No. _____

IN THE
Supreme Court of the United States

EDWARD MAGRUDER, Petitioner

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTOIRARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal agents found heroin during a warrantless search of a backpack that they seized from Petitioner as he exited a bus. Agents then arrested Petitioner for possessing with intent to distribute the heroin found by their search. Respondent later justified the search as having taken place "incident to arrest." It is undisputed that, months before the backpack search, the agency showed probable cause to believe that Petitioner had conspired to distribute drugs. On the day of the backpack's search, there was no evidence introduced into the record that agents had effectively arrested Petitioner based on probable cause for any particular offense, or that they were about to do so, before they searched and found the heroin.

The question presented is:

> Whether the Fourth Amendment's "search incident to arrest" exception permits a warrantless search anytime agents had probable cause to believe that a defendant had committed some arrestable offense -- even when agents had made no arrest, and were not already going to make one, before the search.
> .

RELATED PROCEEDINGS

United States District Court for the District of Columbia (D.D.C.):

United States v. Magruder, No. 1:19-cr-00203-CKK-1, (Apr. 22, 2022)

United States Court of Appeals for the District of Columbia (D.C. Cir.):

United States v. Magruder No. 22-3025; (Jan. 21, 2025), rehearing denied February 12, 2025

TABLE OF CONTENTS

INDEX OF APPENDICIES

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

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UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The court of appeal's panel opinion (App. I, 74-85) is reported at 126 F.4th 671 The district court's opinion (App. B, 4-24) is reported at 2021 WL 5769462. The district court's memorandum opinions denying Mr. Magruder's Motion to Withdraw Plea of Guilty are reported or found at (App. D, 26-40; App. F, 42-65; App. H, 67-73).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2025. (App. J, 86). The court of appeals denied a timely petition for rehearing on February 12, 2025 (App. K, 87). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (2025).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

Our liberty from governmental overreach relies in key part upon the Fourth Amendment's warrant requirement for searches and seizures – to which this Court has specified only limited exceptions, such as when there are countervailing values of officer safety and potential destruction of evidence at stake during an arrest. In this matter, Petitioner's narcotics conviction resulted from a warrantless search under circumstances that were beyond even the outer bounds established for the exception for searches incident to arrest.

The court below upheld the agents' search of Petitioner's backpack erroneously, where the factual record did not establish an arrest made, or going to be made, for any offense until after agents found heroin through their warrantless search. Rather, agents simply had probable cause to believe Petitioner had engaged in earlier criminal activity months earlier. The facts therefore are distinguishable from cases

upholding searches as incident to arrest where the search precedes a formal arrest, or where an arrest is made for a different offense than is later prosecuted.

This Court should grant certiorari to review this case for a combination of reasons under Rule 10. First, it involves an important constitutional issue in which the lower court has made a novel application of the search incident to arrest doctrine, which would permit broadly the *post hoc* rationalization of warrantless searches in routine police encounters.

Additionally, this Court should exercise here its supervisory powers over the federal judiciary. The court of appeals departed from the typical judicial practice of closely examining the cases upon which it relied for distinguishing facts. Relatedly, the district court and the court of appeals departed from their typical practice of seeking a sufficiently developed factual record of the purported incident search timeline, based upon which one could examine the applicability of the judicial precedents.

Now is especially the time to take up this important question. Police and federal agents need definite rules about the limited occasions where they are allowed to conduct searches or seize evidence without first getting a warrant from the independent judiciary. Allowing judicial exceptions to the warrant requirement to morph without compelling justification and factual analysis will embolden agents inclined to not seek permission now, but to count on forgiveness later.

The Court should also, especially in light of the three reasons above, grant review to correct the error in a published decision below: Respondent did not establish

that agents searched the backpack after an arrest for an offense or while an arrest was already coming. Rather, in reality, the government contravened this Court's longstanding admonition that an incident search may not precede an arrest and then use the fruits of that search to serve as any justification for that warrantless search.

STATEMENT OF THE CASE

Petitioner Edward Magruder is seeking this Court's review of the court of appeal's affirmance of his judgment of conviction in the district court below.

A. District Court. Mr. Magruder's narcotics charge in this case occurred in the wake of his arrival back to his hometown of Washington, D.C. from a trip. As further described below, agents of the Federal Bureau of Investigation (FBI) stopped him to search his backpack without a search or arrest warrant, found heroin in his backpack, arrested him, and charged him by Complaint with possession with intent to distribute a kilogram or more of heroin, in violation of 21 U.S.C. §§841(a) and (b)(1)(A).[1] The grand jury later indicted him for the same offense.

