No. 11-770

In the Supreme Court of the United States

CHUNON L. BAILEY, AKA POLO, 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, under *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981), the detention of an individual who has just left the premises to be searched under warrant is permissible when the individual is detained out of view of the house as soon as practicable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 652 F.3d 197. The order of the district court (Pet. App. 22a-57a) is reported at 468 F. Supp. 2d 373.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on September 20, 2011 (Pet. App. 21a). The petition for a writ of certiorari was filed on December 16, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possessing at least five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-20a.

1. On July 28, 2005, a confidential informant advised Officer Richard Sneider of the Suffolk County, New York, Police Department that he had purchased six grams of crack cocaine that weekend at 103 Lake Drive, Wyandanch, New York, from an individual named "Polo" (who turned out to be petitioner) and that he had seen a .380 semi-automatic handgun on the kitchen table at the apartment. The informant stated that he had made purchases from "Polo" six or seven times before, sometimes in Bay Shore, New York, where "Polo" used to live. At 8:45 p.m. that evening, based on the information provided by the informant, Officer Sneider obtained a warrant to search the basement apartment at 103 Lake Drive for a .380 handgun.[1] The warrant provided that the apartment was "believed to be occupied by an individual known as 'Polo,' a heavy set black male with short

[1] Officer Sneider testified (C.A. App. A207) that he sought a warrant to search only for the firearm because the informant had not seen a quantity of drugs at the Lake Drive residence during the weekend sale when he saw the firearm.

hair. Pet. App. 3a; Gov't C.A. Br. 4-5; C.A. App. A197-A198, A207.

At 9:56 p.m. that evening, while conducting pre-search surveillance, Officers Sneider and Richard Gorbecki observed two men—later identified as petitioner and Bryant Middleton—exiting the gate at the top of the stairs that led down to the basement of 103 Lake Drive and getting into a black Lexus parked in the driveway. Both petitioner and Middleton matched the informant's description of "Polo." The officers determined that for safety reasons they would not confront the two men in the driveway; in particular, they wished to avoid alerting anyone else who might have been in the apartment to the presence of law enforcement. The officers therefore watched as petitioner's car pulled out of the driveway and proceeded down the block. The officers did not stop the car in the immediate neighborhood, so as to prevent people in the apartment or neighbors from seeing the stop. Once petitioner's car turned off Lake Drive, the officers positioned themselves directly behind it and allowed it to pass through an intersection and turn off a crowded street. At that point, the officers pulled the car over in the parking lot of a fire station. In all, the car traveled about one mile from the apartment. Pet. App. 3a-4a & nn.2-3; Gov't C.A. Br. 4-5; C.A. App. A117-A119.

After pulling the vehicle over, the officers conducted pat-down searches of petitioner and Middleton for weapons. They found keys, including the key to the Lexus, in petitioner's front left pocket. At Officer Sneider's request, petitioner identified himself and produced a driver's license with an address in Bay Shore, New York—consistent with the informant's report of previous encounters with "Polo." Petitioner told Officer Sneider

that he was "coming from [his] house" at 103 Lake Drive. Middleton also identified himself and told Officer Gorbecki that petitioner was driving him home so that he could comply with a curfew imposed as a condition of his parole. Middleton stated that petitioner's residence was 103 Lake Drive. The officers placed both men in handcuffs. In response to petitioner's inquiry as to why they were being "arrested," the officers informed both men that they were being detained, but not arrested, incident to the execution of a search warrant in the basement apartment of 103 Lake Drive. Petitioner responded: "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation." Pet App. 4a-5a, 25a; Gov't C.A. Br. 7.

The officers summoned a patrol car to return petitioner and Middleton to 103 Lake Drive while the officers drove petitioner's car to that location. Upon their return, petitioner and Middleton were informed that during the search of the apartment the police had discovered a gun and drugs in plain view. Petitioner and Middleton were arrested, and petitioner's house key and car key were seized incident to the arrest. In total, less than ten minutes elapsed between the stop of petitioner's car and his formal arrest. Later that evening, an officer discovered that one of the keys on petitioner's key ring opened the door of the basement apartment. Pet. App. 5a; Gov't C.A. Br. 8.

