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Search Incident to Probable Cause?: The Intersection of *Rawlings* and *Knowles*

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NOTE

SEARCH INCIDENT TO PROBABLE CAUSE?: THE INTERSECTION OF RAWLINGS AND KNOWLES

Marissa Perry*

The search incident to arrest exception authorizes an officer to search an arrestee's person and his or her area of immediate control. This exception is based on two historical justifications: officer safety and evidence preservation. While much of search incident to arrest doctrine is settled, tension exists between two Supreme Court cases, Rawlings v. Kentucky and Knowles v. Iowa, and a crucial question remains unanswered: Must an officer decide to make an arrest prior to commencing a search? In Rawlings, the Supreme Court stated that a search may precede a formal arrest if the arrest follows quickly thereafter. In Knowles, the Supreme Court rejected the lower court's reasoning that a search is valid so long as an officer has probable cause to make an arrest, even if an arrest never happens. This tension has led to differing interpretations among the lower courts, resulting in three different readings of Rawlings. This Note argues that Supreme Court should settle the lower courts' varied interpretations of Rawlings and Knowles and answer the unresolved question. It proposes a new rule and argues that the Supreme Court should hold that in order for a search incident to arrest to be valid, the officer must intend to make an arrest before commencing the search.

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INTRODUCTION

One of the most important exceptions to the Fourth Amendment's warrant requirement is a search incident to arrest, which allows an officer to search a person and his or her area of immediate control.¹ There is an unresolved question in search incident to arrest doctrine that arises frequently: When can the search precede the arrest? In particular, must the officer have already decided to make an arrest prior to commencing the search? The Supreme Court has not resolved this question, though it has touched on the issue in two cases that are in tension with one another.² The issue has also divided the lower courts.³ This question ought to be settled, and the Supreme Court should be the one to resolve it. This Note addresses how the Supreme Court might resolve the question and explains the legal and practical concerns that justify its resolution by our nation's highest Court.

Much of the search incident to arrest doctrine is settled. The two justifications for the exception are officer safety and evidence preservation. These justifications define the scope of a search incident to arrest, which is limited to a search of the arrestee's person and any items within his or her immediate control.⁴ If the arrested individual is a recent occupant of a vehicle, the police officer may, in certain instances, also conduct a search of the vehicle.⁵ The exception provides police officers with "an unqualified right to search" any individual they arrest.⁶ The officer need not obtain a search warrant

1. If the person arrested is an occupant or recent occupant of a car, the right to search may extend to the interior of the vehicle. See *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

2. Compare *Rawlings v. Kentucky*, 448 U.S. 98 (1980), with *Knowles v. Iowa*, 525 U.S. 113 (1998).

3. Compare *United States v. Smith*, 389 F.3d 944, 951–52 (9th Cir. 2004) (holding that so long as there is probable cause to arrest and the search is conducted soon thereafter, the search is valid as incident to arrest), and *United States v. Anchondo*, 156 F.3d 1043, 1045–46 (10th Cir. 1998) (same), and *United States v. Ilazi*, 730 F.2d 1120, 1126–27 (8th Cir. 1984) (same), with *United States v. Patiutka*, 804 F.3d 684, 688 (4th Cir. 2015) (citing *Rawlings* for the proposition that the search may precede arrest so long as probable cause existed prior to the search), and *United States v. Abney*, 496 F. App'x 248, 254 (3d Cir. 2012) (same), and *United States v. Bizier*, 111 F.3d 214, 216–17 (1st Cir. 1997) (same), and *United States v. Banshee*, 91 F.3d 99, 102 (11th Cir. 1996) (same), and *United States v. Hernandez*, 825 F.2d 846, 852 (5th Cir. 1987) (same), and *United States v. Donaldson*, 793 F.2d 498, 503 (2d Cir. 1986) (same), and with *United States v. Powell*, 483 F.3d 836, 839–41 (D.C. Cir. 2007) (en banc) (holding that because there was probable cause, the formal arrest could follow quickly after the search, while emphasizing "we do not say that having probable cause to arrest is by itself sufficient"), and *United States v. Williams*, 170 F. App'x 399, 404–05 (6th Cir. 2006) (upholding a search that preceded an arrest because the "officers took preliminary steps towards a formal arrest based upon existing probable cause"), and with *Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003) (holding that a defendant must be under custodial arrest at the time of the search).

4. *Searches Incident to Valid Arrests*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 82, 82–84 (2015).

5. *Id.* at 85; see *infra* text accompanying notes 52–54.

6. Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 381 (2001).

prior to conducting such a search.⁷ The exception does not require an officer to have probable cause to believe that evidence from the crime that the suspect was arrested for will be found; nor is it limited to situations in which the arrested individual is more likely to possess dangerous weapons due to the nature of the crime committed.⁸ Crucially, in order for the search to be lawful, the police officer may not use evidence obtained from a search incident to arrest to justify a finding of probable cause to arrest.⁹

Uncertainty still exists, however, concerning when a search incident to arrest may lawfully precede an arrest. The Supreme Court has touched on this question in two cases: *Rawlings v. Kentucky*¹⁰ and *Knowles v. Iowa*.¹¹ In *Rawlings*, officers searched Rawlings after he admitted ownership of a large quantity of illegal drugs, but before the police officers had arrested him.¹² The Court upheld the search as incident to arrest, stating that “[w]here the formal arrest follow[s] quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa” so long as probable cause existed prior to the search.¹³ In *Knowles*, an officer conducted a search of Knowles’s vehicle after issuing him a citation for speeding.¹⁴ The Iowa Supreme Court upheld the search, reasoning that “so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest” to justify the search.¹⁵ The Supreme Court reversed, holding that “neither of the [] underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case.”¹⁶

The tension between these two cases has led to division among the lower courts on this crucial issue. The majority of circuit courts have cited *Rawlings* to uphold searches that precede an arrest.¹⁷ The Eighth, Ninth, and

7. *Id.*

8. See *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does 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 upon the person of the suspect.”); see also Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 *TEMP. L. REV.* 221, 226 (1989) (“Search incident to arrest differs from other exceptions to the warrant requirement in that it not only permits the government to search without a warrant, but also permits a search without probable cause to believe that evidence of criminal activity will be found during the search.”).

9. See *Searches Incident to Valid Arrests*, *supra* note 4, at 86–87.

10. 448 U.S. 98 (1980).

11. 525 U.S. 113 (1998).

12. *Rawlings*, 448 U.S. at 111.

13. *Id.*

14. *Knowles*, 525 U.S. at 114.

15. *Id.* at 115–16.

16. *Id.* at 117.

17. See *United States v. Patiutka*, 804 F.3d 684, 688 (4th Cir. 2015); *United States v. Abney*, 496 F. App’x 248, 254 (3d Cir. 2012); *United States v. Powell*, 483 F.3d 836, 838–39 (D.C. Cir. 2007) (en banc); *United States v. Williams*, 170 F. App’x 399, 404 (6th Cir. 2006);

Tenth Circuits have articulated a “two-part test,” stating that, so long as probable cause exists prior to the search and an arrest follows soon thereafter, the timing of the search is not important.¹⁸ Other courts, including the Seventh Circuit and several state supreme courts, have held that more than probable cause is needed to justify a search incident to arrest.¹⁹

This issue is important to resolve for two reasons. First, it is unclear that mere probable cause to arrest triggers the rationales used to justify the search incident to arrest. The Supreme Court stated in *United States v. Robinson*—and reaffirmed in *Knowles*—that concerns for officer safety “flow[] from the fact of the arrest.”²⁰ The Supreme Court has reasoned similarly when discussing the second rationale for the exception, evidence preservation.²¹ Only one circuit court has said that the concerns for officer safety and evidence preservation are as apparent before an arrest,²² and the Supreme Court has yet to express its opinion on this question. If these concerns are not present before an arrest, the two-part test risks untethering the rule from its justifications.