According to the agent's affidavit in support of the Complaint, in the summer of the year 2018, the FBI received information that a person later identified as Mr. Magruder was involved in the distribution of large quantities of narcotics. The FBI in a March 2019 warrant application demonstrated probable cause of Mr. Magruder's involvement in a narcotics conspiracy, and subsequently gained judicial authorization to track Mr. Magruder's cellular telephone number based on

[1] 21 U.S.C. § 841(a) (2007); 21 U.S.C. § 841(b)(1)(A) (2007).

information that he would travel to New York to acquire narcotics and return to Washington, D.C.

Then, in June 2019, agents surveilled Mr. Magruder at a bus terminal in New York. On the following afternoon of June 8, 2019, agents tracked him aboard a return bus the next day to D.C., where a task force of FBI agents and local police officers awaited him. The affidavit recounted that after he walked off the bus with a blue backpack as he had on the day before in New York, "agents approached defendant Magruder, stopped him, and searched his backpack," found a substance at the bottom that field-tested as heroin, and then arrested him for possession with intent to distribute heroin. (App. A, 3). The complaint affidavit made no reference to any grounds for the stop, or to consent to search, a search warrant, a basis for an investigative search under exigent circumstances, an arrest warrant, a search incident to arrest, or any other supposed constitutional basis for the warrantless search of the backpack after Mr. Magruder's arrival in Washington D.C.

Mr. Magruder soon pled guilty to possession with intent to distribute heroin, as previously charged, pursuant to a plea agreement.

Mr. Magruder thereafter successfully sought new counsel and moved to withdraw his plea under Fed. R. Crim. Pro. 11(d). Mr. Magruder claimed, *inter alia*, that his counsel through the Rule 11 plea hearing had rendered ineffective assistance in failing to investigate or pursue multiple arguments that Government's key evidence should be suppressed under the Fourth Amendment, and in misleading him into believing that the Government had turned over all discovery to

him. As relevant to this Petition, Mr. Magruder challenged the search of his backpack on June 8, 2019 without a warrant. Mr. Magruder claimed that there was no consent to search his backpack, no grounds for an investigative stop of him in search for weapons under *Terry v. Ohio*[2], and no probable cause for his post-search arrest on the charges for which he was later convicted.

In opposition to Mr. Magruder's contention that he had a viable claim to suppressing the search of the backpack, Respondent posited for the first time, two years after the arrest for the drugs found, that the FBI had made a search incident to arrest. Moreover, Respondent said, agents had probable cause for arresting Mr. Magruder at the time based on previously intercepted calls and the ongoing nature of drug conspiracies. Specifically, the prosecutor argued that the facts relating to Mr. Magruder's travels, and time spent in New York, and communication months before with an alleged drug dealer contributed to a finding of probable cause. However, nowhere did the Petitioner introduce any evidentiary support for the assertion that the search of Mr. Magruder's backpack was indeed conducted incident to an arrest for some offense. The record was not developed to justify a search whether incident to arrest or to another warrant exception. The only source of factual evidence in the record describing the events following Mr. Magruder stepping off the bus remained the minimal text in the case agent's complaint

[2] 392 U.S. 1 (1968).

affidavit stating first that a stop happened (*for some unstated reason)*, then the search happened, and next the arrest for the discovered drugs happened.[3]

Respondent introduced no bodycam or dashboard cam video from the local task force members, who were present at the bus station that day and were required to employ such technology during encounters, showing the unfolding of the search and arrest. Respondent did not explain why FBI agents tracking Mr. Magruder up and down the Mid-Atlantic, and accompanied to the Union Station bus terminal by a squad of local task force officers, chose to make a warrantless search of Mr. Magruder instead of obtaining a warrant from a judge in the federal courthouse several blocks away.

The district court rejected Mr. Magruder's efforts to withdraw his plea based on ineffective assistance. Assuming for purposes of the motion that his counsel *was* deficient in not reviewing discovery with him, the district court held that Mr. Magruder had not established that bis guilty plea was tainted by ineffective assistance of counsel under *Strickland v. Washington*[4], which is that the defendant must prove that the deficient performance prejudiced the defendant. The court agreed with the Respondent's position that there was probable cause to search Mr.

