No. 08-227

In the Supreme Court of the United States

ANTONIO RAY LIDDELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, after police officers discover a gun in a car of an individual whom they have arrested and ask the individual, without issuing the warnings required under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), if the car contains anything that could cause harm to the officers, the resulting statements are admissible under the "public safety exception" to *Miranda*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Constitution and statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 517 F.3d 1007. The opinion of the district court (Pet. App. 12a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2008. A petition for rehearing was denied on April 23, 2008 (Pet. App. 22a). On July 14, 2008, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 21, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Iowa to three

counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He also entered a conditional plea of guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). He was sentenced to 188 months of imprisonment, to be followed by 72 months of supervised release. The court of appeals affirmed. Pet. App. 1a-11a.

1. At approximately 12:45 a.m. on August 18, 2005, Clinton, Iowa Police Officer Michael Adney noticed that the car driven by petitioner was playing extremely loud music, and he activated his emergency lights to initiate a traffic stop. Petitioner drove two to three blocks and made three turns before finally stopping. After speaking with petitioner and determining that he was barred from driving in Iowa, Adney placed him under arrest and patted him down, finding a bag of marijuana, $183 in cash, and two cell phones. Adney handcuffed petitioner and placed him in the patrol car. Pet. App. 2a, 12a-13a.

Meanwhile, Officer Jon Melvin arrived and began conducting a search incident to arrest of the passenger compartment of petitioner's car. Melvin found an unloaded .38 caliber revolver under the driver's seat, showed the gun to Adney, and asked whether he had searched petitioner thoroughly. Adney removed petitioner from the patrol car and asked, "Is there anything else in there we need to know about?" Melvin immediately added, "That's gonna hurt us?," and Adney repeated, "That's gonna hurt us? Since we found the pistol already." Petitioner said, "I knew it was there * * * but it's not mine," before telling the officers there were no other weapons in the car. Melvin finished searching the car, finding rolling papers and a sock containing .38 caliber ammunition. Pet. App. 2a, 13a-15a.

2. Petitioner was charged with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), and with three unrelated counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He moved to suppress his statement about the gun to the arresting officers on the ground that he had not been given *Miranda* warnings before the officers questioned him.[*] See *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The government argued that the statement was admissible under the "public safety exception" established in *New York* v. *Quarles*, 467 U.S. 649 (1984). Pet. App. 2a-3a, 15a.

The district court denied petitioner's suppression motion, agreeing that "the officers' very limited questioning of [petitioner] * * * was reasonably prompted by a concern for officer safety and therefore falls within the public safety exception to *Miranda*." Pet. App. 21a. The court emphasized that the discovery of a firearm concealed in petitioner's car created "an objectively reasonable concern that other, possibly loaded, firearms may also be in the vehicle which could cause harm to an officer if they were to happen upon them unexpectedly or mishandle them in some way." *Id.* at 19a. Petitioner pleaded guilty to the three drug counts and entered a conditional guilty plea to the felon-in-possession offense, reserving his right to appeal the suppression ruling. He was sentenced to 188 months of imprisonment, to be followed by 72 months of supervised release. 1/29/07 Tr. 11-12.

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[*] Petitioner disclaimed any challenge to the search incident to arrest of his car. See 1/3/06 Tr. 27 (petitioner's counsel: "they had every right to search the car"). Thus, this case does not present the Fourth Amendment question that is before this Court in *Arizona* v. *Gant*, No. 07-542 (argued Oct. 7, 2008).

3. The court of appeals affirmed. Pet. App. 1a-11a. It found the district court's analysis to be consistent with circuit precedent and agreed that, "when the officers found [petitioner's] concealed .38 caliber revolver, they had good reason to be concerned that additional weapons might pose a threat to their safety when they searched [petitioner's] car incident to a late-night arrest." *Id.* at 5a.