Second, there are serious practical implications to consider when evaluating the multiple approaches lower courts have taken in analyzing this question. Under the Eighth, Ninth, and Tenth Circuits’ approach, as long as officers had probable cause to arrest an individual for an offense, they could conduct a search of his person, any items within his or her immediate control, and potentially a vehicle, if he was considered a recent occupant thereof, *before* the officer determined whether or not he was going to arrest the individual.²³ Considering the high number of arrestable offenses for which officers generally issue a warning or citation, the practical consequence of the rule articulated by the Eighth, Ninth, and Tenth Circuits creates a substantial risk for pretextual searches.

This Note contends that, in addition to probable cause and an arrest that follows quickly thereafter, a valid search incident to arrest requires that the officer intended to arrest the person prior to commencing the search. By

United States v. Bizier, 111 F.3d 214, 217 (1st Cir. 1997); *United States v. Banshee*, 91 F.3d 99, 102 (11th Cir. 1996); *United States v. Hernandez*, 825 F.2d 846, 852 (5th Cir. 1987); *United States v. Donaldson*, 793 F.2d 498, 503 (2d Cir. 1986).

18. See *United States v. Smith*, 389 F.3d 944, 952 (9th Cir. 2004); *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998); *United States v. Ilazi*, 730 F.2d 1120, 1126–27 (8th Cir. 1984).

19. See *Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003); *People v. Reid*, 26 N.E.3d 237, 240 (N.Y. 2014); *State v. Crutcher*, 989 S.W.2d 295, 299–300 (Tenn. 1999).

20. *Knowles*, 525 U.S. at 117 (quoting *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973)).

21. See *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (“Where there is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person.”); *Chimel v. California*, 395 U.S. 752, 764 (1969).

22. *United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007) (en banc) (contending that concerns for officer safety and evidence preservation are greater before a police officer takes a suspect into custody than they are after).

23. See *supra* note 18.

adopting a reading of *Rawlings* that does not require that the officer intended to arrest, lower courts risk transforming the search incident to arrest exception into a search incident to probable cause exception.

This note proceeds as follows. Part I provides a summary of modern search incident to arrest doctrine. Part II compares the competing interpretations of the intersection of *Rawlings* and *Knowles* at the lower court level. Part III contends that the Supreme Court should resolve this unsettled question and hold that in order for a search incident to arrest to be valid, the officer must intend to make an arrest before commencing the search.

I. MODERN SEARCH INCIDENT TO ARREST DOCTRINE

This Part provides an overview of the modern search incident to arrest doctrine. It begins with a discussion of *Chimel v. California*, which articulated the two justifications for the search incident to arrest exception, and *United States v. Robinson*, which established a bright-line rule that the exception is triggered by the arrest itself. Part I then addresses the search incident to arrest exception in the vehicle context, providing an overview of *New York v. Belton* and *Arizona v. Gant*. It concludes with a synopsis of *Rawlings v. Kentucky* and *Knowles v. Iowa*, the analysis of which is crucial to the question at the heart of this Note: Must an officer decide to make an arrest prior to commencing the search?

*Chimel v. California*²⁴ announced the justifications underlying search incident to arrest for the first time.²⁵ In *Chimel*, three police officers arrived at Chimel's home with a warrant for his arrest for the burglary of a coin shop.²⁶ The officers did not have a search warrant, but requested Chimel's permission to "look around."²⁷ Chimel denied the officer's request; the officers nonetheless conducted a full search of defendant's entire home, stating that they had the authority to do so "on the basis of the lawful arrest."²⁸ In a search lasting forty-five to sixty minutes,²⁹ the police officers seized a number of items as evidence, including coins, medals, and tokens.³⁰ Items seized from Chimel's home were subsequently admitted into evidence against him at his trial in state court for burglary.³¹ Chimel objected to the admission of this evidence, arguing that the items had been unconstitutionally seized.³² The court overruled his objection and subsequently convicted him.³³ Both the California Court of Appeal and the California Supreme Court affirmed,

24. 395 U.S. 752 (1969).

25. Logan, *supra* note 6, at 391.

26. *Chimel*, 395 U.S. at 753.

27. *Id.*

28. *Id.* at 753–54.

29. *Id.* at 754.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.*

holding that because the officers had arrested Chimel, searching his home was lawful as incident to a lawful arrest.³⁴

The Supreme Court granted certiorari to determine “whether the warrantless search of the petitioner’s entire house can be constitutionally justified as incident to that arrest.”³⁵ Recognizing that the constitutional standard for search incident to arrest had been “far from consistent” since its first approval of the exception in *Weeks v. United States*,³⁶ the Court began its analysis with an overview of its conflicting opinions on the scope of a search incident to arrest.³⁷

The Court emphasized the importance of the background and purpose of the Fourth Amendment in determining the scope of this exception.³⁸ It determined that its analysis in *Terry v. Ohio*, that “[t]he scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible,” is applicable to the search incident to arrest exception.³⁹ It then went on to articulate the two justifications for a search incident to arrest:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.⁴⁰

The Court explained that these two justifications for the search incident to arrest exception, officer safety and the preservation of evidence, defined the scope of a search to be “a search of the arrestee’s person and the area ‘within his immediate control.’”⁴¹ Because the search went beyond the defendant’s person and area within his immediate control, the Court explained, evidence of the items seized should have been suppressed.⁴²

While *Chimel* articulated the two reasons that trigger the search incident to arrest exception, it left open the question of whether officers always have the right to search incident to an arrest.⁴³ *Chimel* did not address whether the right to conduct a search incident to arrest depends on probable cause

34. *Id.* at 754–55.

35. *Id.* at 755.

36. *Id.* (citing *Weeks v. United States*, 232 U.S. 383 (1914)).

37. *Id.* at 755–60.

38. *Id.* at 760–61.

39. *Id.* at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

40. *Id.* at 762–63.

41. *Id.* at 763.

42. *Id.* at 768.

43. Logan, *supra* note 6, at 392.

that the arrestee had a weapon or evidence to conceal on his person or within his or her immediate control.⁴⁴

The Court determined that an arrest provides a categorical right to search in *United States v. Robinson*.⁴⁵ It explained that while the justifications for the search incident to arrest exception are based on officer safety and preservation of evidence, the authority to conduct such a search is not dependent on the probability that the police officer will find weapons or evidence.⁴⁶ The justifications for the exception are triggered at the moment of arrest: “[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.”⁴⁷ In other words, it is the arrest that justifies the search, not the existence of probable cause or reasonable suspicion that an officer would find a weapon or concealed evidence when conducting the search.

The Court has also addressed the scope of a search incident to arrest in the context of vehicle searches. In *New York v. Belton*, the Court acknowledged that although *Chimel* clearly stated that the scope of a search incident to arrest should not extend beyond the area within the immediate control of the arrested person, it did not provide a workable definition of “the area within the immediate control of the arrestee” for courts and police officers.⁴⁸ The Court assumed that, generally speaking, articles inside the passenger compartment of a vehicle are “within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’”⁴⁹ Based on this assumption and a desire to create a bright line rule, the Court concluded that the scope of a search incident to an arrest of an occupant of a vehicle includes a search of the passenger compartment of the vehicle, and any containers found therein.⁵⁰ For years, many courts understood *Belton* to allow a search of an automobile as incident to the arrest of an occupant even if it was impossible for the arrestee to gain access to the vehicle at the time of the search.⁵¹

44. *Id.*

45. 414 U.S. 218, 225 (1973).

46. *Robinson*, 414 U.S. at 235.

47. *Id.* at 234 n.5.

48. 453 U.S. 454, 460 (1981).

49. *Belton*, 453 U.S. at 460 (alteration in original) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

50. *Id.* at 460–61 (citing *Robinson*, 414 U.S. 218, and *Draper v. United States*, 358 U.S. 307 (1959)). In concluding that the search incident to arrest of an occupant of a vehicle included search of the passenger compartment and any containers located therein, the Court was also motivated in part by the need for straightforward rules: “Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.” *Id.* at 458 (quoting Wayne R. LaFare, “Case-by-Case Adjudication” versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141).