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[3] New, post-plea counsel in the district court asserted in briefing one of her motions that "law enforcement seized [Mr. Magruder's] person when they commanded him to go with them" after he exited the bus, because he would not have felt free to leave. The Court should disregard this non-probative assertion, among other reasons because Mr. Magruder did not attest to this, and there is no apparent reason why counsel would make this assertion. On the present record, it is at least as likely that Mr. Magruder felt merely that he could not refuse the FBI's demand to inspect his backpack, which counsel also then asserted. No lower court has relied upon this assertion by counsel.

[4] 466 U.S. 688 (1984).

Magruder incident to arrest, based on communications intercepted in the months before that were understood by agents as being about drug dealing, as well as Mr. Magruder's travel patterns. However, the court did not state in the first place what proof there was in the record of when and how an arrest occurred somewhere on a timeline of the encounter, incident to which the search was justified. The district court denied an evidentiary hearing.

On April 22, 2022, the court sentenced Mr. Magruder to 180 months in prison and 60 months of supervised release on count one of the Indictment for possession with intent to distribute the drugs found in his backpack.

B. Court of Appeals. Mr. Magruder's direct appeal from the district court's judgment raised two different arguments as to how court-appointed counsel in the district court had ineffectively assisted him in counseling his guilty plea, by not bringing viable Fourth Amendment claims. This first, based on the backpack search, he raises now again in this Petition.[5] Mr. Magruder argued that the search incident to arrest doctrine could not apply to the backpack search given that the record showed no arrest that day for drug conspiracy, and no evidence that the agents were going to arrest him for any drug charge, until after the search.

As an alternative to vacating the judgment against him, Mr. Magruder requested the court of appeals to remand his case to the district court for further development of the factual record for his Fourth Amendment claims.

[5] The second issue of ineffective assistance of counsel, raised for the first time on direct appeal and based on the defectiveness of a 2018 Louisiana federal search warrant for his cellphone data, Mr. Magruder does not raise again here.

In a published decision, *United States v. Magruder*[6], the court of appeals denied Mr. Magruder's appeal, rejecting the claims of ineffective assistance and holding that the search of the backpack was lawfully incident to arrest. *Id. a*t 678. Writing for the court, Judge Henderson cited cases applying the search incident to arrest doctrine to searches occurring before "formal" arrest: "'Where the formal arrest followed quickly on the heels of the challenged search of [defendant's] person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.'" *Id.* (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980)). Judge Henderson went on to recite facts in the record about the past investigation of Mr. Magruder that "established probable cause *for arrest* before the search," (I*d.*) (*emphasis added*). Notably, though, the court did not find that an arrest for that conspiracy offense actually took place before the search, nor that an arrest was already going to happen even before the search. *See id.*

To the contrary, the court continued: "Nor does it matter whether the agents subjectively intended to arrest Magruder before the search or whether they announced that Magruder was under arrest before conducting the search." *Id.* (citing *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *See also United States v. Thornton*, 733 F.2d 121, 123-28 (D.C. Cir. 1984) (characterizing a search as properly incident to arrest when an officer with probable cause to arrest stated

[6] 126 F.4th 671 (D.C. Cir. 2025)

during the initial search that the defendant was not yet under arrest but then placed the defendant under arrest upon discovering narcotics)).

Finally, the Court also reasoned that the existence of probable cause for a narcotics conspiracy at the time of the search sufficed to render it lawfully incident to arrest, even though Mr. Magruder was never charged with conspiracy. *See id.* (citing *United States v. Bookhardt*, 277 F.3d 558, 565 (D.C. Cir. 2002) ("even if probable cause does not support arrest for the offense charged by the arresting officer, an arrest (and search incident thereto) is nonetheless valid if the same officer had probable cause to arrest the defendant for another offense.").) The D.C. Circuit then emphasized the breadth of the warrant exception it was now recognizing, allowing search incident to arrest if there was: "probable cause to believe *some* crime existed before searching Magruder, as was patently the case here, the FBI agents could stop and search Magruder and his backpack immediately before formally arresting him and were not required to charge Magruder with the same offense that supported the initial probable cause." *Id.* (emphasis in the original). As noted above, though, the court did not find based on the factual record below, that agents had stopped Mr. Magruder in order to arrest him for a particular offense for which they had probable cause, versus this being some other kind of investigatory stop or encounter.