Judge Gruender concurred. Pet. App. 5a-11a. He agreed that "the search of a vehicle that potentially contains a loaded weapon may well be inherently dangerous," *id.* at 9a, but he explained that, if it were not for prior circuit precedent, he would hold that the public safety exception does not apply in the absence of "exigent circumstances" in the form of "evidence that an immediate danger existed as a result of the possible presence of * * * a weapon in [the] car or that the public might have later come upon a weapon." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-18) that the decision below represents an unwarranted expansion of the "public safety exception" to *Miranda* established by this Court in *New York* v. *Quarles*, 467 U.S. 649 (1984), and that it conflicts with decisions of the Fourth, Fifth, and Sixth Circuits. The decision below is correct and does not expand the public safety exception. Moreover, this is not an appropriate vehicle to resolve whatever tension exists in the circuits on the issue because it would not change the outcome of this case.

1. In *Quarles*, this Court held that *Miranda* does not require the exclusion of unwarned statements elicited by police questioning that is "reasonably prompted by a concern for the public safety." 467 U.S. at 656. In

Quarles, officers chased a rape suspect through a supermarket and arrested him there. *Id.* at 651-652. The officers had been told that the suspect was armed, and, upon frisking him, discovered an empty shoulder holster. *Id.* at 652. After handcuffing the suspect, one of the officers asked him where the gun was. *Ibid.* The suspect responded, "the gun is over there." *Ibid.* The Court held that, although the suspect had not received *Miranda* warnings, his statement was nevertheless admissible. *Id.* at 659. The Court reasoned that, where officers "ask questions reasonably prompted by a concern for the public safety," any statements made in response are admissible, regardless of "the motivation of the individual officers involved." *Id.* at 656. The Court cautioned that such a "public safety" exception "will be circumscribed by the exigency which justifies it." *Id.* at 658. The Court added, however, that "[w]e think police officers can and will distinguish almost instinctively between questions necessary to secure *their own safety or the safety of the public* and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-659 (emphasis added); see also *id.* at 659 n.8 (distinguishing between questions that are "clearly investigatory" and those that "relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon").

The court below correctly applied *Quarles* in holding that petitioner's statement was admissible under the public safety exception. As the court explained, the discovery of a concealed .38 caliber handgun gave the officers "good reason to be concerned that additional weapons might pose a threat to their safety when they searched [petitioner's] car incident to a late-night arrest." Pet. App. 5a. Given their well-founded concern

that "other, possibly loaded firearms m[ight] also be in the vehicle" (*id.* at 19a), the officers had an "objectively reasonable need to protect [themselves]" (*Quarles*, 467 U.S. at 659 n.8) by inquiring about any other dangerous objects before proceeding with their late-night search.

The officers' single question—advising petitioner that they had found the pistol and asking whether there was "anything else" in his car "that's gonna hurt us"—narrowly focused on the need to protect their safety, rather than on any effort to "elicit testimonial evidence." *Quarles*, 467 U.S. at 659. And although the application of the public safety exception does not depend on the subjective motivation of the officers involved, *id.* at 656, everything about the situation here, in which the officers made the inquiry only after finding a previously unnoticed gun hidden in petitioner's car and discussing whether his person had been thoroughly searched, suggests that they were genuinely—and reasonably—concerned about threats to their safety. *Id.* at 659 (recognizing that the public safety exception is intended to "free [officers] to follow their legitimate instincts when confronting situations presenting a danger to the public safety").

Petitioner contends (Pet. 12, 13) that the public safety exception was inapplicable here, because there was not an "emergency" or unusually "urgent need to search." As he explains (Pet. 14), he had been "arrested" and there were "no third parties * * * in the vicinity who might come upon a weapon." But the facts of *Quarles* itself did not involve an emergency of the kind petitioner suggests is required. Like petitioner, the defendant in *Quarles* was handcuffed and in the custody of armed officers. See 467 U.S. at 655. Moreover, as the dissent noted, the police had no evidence that he

had an accomplice, the supermarket was "apparently deserted" during the late-night arrest, and the "police could easily have cordoned off the store and searched for the missing gun." *Id.* at 674-676 (Marshall, J., dissenting); see *United States* v. *Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994) (a "pressing need for haste is not essential").