51. See, e.g., *Arizona v. Gant*, 556 U.S. 332, 341 (2009).

The Court rejected this interpretation in *Arizona v. Gant*, noting that authorizing a categorical right to search a vehicle incident to a “recent occupant’s arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with *Belton*.”⁵² Instead, the Court held that the *Chimel* justifications authorize a search of a vehicle as incident to the arrest of a recent occupant “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”⁵³

The *Gant* Court also recognized that the unique circumstance of vehicles justifies a search of the vehicle’s passenger compartment in cases when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁵⁴ Importantly, this additional exception would not come into play in the case of an arrest for a traffic violation, as there would be no reasonable basis for a police officer to conclude that evidence of the traffic violation was present in the vehicle. The Court has also recently declined to extend the search incident to arrest exception to electronic data on cell phones on the basis that such an extension would “untether the rule from the justifications underlying the *Chimel* exception.”⁵⁵

Two Supreme Court cases, *Rawlings* and *Knowles*, seem to be in tension with one another. In *Rawlings v. Kentucky*, police officers arrived at Lawrence Marquess’s house with a warrant for his arrest on drug distribution charges.⁵⁶ Marquess was not present; however, one of his housemates and four visitors, including Rawlings, were present.⁵⁷ While searching for Marquess, the officers smelled and visually observed marijuana.⁵⁸ Two of the officers left to obtain a search warrant, while the four remaining officers detained Rawlings and the other occupants.⁵⁹ When the officers returned with a search warrant, they ordered Rawlings’s companion to empty the contents of her purse.⁶⁰ Among the contents were a number of different drugs,⁶¹ all of which Rawlings immediately claimed to own.⁶² The officers

52. *Id.* at 343.

53. *Id.*

54. *Id.* at 343. (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)). The Court noted that this additional vehicle exception did not flow from the *Chimel* rationale. *Id.*

55. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (quoting *Gant*, 556 U.S. at 343).

56. 448 U.S. 98, 100 (1980).

57. *Rawlings*, 448 U.S. at 100.

58. *Id.*

59. *Id.* The police officers informed the occupants that they would be allowed to leave if they consented to a body search. Two of the occupants did consent to such a search, and were allowed to leave. *Id.*

60. *Id.* at 101.

61. The drugs included “a jar containing 1,800 tablets of LSD and a number of smaller vials containing benzphetamine, methamphetamine, methyprylan, and pentobarbital.” *Id.*

62. *Id.*

searched Rawlings, found \$4,500 in cash and a knife, and then placed him under formal arrest.⁶³

Rawlings, as petitioner, argued several issues before the Court, including that the search of his person was illegal.⁶⁴ The Court noted that it had “no difficulty upholding this search as incident to petitioner’s formal arrest,”⁶⁵ explaining that:

Once petitioner admitted ownership of the sizable quantity of drugs found in Cox’s purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.⁶⁶

At a minimum, *Rawlings* stands for the proposition that it is possible for a search incident to arrest to precede the arrest. It did not, however, answer the question presented in this Note: Must the officer have already decided to make an arrest prior to commencing the search?

In *Knowles v. Iowa*, a police officer stopped Knowles for speeding and issued him a citation, although the officer could have arrested him for the violation.⁶⁷ Pursuant to Iowa law,⁶⁸ the officer conducted a full search of his vehicle and discovered marijuana and a “pot pipe.”⁶⁹ The officer then arrested Knowles and charged him with violating Iowa’s controlled substances law.⁷⁰ He moved to suppress the evidence prior to the trial. The trial court, however, denied his motion based on state authority.⁷¹ The Iowa Supreme Court affirmed the constitutionality of the search, concluding that “so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest.”⁷²

The U.S. Supreme Court rejected the Iowa Supreme Court’s reasoning in a unanimous opinion.⁷³ The Court’s analysis focused on the two historical justifications for the search incident to arrest exception articulated in *Chimel*: officer safety and evidence preservation.⁷⁴ Noting that concerns regarding officer safety were still present in the case of a routine traffic stop,

63. *Id.*

64. *Id.* at 110.

65. *Id.* at 111.

66. *Id.*

67. 525 U.S. 113, 114 (1998).

68. *Knowles*, 525 U.S. at 115. The Court noted that section 805.1(4) of the Iowa Code provides that the issuance of a citation instead of making an arrest “does not affect the officer’s authority to conduct an otherwise lawful search.” *Id.*

69. *Id.* at 114.

70. *Id.*

71. *Id.* at 114–15. The Iowa Supreme Court had previously determined that this provision of the statute allows officers to conduct a “full-blown search” of the driver and his vehicle if the police officer decides to issue a citation instead of making an arrest. *Id.* at 115.

72. *Id.* at 115–16.

73. *Id.* at 113, 116.

74. *See id.* at 116.

the Court nevertheless determined that the danger to the officer was less, and thus did not justify the search in this case.⁷⁵ The Court also recognized that the concerns for officer safety during an arrest are due to “the extended exposure” of an arrest, reemphasizing 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.”⁷⁶ It similarly concluded that concerns about evidence preservation were not present in the context of issuing a citation.⁷⁷

II. VARYING INTERPRETATIONS OF THE INTERSECTION OF *RAWLINGS* AND *KNOWLES*

Lower courts have diverged in their application of *Rawlings v. Kentucky* and the extent to which *Knowles v. Iowa* complicates the analysis. This Part argues that lower courts have generally interpreted *Rawlings* in three different ways.⁷⁸ Section II.A contends that three circuit courts have articulated what I call a “two-part test”⁷⁹ for evaluating the lawfulness of a search incident to arrest. Section II.B notes that there are also a number of circuits that have not adopted a two-part test, but have held searches valid under the *Rawlings* rationale. Section II.C highlights the courts that have rejected the two-part test, in particular the Seventh Circuit.

A. The “Two-Part Test” Interpretation of *Rawlings*

Several courts take the view that *Rawlings* stands for the proposition that a search incident to arrest may precede the arrest, so long as probable cause existed prior to the search and an arrest followed soon after. These courts, which include the Eighth, Ninth, and Tenth Circuits, have announced a two-part test. In effect, the two-part test seems to suggest that once an officer has probable cause to arrest prior to conducting a search and makes an arrest soon after the search, it has met its total burden. Absent from the two-part test is a determination of whether the officer intended to arrest before commencing the search.

The lower courts’ application of *Rawlings* was not the first time such a view was advanced. Justice Harlan proposed the same idea twelve years before the *Rawlings* decision in his concurrence in *Sibron v. New York*.⁸⁰ He

75. *Id.* at 117.

76. *Id.* (alteration in original) (quoting *United States v. Robinson*, 414 U.S. 218, 234–35, 234 n.5 (1973)).

77. *Id.* at 118. The Court also cited *Cupp v. Murphy*, which provides authority for the proposition that an individual is less likely to attempt to destroy evidence of a crime in the absence of an arrest. *Id.* at 117 (citing *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (“Where there is no formal arrest . . . a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence”)).

78. There is, naturally, some important variation in analysis in these three classifications.

79. The Tenth Circuit has described this test as a “two-part inquiry.” *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998).

80. See 392 U.S. 40, 77 (1968) (Harlan, J., concurring).

took issue with the majority's suggestion that, while it was clear that the arrest occurred "late enough," meaning after probable cause had developed, "there might be a problem about whether it occurred *early* enough, *i.e.*, before Peters was searched."⁸¹ In Justice Harlan's view, the Court was incorrect in implying that such a time sequence could make a difference. He felt that the prosecution is only required to demonstrate that probable cause existed prior to a search; this is a prosecutor's "total burden."⁸² California Supreme Court Justice Traynor had articulated a similar view in 1955.⁸³

The Eighth and Ninth Circuits have adopted similar interpretations of *Rawlings*. In *United States v. Ilazi*,⁸⁴ the Eighth Circuit announced that "[a] search is valid as incident to an arrest even if it is conducted before the actual arrest, provided that (1) the arrest and the search are substantially contemporaneous, and (2) probable cause to arrest existed before the search."⁸⁵ While the Eighth Circuit decided *Ilazi* more than ten years before *Knowles*, which could have affected the court's analysis of *Rawlings*, the Eighth Circuit has subsequently reaffirmed its reasoning from *Ilazi*.⁸⁶ The Ninth Circuit adopted a similar two-part analysis in *United States v. Smith*,⁸⁷ holding that "as long as there is probable cause to make an arrest, and the search is conducted roughly contemporaneously with the arrest, the search-

81. *Sibron*, 392 U.S. at 76–77.

