

No. 17-6606

IN THE SUPREME COURT OF THE UNITED STATES

JOSE DIAZ, 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 frisk where he fumbled in his jacket pockets and waistband while he was lawfully detained by a police officer, probable cause existed to arrest him, and the officer arrested him immediately after the frisk.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 854 F.3d 197. The opinion of the district court (Pet. App. 27a-51a) is reported at 122 F. Supp. 3d 165.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2017. A petition for rehearing was denied on July 31, 2017 (Pet. App. 52a). The petition for a writ of certiorari was filed on October 30, 2017 (Monday). 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 Southern 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). He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-26a.

1. During a routine patrol of an apartment building conducted with the building owner's consent, New York City Police Officer Chris Aybar and her partner encountered petitioner and two other men in a stairwell. Pet. App. 4a-5a. Petitioner was sitting next to a bottle of vodka and holding a red plastic cup containing a liquid that smelled like alcohol. Id. at 5a. One of his companions also had a red plastic cup, and the other companion was smoking a marijuana cigarette. Ibid. Officer Aybar testified that she initially intended to issue petitioner a summons for violating New York City's open-container law, but did not plan to arrest him. Ibid.

"Because Officer Aybar did not feel safe confronting [petitioner] while he was seated, she ordered him to stand against the wall and produce his identification." Pet. App. 6a. Petitioner stood, but did not immediately produce identification; instead, he "fumbled with his hands in his jacket pockets and rearranged his waistband." Ibid. Officer Aybar testified that

petitioner was "persistent in trying to take off his jacket and trying to go readjusting his waistband and going into his pockets." 7/24/2015 Hearing Tr. (Tr.) 42. She added that she thought petitioner "had something on him" and "didn't know what he was going to try to take out of his jacket." Tr. 39, 42. Fearing for her safety, "Officer Aybar frisked [petitioner] and felt a bulge on his jacket," which turned out to be a loaded .380 caliber firearm. Pet. App. 6a. Officer Aybar then placed petitioner under arrest. Ibid.

2. A federal grand jury returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). The district court denied petitioner's motion to suppress the firearm. Pet. App. 27a-51a. The court disagreed with the government's argument that Officer Aybar was justified in frisking petitioner as a protective measure under Terry v. Ohio, 392 U.S. 1 (1968). Pet. App. 35a-36a. But the court agreed with the government's alternative argument that the frisk was a valid search incident to arrest, relying on the Second Circuit's decision in United States v. Ricard, 563 F.2d 45 (1977), cert. denied, 435 U.S. 916 (1978). Pet. App. 36a-50a. After denying the motion to suppress, the court convicted petitioner in a bench trial on stipulated facts. Id. at 9a. It sentenced him to 33 months of imprisonment. Ibid.

3. The court of appeals affirmed. Pet. App. 1a-26a. The court first determined that, at the time of the frisk, Officer Aybar had probable cause to arrest petitioner for violating New York's open-container law (a determination that petitioner does not challenge). Id. at 11a-16a. The court then rejected petitioner's contention that the search "was not a lawful search incident to an arrest because, at the time of the search, Officer Aybar did not intend to arrest [petitioner] and would not have ultimately done so had she not discovered the gun." Id. at 17a; see id. at 17a-26a. The court explained that this Court has held that a search incident to arrest may occur "before or after the arrest," id. at 17a (citing Rawlings v. Kentucky, 448 U.S. 98, 111 (1980)), "so long as it is 'substantially contemporaneous with the arrest,'" id. at 17a-18a (quoting Shipley v. California, 395 U.S. 818, 819 (1969) (per curiam)). And the court added that its prior decision in Ricard had rejected the argument that a search conducted immediately before an arrest cannot be justified as an incident search unless the officer subjectively intended to arrest the defendant before the search. Id. at 18a (citing Ricard, 563 F.2d at 48-49).