The D.C. Circuit's opinion did not discuss the precedents beyond brief quotes and parentheticals, and did not address whether there were facts in those cases

distinguishing them from what was known about the search and arrest in Mr. Magruder's.

C. Petition for Panel Rehearing. Mr. Magruder filed a timely petition for rehearing before the same panel of the D.C. Circuit, on the grounds that the court's opinion manifestly failed to address and overlooked clear limitations to the holdings of cases applying the "search incident to arrest" exception to the warrant requirement. Mr. Magruder claimed to have distinguished cases relied upon by the panel's opinion, with no explanation from the court in its now-published decision as to why the court could cite those cases to extend the search incident to arrest doctrine into new factual territory.

On February 12, 2025, the D.C. Circuit summarily denied Mr. Magruder a panel rehearing in a single-sentence *per curiam* order.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit in the case at bar has now expansively interpreted the text of this Court's and other circuit court decisions on the doctrine of the "search incident to arrest" exception to the Constitution's warrant requirement. This new precedent extends the doctrine to apply anytime there is probable cause exists for some offense, without officers needing to arrest someone on that offense. This may encourage even more warrantless searches during police encounters, raising this issue to public importance. Prior cases cited by the court below, unlike the case at bar, typically involved actual informal arrests, or arrests that were going to happen. Mr. Magruder raised these serious problems with the precedential value of those

cases, but the court below did not meet them. This Court should use its supervisory power to examine the contours of when searches are properly incident to arrest, requiring courts below to examine a sufficiently developed factual record for the timeline of the police encounter, before they interpret judicial precedents. Public policy reasons behind the existence of this judicially-created exception simply do not apply to many common situations where authorities neither make a de facto arrest, norare necessarily going to do so, but desire to conduct a search. Respect for the judiciary's independent review of invasive searches and seizures requires this Court's re-examination of the decision below. Here, the D.C. Circuit's expansive holding wrongly permitted the fruit of a so-called incident search to serve as the basis of Mr. Magruder's arrest and conviction, contrary to this Court's express rule. For this combination of reasons, the Court should grant the petition.

I. The Petition Raises an Important Constitutional Issue

Petitioner raises an unsettled issue of constitutional importance -- whether the search incident to arrest exception broadly applies anytime authorities have probable cause to arrest a defendant for *some* crime, even though an arrest had not yet happened and was not already going to happen -- thus meeting a top criteria of this Court's Rule 10 for granting the writ of certiorari.

Important, novel constitutional issues often merit this Court's review. In *Thornton v. United States*, 541 US 615 (2004), this Court granted certiorari to examine the unsettled issue of whether an officer can conduct a warrantless search of a vehicle's passenger compartment as a contemporaneous incident of arrest, even

when the arrested individual is no longer near the vehicle. *See id.* at 619. This and other search incident to arrest cases taken up by this Court cited *infra*, directly concern the foundational "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. Amend. IV, and the reasonableness of warrantless searches pursuant to a specific exception to the warrant requirement. *See, e.g., Terry v. Ohio,* 392 U.S. 1, 30 (1968). "Novel" applications of constitutional precedents by the court below especially merit this Court's review. *See United States v. Gouveia,* 467 U.S. 180, 182 (1984) (granting certiorari to review the court of appeals' "novel application of our Sixth Amendment precedents" respecting the right to counsel in the context of prison inmates held in administrative detention during a murder investigation). This is a crucial function, ensuring that lower courts' applications of constitutional precedent do not exceed those precedents' original policy rationales without good reason.

In the case at bar, a constitutional question arises because the court below adopted a novel interpretation of precedent about the outer reaches of the search incident to arrest doctrine, which would avoid suppression of the fruits of the warrantless search of Mr. Magruder's backpack where no other exception to the warrant requirement applied. There was admittedly no consent to search Mr. Magruder's backpack, and no grounds for an investigative stop of him in search for weapons under *Terry v. Ohio,* 392 U.S. 1 (1968). Furthermore, his actual, formal arrest -- based on its face by the fruits of the search or the quantity of heroin agents discovered by searching in his backpack -- could not serve as the basis for an earlier