2. A grand jury charged petitioner with one count of possessing at least five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and one count of possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). Petitioner

moved to suppress the physical evidence, including his house key and car key, as well as his statements to the officers, on the grounds that they were the tainted fruit of an illegal detention and search.

Following an evidentiary hearing, the district court denied the motion to suppress. Pet. App. 22a-57a. As relevant here, the court first held that petitioner's detention was lawful under *Michigan* v. *Summers*, 452 U.S. 692 (1981). Pet. App. 22a-35a. The court found that the officers' authority to detain petitioner incident to the search of his apartment was not strictly confined to the physical premises of the apartment, *id.* at 28a-31a, and that the detention here was permissible because it "took place at the earliest practicable location that was consistent with the safety and security of the officers and the public," *id.* at 31a.

In the alternative, the court held that petitioner's detention was a lawful investigative detention based on reasonable suspicion under *Terry* v. *Ohio*, 392 U.S. 1 (1968). Pet. App. 36a-42a. The court found that because petitioner matched the informant's description of the person trafficking drugs from the Lake Drive apartment, the officers had reasonable suspicion to conduct a *Terry* stop. *Id.* at 38a-39a. Moreover, given that the officers were searching for a gun at the apartment, they were justified in conducting a pat-down search of petitioner during the stop and placing him in handcuffs while they transported him back to the apartment. *Id.* at 39a. The court also found that the officers acted reasonably in transporting petitioner a short distance to the search site rather than staying in front of the firehouse while the warrant was executed. *Id.* at 42a.

Petitioner was convicted on all counts after a trial.

3. The court of appeals affirmed. Pet. App. 1a-20a. As relevant here, the court agreed with the district court that petitioner's detention during the search of his residence was reasonable under *Summers*. The court found no reason to limit *Summers* to detentions occurring at or inside the threshold of a residence, or any similar "bright-line rule." *Id.* at 13a. It explained that instead, "[t]he guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence." *Ibid.* In that regard, the court recognized that the concerns animating *Summers*—in particular, "prevention of flight" and "minimizing the risk of harm to the officers," *id.* at 14a n.6 (citation omitted)—could equally justify the brief detention of an occupant who leaves the premises during or immediately prior to the execution of the search warrant and is detained a few blocks away. *Id.* at 10a, 13a-16a.

The court of appeals noted that "the Eighth and Tenth Circuits apparently concluded that once an occupant leaves a premises subject to search without knowledge of the warrant, *Summers* is inapplicable." Pet. App. 13a. But the court rejected that view because it "would put police officers executing a warrant in an impossible position: when they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking office safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered)." *Id.* at 14a. The court concluded that "*Summers* imposes upon police a duty based on both

geographic *and* temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search." *Id.* at 15a.

Applying that standard, the court of appeals had "no trouble concluding that [petitioner's] detention was lawful under the Fourth Amendment." Pet. App. 15a. The court found that the officers' decision to wait until petitioner had driven out of view of the house before detaining him was "reasonable and prudent." *Ibid.* In particular, the court explained, the officers had a valid concern for their own safety: because the search warrant authorized a search for a gun and petitioner matched the informant's description of the occupant of the residence to be searched, the officers could reasonably conclude that detaining petitioner at the residence might pose a risk to their safety. See *ibid.* (noting that the execution of a warrant "is the kind of transaction that may give rise to sudden violence") (quoting *Summers*, 452 U.S. at 702). The court further explained that because the officers had reason to believe that the occupant of the residence sold drugs out of the apartment, it was reasonable for them to conclude that detaining petitioner immediately outside the apartment might alert any occupants of the premises to their presence, thus risking the destruction of evidence. *Ibid.* The court also noted that petitioner's detention was brief: he was detained for less than ten minutes before being returned to 103 Lake Drive (where he was formally arrested), and the officers "did not attempt to exploit the detention by trying to obtain additional evidence from [petitioner] during execution of the search warrant." *Id.* at 16a.