The court of appeals rejected petitioner's contention that Ricard is inconsistent with this Court's subsequent decision in Knowles v. Iowa, 525 U.S. 113 (1998). Pet. App. 18a-22a. In Knowles, a police officer who had probable cause to arrest a driver

for a traffic offense instead issued a citation. 525 U.S. at 114. After issuing the citation, the officer “conducted a full search of the car” pursuant to a state law authorizing officers “to conduct a full-blown search of an automobile and driver in those cases where police elect not to make a custodial arrest and instead issue a citation.” Id. at 114-115. This Court held the search unlawful, declining to extend the search-incident-to-arrest doctrine to that circumstance. Id. at 118-119.

The court of appeals distinguished Knowles from Ricard and from this case, explaining that “the search in Knowles occurred after the officer had completed the traffic stop by issuing a citation, whereas the search in Ricard (and the case at bar) occurred before any such event took place.” Pet. App. 20a. The court explained that “[i]t thus remained uncertain in Ricard (and here) whether the encounter would lead to an arrest,” and that “the dangers to the officer that accompany the prospect of arrest therefore remained present.” Ibid.

The court of appeals disagreed with the reasoning of the New York Court of Appeals in People v. Reid, 26 N.E.3d 237 (2014), which had concluded that a search during a traffic stop could not be justified as a search incident to an arrest where the officer testified that he did not intend to arrest the driver until the search revealed a weapon. Pet. App. 22a-24a. The court explained that Reid’s conclusion “ignores that an officer who stops a person

to issue a citation faces an evolving situation” and is not bound by her initial intention to issue a citation rather than making an arrest. Id. at 23a. The court also observed that Reid’s approach “appears to require a court to consider the officer’s intent,” which contradicts this Court’s “‘repeated rejection of a subjective approach’ in the Fourth Amendment context.” Ibid. (brackets and citation omitted).

Because the court of appeals held that Officer Aybar’s frisk was a valid search incident to arrest, it did not consider the government’s alternative argument that “the search was a lawful Terry search.” Pet. App. 26a n.16.

ARGUMENT

Petitioner contends (Pet. 13-34) that Officer Aybar’s search was not a valid search incident to arrest because she conducted the search before she arrested him or intended to arrest him. That contention lacks merit and does not warrant further review. This Court has previously denied review of the same issue, see Heaven v. Colorado, 137 S. Ct. 2297 (2017) (No. 16-1225); Powell v. United States, 552 U.S. 1043 (2007) (No. 07-5333), and 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. Petitioner did not advocate below one of the two alternative rules he now urges this Court to adopt, and he would not be entitled to relief even if he prevailed on the

question presented because Officer Aybar's protective frisk was justified under Terry v. Ohio, 392 U.S. 1 (1968).

1. The court of appeals correctly held that the search at issue here 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, 762-763 (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. Id. at 763.

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 petitioner'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

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.

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.

b. 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 Aybar had probable cause to arrest him for violating New York's open-container law. Pet. App. 11a-16a. 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. App. 6a. The court of appeals thus correctly held that the search was a lawful search incident to arrest.

2. Petitioner challenges that holding on two distinct grounds. First, and more broadly, he asserts (Pet. 3) that "an incident search requires an existent arrest at the time of the

search,” and thus may not precede the arrest. Second, he advances (Pet. 5) 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 neither is supported by this Court’s decision in Knowles v. Iowa, 525 U.S. 113 (1998).

a. Petitioner acknowledges (Pet. 31-32) 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. 33) that the Court’s statement “lacks binding force” because it was “unnecessary to the disposition of the case.” 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. 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); see Rawlings, 448

U.S. at 111 (citing Brown 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. “This holding was no mere dictum.” Green v. Brennan, 136 S. Ct. 1769, 1779 (2016). It 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., 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, 997-998 (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. Smith, 389 F.3d 944, 951-952 (9th Cir. 2004) (“A search incident to arrest need not be delayed until the arrest is effected.”), cert. denied, 544 U.S. 956 (2005); United States v. Bizier, 111 F.3d 214, 217 (1st Cir. 1997) (“[W]hether a formal arrest occurred prior to or