search incident to arrest for those same drugs. *See Smith v. Ohio*, 494 U.S. 541, 542-43 (1990) (*per curiam*) ("'[J]ustify[ing] the arrest by the search and at the same time ... the search by the arrest,' just 'will not do.'" . . . '[A]n incident search may not precede an arrest and serve as part of its justification.'") (quoting *Johnson v. United States,* 333 U.S. 10, 16-17 (1948), and *Sibron v. New York,* 392 U.S. 40, 63 (1968)). Instead, Respondent then proposed a twist on the doctrine of search incident to arrest, relying not upon the post-search arrest, but rather upon the earlier existence of probable cause for a drug conspiracy. Adopting Respondent's justification, the D.C. Circuit held that the search prior to the arrest was lawfully incident to arrest so long there was "probable cause to believe *some* crime existed before searching Magruder." *Magruder*, 126 F.4th at 678. For this proposition, the court relied upon a series of decisions that, shorn of their factual context, appeared to offer precedential support.

The court first quoted this Court's decision in *Rawlings v. Kentucky*, 448 U.S. 98 (1980) that "[w]here the formal arrest followed quickly on the heels of the challenged search of [defendant's] person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." *Id.* at 111. However, as Mr. Magruder has always contended, that seminal case is readily distinguishable on the facts from the case at bar. In *Rawlings:* The arrest of the petitioner for drug possession was already independently set in motion "[o]nce petitioner admitted ownership of the sizable quantity of drugs found in [co-defendant] Cox's purse"; then petitioner was himself searched; and then petitioner

was formally arrested for possession within intent to sell the controlled substances recovered *from Cox's purse. See id.* The petitioner's arrest was *not* dependent on what was recovered from the petitioner in his own search incident to arrest, which yielded other items – cash and a gun. *See id.* It is in this context that this Court dispensed with requiring a strict sequence of formal arrest-then-search.

In contrast to *Rawlings*, the Respondent here has not pointed to evidence for any execution of an arrest on charges that did not rely upon the fruits of the warrantless search prior to the arrest. The Respondent relies on months-old drug conspiracy conduct to assert the search incident to arrest doctrine. However, agents did not arrest or charge Mr. Magruder on conspiracy charges. What they did do was carry out Mr. Magruder's arrest for the conduct revealed by the backpack search. The question of how the rule of *Rawlings* applies to cases like the instant one -- where the formal arrest took place subsequent to and on the basis of the fruits of the search, and that an arrest on the basis of some other offense was not already accomplished or at least in progress before the search based on probable cause from distinct facts – is thus a novel one.

Other cases cited by Petitioner on appeal support his interpretation of the *Rawlings* line of cases, *i.e.*, a lawful search can take place incident to an already performed arrest or right before an arrest that was already going to occur. *See United States v. Powell*, 483 F.3d 836, 838 (D.C. Cir. 2007) (following *Rawlings*) (officer detained the defendant because he was "going to be placed under arrest" for urinating in public," then officer searched him, finding a firearm, and immediately

following the search, handcuffed and formally placed him under arrest for public urination as well as for the firearms violation brought to light by the search); *United States v. Cutchin*, 956 F.2d 1216, 1219 (D.C. Cir. 1992) (following *Rawlings)* (upholding a search as incident to arrest where the police officer testified that at the time of the frisk "he intended to arrest [the defendant] for driving without a license," thus "[i]t is of no moment that [the officer] conducted the frisk before he formally placed [the defendant] under arrest.").

Another appellate case following *Rawlings* and cited by the court below, *United States v. Thornton*, 733 F.2d 121 (D.C. Cir. 1984), similarly is distinguishable from Mr. Magruder's case on account of the very quote from it that the court below used. In *Thornton*, the challenged search followed the officer seeing the defendant place a plastic baggie resembling street-packaged narcotics into his pocket and therefore having probable cause to believe that the defendant possessed narcotics in his pocket. *Id.* at 123, 125. Before searching, the officer told the defendant that he was "not yet under arrest," later arresting him after recovering the narcotics in the search. *Id.* at 128 n. 9. The use of the words "not yet" are subject to the obvious interpretation that the defendant's formal arrest for drug possession was already imminently going to happen, on account of the probable cause for that offense that existed before the search (the officer seeing the defendant pocket the drugs). In contrast, there is no evidence in the record that the FBI already intended to arrest Mr. Magruder regardless of what was in his backpack, thus placing him outside the *Rawlings* line of cases, including *Thornton*.