Accordingly, the court concluded that "[b]ecause the officers acted as soon as reasonably practicable in de-

taining [petitioner] once he drove off the premises subject to search, * * * his detention during the valid search of the house did not violate the Fourth Amendment." Pet. App. 16a. Because of that holding, the court did not decide whether petitioner's detention was also reasonable as a *Terry* stop. *Id.* at 16a n.7.

ARGUMENT

Petitioner renews his claim (Pet. 8-17) that his detention violated the Fourth Amendment and that the keys found on his person and the statements he made at the time his car was stopped should be suppressed as fruits of that violation. The court of appeals correctly rejected that claim. While some tension over the proper analysis of *Michigan* v. *Summers*, 452 U.S. 692 (1981), exists in the lower courts, no square conflict currently exists that requires this Court's intervention. The Court denied review of similar questions in *Castro-Portillo* v. *United States*, 552 U.S. 829 (2007) (No. 06-10538), and *Alberto Cavazos* v. *United States*, 537 U.S. 910 (2002) (No. 02-5348), and the same result is warranted here, particularly because petitioner's detention was justified by reasonable suspicion quite apart from *Summers*.

1. The court of appeals correctly held that the considerations that led this Court to find reasonable the detention in *Summers*, equally support the conclusion that petitioner's brief detention here was reasonable.

a. In *Summers*, this Court explained that the detention of an occupant of a place about to be searched for contraband pursuant to a warrant only marginally intrudes upon the occupant's privacy interests (452 U.S. at 701-702), while such detention advances substantial law enforcement interests such as "preventing flight," "minimizing the risk of harm to the officers," and "orderly

completion of the search" (*id.* at 702-703). For those reasons, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted," and such detention "is constitutionally reasonable." *Id.* at 705. The *Summers* rule, this Court has since noted, is categorical. See *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005).

As the court of appeals recognized, the "very interests at stake in *Summers*" establish that a detention like the one here is reasonable. Pet. App. 14a. As for the effect on the person being detained: the search itself, and the fact that the detention will be only marginally more intrusive than the search, are the same whether the initial detention occurs in the residence, at the threshold, or nearby. The interests of law enforcement too are similar to those described in *Summers*: If law enforcement cannot follow and promptly detain an occupant who has just left the premises, the occupant might soon return. Or the occupant might learn from a neighbor that his residence was being searched and flee. And *Summers*'s observation about how an occupant's presence will often facilitate the "orderly completion of the search," 452 U.S. at 703, applies equally whether the occupant is kept on the premises or must be brought a short distance back to the premises; in either case, the occupant can assist in opening any locked doors or containers.

b. Petitioner argues (Pet. 13-17) that *Summers*'s reasoning implies that it is unreasonable to detain someone who has left the immediate area of the place to be searched. But *Summers* itself noted that it did "not view the fact that respondent was leaving his house when the officers arrived to be of constitutional signifi-

cance." 452 U.S. at 702 n.16; see *ibid.* ("The seizure of respondent on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside."). The question is not whether the officers detained petitioner while he happened to still be on the premises, but whether they detained him "as soon as practicable" (Pet. App. 14a-15a) after the officers saw him leaving the premises. See *id.* at 15a ("[W]hile '[t]he proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, . . . it is by no means controlling.'") (quoting *United States* v. *Cavazos*, 288 F.3d 706, 712 (5th Cir.), cert. denied, 537 U.S. 910 (2002)). In other words, "the focus [in applying *Summers*] should be on whether police detained the defendant as soon as practicable after departing the premises, which 'will normally, but not necessarily, result in detention of an individual in close proximity to his residence.'" *United States* v. *Castro-Portillo*, 211 Fed. Appx. 715, 721 (10th Cir.) (unpublished) (quoting *United States* v. *Cochran*, 939 F.2d 337, 339 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992)), cert. denied, 552 U.S. 829 (2007).[2]