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 that determining a search to be lawful based in part on "the formal arrest" that "followed quickly on [its] heels," Rawlings, 448 U.S. at 111, contravenes the principle that "the constitutionality of a search turns on whether it was justified 'at its inception,' not on subsequent events." Pet. 30 (citation omitted). But the decisions petitioner cites do not establish any categorical rule that would require a repudiation of Rawlings. Instead, they merely state that a court determining the reasonableness of a search must conduct a "twofold inquiry" that considers both "'whether the . . . action was justified at its inception'" -- that is, whether any search was permissible -- and "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified [it] in the first place.'" New Jersey v. T. L. O., 469 U.S. 325, 341 (1985) (quoting Terry, 392 U.S. at 20). To the extent it is necessary to view

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

Rawlings through that lens, it is clear that this Court deemed the search justified at its inception by the existence of “probable cause to place [the suspect] under arrest” and the fact that “the formal arrest followed quickly on the heels of the challenged search.” 448 U.S. at 111.

Petitioner relatedly asserts (Pet. 31) that, under a rule that the search may precede the arrest, Officer Aybar “could not have known whether her actions were constitutional when she acted.” But that is not correct. Under Rawlings, a police officer in Officer Aybar’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 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). Petitioner thus identifies no sound reason to question the rule adopted by this Court in Rawlings and uniformly followed by the courts of appeals.

b. In the alternative, petitioner contends (Pet. 33) that a search incident to arrest may precede the arrest, but only if the arrest “is intended” at the time of the search. The court of appeals correctly rejected that argument as “at odds with [this] Court’s ‘repeated rejection of a subjective approach’ in the Fourth Amendment context.” Pet. App. 23a (brackets and citation omitted).

As this Court has explained, “[t]he reasons for looking to objective factors, rather than subjective intent, 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 404-405. 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: Officer Aybar had probable cause to arrest petitioner before she frisked him, and she did in fact arrest him immediately thereafter. See 448 U.S. at 111. Petitioner's argument does not dispute that a reasonable officer in Officer Aybar's position could have taken exactly the same actions without violating the Fourth Amendment, so long as she planned to arrest him at the time of the search. Instead, petitioner asserts (Pet. 5, 33) that Officer Aybar's actions were invalid because she did not "intend[]" to arrest him when she began the search.

Petitioner thus seeks to place dispositive weight on Officer Aybar'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 Aybar subjectively lacked a particular "state of mind." Ibid.

Petitioner contends (Pet. 34) that this Court "has endorsed the consideration of subjective intent" in other Fourth Amendment cases. But the only case he cites, Florida v. Jardines, 569 U.S. 1 (2013), addressed a very different issue. There, the question was "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." Id. at 3. The Court explained that visitors to a home, including police officers, have an "implicit license" to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id. at 8. But the Court held that the officers exceeded that license -- and therefore conducted a Fourth Amendment search -- because "[t]here is no customary invitation" to "introduc[e] a trained police dog to explore the area around

the home.” Id. at 9. In reaching that conclusion, the Court was careful to distinguish its limited consideration of the officers’ behavior, which “objectively reveal[ed] a purpose to conduct a search,” from prohibited consideration of an officer’s “subjective intent.” Id. at 10. The Court thus reaffirmed the principle that a search “that is objectively reasonable is not vitiated by the fact that the officer’s real reason for making the * * * search has nothing to do with the validating reason.” Ibid. Petitioner’s argument conflicts with that principle: He asserts that what would otherwise be an objectively reasonable search incident to arrest is “vitiated by the fact that [Officer Aybar’s] real reason” for the search, ibid., was something other than a planned arrest.³

c. Petitioner errs in asserting (Pet. 3-4, 29-30) that this Court’s decision in Knowles supports either of his arguments. In Knowles, the defendant was stopped for speeding, and although the