In any event, the late-night search incident to arrest in this case necessarily involved some urgency. Petitioner concedes that—unlike an inventory search associated with impounding a vehicle—the search incident to his arrest could not be "leisure[ly]." Pet. 14. Indeed, a search incident to a custodial arrest is, by definition, "contemporaneous" with the arrest, *Preston* v. *United States*, 376 U.S. 364, 367 (1964), and it "is necessarily" governed by the officer's "quick *ad hoc* judgment." *United States* v. *Robinson*, 414 U.S. 218, 235 (1974). By requiring officers in such circumstances to deliberate about whether to give *Miranda* warnings before asking the arrestee a non-investigative question that could enable them to conduct their search more quickly and safely, petitioner would revoke the permission *Quarles* gave officers to "follow their legitimate instincts." 467 U.S. at 659.

Thus, courts have correctly applied the public safety exception to an officer's inquiry, made before searching a suspect who has been arrested, about whether the arrestee has anything dangerous on his person. See *United States* v. *Lackey*, 334 F.3d 1224, 1227-1228 (10th Cir.) (officer asked handcuffed defendant whether "you have any guns or sharp objects on you"), cert. denied, 540 U.S. 997 (2003); *Carrillo*, 16 F.3d at 1049-1050 (before searching defendant at detention facility, officer asked if he had any drugs or needles on his person);

United States v. *Webster*, 162 F.3d 308, 332 (5th Cir. 1998) (police asked handcuffed suspect whether he had any needles in his pockets that could injure them), cert. denied, 528 U.S. 829 (1999). As the Tenth Circuit explained in *Lackey*, there is little reason to require *Miranda* warnings before police may ask a question that is not designed "to acquire incriminating evidence" (which will presumably be recovered during the search in any case), but is instead designed to protect officers from mishandling firearms or drug paraphernalia they might come upon unexpectedly during a search; in that context, "[t]he risk of incrimination is limited to non-responsive answers." 334 F.3d at 1228; see also *United States* v. *Reyes*, 353 F.3d 148, 154 (2d Cir. 2003) (where arresting officers' "limited" questions "were not posed to elicit incriminating evidence," police could not "be faulted for the unforeseeable results of their words or actions"). That reasoning is equally applicable in this case, where it was only petitioner's non-responsive statement that he "knew [the gun] was there" that was incriminating.

Petitioner's concern (Pet. 7) that the decision below "dramatically undermines *Miranda* because virtually *every* search conducted by police officers involves the possibility of discovering a dangerous item" is mistaken. In this case, the district court found, it was only after Officer Melvin discovered a concealed firearm during his initial "cursory search" of the car that the officers had a "concern for their safety" that "justified the immediate and limited questioning," Pet. App. 20a-21a, and the court of appeals agreed that the discovery of the concealed handgun gave the officers "good reason to be concerned that additional weapons might pose a threat to their safety." *Id*. at 5a.

Petitioner's assertion (Pet. 14) that the officers should simply have impounded his car and searched it "at their leisure" ignores the risks that an unsecured, loaded firearm could pose to police officers or members of the public during the impoundment and subsequent search. See *United States* v. *Fox*, 393 F.3d 52, 60 (1st Cir. 2004), vacated on other grounds, 545 U.S. 1125 (2005). In *Fox*, another traffic-stop case, a police officer discovered an unused shotgun shell during a search incident to the arrest of a suspect whom he had previously arrested for possessing a firearm. Explaining that the officer "had ample reason to fear for his own safety and that of the public," the court concluded that the officer was justified in asking whether the suspect had a gun or other weapon in his vehicle. *Ibid*. Further, the court held, the officer was justified in asking how to open the breech of a shotgun that he found in the suspect's car, in order to avoid the risks of "transporting the gun without first ensuring that it was not loaded." *Ibid*. (noting danger that "dilapidated" gun "could have fired if inadvertently bumped or jostled"). Likewise, in this case, there was no reason to require police officers to bear the risks of impounding and searching—late at night and in the dark—a vehicle that might contain a loaded firearm or other weapons, when the dangers posed by a concealed weapon could be easily dispelled by the officers' narrowly focused inquiry about other dangerous items.