82. *Id.* at 77 (concluding that there was "no case in which a defendant may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards'").

83. For a discussion of California Supreme Court Justice Traynor's view on why the exception as understood this way may benefit an arrestee, see *infra* notes 160–161 and accompanying text.

84. 730 F.2d 1120 (8th Cir. 1984). *Ilazi* and Pinjoli had taken a flight from West Palm Beach, Florida to the Minneapolis–St. Paul International Airport. *Ilazi*, 730 F.2d at 1121. Several airport officials observed the pair deplaning, and noticed that they had glassy eyes and were walking slowly and staggering. *Id.* Minnesota Bureau of Criminal Apprehension Special Agent Olby and Airport Police Department Officer Mortensen approached Pinjoli and *Ilazi*, informing both that they were not under arrest and were free to leave, and then requested their identification. *Id.* at 1122. Pinjoli did not have identification, and claimed that he had lost his immigration papers in a swimming pool in Florida. *Id.* *Ilazi* did, and handed the officers an Immigration and Naturalization Service form and a driver's license. *Id.* Both men were traveling without luggage. *Id.* Agent Olby and Officer Mortensen then thanked the men and left to inform Agents Lewis and Kramer about their interaction with *Ilazi* and Pinjoli. *Id.* Agents Lewis and Kramer then approached *Ilazi* and Pinjoli. *Id.* at 1123. During the interaction, the Agent Lewis noticed a bulge in *Ilazi*'s right sock, because his boot was unzipped. *Id.* Agent Lewis reached for the bulge, and *Ilazi* "jumped back" when Lewis touched the boot. *Id.* The men were told they were under arrest and were subsequently searched. *Id.* Two bags of cocaine were found in *Ilazi*'s boots and a third bag was found in his underwear. *Id.*

85. *Id.* at 1126 (citing *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980)).

86. See *United States v. Brooks*, 290 F. App'x 955, 960 (8th Cir. 2008) (per curiam) ("The search of [defendant]'s person was justified as a search incident to a lawful arrest, which is valid 'even if it is conducted before the actual arrest, provided that (1) the arrest and the search are substantially contemporaneous, and (2) probable cause to arrest existed before the search.'" (quoting *Ilazi*, 730 F.2d at 1126)). *Brooks* also makes no mention of *Knowles*.

87. 389 F.3d 944 (9th Cir. 2004). *Smith* was pulled over for driving ninety-six miles per hour with his high beam lights on. *Smith*, 389 F.3d at 946. *Smith* told the officers that he did

incident-to-arrest doctrine applies and no warrant is required.”⁸⁸ Notably, *Smith* represented an extension from earlier Ninth Circuit cases by “specifically h[olding] that the warrantless search of a vehicle . . . may precede the arrest.”⁸⁹ The court noted that it did not see a sound basis for treating the situations in the two cases differently.⁹⁰

The Tenth Circuit has taken the most expansive interpretation of *Rawlings* of all the circuit courts. In *United States v. Anchondo*,⁹¹ the Tenth Circuit relied on *Rawlings* to announce a rule similar to those articulated in *Ilazi* and *Smith*.⁹² According to the Tenth Circuit, “[a] warrantless search preceding an arrest is a legitimate ‘search incident to arrest’ as long as (1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed shortly after the search.”⁹³ The court’s analysis, however, went one step beyond the Eighth and Ninth Circuits by further holding that “[w]hether or not the officer intended to actually arrest the defendant at the time of the search is immaterial to this two-part inquiry.”⁹⁴ Although *Ilazi* and *Smith* make no mention of either intent to arrest or *Knowles* in their analyses,⁹⁵ neither do the opinions explicitly foreclose an examination of the officer’s

not have identification on him, but that he was registered in Arizona. *Id.* The officers contacted dispatch to determine whether the California or Arizona driver’s license databases contained a license that matched the information Smith gave him, but found no match. *Id.* The officers then asked Smith for his social security number. *Id.* at 947. Using the social security number, dispatch notified the officers that the number corresponded to a Vernon Smith, who was listed as having brown hair and eyes, being six feet tall, and weighing 200 pounds. *Id.* The officers observed that this description did not match Smith and informed him of the discrepancy. *Id.* While one of the officers continued to question Smith, the other began to search the vehicle for Smith’s identification and located a wallet. *Id.* Eventually it was revealed that he had given the officers his brother’s information. *Id.* Smith was subsequently arrested for impersonation. *Id.*

88. *Id.* at 952. *Smith* likewise made no mention of *Knowles*.

89. *Id.*

90. *Id.* This Note contends that the warrantless search of a *person* incident to arrest is in fact different from a warrantless search of a *vehicle* incident to arrest. See discussion *infra* Section III.B.

91. 156 F.3d 1043 (10th Cir. 1998). Anchondo and his passenger were stopped at a checkpoint near the Mexican border. *Anchondo*, 156 F.3d at 1044. While a border patrol agent asked Anchondo routine questions, a canine alerted to the presence of illegal narcotics in the vehicle. *Id.* The agents requested Anchondo move his vehicle to a secondary inspection area to explore the dog’s alert, to which Anchondo consented. *Id.* Finding no contraband in the vehicle, one of the agents conducted a “pat and frisk” of Anchondo. *Id.* at 1044–45. He felt a hard object in Anchondo’s waistline, and, believing it to be a handgun, he removed it. *Id.* at 1045. The object was in fact a package of cocaine that was strapped to his stomach. *Id.* Three other packages were removed. *Id.*

92. *Id.* at 1045.

93. *Id.*

94. *Id.* In a case decided after *Anchondo*, the Tenth Circuit cited *Knowles* for support that “there can be no search incident to arrest unless the suspect is at some point formally placed under arrest.” *United States v. Sanchez*, 555 F.3d 910, 921 (10th Cir. 2009).

95. Indeed, it would have been impossible for the *Ilazi* court to cite *Knowles*, as it occurred several years before *Knowles*.

intent to actually arrest the defendant at the time of the search as part of the two-part test.

B. *Searches Valid Under Rawlings Rationale Interpretation*

Other courts have used *Rawlings* to uphold searches that precede arrests, but have done so without adopting a two-part test. The courts in this group have varied in their analyses of *Rawlings* and the impact *Knowles* has on this question.

Some courts, including the First, Second, and Third Circuits, use *Rawlings* to uphold searches made prior to arrests without much analysis. These decisions generally adhere to the following pattern:

[Provides summary of the facts]. Once the defendant did X, the officer had probable cause to arrest him for Y offense. A formal arrest followed the search. So long as 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.” *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980).⁹⁶

These courts have not promulgated a two-part test for trial courts to use in suppression hearings,⁹⁷ nor have they engaged with the interaction between *Rawlings* and *Knowles*. Rather, they consider the facts and conclude that *Rawlings* permits such a search.

Two Circuits, the Sixth and the D.C. Circuit, have probed the intersection of *Rawlings* and *Knowles*. In *United States v. Williams*,⁹⁸ the Sixth Circuit seemed to adopt the two-part test described in Section II.A, stating that “[a] warrantless search that precedes an arrest may be constitutionally valid as long as (1) a legitimate basis for the arrest existed before the search, and (2)

96. See, e.g., *United States v. Madriz*, 532 F. App’x 353, 355 (4th Cir. 2013) (“[T]he police had probable cause to arrest Madriz for conspiracy to distribute narcotics prior to the second pat down by Officer Peterson. Therefore, even though that search preceded Madriz’s formal arrest, the search was nonetheless justified as a search incident to his arrest.” (citing *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980))); *United States v. Donaldson*, 793 F.2d 498, 503 (2d Cir. 1986).