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[2] See also *United States* v. *Montieth*, 662 F.3d 660, 666 (4th Cir. 2011) (upholding detention of occupant approximately one mile from the residence to be searched; court "decline[d] to delineate a geographic boundary at which the *Summers* holding becomes inapplicable" and instead looked to whether occupant was detained "as soon as practicable" after the police saw him leave the residence); *United States* v. *Bullock*, 632 F.3d 1004, 1018-1021 (7th Cir. 2011) (upholding detention a few blocks from the residence); *United States* v. *Head*, 216 Fed. Appx. 543, 546 (6th Cir. 2007) (unpublished) ("Summers does not impose upon police a duty based on geographic proximity") (quoting *Cochran*, 939 F.2d at 339); *Castro-Portillo*, 211 Fed. Appx. at 721 (upholding detention two blocks from residence because police detained defen-

Petitioner also asserts (Pet. 14-17) that the law enforcement interests underlying the *Summers* rule dissipate once an occupant drives away from the premises to be searched. As the court below explained, however, "[a]t least two of the law enforcement interests articulated in *Summers* applied here—namely, prevention of flight should incriminating evidence be found during the search and minimizing the risk of harm to the officers." Pet. App. 14a n.6 (quoting *id.* at 30a). Petitioner suggests (Pet. 15) that the interest in preventing flight is attenuated when the individual has already left the premises before the search has begun because he would have "no reason to know that a search is imminent." But anyone on the premises or nearby could readily alert a departing occupant to the search by placing a call to his cell phone or sending him a text message.

Petitioner also argues (Pet. 15) that once an individual leaves the premises to be searched, he poses "a minimal risk, if any" to the officers executing the warrant. But as noted above, neighbors or persons still at the premises to be searched could alert the departing occupant to the presence of the search team. Petitioner posits (Pet. 15) that if the individual learns of the search and returns to the premises to obstruct the search, he could be detained at that time. But it is far safer for officers to "'exercise unquestioned command of the situation' at precisely the moment when *Summers* recognizes they most need it," Pet. App. 14a (quoting *Summers*, 452 U.S. at 703), by detaining the departing occupant rather than letting him leave and risking the possibility

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dant as soon as reasonably practicable); *Cavazos*, 288 F.3d at 711-712 (upholding a detention incident to a warrant-authorized search and rejecting the defendant's argument "that the two blocks between him and his residence should foreclose the application of *Summers*").

that he will suddenly return—possibly armed and with the assistance of others—to obstruct the search. See *Castro-Portillo*, 211 Fed. Appx. at 721 ("[T]he fact that [the defendant] was leaving the scene and did not have knowledge of the search warrant did not mean he did not pose a threat to officers executing the warrant, as he may have returned home unexpectedly while the search was ongoing and, once there, '[tried] to forcibly thwart execution of the warrant.'") (quoting *United States* v. *Ritchie*, 35 F.3d 1477, 1484 (10th Cir. 1994)).

Finally, petitioner urges (Pet. 14-15) that a detention away from the immediate vicinity of the premises to be searched is more intrusive than a detention at the premises itself because the former exposes the individual to the indignity of detention in full public view. But *Summers* itself approved a detention outside the defendant's residence, and whether an individual is detained as he is exiting his premises or a short distance away, the detention will perforce be in public view.[3]

2. Petitioner urges (Pet. 8-12) that review by this Court is necessary to resolve a "deep and longstanding" conflict among lower courts over *Summers*'s application to the detention of suspects who have "left the immediate vicinity of the premises to be searched." While some tension exists over the reach of *Summers,* no square conflict exists that warrants this Court's review.

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[3] Amicus National Association of Criminal Defense Lawyers contends (Br. 3) that *Summers*'s "categorical authorization [for certain detentions] has been extended by lower courts beyond the core circumstances that supported the original rule" and this Court now needs to "realign the scope of the rule with its justifications." But for the reasons explained in the text, courts have correctly recognized that *Summers*'s rationale applies equally whether the occupant is detained on the premises or detained as soon as practicable after leaving the premises.