Consistent with *Quarles*, courts have generally not adopted categorical rules governing the application of the public safety exception; instead, the applicability of the exception depends on the circumstances of a particular case. See *Quarles*, 467 U.S. at 658-659 & n.8 (recognizing that the public safety exception reduced the clarity of the *Miranda* rule and distinguishing the facts of

prior cases). Thus, courts have recognized "the need for 'flexibility in situations where the safety of the public and the officers are at risk,'" *United States* v. *Estrada*, 430 F.3d 606, 612 (2d Cir. 2005) (quoting *Reyes*, 353 F.3d at 155), cert. denied, 547 U.S. 1048 (2006), and have also recognized that application of the public safety exception turns on whether, in the particular circumstances presented, officers had an objectively reasonable need to ask safety-related questions in order to neutralize a threat to themselves or to the public. See *Estrada*, 430 F.3d at 612 (exception is "a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of the circumstances in a given case") (internal quotation marks omitted).

Petitioner's reliance (Pet. 15-16) on *Orozco* v. *Texas*, 394 U.S. 324 (1969), is misplaced. There, police officers investigating a shooting murder went to the defendant's boardinghouse, where they woke up the defendant. *Id.* at 325. When the defendant gave his name, the officers put him under arrest and began questioning him about the murder. *Ibid*. They asked whether he had been to the restaurant where the murder occurred, and "when he answered 'yes' he was asked whether he owned a pistol." *Ibid*. When he admitted owning one, they asked where the pistol was located, and the defendant told them. *Ibid*. This Court suppressed the defendant's statements because the defendant had not been given *Miranda* warnings prior to the interrogation. *Id*. at 326-327. As the Court noted in *Quarles*, the line of questions in *Orozco* was "clearly investigatory" and indistinguishable from the questions police would ask "to solve a serious crime." 467 U.S. at 659 n.8. Here, by contrast, the officers' single question—about whether the car contained any items other than the pistol that could "hurt"

the officers during their search—was directed to safety, not crime solving.

2. Petitioner contends (Pet. 7-13) that review by this Court is needed because the court of appeals' conclusion that the public safety exception can be applied on the basis of an officer's "fear of mishandling firearms, drug paraphernalia, or other dangerous items during a search under circumstances similar to those in this case" conflicts with decisions of the Fourth, Fifth, and Sixth Circuits. The cases petitioner cites involve circumstances that differ significantly from those in this case.

In *United States* v. *Mobley*, 40 F.3d 688 (4th Cir. 1994), cert. denied, 514 U.S. 1129 (1995), the court declined to apply the exception to a question that was not intended to protect officers conducting a search incident to an arrest. The agents arrested a suspect who was alone at his apartment and "answered the door naked," making it "quite apparent that he was unarmed." *Id.* at 690. After they had made a protective sweep of the apartment, and "as [the arrestee] was being led away," an FBI agent asked whether there were any weapons in the apartment that could pose a danger to agents who would remain behind to search the apartment pursuant to a warrant. *Id.* at 690-691, 693.