97. For a discussion of courts that have opted to use a two-part analysis, see *supra* Section II.A.

98. 170 F. App’x 399 (6th Cir. 2006). Two officers observed a vehicle with an unlocked trunk that matched the description of a car that had been reported stolen earlier that day. *Williams*, 170 F. App’x at 401. The police officers followed the car, and, when the driver failed to stop at a stop sign, pulled over the car. *Id.* The officers ordered Williams out of the car and requested his license after patting him down for weapons. *Id.* Williams produced his parole card instead. *Id.* The officers then placed Williams in the back of their squad car while they searched his vehicle. *Id.* At some point during the search, either in the initial pat down or in the subsequent search of the car, the officers “discovered a clip, a 380 magazine with six rounds in the magazine.” *Id.* The officers also learned that Williams did not have a driver’s license in his name. *Id.* The officers advised Williams of his rights and, after he signed a waiver of rights form, questioned Williams. *Id.* The officers then issued him a misdemeanor citation for failing to stop at a stop sign and driving without a license, and then they released him. *Id.* Some time later, a federal grand jury indicted Williams with being a convicted felon in possession of ammunition. *Id.* The trial court denied his motion to suppress. *Id.*

the arrest followed ‘quickly on the heels . . . of the challenged search.’”⁹⁹ But the court went on to discuss its view of the *Rawlings* holding, noting that one could argue that the “literal language of *Rawlings*” permits an officer to search an individual’s vehicle during the course of a routine traffic stop, arrest the individual upon discovering contraband, and “validate the search by testifying that he arrested the suspect for the misdemeanor traffic offense.”¹⁰⁰ The court concluded that such an interpretation was both contrary to the holding of *Rawlings* and to the Fourth Amendment.¹⁰¹

The Sixth Circuit also took steps to distinguish the case before it from *Knowles*. The court observed that in the case before it, the officers had taken “preliminary steps towards a formal arrest” prior to conducting the search, whereas in *Knowles*, the officer did not take steps to effectuate the arrest until after he had completed the search.¹⁰² The court concluded that *Rawlings* was more analogous to the present situation, and upheld the search.¹⁰³ The Sixth Circuit thus seemed to suggest that the distinction between *Rawlings*-land and *Knowles*-land turns on whether “the officers took preliminary steps towards a formal arrest based upon existing probable cause” before conducting the search.¹⁰⁴

The D.C. Circuit is the only circuit court to have addressed whether validating a search under the *Rawlings* rationale severs the search incident to arrest exception from its two justifications.¹⁰⁵ Sitting en banc in *United States v. Powell*, the court considered Powell’s argument that *Rawlings* only permits a search to precede an arrest when the search followed a custodial arrest.¹⁰⁶ While the court recognized that *Rawlings* was “detained” for forty-five minutes prior to the search and subsequent “formal arrest,” it concluded that

99. *Id.* at 404.

100. *Id.* at 404–05.

101. *Id.* at 405.

102. *Id.*

103. *Id.*

104. *Id.* One could make the argument that this should place the Sixth Circuit in category three instead. Because the Sixth Circuit has not expanded on its opinion in *Williams*, however, I have decided to provide a more conservative assessment.

105. See *United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007) (en banc). Three officers in an unmarked police car observed Powell and another man urinating near a parked car in an industrial area. *Id.* at 837. The officers stopped the car near the men. Two of the officers walked to the men who had been urinating, while the third officer, seeing a third man sitting in the parked vehicle, approached the vehicle on the driver’s side. *Id.* The two officers detained the men who were outside the car because “‘they were going to be placed under arrest’ for urinating in public.” *Id.* The third officer leant through an open window in the car and observed three cups containing a yellowish liquid. He testified that he concluded the cups contained alcohol based on the smell. *Id.* The officer ordered the passenger out of the vehicle “with the intention of arresting him for possession of an open container of alcohol in a vehicle upon a public way.” *Id.* He then proceeded to search the vehicle, finding a capped cognac bottle and a backpack, inside which he discovered “an Intertech 9 semi-automatic pistol with 23 rounds in the magazine and one round in the chamber.” *Id.* The men were then taken into custody. *Id.* at 838.

106. *Id.* at 840–41.

this prior detention was irrelevant because the *Rawlings* Court did not suggest that “the lawfulness of the search turned upon the suspect being in custody before he was searched.”¹⁰⁷ The *Powell* court then rejected the argument that without such a custodial arrest requirement, the exception would no longer be tethered to its justifications, contending that concerns for evidence preservation and officer safety “are greater before the police have taken a suspect into custody than they are thereafter.”¹⁰⁸ Finally, addressing the argument that the court’s decision was inconsistent with *Knowles*, the D.C. Circuit clarified that “having probable cause to arrest is [not] by itself sufficient to bring a search within the *Belton* exception to the warrant requirement,”¹⁰⁹ emphasizing that “it is the ‘fact of the arrest’ that makes all the difference.”¹¹⁰

C. Intent to Arrest Requirement Interpretation of *Rawlings*

A minority of courts has held that mere probable cause to arrest and an arrest thereafter is insufficient to justify a search incident to arrest. These courts likewise vary in their analyses of what the Fourth Amendment demands, and reach different conclusions regarding when, if ever, an officer may search before making an arrest.

The Seventh Circuit is the only circuit court to have held a search incident to arrest invalid on the grounds that the defendant was not “under custodial arrest” at the time of the search.¹¹¹ The court evaluated the question of when a search may precede an arrest in the context of a vehicle search, often termed a *Belton* search, in *Ochana v. Flores*.¹¹² The court noted that *Knowles* stands for the proposition that police officers may not search a vehicle during the course of a traffic stop, even if the officer has “probable cause to arrest the driver for the traffic violation.”¹¹³ The Seventh Circuit concluded that “[i]n order to conduct a *Belton* search, the occupant of the vehicle must actually be held under custodial arrest.”¹¹⁴ The court noted that *Ochana* “was not told that he was under arrest; he was not handcuffed or frisked; and no sobriety test was conducted.”¹¹⁵ It thus appears that, at least

107. *Id.* at 840.

108. *Id.* at 840–41.

109. *Id.* at 841.

110. *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973)).

111. *Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003); *see supra* note 3 (highlighting the divergence in interpretations among the circuits and citing *Ochana* for the holding that a search incident to arrest is invalid if a defendant is not under custodial arrest at the time of the search).

112. *Ochana*, 347 F.3d at 270.

113. *Id.*

114. *Id.*

115. *Id.* While it is possible that the Seventh Circuit could limit the custodial arrest requirement to searches of a vehicle incident to arrest, the *Ochana* opinion suggests that this requirement would extend to other contexts. The court noted that the search incident to arrest exception “turn[s] on the objective belief of a reasonable person in the suspect’s position.” *Id.*

in the context of a vehicle search, a search may not precede an arrest if the individual is not already under custodial arrest. Notably, the Seventh Circuit did not mention *Rawlings* in its analysis of the issue.¹¹⁶

Several state supreme courts also fall into this third category. The New York Court of Appeals held in *People v. Reid* that the search incident to arrest exception “requires proof that, at the time of the search, an arrest has already occurred or is about to occur.”¹¹⁷ In the event that the arrest has not yet occurred, “the officer must have intended to make [an arrest]” in order to trigger the exception.¹¹⁸ The Court of Appeals reasoned that a search cannot be justified as a search incident to arrest if, but for the search, the officer would not have arrested the individual.¹¹⁹ The court based its analysis on *Knowles*, noting that “[t]he problem, in *Knowles* as here, was that the search caused the arrest and not the other way around.”¹²⁰