³ Although petitioner does not cite them, some of this Court’s decisions have stated in dicta that the motive for a search may be relevant to its validity in the context of an “inventory search or administrative inspection.” Whren, 517 U.S. at 812. But the Court has since clarified that even in the context of inventory searches and other similar programs, determining the validity of a search “has nothing to do with discerning what is in the mind of the individual officer conducting the search.” Brigham City, 547 U.S. at 405. Instead, those cases reflect that fact that “in the context of programmatic searches conducted without individualized suspicion * * * ‘an inquiry into programmatic purpose’ is sometimes appropriate.” Ibid. (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 46 (2000)).

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 the police to conduct a full-scale search of a car and driver whenever they 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 117-118.

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 Aybar's search "occurred before" she had issued a citation or otherwise concluded the encounter. Pet. App. 20a. "It thus remained uncertain * * * whether the encounter would lead to an arrest," and the "the dangers to the officer that accompany the prospect of arrest therefore remained present." Ibid. 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. 13-25) 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 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).⁴ The erroneous Ochana dicta 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 likewise 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 decisions on which he relies differs in critical respects from

⁴ Accord 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).

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 trooper lacked probable cause” when the search began and “the defendant was not arrested” even after the search. Id. at 576; see Bailey v. State, 987 A.2d 72, 88 (Md. 2010) (officer “did not have probable cause”); Belote v. State, 981 A.2d 1247, 1249 (Md. 2009) (officer “never made a custodial arrest” and suspect was not taken into custody until “more than two months” after the search); State v. Crutcher, 989 S.W.2d 295, 302 n.12 (Tenn. 1999) (“police did not take custody of [the suspect] until several hours after the search”).

c. Petitioner also relies (Pet. 21-24) on decisions from California, Idaho, and Virginia. Although aspects of the reasoning of those decisions is 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); see Lovelace v. Commonwealth, 522 S.E.2d 856, 860 (Va. 1999) (“the officers could have issued only a summons”). Here, in contrast, New York law authorized an arrest for petitioner’s open-container violation. Pet. App. 25a n.15.

Indeed, Officer Aybar testified that her practice is to make arrests for such a violation if the suspect cannot produce identification to verify his name and address for purposes of issuing a summons. Tr. 43. The court of appeals thus distinguished Macabeo on the ground that “no New York law prohibited Officer Aybar from arresting [petitioner] for the open-container violation.” Pet. App. 25a n.15.⁵

The Idaho Supreme Court’s decision in State v. Lee, 402 P.3d 1095 (2017), is likewise distinguishable. In that case, the 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 Aybar did not tell petitioner that he would receive only a citation before frisking him.

⁵ As petitioner observes (Pet. 22 n.4), this Court has 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. Virginia v. Moore, 553 U.S. 164, 171 (2008). But Lovelace preceded this Court’s decision in Moore, and the California Supreme Court’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.

d. 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. 26 N.E.3d at 240 (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 court of appeals here likewise specifically rejected Reid, explaining that its reliance on subjective intent was "at odds with [this] Court's 'repeated rejection of a subjective approach' in the Fourth Amendment context." Pet. App. 23a (brackets and citation omitted).