a. Seven federal courts of appeals have declined to append an inflexible geographical component onto the *Summers* rule. See Pet. App. 13a-15a (2d Cir.); *United States* v. *Montieth*, 662 F.3d 660, 666-669 (4th Cir. 2011); *Cavazos*, 288 F.3d at 711-712 (5th Cir.); *Cochran*, 939 F.2d 338-339 (6th Cir.); *United States* v. *Bullock*, 632 F.3d 1004, 1018-1021 (7th Cir. 2011); *Castro-Portillo*, 211 Fed. Appx. at 720-724 (10th Cir.); *United States* v. *Sears*, 139 Fed. Appx. 162, 166 (11th Cir.) (unpublished), cert. denied, 546 U.S. 971 (2005).

b. Petitioner cites (Pet. 8-10) older decisions from the Eighth, Ninth, and Tenth Circuits as in conflict with the decision below. None establishes a conflict that warrants this Court's review. Each was decided before *Muehler*, and—contrary to *Muehler*'s teaching that *Summers* articulates a categorical rule—each engages in an *ad hoc* reweighing of the interests at stake in the particular case. Moreover, the Ninth and Tenth Circuits have since limited or cast doubt on their older cases. And the Eighth Circuit does not appear to have decided a case in which that court's interpretation of *Summers* was outcome-determinative.

i. Petitioner relies on *United States* v. *Edwards*, 103 F.3d 90 (10th Cir. 1996), *United States* v. *Sherrill*, 27 F.3d 344 (8th Cir.), cert. denied, 513 U.S. 1048 (1994), and *United States* v. *Taylor*, 716 F.2d 701 (9th Cir. 1983), to establish a division among the courts of appeals. Each of those decisions applies *Summers* in a way that this Court has since made clear (in *Meuhler*) is incorrect.

In *Edwards*, the defendant was detained for 45 minutes after he had driven three blocks away from the house to be searched. 103 F.3d at 91. During that time, the defendant was searched, the defendant's car was

searched, the defendant was handcuffed, weapons were drawn on the defendant, and no effort was made to return the defendant to the site of the search. *Id.* at 91-92. The Tenth Circuit concluded that *Summers* did not justify the extended detention because (1) the defendant did not in fact know of the search warrant, (2) the police knew of the locations the defendant would likely return to, reducing the concern that they would be unable to later arrest the defendant, (3) "the police could have 'tailed' [the defendant]" after conducting a *Terry* stop of his vehicle, and (4) the detention did not facilitate completion of the search, aside from supplying keys to the place to be searched, which the defendant provided early on in the detention. *Id.* at 93-94.

In *Sherrill*, the Eighth Circuit ultimately found that the detention of a defendant stopped one block from his house was justified by probable cause. 27 F.3d at 346-347. But as an initial matter, it declined to apply *Summers* because (1) the outdoor stop of the defendant was in the court's view more intrusive on the defendant's interests than the stop in *Summers* (but see *Summers*, 452 U.S. at 702 n.16), and (2) the defendant was unaware of the search warrant and thus "the officers had no interest in preventing flight or minimizing the search's risk." 27 F.3d at 346.

In *Taylor*, the defendant was driving away from the house about to be searched pursuant to a warrant; he was stopped, ordered to lie down in a ditch, and handcuffed. 716 F.2d at 705. The Ninth Circuit ultimately upheld the stop and arrest as supported by reasonable suspicion and then probable cause. *Id.* at 707-709. But as an initial matter, it declined to apply *Summers*. *Id.* at 707. In keeping with *Summers* itself (see 452 U.S. at 702 n.16), the Ninth Circuit found "no merit to [the de-

fendant's] attempt to distinguish *Summers* on the ground[] that he * * * was not at the premises when detained." *Taylor*, 716 F.2d at 707. But the Ninth Circuit went on to find it significant that "much of the justification for the rule announced in *Summers* is inapplicable to [the defendant's] situation" because (1) neither an interest in completing the search nor in preventing flight subjectively "motivated [the officer's] detention of [the defendant]," and (2) the defendant "was obviously in no position to facilitate the orderly completion of the search * * * while lying handcuffed face down in a ditch." *Ibid.*

The analytical approach in each of those cases is incorrect because each considers the interests identified in *Summers* and evaluates them in light of the particular facts of the case at hand. But "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" *Muehler*, 544 U.S. at 98 (quoting *Summers*, 452 U.S. at 705 n.19).