The Supreme Court of Tennessee has also invalidated a search incident to arrest on the grounds that the defendant was not under arrest at the time the officer conducted the search.¹²¹ In *State v. Crutcher*, a police officer observed three motorcyclists driving at excessive speeds.¹²² He successfully pulled over two of the motorcyclists, but the third attempted to evade the officer.¹²³ In his attempt to flee, Crutcher crashed and was thrown from his motorcycle.¹²⁴ The officer testified that “upon reaching [Crutcher], he placed one arm behind [Crutcher’s] back” because he “intended to arrest him for reckless endangerment and evading arrest.”¹²⁵ However, because Crutcher complained of his injuries, the officer did not handcuff him, and instead called for medical assistance.¹²⁶ The officer testified that while they waited for an ambulance, he did not take any further steps to arrest Crutcher, and a second officer at the scene testified that they had agreed to allow Crutcher’s friend to remove his motorcycle.¹²⁷ Before releasing the motorcycle to his friend, however, the officers conducted a search of a backpack and jacket that were located on the motorcycle.¹²⁸ The search produced a .38 caliber

Additionally, as I discuss in Part III, it seems likely that in the case of the search of a person, the search itself would simultaneously provide the person with “reason to believe that he was under custodial arrest.” *Id.*

116. See *United States v. Powell*, 483 F.3d 836, 839 (D.C. Cir. 2007) (“Only the Seventh Circuit has held that a *Belton* search may not precede a custodial arrest, but it did so in an opinion that betrayed no awareness of the Supreme Court’s holding in *Rawlings*.”).

117. 26 N.E.3d 237, 240 (N.Y. 2014).

118. *Reid*, 26 N.E.3d at 240.

119. *Id.*

120. *Id.*

121. See *State v. Crutcher*, 989 S.W.2d 295, 297–98 (Tenn. 1999).

122. *Id.* at 298.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

handgun and a pill bottle, the contents of which were later determined to be cocaine.¹²⁹

The court considered whether Crutcher was under arrest at the time the officers searched his jacket and backpack.¹³⁰ The court noted that Tennessee requires an “actual restraint on the arrestee’s freedom of movement” in order to constitute an arrest.¹³¹ Recognizing that this case presented a close call, the court nevertheless concluded that Crutcher was not under arrest when the officers searched his jacket and backpack.¹³² Because the court determined that Crutcher was not under arrest at the time of the search, the court reasoned that the search was not incident to arrest.¹³³ The majority engaged with *Rawlings* in a footnote, but ultimately rejected its applicability.¹³⁴

III. A PROPOSAL FOR A NEW RULE

This Part argues that the Supreme Court should settle the lower courts’ varied interpretations of *Rawlings v. Kentucky* and *Knowles v. Iowa* and answer the unresolved question: Must an officer have already decided to make an arrest prior to commencing a search? It suggests a way for the Court to resolve this question that takes into account both the justifications for the exception and the practical consequences of the varying lower court interpretations. This Part contends that the Supreme Court should hold that in order for a search incident to arrest to be valid, the officer must intend to make an arrest before commencing the search. Section III.A argues that many lower courts’ interpretations of *Rawlings* have untethered the rule from its justifications. This rule would re-tether the exception to the *Chimel* rationales. Section III.B contends that the proposed rule would also serve an important practical function, as it would guard against transforming the exception into a search incident to probable cause exception. Section III.C addresses the counterargument that this rule is precluded by a line of Supreme Court cases that prohibit evaluating an officer’s subjective intent, and argues that this does not prevent courts from considering whether the officer intended to arrest the individual searched.

129. *Id.*

130. *Id.* at 299. The State conceded that the officers did not have authority to conduct an inventory search. *Id.*

131. *Id.* at 301–02.

132. *Id.* at 302. The court considered the officer’s testimony that “he did not arrest the appellee due to the appellee’s injuries,” that he did not discuss criminal charges or an arrest with Crutcher after he had asked the officers what was going to happen to him, and that there was no other evidence that Crutcher was being detained for reasons other than to be transported to the hospital. *Id.*

133. *Id.*

134. *Id.* at 302 n.12.

A. *The Exception's Justifications Provide Support for the New Rule*

As discussed in Part I, the two justifications for the search incident to arrest exception are officer safety and evidence preservation. The Court has adopted a bright-line rule for this exception, noting that these two concerns “flow[] from the fact of the arrest.”¹³⁵ The Supreme Court has not suggested that mere probable cause to arrest triggers the concerns that justify the search.¹³⁶ It has also repeatedly emphasized the importance of ensuring that the rule does not become “untether[ed] . . . from the justifications underlying the *Chimel* exception.”¹³⁷

The two-part test is at odds with, and untethers the rule from, the two justifications for the exception. It sanctions a search on the basis of probable cause alone so long as an officer, after conducting the search, makes an arrest. Courts that summarily uphold searches made prior to arrest under the authority of *Rawlings* also risk untethering the rule from its justifications. The lack of analysis in these opinions provides unclear guidance to trial courts. And it risks implying that an officer may search a person if he or she has probable cause for a pedestrian offense and arrest the person if he or she finds contraband, validating the search on the basis of probable cause for the misdemeanor offense.¹³⁸

The justifications for the exception are based on the fact of the arrest, not the existence of probable cause. As the Court has repeatedly emphasized, the dangers to officer safety that justify the search incident to arrest exception stem from the arrest itself: “[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.”¹³⁹ The Court has likewise recognized that the second justification, concerns about the preservation of evidence, also flows from the arrest itself. In *Cupp v. Murphy*,¹⁴⁰ a defendant who had voluntarily agreed to talk to the police about his wife’s murder was subjected to a warrantless and nonconsensual fingernail scraping.¹⁴¹ The Court held that because the defendant was not under arrest at the time of the search, the circumstances did not justify a full *Chimel* search.¹⁴² The

135. *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973).

136. Note that the D.C. Circuit has put forth this argument in *United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007). If the Supreme Court were to adopt the D.C. Circuit’s reasoning, that the concerns for officer safety and evidence preservation “are greater before the police have taken a suspect into custody than they are thereafter,” *Powell*, 483 F.3d at 840–41, I concede that the justifications would be re-tethered to the *Chimel* justifications.

137. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)).

138. See *United States v. Williams*, 170 F. App’x 399, 404–05 (6th Cir. 2006) (recognizing that the “literal language of *Rawlings*” would permit such an interpretation).

139. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Robinson*, 414 U.S. at 234 n.5).

140. 412 U.S. 291 (1973).

141. *Cupp*, 412 U.S. at 292.

142. *Id.* at 296. The search was later deemed valid under the exigent circumstances exception. *Id.*

Court explained that “[w]here there is no formal arrest . . . a person might well be less likely to take conspicuous, immediate steps to destroy incriminating evidence.”¹⁴³

A search justified by the existence of probable cause alone thus appears impermissible because it is the arrest not probable cause that triggers the two concerns that justify the search. Without an arrest, there is little incentive for the individual to injure the officer in an attempt to flee or to destroy or conceal evidence. The rule is untethered from its justification.¹⁴⁴

To re-tether the rule to its justifications, this Note proposes a new rule: in order for a search incident to arrest that occurs prior to the arrest to be valid, the officer must intend to make an arrest before commencing the search. This requisite intent should be inferred from the objective circumstances of the interaction between the officer and the arrestee. Courts may presume intent to arrest if the officer takes “preliminary steps towards a formal arrest” prior to or contemporaneous with conducting a search.¹⁴⁵ Such steps may include frisking, handcuffing, or placing the person in the squad car, or telling him that he’s under arrest.

When an officer fails to convey intent to arrest through his or her words or actions, the concern for officer safety and evidence preservation that justify the search incident to arrest exception are not triggered. When, however, an officer takes preliminary steps toward a formal arrest, the concerns justifying the search incident to arrest exception are immediately triggered.¹⁴⁶ Upon realizing that arrest is imminent, an individual will be likely to attempt to escape, injure the officer, or conceal or destroy evidence.¹⁴⁷ Indeed, concerns for officer safety and evidence preservation may be at their *greatest* during the time in which an arrest is imminent.¹⁴⁸

143. *Id.*

144. See Logan, *supra* note 6, at 409 (warning of the problems created by “conflat[ing] the significance of probable cause with that of actual arrest”).

