance on decisions from other state courts of last resort is likewise misplaced. As in Macabeo, the Virginia Supreme Court's decision in Lovelace v. Commonwealth, 522 S.E.2d 856 (1999), involved an offense for which "the officers could have issued only a summons." Id. at 860.[3] 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, by contrast, the officers did not tell petitioner that he would receive only a summons before searching his wallet.

Petitioner additionally errs in asserting (Pet. 20 & n.3) that the decision below conflicts with decisions of the highest state courts in Maryland, Massachusetts, and Tennessee. Each of the decisions on which he relies differs in critical respects from

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[3] Lovelace preceded this Court's decision in Virgina v. Moore, 553 U.S. 164 (2008), which held that, "when an officer has probable cause to believe a person committed even a minor crime in his presence," an "arrest is constitutionally reasonable" even if it would violate state law. Id. at 171. 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.

this one because the officers lacked probable cause, did not actually arrest the defendant after the search, or both. In Commonwealth v. Craan, 13 N.E.3d 569 (Mass. 2014), for example, the court determined that "the trooper lacked probable cause" of any offense before the search began -- and the defendant was not arrested even after the search. Id. at 576. He was instead issued a summons, allowed to drive away, and charged "[a]pproximately two months later." Id. at 572, 576; see Belote v. State, 981 A.2d 1247, 1249 (Md. 2009) (explaining that officer "never made a custodial arrest" and suspect was not taken into custody until months later); State v. Ingram, 331 S.W.3d 746, 759 (Tenn. 2011) (explaining that "the police officers did not take the [suspect] into custody until his indictment more than four months after the searches").

The decision below also does not conflict with the Supreme Court of Washington's decision in State v. O'Neill, 62 P.3d 489 (2003) (en banc). In O'Neill, the court relied on the Washington state constitution, not the Fourth Amendment, to determine that a search of a defendant's car was not a proper search incident to arrest. Id. at 500-502. In so doing, the court explained that the state constitution "provides greater protection of a person's right to privacy than the Fourth Amendment" and permits warrantless searches incident to arrest in "narrower" circumstances than the Fourth Amendment would allow. Id. at 500. And although the court found that the state constitution required "a valid custodial

arrest" as "a condition precedent to a search incident to arrest as an exception to the warrant requirement," id. at 502, the court did not hold that the Fourth Amendment imposes the same requirement, see id. at 501.

c. Petitioner's claimed conflict thus reduces to the New York Court of Appeals' decision in People v. Reid, 26 N.E.3d 237 (2014). In that case, a police officer who had probable cause to arrest a driver for driving while intoxicated patted him down, discovered a switchblade knife in his pocket, and then arrested him. Id. at 238. The court recognized that, under Rawlings, the search "was not unlawful solely because it preceded the arrest." Id. at 239. But the court concluded that the search was invalid because the officer did not intend to arrest the defendant when the search began. Id. at 240. The court stated that "[w]here no arrest has yet taken place [at the time of the search], the officer must have intended to make one if the 'search incident' exception is to be applied." Ibid. As the dissent in Reid explained, the majority contravened this Court's precedents by making "the police officer's subjective intent" determinative of the search's validity. Ibid. (Read, J.). Under such an approach, cases involving searches incident to arrest "would inevitably devolve into difficult-to-resolve disputes about motive." Id. at 241.

The shallow, recent conflict created by the divided decision in Reid does not warrant this Court's intervention. The New York Court of Appeals has not itself had occasion to apply, clarify, or

revisit Reid since it was decided in 2014. If the issue arises again, the court may well reconsider its outlier approach -- particularly now that the Second Circuit has squarely rejected it in United States v. Diaz, 854 F.3d 197 (2017), cert. denied, 138 S. Ct. 981 (2018). Cf. People v. 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.

3. Even were the question presented worthy of this Court's attention in some case, this case presents an unsuitable vehicle for that consideration. The district court correctly determined that, even if the search of petitioner's wallet could not be justified as incident to his arrest, the evidence found during the search of the wallet would be admissible because it would inevitably have been discovered during an inventory search of petitioner's wallet at the jail. "[T]he inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source." Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016). The government bears the burden to show by a preponderance of the evidence that the evidence sought to be suppressed would have been discovered by lawful means. Nix v. Williams, 467 U.S. 431, 444 (1984).

As the district court found, Pet. App. 6a-14a, the government met its burden here. The record establishes that, at booking, "[a]ny illegal items are kept separate from the individual's personal property and kept by [the police department] as evidence." Id. at 9a (citation omitted). And the record establishes that, prior to petitioner's booking, officers knew the license was illegitimate, because it either had been altered or was counterfeit, and upon viewing it, an officer would immediately be able to tell that it was counterfeit. C.A. E.R. 111-112. The officers also knew that the credit card, of which they had a copy, was illegally in petitioner's possession. Id. at 119. Finally, as the district court also found, prior to opening petitioner's wallet, petitioner either had already been arrested or was going to be arrested. Pet. App. 6a-7a. Because the evidence at issue in this case would not have been suppressed -- and thus the outcome of this case would not change -- even if petitioner prevailed on the question presented, this case is a poor vehicle for considering that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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