ii. The Tenth Circuit's decision in *Castro-Portillo* recognizes that the approach of those older cases is inconsistent with *Summers* and does not survive *Muehler*. In *Castro-Portillo*, the defendant left his house just before a warrant authorizing a search of the house for drugs and weapons was executed, and he was briefly detained two blocks away. He was ordered to exit his car, handcuffed, and frisked for weapons. He was returned to his home, where officers had started the search. *Castro-Portillo*, 211 Fed. Appx. at 717. The court upheld the defendant's detention as permissible under *Summers* and *Muehler*. *Id.* at 720-724. The court explained that "when a neutral magistrate has deter-

mined police have probable cause to believe contraband exists" in a particular home, "the connection of an occupant to [the] home *alone* justifies a detention of that occupant." *Id.* at 720 (quoting *Muehler*, 544 U.S. at 99 n.2) (emphasis added by *Castro-Portillo*).

Castro-Portillo emphasized that "[t]he fact [the defendant] was not observed committing a crime at the time of the stop, drove away from the house moments before the execution of the search warrant, and did not know about the search warrant did not prevent authorities from having the requisite suspicion to stop him." 211 Fed. Appx. at 721. And relying on the Sixth Circuit's decision in *Cochran*, the *Castro-Portillo* court found distinctions based on place of detention insignificant, because "*Summers* does not impose upon police a duty based on geographic proximity (*i.e.*, defendant must be detained while still on his premises)." *Ibid.* (quoting *Cochran*, 939 F.2d at 339). Rather, "the focus should be on whether police detained the defendant as soon as practicable after departing the premises." *Ibid.*

Castro-Portillo accordingly rejected the defendant's contention that it should follow *Edwards* or *Sherrill*. It found *Edwards* factually distinguishable in that the detention in *Castro-Portillo* "occurred during the search of the house and * * * was not 'unduly prolonged' prior to execution of the search warrant," but instead was "as short as the situation and search warranted." 211 Fed. Appx. at 722 (quoting *Summers*, 452 U.S. at 701). And of particular relevance here, *Castro-Portillo* expresses doubt about *Sherrill*'s correctness in light of *Muehler*. See *id.* at 722 n.3.

Similarly, the Ninth Circuit has recognized *Muehler*'s command that *Summers* states a categorical rule, and that court has accordingly emphasized the aspects

of its cases that are consistent with *Muehler*. See *United States* v. *Davis*, 530 F.3d 1069, 1080 (9th Cir. 2008) (citing *Taylor* for the proposition that it had "rejected attempts to distinguish *Summers* based on the fact[] * * * that the detainee was not at the premises when detained.").

The Eighth Circuit has not had a similar opportunity since *Muehler* to revisit its decision in *Sherrill*. That weighs against this Court's review at this time not only because the Eighth Circuit may align itself with the majority of circuits, but also because *Sherrill* itself has, to the government's knowledge, never proven outcome-determinative. In particular, no decision from the Eighth Circuit itself or any district court within the Eighth Circuit appears to rely on *Sherrill*'s interpretation of *Summers* to find a Fourth Amendment violation.[4] Indeed, *Sherrill*'s treatment of *Summers* was not outcome determinative in *Sherrill* itself. See 27 F.3d at 346-347 (finding defendant's arrest supported by probable cause).

c. The state cases petitioner cites (Pet. 10-11) also do not establish a division of authority that warrants this Court's review. Each of those cases found *Summers* not to apply for factual reasons not presented here. In particular, in *Parks* v *Commonwealth*, 192 S.W.3d 318

[4] In *United States* v. *Reinholz*, 245 F.3d 765, cert. denied, 534 U.S. 896, and 534 U.S. 933 (2001), the Eighth Circuit rejected the argument that *Summers* supported officers' arrest of the defendant as he was leaving his workplace, "at least a twenty-five minute drive from his residence," which was the place to be searched. *Id.* at 777-778. And the court ultimately found a Fourth Amendment violation because the arrest was not otherwise supported by probable cause. *Id.* at 778-779. But those facts are readily distinguishable from cases in which the defendant is seen leaving the scene of the search and is detained as soon as practicable thereafter.