The shallow, recent conflict created by the divided decision in Reid does not warrant this Court's intervention now. The New York Court of Appeals has not had occasion to apply Reid since that case 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. 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 an appropriate vehicle in which to consider it for two independent reasons.

a. First, petitioner did not present to the courts below one of the two alternative rules he now urges this Court to adopt. Petitioner now contends that "an incident search requires an existent arrest at the time of the search" and that the Court's contrary holding in Rawlings should be disregarded as dicta. Pet. 3; see Pet. 32-33. Petitioner did not make that argument below. To the contrary, the district court observed that "[n]o one * * * is disputing" that "as long as [the search] is substantially contemporaneous with the arrest, it doesn't matter if the search precedes or follows the arrest." Tr. 97. And on

appeal, petitioner expressly endorsed the rule that “[a]n incident search may precede a ‘formal arrest’ that follows ‘quickly on [its] heels.’” Pet. C.A. Br. 31 (quoting Rawlings, 448 U.S. at 111); see id. at 43-44. Because this Court is “a court of review, not of first view,” Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), it should decline to consider a rule that petitioner never asked the courts below to adopt.

b. Second, petitioner would not be entitled to relief even if he prevailed on the question presented because Officer Aybar’s frisk was valid as a limited protective pat-down under Terry. The court of appeals raised the Terry issue sua sponte and directed the parties to brief it. See Gov’t C.A. Supp. Br. 1. The court ultimately did not reach that issue because it concluded that circuit precedent dictated the conclusion that the search was a valid search incident to arrest. Pet. App. 25a-26a & n.16. But even if this Court granted review and rejected that holding, Terry would provide a ready alternative ground for upholding the search.

Under Terry, an officer who has lawfully detained a suspect may conduct a limited protective frisk for weapons if she 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 Terry standard was amply satisfied here. Officer Aybar and her partner encountered three men drinking and smoking marijuana in an apartment building at night. Pet. App. 4a-5a. When Officer Aybar asked petitioner for his identification, he did not immediately produce it. Tr. 42. Instead, "he was persistent in trying to take off his jacket and trying to go readjusting his waistband and going into his pockets." Ibid. Confronted with that conduct, Officer Aybar reasonably believed that petitioner "had something on him" and was reasonably concerned for her safety because she "didn't know what he was going to try to take out of his jacket." Tr. 39, 42. Officer Aybar's suspicions proved correct: When she frisked petitioner, she "felt a bulge on his jacket" and discovered that one of the pockets he had been "fumbl[ing] with his hands in" contained a "loaded .380 caliber Taurus firearm." Pet. App. 6a.

Under the 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). Indeed, courts of appeals have repeatedly held that officers may conduct a Terry

frisk based on similar furtive movements suggesting 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. 2014) (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 district court “swiftly rejected” the government’s Terry argument, holding that the facts observed by Officer Aybar did not “suffice to establish reasonable suspicion.” Pet. App. 35a. In so holding, however, the court relied exclusively on cases addressing the requirement for an initial Terry stop -- that is, whether the officer 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) (emphasis added).⁶

⁶ See Pet. App. 35a-36a (citing Reid, 448 U.S. at 440-441; United States v. Sanders, 208 F.3d 204 (2d Cir. 2000) (Tbl.); United States v. Bellamy, 592 F. Supp. 2d 308, 318 (E.D.N.Y. 2009); and United States v. Doughty, No. 08-cr-375, 2008 WL 4308123, at *5-*6 (S.D.N.Y. Sept. 19, 2008)).

The question here is different. There is no dispute that Officer Aybar and her partner had lawfully detained petitioner and his companions for open-container and marijuana offenses. The question thus is not whether petitioner's actions would have justified a Terry stop absent other criminal activity. It is, instead, whether Officer Aybar had reason to believe "that the individual whose suspicious behavior [s]he [wa]s investigating at close range [wa]s armed and presently dangerous." Terry, 392 U.S. at 24.

For good reason, that 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. Accordingly, even if the district court were correct that "[f]urtive behavior absent additional indicia of suspicion generally does not suffice to establish reasonable suspicion" of criminal activity that would justify an initial stop, Pet. App. 35a (citation omitted), it would not follow that an officer must ignore the threat to her safety posed by a suspect's furtive behavior after she has lawfully detained him on other grounds. That is what happened here, and neither petitioner nor the district court cited any decision

invalidating a minimally invasive protective frisk under analogous circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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