145. See, e.g., United States v. Williams, 170 F. App’x 399, 405 (6th Cir. 2006) (distinguishing the case at hand from *Knowles* on the basis that, in *Knowles*, “the officers took no steps towards effectuating an arrest until after the search had concluded”).

146. See *Williams*, 170 F. App’x at 405; State v. Hart, 639 N.W.2d 213, 218 (Wis. Ct. App. 2001), *overruled by* State v. Sykes, 695 N.W.2d 277, 287 (Wis. 2005). One court has provided the following explanation:

Where there is no custodial arrest, however, these underlying rationales for a search incident to an arrest do not exist. An individual who does not believe that he has been arrested has no need to effect an escape or to harm the police officer that has detained him. Moreover, an individual who does not believe that he has been arrested has little or no need to destroy evidence and, thus, almost certainly will not destroy evidence that might be in his possession. Therefore, an officer’s objective ‘manifestation of purpose and authority’ at the ‘moment of arrest,’ by words or conduct, which signal to an individual that he or she is under arrest, will be, and always has been, significant in determining whether a custodial arrest has occurred in Maryland.

Belote v. State, 981 A.2d 1247, 1252 (Md. 2009) (quoting Logan, *supra* note 6, at 431–32).

147. See *Belote*, 981 A.2d at 1252.

148. United States v. Powell, 483 F.3d 836, 840–41 (D.C. Cir. 2007) (en banc).

This Note does not advocate the approach taken by the Tennessee Supreme Court. Although this Note does not support an interpretation of *Rawlings* that permits a search incident to arrest under the two-part test, it also does not support adoption of a rule that ignores *Rawlings*. The Court has emphasized time and again that it is not the job of the courts to micromanage the scene of an arrest.¹⁴⁹ *Rawlings* appears to provide officers flexibility in the field when, to promote officer safety and the preservation of evidence, it is appropriate to search an individual before placing him or her under formal arrest.¹⁵⁰

B. *Practical Concerns Provide Support for the New Rule*

Those that are skeptical of the rule argued for here may question why this issue even deserves consideration by the Supreme Court. Some may argue that it does not demand attention because an intrusion should be justified by the fact that the officer had probable cause to arrest for a crime in the first place.¹⁵¹ This Section explains the practical danger of allowing the search incident to arrest exception to transform into a search incident to probable cause exception.

A search incident to probable cause exception would provide officers with an incredible amount of discretion to conduct a search. The language of the two-part test, for example, authorizes an officer to search an individual and their area of immediate control for a misdemeanor offense and arrest the individual if contraband is found, validating the search as incident to arrest for the misdemeanor.¹⁵² Arguably, upholding searches under “the literal language of *Rawlings*” without any further analysis also permits such a search.¹⁵³ Aside from untethering the rule from its justifications, this interpretation of *Rawlings* affords officers enormous discretion to search, and this discretion is subject to abuse.¹⁵⁴ For illustrative purposes, consider the following hypothetical: A driver is pulled over for a traffic violation, let’s say failing to stop at a stop sign. The officer asks the driver to step out of the vehicle, but does not place him into the squad car or handcuff him. The officer then conducts a search of the passenger compartment, and finds a

149. See, e.g., *Chimel v. California*, 395 U.S. 752, 773–74 (Harlan, J., concurring) (“An arrest itself may often create an emergency situation making it impracticable to obtain a warrant before embarking on a related search.”).

150. See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2491–92 (2014) (emphasizing the Court’s “general preference to provide clear guidance to law enforcement through categorical rules”). The Court cited the *Michigan v. Summers* as support for this preference. 452 U.S. 692, 705 n.19 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 219–220 (1979) (White, J., concurring)).

151. This would appear to be Justice Harlan’s view. See, e.g., *Sibron v. New York*, 392 U.S. 40, 77 (1968) (Harlan, J., concurring).

152. See *United States v. Williams*, 170 F. App’x 399, 404–05 (6th Cir. 2006).

153. *Id.* at 404.

154. *Id.*

backpack containing several bags of cocaine. Only then does the officer decide to arrest the driver, charging him for failing to stop at the stop sign and possession of cocaine. Probable cause to arrest for failure to stop at the stop sign existed before the search,¹⁵⁵ and an arrest followed quickly thereafter. In at least three circuits, the cocaine evidence would be admissible as a search incident to arrest.¹⁵⁶

Now, consider a second hypothetical: Once again, a driver is pulled over for failing to stop at a stop sign. The officer asks the driver to step out of the vehicle, but does not place the individual into the squad car or handcuff him. The officer then conducts a search of the passenger compartment; the search reveals no contraband. Must the officer arrest the individual for failure to stop at a stop sign in order to validate the search? If the officer does not make a subsequent arrest, the search would appear to be unreasonable and a violation of the Fourth Amendment. This hypothetical demonstrates the danger of granting such broad authority to search.

In order to fully understand that potential for abuse, it is useful to consider in what circumstances the two-part test would be most prone to abuse. This Note's proposed rule would require officers to intend to make an arrest prior to the search, which courts can determine by evaluating whether the officer took "preliminary steps towards a formal arrest"¹⁵⁷ before conducting a search. Section III.A noted that these preliminary steps include frisking, handcuffing, or placing the arrestee in the squad car, or telling him that he's under arrest. Because frisking a person is a preliminary step towards making an arrest, a search of the arrestee's person may contemporaneously be considered a preliminary step in making the arrest and a search.¹⁵⁸

The ability to contemporaneously search and arrest a person suggests that the circumstances in which the two-part test is most likely to be abused is in the automotive context. Unlike in the case of the search of an arrestee's person, the search of a vehicle cannot be viewed as incident to a contemporaneous arrest. Compounded with this is the reality that there are myriad

155. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

156. See, e.g., *United States v. Smith*, 389 F.3d 944, 952 (9th Cir. 2004); *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998); *United States v. Ilazi*, 730 F.2d 1120, 1126–27 (10th Cir. 1984). While this is an extreme example of the level of abuse such an articulation of *Rawlings* is subject to, consider *State v. Cornell*, 491 N.W.2d 668, 670 (Minn. Ct. App. 1992). In *Cornell*, Cornell was pulled over for driving ninety miles per hour in a fifty-five miles per hour zone and was placed in the squad car. He admitted to smoking marijuana thirty minutes before driving, but denied having marijuana on him. *Id.* at 669. After issuing a speeding ticket and deciding to release Cornell, the police officer conducted a search of Cornell and found a bag of marijuana. *Id.* In his testimony, the police officer stated "that he decided to arrest him upon finding the marijuana." *Id.* The court upheld the search on the basis that probable cause existed prior to conducting the search and the arrest and search were substantially contemporaneous. *Id.* at 671.

157. *Williams*, 170 F. App'x at 405.

158. See *New York v. Belton*, 453 U.S. 454, 457 (1981) (noting that an arrest justifies a "contemporaneous search").

potential traffic violations, and full compliance with all regulations at all times is incredibly difficult, if not impossible. This is not to argue that an officer who has probable cause to stop a motorist must not act on that probable cause unless a reasonable officer would have also made such a stop.¹⁵⁹ This fact, however, highlights that the two-part test will be particularly susceptible to abuse in the context of a routine traffic violation.

Of course, there are arguably costs to such a rule. California Supreme Court Justice Traynor took a position similar to the two-part test in 1955.¹⁶⁰ He argued that a rule like this would be advantageous to an innocent person, because the search would be able to convince the police officer that, while probable cause might have existed, that belief was erroneous.¹⁶¹ While this feature of the two-part test may be advantageous for some individuals, these advantages do not appear to outweigh the risk of abuse.