(Ky. 2006), the court found that *Summers* did not apply because the defendant had departed the residence to be searched "before the warrant was issued." *Id.* at 334. In *State* v. *Hill*, 130 P.3d 1 (Kan. 2006), the court emphasized that "[p]rior to the execution of the search * * * [the defendant] had been arrested and was in police custody at the police station," not merely detained on the street or at the place being searched. *Id.* at 10. And in *Commonwealth* v. *Charros*, 824 N.E.2d 809 (Mass.), cert. denied, 546 U.S. 870 (2005), a number of factors not present here seemed to bear on the court's refusal to apply *Summers*. See *id.* at 816 (noting the "spectacular fashion" in which police stopped the defendant's van, the "indignity of [the defendant's] arrest in full view of the public" during rush hour, and the "palpable potential for exploitation [of the stop] by the officers, who otherwise had no authority to search [the defendant's] van"). To the extent *Charros* speaks clearly to the issue here, it does not assist petitioner: It discusses but does not disagree with the Sixth Circuit's decision in *Cochran*, *supra*. *Charros*, 824 N.E.2d at 817. And *Charros* contrasts the stop at issue—in a place "with no connection to the premises to be searched"—with the stop at issue in *Commonwealth* v. *Catanzaro*, 803 N.E.2d 287 (Mass. 2004), in which the court had approved a stop of the defendant "as soon as reasonably practicable on leaving [the premises to be searched]." 824 N.E.2d at 817.

3. In any event, this case would be an unsuitable vehicle for addressing the application of *Summers* to the initial detention of someone shortly after he leaves the premises about to be searched.

a. Even putting *Summers* aside, petitioner's detention did not violate the Fourth Amendment because (as the district court found, Pet. App. 36a-42a) the informa-

tion known to the officers established reasonable suspicion to conduct a *Terry* stop of the car, see Gov't C.A. Br. 31-34, which evolved into probable cause as events unfolded. The officers had probable cause (as evidenced by a valid search warrant) to believe that the Lake Drive apartment from which petitioner exited contained a weapon. They knew from the informant that "Polo" had sold the informant illegal drugs on multiple occasions, including out of the Lake Drive apartment. Petitioner left the Lake Drive apartment in the company of another person, both of whom matched the informant's description of "Polo." Taken together, that information supplied the officers reasonable suspicion to conduct an investigatory stop.

Because the object of the search warrant was a weapon, it was also reasonable for the officers to conduct a pat-down search of petitioner. Immediately after the officers stopped the car and frisked petitioner, he admitted that he lived at the Lake Drive residence to be searched, but he produced a driver's license showing a Bay Shore address; this was significant because the informant had told officers that "Polo" had previously sold him drugs in Bay Shore, but most recently sold them from the Lake Drive apartment. Those developments gave the officers probable cause to believe that petitioner was in fact "Polo," to believe petitioner had repeatedly sold illegal drugs to the informant, and therefore to arrest petitioner.

b. This case is also a poor vehicle for review of any Fourth Amendment issue because any error in admitting the fruits of the detention was harmless. Ample evidence at trial established petitioner's control of the Lake Drive apartment. First, several documents bearing petitioner's name were found during the warrant-

authorized search of that residence: an identification card, old letters, a mail money receipt, an old tax mailing, and KMart pay stubs. No documents were found bearing anyone else's name. Second, Middleton testified that petitioner had led him to the Lake Drive apartment—which he understood to be petitioner's new apartment—where they played video games. The informant likewise testified that petitioner had taken him to the Lake Drive apartment, where petitioner sold him crack cocaine. Third, Middleton and the informant both testified that petitioner had moved from his Bay Shore residence to a new apartment in Wyandanch shortly before the search, and Middleton testified that he had seen "a lot of boxes" in the Wyandanch apartment. Gov't C.A. Br. 34-35. The evidence petitioner says should have been suppressed—the keys and his statements—was cumulative of that independent evidence demonstrating petitioner's control over the Lake Drive apartment, and thus any error in admitting the keys and statements was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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