Similarly, the police were not conducting a search incident to an arrest in *United States* v. *Melvin*, No. 05-4997, 2007 WL 2046735 (4th Cir. July 13, 2007), cert. denied, 128 S. Ct. 637 (2007). After they had towed the defendant's truck to an impound lot, he emerged from his house, and officers arrested him on an open warrant. *Id.* at *8. They took him back inside the house and then asked him whether there was "anything the agents needed to know about in the truck." *Ibid.* The court held that the public safety exception did not apply to the

defendant's response, since the truck "was already on its way to the impound lot" and there was no evidence that anything in the truck would pose a threat to the public while at the impound lot. *Id.* at *11. Unlike the instant case, where the police were, at the time they asked the question, actively engaged in an immediate search incident to an arrest and they had already found a weapon (which gave them a legitimate reason for concern that the car might contain additional weapons), no circumstances in *Melvin* raised any specific concern on the part of the police about the presence of weapons in the truck.

In *United States* v. *Williams*, 483 F.3d 425 (6th Cir. 2007), the court considered the government's appeal from an order suppressing an unwarned statement made by a suspect who was arrested in his room at a boarding house. The court stated that the public safety exception would apply only if officers reasonably believed that the suspect had a weapon and that someone other than the police could gain access to it, *id.* at 428-429, but rather than resolving whether the exception applied, the court remanded for additional fact findings by the district court, *id.* at 430. Although it is true that the government did not produce any evidence in this case of a specific risk that a member of the public might obtain access to a weapon within petitioner's car, this Court has made it clear that the public safety exception exists not just to protect third-party members of the public, but also the officers themselves. See *Quarles*, 467 U.S. at 658 n.7 (referring to questions "crucial to [officers'] efforts to protect themselves and the public"); *id.* at 659 (referring to officers' ability to ask "questions necessary to secure their own safety or the safety of the public")'; *id.* at 659 n.8 (noting that the exception applies when there is "an objectively reasonable need to protect the

police or the public from any immediate danger associated with the weapon").

Finally, petitioner claims (Pet. 10-11) a conflict with *United States* v. *Raborn*, 872 F.2d 589 (5th Cir. 1989). In *Raborn*, however, the defendant challenged the admission of the gun that was discovered under the seat cover in his truck, rather than his statement that it was located there. Thus, the Fifth Circuit merely observed in passing that it would be "difficult" to apply the public safety exception to circumstances where "only the police officers had access to the [suspect's] truck," before affirming the admission of the weapon on an inevitable discovery theory. *Id*. at 595. Even assuming that inconclusive dictum about the public safety exception reflects a general approach of the Fifth Circuit, it could not be read so broadly as to require exclusion under the facts of a case such as this, where officers, having come upon one weapon, specifically inquired about other objects that might "hurt" them, demonstrating an objectively reasonable focus on safety as opposed to investigation.

3. Even if the decision below is in tension with some of the reasoning of some of the decisions petitioner cites, this case is not an appropriate vehicle for resolving the issue because the court of appeals' application of the public safety exception did not alter the ultimate outcome of this case. When the police stopped petitioner's car, he was the sole occupant, and they discovered a handgun underneath the driver's seat. Petitioner's statement (that he knew the gun was there but that it was not his) was not necessary to prove his status as a convicted felon or his illegal possession of that firearm. As a result, even if the district court erred in refusing to suppress that statement, petitioner would be unable to establish any entitlement to withdraw his guilty plea.

See, *e.g.*, *United States* v. *Leake*, 95 F.3d 409, 420 n.21 (6th Cir. 1996) (explaining that a defendant is not entitled to withdraw a conditional plea simply because he "manages to exclude any evidence on appeal"; instead, "[t]he inquiry requires an examination of the degree of success and the probability that the excluded evidence would have had a material effect on the defendant's decision to plead guilty"); *United States* v. *Burns*, 684 F.2d 1066, 1076 (2d Cir. 1982) (declining to permit defendant to withdraw conditional plea where the otherwise admissible evidence was so overwhelming that suppression of the challenged evidence "would not have altered [the defendant's] decision to plead guilty"), cert. denied, 459 U.S. 1174 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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