The court below also upheld the warrantless search of Mr. Magruder based on a line of cases holding that the offense justifying the search incident to arrest may be different than the offense with which authorities ultimately charge the defendant. *See Whren v. United States,* 517 U.S. 806, 813 (1996) (regardless of officers' subjective intentions about finding evidence of drugs, probable cause for violation of the traffic laws supported arrest, incident to which a lawful search took place finding drugs); *United States v. Bookhardt*, 277 F.3d 558, 560 (D.C. Cir. 2002) ("[E]ven if probable cause does not support arrest for the offense charged by the arresting officer, an arrest (and search incident thereto) is nonetheless valid if the same officer had probable cause to arrest the defendant for another offense."). These cases, too, are distinguishable on their facts and do not support the court's ultimate conclusion that the search was lawfully incident to arrest. Each of these cases upheld searches that followed **arrests that had actually taken place for specific offenses.** The arrests were not justified only because there was probable cause to believe an offense had taken place.

These cases are, therefore, not legal authority for police and prosecutors to think up after-the-fact any other offense for which the officers had information constituting probable cause and, without there having been an arrest, justify a warrantless search. For example, similar to *Whren*, in *Bookhardt*, officers did in fact stop the defendant for reckless driving, an offense for which the defendant was not later formally charged but which was later found on appeal to be supported by probable cause. See *id.* at 565. Thus, in *Bookhardt,* there was first a detention for

an offense that was supported by probable cause to justify the search mentioned in the case. *See id.*

Indeed, the court in *Bookhardt* anticipated and drew attention to Petitioner's distinction, citing this Court for the "key point" that if an officer "did not arrest the defendant at all" on the basis of an offense, then "the two historical justifications for the search-incident to-arrest exception—the need to disarm the subject in order to take him into custody and the need to preserve evidence for later use at trial" are not present to justify the search. *See Bookhardt*, 277 F.3d at 566 (*citing Knowles v. Iowa*, 525 U.S. 113 (1998))

The decision below thus allows and invites an open-ended, *post hoc* reimagining of the government's grounds for search to include the mere existence at the time of probable cause for some offense. This decision thus extended the doctrine of search incident to arrest considerably, and in potential conflict with precedent cited above. That authority does not support what happened here – Respondent seizing upon an uncharged legal theory under which the FBI theoretically could have had probable cause to arrest, b*ut upon which basis the FBI did not make an arrest*, and positing that theory only in opposition to Petitioner's post-conviction efforts to withdraw his plea and bring a suppression motion. If law enforcement could do this, the issue arises: Wouldn't the constitutional requirement for a search warrant prove to be illusory?

II. The Courts Below Departed From Regular Procedures

This Court should grant the petition and exercise its supervisory power over the lower courts because of departures from rigorous fact-finding and factual analysis of precedents. Judges below had extremely little in the record before them about the moments leading up to the warrantless search of Mr. Magruder before determining a lawful search incident to arrest. They also offered few explanations about the fact-rich judicial precedents which they interpreted, leading to their misapplication in this case**.** This Court should correct these departures.

Under Rule 10, this Court will review cases below where there are important federal procedural issues calling for the exercise of the Court's supervisory power. On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. "The judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 340 (1943). Furthermore, an unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the court of appeals provides reason to grant certiorari. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 470 (1982). This Court exercises its supervisory power to review decisions below to avoid departure from the accepted course of judicial proceedings in federal cases.

The large body of Fourth Amendment jurisprudence over the past several decades developing the contours of the search incident to arrest exception is notable

for the typically close attention that courts, especially this one, pay to the factual details of the underlying police encounter. To apply the nuances of the doctrine, courts look for a clear record to the extent possible. A conclusion of whether this exception applies frequently turns on such detail. For example, courts seek to find out whether, when, where, and how defendants were under arrest, and what officers knew and did, on a detailed timeline leading up to the arrest and search. As this Court has said: "[A] search incident to a lawful arrest may not precede the arrest and serve as part of its justification. It is a question of fact precisely when, in each case, the arrest took place." *Sibron v. New York,* 392 U.S. 40, 65 (1968). Courts look at what transpired between the defendant and the officer that might determine de facto custodial arrest, versus voluntary accompaniment or cooperation in the investigation, at one point or another relative in time to the search. *See id.* at 63.