C. *Whren Does Not Preclude the New Rule*

Courts generally dismiss arguments that a search incident to arrest was invalid because the officer did not intend to make an arrest prior to commencing the search.¹⁶² Courts base this conclusion on *Whren v. United States*¹⁶³ and subsequent Supreme Court cases that make clear that “[t]he officer’s subjective motivation is irrelevant.”¹⁶⁴

Whren has been criticized for allowing pretextual searches, and many advocate for the Court to overrule its opinion.¹⁶⁵ Despite this sharp critique, the fact that the Supreme Court’s decision in *Whren* was unanimous and that the Court has gone on to reaffirm its reasoning in subsequent decisions indicates that *Whren* is likely here to stay. Thus, instead of attacking the holding in *Whren* to support the intent requirement of the rule, this Note provides an alternate reading to *Whren*, and argues that one may read a distinction between subjective motivations and intent.

159. Such an argument was rejected by the Supreme Court in *Whren v. United States*, 517 U.S. 806, 819 (1996).

160. *People v. Simon*, 290 P.2d 531, 533 (Cal. 1955) (“[I]f the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest.”).

161. *Id.*

162. See, e.g., *Knop v. State*, No. 11–0692, 2012 WL 3589980, at *3–5 (Iowa Ct. App. Aug. 22, 2012); *State v. Sherman*, 931 So.2d 286, 297 (La. 2006); *State v. O’Neal*, 921 A.2d 1079, 1086–87 (N.J. 2007).

163. 517 U.S. 806 (1996).

164. *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006); see, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011); *Devenpeck v. Alford*, 543 U.S. 146 (2004).

165. See, e.g., WAYNER, LAFAVE, *SEARCH AND SEIZURE* § 1.4(f) (5th. ed. 2015) (criticizing the effects of *Whren* on pretextual arrests); Mark M. Dobson, *The Police, Pretextual Investigatory Activity, and the Fourth Amendment: What Hath Whren Wrought?*, 9 ST. THOMAS L. REV. 707, 742 (arguing that the approach adopted by the Court in *Whren* will encourage arbitrary and invasive police action).

Officers stopped the defendants in *Whren*, who were both African American, for committing a traffic violation.¹⁶⁶ Upon approaching the driver's side window, the officer observed two bags of crack cocaine.¹⁶⁷ Both men were arrested, charged, and convicted with various federal drug laws.¹⁶⁸ On appeal to the Supreme Court, the defendants agreed that the police officers had probable cause to believe multiple traffic violations had been made, but argued that the test for traffic stops should not be based solely on whether there was probable cause to justify a stop.¹⁶⁹ Rather, the defendants contended, a traffic stop's reasonableness should be based on "whether a police officer, acting reasonably, would have made the stop for the reason given."¹⁷⁰ They argued that because there are so many potential traffic violations and compliance with all is unlikely, a police officer will almost always be able to find that a motorist has violated a traffic regulation.¹⁷¹ This reality, defendants argued, "creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists."¹⁷²

The Court rejected the defendants' argument, noting that there is no principle "that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause."¹⁷³ The Court stated further that the constitutionality "of traffic stops [does not] depend[] on the actual motivations of the individual officers involved."¹⁷⁴ It also explained that this principle is not based on the "evidentiary difficulty of establishing subjective intent," but rather on the basis that Fourth Amendment "'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."¹⁷⁵

166. *Whren*, 517 U.S. at 808, 810. In *Whren*, plainclothed police officers were on patrol when they observed a vehicle waiting at an intersection for "an unusually long time." *Id.* at 808. When the unmarked police car turned around to head back toward the vehicle, the vehicle suddenly turned, without signaling, and began traveling "at an 'unreasonable' speed." *Id.* The police officers pulled up alongside of the vehicle when it was stopped at a red light, and one of the officers stepped out of the car to direct the driver to put the vehicle in park. *Id.* As the officer approached the window, he observed two large bags of cocaine. *Id.* at 808–09. The two occupants of the vehicle, both of whom were African American, were arrested after this discovery. *Id.* at 809–10.

167. *Id.* at 808–09.

168. *Id.* at 809.

169. *Id.* at 810.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 811.

174. *Id.* at 813.

175. *Id.* at 814.

Whren's reasoning has been subsequently reaffirmed in several Supreme Court decisions: *Devenpeck v. Alford*,¹⁷⁶ *Brigham City v. Stuart*,¹⁷⁷ and *Ashcroft v. al-Kidd*.¹⁷⁸ In *Brigham City*, the Court stated 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.'"¹⁷⁹ The Court concluded that it did not matter whether the officers' subjective motives for engaging in the action—entering a private residence—were "to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."¹⁸⁰

One may make a distinction between an officer's subjective *motivations* or reasons for making an arrest and an officer's *intent* to arrest as judged by the circumstances, viewed objectively. When the Court has held that the subjective intent of an officer is irrelevant, it has always referred to the reasons *why* the officer made the arrest.¹⁸¹ Courts are foreclosed from examining an officer's subjective motivations to determine if a search incident to arrest was pretextual, but courts are not necessarily precluded from evaluating whether an officer intended to arrest, as judged by the objective circumstances. While the former examination necessarily invites inquiries into an officer's state of mind,¹⁸² the latter can and is judged by the circumstances.¹⁸³

The Court noted in *Whren* that it had never endorsed a principle that an officer's actions that are "justifiable on the basis of probable cause" could be invalidated because the officer had an ulterior motive.¹⁸⁴ But a search incident to arrest is not justifiable on the basis of probable cause. A search incident to arrest is, instead, justifiable on the basis of the arrest. *Whren* may not necessarily preclude an inquiry into whether or not the officer intended to make an arrest prior to commencing the search, because the search incident to arrest intrusion is impermissible without an arrest. In this context, it is not a question of whether the arrest itself would be unconstitutional because of an officer's alleged pretextual use of probable cause to arrest, but rather whether the search is unconstitutional because the officer had not yet decided that an arrest was going to be made.

Evaluating searches incident to arrest in this way not only guards against searches made based on probable cause, but against searches made without

176. 543 U.S. 146 (2004).

177. 547 U.S. 398 (2006).

178. 131 S. Ct. 2074 (2011).

179. *Brigham City*, 547 U.S. at 404 (second alteration in the original) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

180. *Id.* at 405.

181. *See, e.g., al-Kidd*, 131 S. Ct. at 2082–83 (refraining from looking to motives such as racial profiling, which points to a reason *why* the officer may have made the arrest); *Devenpeck*, 543 U.S. at 154–56 (discussing how looking into *why* the officer may have made the arrest would lead to arbitrary results).

182. *See Brigham City*, 547 U.S. at 404.

183. *See Logan, supra* note 6, at 432.

184. *Whren v. United States*, 517 U.S. 806, 811 (1996).

the intent to make an arrest. Such inquiries also re-tether the rule to its justifications.

There is Supreme Court authority for the proposition that courts may evaluate whether or not an officer intended to make an arrest. In *County of Sacramento v. Lewis*,¹⁸⁵ the Supreme Court recognized that a seizure only occurs “when there is a governmental termination of freedom of movement *through means intentionally applied*.”¹⁸⁶ This not only permits, but requires courts to consider whether the officer intended to seize an individual. That it is necessary to determine whether an officer has intentionally applied a restriction on the freedom of movement in the context of finding a seizure suggests that it is proper to determine whether an officer intentionally took steps toward a formal arrest before conducting a search.

CONCLUSION

Tension between two Supreme Court cases has led to differing answers on a crucial Fourth Amendment question. This issue is important to resolve because several of the current interpretations risk transforming the search incident to arrest exception into a search incident to probable cause exception. The two-part test in particular threatens to erode crucial Fourth Amendment protections by granting police officers exceptional discretion to search an individual and their area of immediate control.

In order to protect Fourth Amendment protections, the Supreme Court should resolve the tension between *Rawlings* and *Knowles* and adopt a new rule: for a search incident to arrest to be valid, the officer must intend to make an arrest before commencing the search. This rule would re-tether the exception to its justifications and take into account important practical considerations. It would guard against police officer abuse by forbidding searches made on the basis of probable cause alone, while still affording officers flexibility in the field when, to promote officer safety and the preservation of evidence, it is appropriate to search an individual before placing him or her under formal arrest.

185. 523 U.S. 833 (1998).

186. *Lewis*, 523 U.S. at 844 (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989)).