The proceedings in Mr. Magruder's case below -- not the first time for a drug defendant represented by court-appointed attorneys -- left behind a spare factual record in the district court. Mr. Magruder pled guilty quickly to possession with intent to distribute the same heroin found in the warrantless search of his backpack. Heading into his Rule 11 plea, the only factual record before the district court of what happened on the day of his search and post-search arrest was contained in a brief complaint affidavit passage stating that "agents approached defendant Magruder, stopped him, and searched his backpack," found a substance at the bottom that field-tested as heroin, and then arrested him for possession with

intent to distribute heroin. (App. A, 3). The affidavit did not state, or suggest, a legal basis for the search of the backpack.

Mr. Magruder's lengthy attempts to withdraw his guilty plea succeeded in adding nothing further to the factual record of that day. Mr. Magruder's request for an evidentiary hearing was denied. Mr. Magruder thus had no opportunity to question agents and local officers, or to subpoena complete body-cam and/or dash-cam records that would have depicted the moments leading up to the search. The body-cam footage he was provided, does not show the encounter between him and the FBI agents as he got off the bus and searched his backpack. In seeking new counsel and moving to withdraw his plea, Mr. Magruder had complained of his prior counsel's failure to obtain all discovery and to move to suppress the search, which in normal course would have prompted the prosecution to elaborate upon facts potentially justifying the search.

Upon this mostly bare factual record, the courts below upheld the warrantless search by mis-interpreting the fact-intensive case law on the search incident to arrest exception developed over the past several decades. Petitioner's arguments on appeal, which have been largely repeated in this petition *supra* in Part I of the Reasons For Granting the Petition, demonstrated how these cases were distinguishable, contrasting the detailed encounter timeline facts in those precedents with the brief and vague narrative of the complaint affidavit. The published opinion of the D.C. Circuit did not address these arguments in the one page with four paragraphs in which it dismissed the core of Petitioner's

constitutional claim about the backpack search. It quoted and cited with parentheticals a handful of cases, discussed *supra* in Part I, but did not seriously examine the facts of any of them and analyze them against Petitioner's.

In the end, the courts below cited no evidence that Mr. Magruder's search followed his arrest for any offense. Indeed, the agent's complaint affidavit, which is the only factual record of the time that day leading up the search, manifestly described the *opposite sequence* of those events. No probative evidence of an arrest before the search emerged in the course of the proceedings below. Moreover, there is no evidence in the record that the FBI had even decided to arrest Magruder when he got off the bus, at least until they dug into his backpack without a warrant and discovered the illegal substance. Respondent easily could have introduced such a helpful fact into the record if it were true. The court below repeatedly ignored this state of affairs, rather than reconciling this factual record with the court's conclusion.

Moreover, the D.C. Circuit expressly did not reach a dispute between the parties over evidentiary burden, which bears on the question of what facts should have been introduced to justify the warrant exception. Petitioner had cited this Court's clear rule that the government bears the burden of proving an exception to the warrant requirement. *See Mincey v. Arizona*, 437 U.S. 385, 390-91 (1978). The Respondent's answering brief countered that it is Petitioner's burden to show that he would have prevailed below in suppressing the back-pack evidence but for his counsel's incompetence. This logic is circular if not upside-down. The Government

had never, ever shown evidence supporting its legal theory as to what happened before the search permitting a search incident to arrest. In contrast, the cases it cited were fully developed on the pre-search facts. The D.C. Circuit found it unnecessary to resolve this dispute, based on its conclusion that the FBI had probable cause before the search to justify a search incident to arrest.

Finally, the D.C. Circuit rejected Petitioner's alternative request for the relief of remanding the case to the district court for further discovery of essential facts including those about the moments leading up to the back-pack search. In particular, one fruitful fact-finding avenue Petitioner suggested would be to obtain any unabridged bodycam videos from officers of the Metropolitan Police Department who were present at the arrest scene, and who should have been in a position to witness the moments leading up to the FBI search of the backpack. The D.C. Circuit ignored Petitioner's request for judicial notice of the policies requiring such video recordings.

Subsequently, Petitioner filed a petition for a panel rehearing on the basis that the court had overlooked arguments about the distinguishing aspects of the precedents upon which it relied. However, maintaining its silence on this point, the panel denied that petition – also without explanation.

III. The Scope of Judicial Oversight of Warrantless Searches Is Vital

Another reason to grant this petition under this Court's Rule 10 is the public importance of clarifying the scope of judicial oversight over warrantless searches.

Searches incident to arrest are limited by the principle that police, must whenever practicable, obtain advance judicial approval of searches through the warrant requirement. *See Chimel v. California*, 395 U.S. 752 (1969).

The frequency of police encounters where the search incident to arrest exception arises and the public importance of preserving judicial oversight of searches and seizures are steady factors. Since this Court's recognition of the search incident to arrest exception to the warrant requirement in the 1914 case of *Weeks v. United States*, 232 U.S. 383 (1914), there have been thousands of reported cases where the exception has been litigated, with more than seven hundred citations alone to this Court's holding in *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980), the principal case relied upon by the D.C. Circuit in this case. The importance of maintaining respect by law enforcement officers for independent judicial oversight is, without doubt, more important today than ever. A limitation to judicial oversight of searches is reasonable when they are made incident to actual arrests, which can be promptly reviewed by prosecutors and magistrate judges for a showing of probable cause for the arrests. *See* Fed.R.Crim.P. 3, 4, 5, and 5.1. These rules of criminal procedure provide the context in which the exception for searches incident to arrest has evolved. Whether to allow the prosecution potentially months or years before judicial oversight of the issue, during which time it may choose among criminal causes of action that might have justified an arrest, and thus a search incident to arrest, is a question of vital public importance. It is a serious step to untether the probable cause required for the search incident to arrest from either

the charge acted upon by the arresting officer or the charge the Government actually filed shortly after the arrest.

IV. The D.C. Circuit Wrongly Broadened the Exception

This Court should also grant the petition in this case to correct the error of the D.C. Circuit's erroneous extension here of the judicially-created exception, which is both unjustified by precedent and unwise.

Under Rule 10, it is proper for the Court, in conjunction with other reasons, to look ahead to the merits and consider the likelihood that it would be correcting error by the court of appeal.

In the discussion in Part I above, Petitioner has established that the cases relied upon by the court below to affirm his judgment of conviction are distinguishable. The plain language of the court's holding would permit police to conduct a search where they had not properly arrested a defendant for an offense, and were not already going to be conducting a probable cause arrest.

This holding is not only unprecedented, it is also the wrong result, because it contravenes at least two important principles this Court has affirmed in cases developing this exception to the warrant requirement. First, as discussed supra in Part III of the Reasons For Granting the Petition, searches incident to arrest are limited by the principle that police, must whenever practicable, obtain advance judicial approval of searches through the warrant requirement. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969). Second, the scope of the exception must not exceed the need to protect officer safety and thwart evidence destruction *during a*

custodial arrest. *See Arizona v. Grant,* 556 U.S. 332, 339 (2009) (scope of search incident to arrest exception is limited where its policy justifications, protecting arresting officers and safeguarding any evidence of the offense of arrest that the arrestee might conceal or destroy, are absent).

In the case at bar, the needlessness of the warrant exception is most pronounced. This was a long-term investigation, in which agents and local police knew that Mr. Magruder was coming off of a bus coming all the way from New York and met him outside the bus in force. Absent were the policy concerns of officer safety and protection of evidence usually present during chaotic, suddenly unfolding, happenstance encounters where officers are thinking in real time about what offenses might be applicable to the unfolding facts. If the FBI were truly going to arrest Mr. Magruder off the bus from New York, they had plenty of time to get a warrant. The fact that they did not take that easy step with their allegedly overwhelming evidence belies any assertion of an intent to arrest Mr. Magruder for conspiracy.

This published decision now holds open the door for police and agents in cases where the suspect is not a stranger to their investigations to conduct a warrantless search, to find evidence, and then decide what prior offense to allege to justify the search. This undermines the warrant requirement and related Fourth Amendment protections. Fewer police may seek search warrants and arrest warrants in advance of approaching a suspect if they can rely on this holding. The search-incident-to-arrest exception would swallow the rule. Future law

enforcement agents at the local, state, and federal level could, of course, use such expansive search power free from timely and effective judicial oversight in cases of a nature far afield from narcotics conspiracy and distribution.

In sum, the published decision below erroneously over-extends the search incident to arrest doctrine to fact patterns to which this exception has never applied before and should not apply, for public policy reasons. The Court should grant the petition so that it is able to correct this error, provide judicial oversight, and clarify the interpretation of existing case law to safeguard the limiting principles of the search incident to arrest exception to the Constitution's warrant requirement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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