No. 16-

In the Supreme Court of the United States

JACQUELINE HEAVEN,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a warrantless search incident to arrest may precede the arrest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jacqueline Heaven respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals, App 1a, is unpublished. It is noted at 2016 WL 5947025. The opinion of the Colorado District Court, App. 12a, is unpublished.

JURISDICTION

The judgment of the Colorado Court of Appeals was entered on October 13, 2016. The Colorado Supreme Court denied review on March 6, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

This case provides an opportunity to resolve one of the oldest, deepest, and frequently-recurring lower court conflicts in the field of criminal procedure. Several lower courts, following a long line of this Court's cases, hold that a warrantless search inci-

dent to arrest must take place *during* or *after* the arrest. But many other lower courts, relying on a single sentence in *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980), hold that a warrantless search incident to arrest may take place *before* the arrest. In the latter group of jurisdictions, the police may conduct a warrantless search, see what they find, and only then decide whether to make an arrest. The result is a serious incursion on our individual liberties, one that is contrary to the long tradition of searches incident to arrest.

1. Petitioner Jacqueline Heaven was shopping at a Walmart in Colorado Springs when she was detained by a Walmart loss prevention officer, who said that he had seen Heaven placing merchandise in her purse. App. 2a. Walmart called the police, and Colorado Springs Police Officer James Schenk arrived soon after. App. 2a. Schenk took Heaven to an office inside the store. App. 2a. He searched her purse without her consent. App. 2a. Schenk did not find any Walmart merchandise. App. 2a. Instead, he found drugs and drug paraphernalia. App. 2a. Officer Schenk then placed Heaven under arrest. App. 2a.

Before trial, Heaven moved to suppress the drugs and the paraphernalia, on the ground that the warrantless search of her purse violated the Fourth Amendment. App. 3a. The trial court denied the motion, on the theory that the search was performed incident to a lawful arrest. App. 3a, 12a-14a. In the trial court's view, Heaven was under arrest at the moment Schenk took her to the office inside the

store, and thus the search of her purse took place after the arrest. App. 13a.

Heaven was found guilty of possessing a controlled substance and possessing drug paraphernalia. App. 1a. She was sentenced to probation.

2. The Colorado Court of Appeals affirmed, but on a ground different from that of the trial court. The Court of Appeals held that the search of Heaven's purse took place *before* the arrest, not after, but that the search was nevertheless performed incident to the arrest. App. 1a-11a.

The Court of Appeals determined that Officer Schenk searched Heaven's purse before he arrested her. App. 2a ("The search of Heaven's purse did not reveal any shoplifted items, but revealed drugs and drug paraphernalia. Officer Schenk then placed Heaven under arrest."); App. 8a ("That Officer Schenk's search preceded his formal arrest of Heaven is not determinative of the lawfulness of the search."). But the Court of Appeals "reject[ed] Heaven's assertion that, because she was not placed under arrest until after Officer Schenk searched her purse, the search could not be justified by the search incident to arrest exception to the warrant requirement." App. 6a.

The Court of Appeals reasoned that "[c]ontrary to Heaven's argument, a search does not become unreasonable merely because it is conducted before a suspect is actually placed under formal arrest." App. 7a. Rather, the court explained, "if an officer is entitled to make an arrest on the basis of information then available to the officer, there is nothing unrea-

sonable in the officer's conducting a search before, rather than after, the actual arrest." App. 7a (citation and internal quotation marks omitted).

The Court of Appeals determined that Officer Schenk had probable cause to arrest Heaven for shoplifting based on the loss prevention officer's report that he had seen her placing merchandise in her purse. App. 8a. Because Schenk *could have* arrested Heaven before the search, the court held, "he was permitted to search her purse as a search incident to arrest," even though he had not arrested her when the search took place. App. 9a.

3. The Colorado Supreme Court denied review. App. 15a.

REASONS FOR GRANTING THE WRIT

There is a deep lower court conflict on whether a warrantless search incident to arrest may precede the arrest. The question has been addressed at considerable length by several of the lower courts, which have come out on both sides. The answer will have important practical consequences. Allowing the police to search first, and only then to decide whether to make an arrest, licenses an investigative method that would have shocked judges before recent times, because it is so clearly contrary to the Fourth Amendment and its common law roots.

I. The lower courts are deeply divided over whether a warrantless search incident to arrest may precede the arrest.

A. How the conflict arose

The conflict exists largely because of a loosely worded sentence in *Rawlings v. Kentucky*, 448 U.S. 98 (1980). In all of the Court's other cases involving searches incident to arrest, decided before and after *Rawlings*, the Court has made clear that the search must be during or shortly after the arrest. In *Rawlings*, however, the Court said: "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." *Id.* at 111. As we will explain below, if one reads this sentence in context, with attention to the facts of *Rawlings*, it expresses a view consistent with the Court's other cases. But the lower courts have not always read this sentence in context.

1. The Court has always required searches incident to arrest to take place during or after the arrest.

"'[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). "Among the exceptions to the warrant requirement is a search incident to a lawful arrest." *Gant*, 556 U.S. at 338.

The exception for searches incident to arrest is older than the Constitution. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2174-75 (2016). It was "well established in the mid-eighteenth century." William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 401 (1995). Indeed, "[t]here is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself." Telford Taylor, *Two Studies in Constitutional Interpretation* 28 (1969). "No historical evidence suggests that the Fourth Amendment altered the permissible bounds of arrestee searches." *Birchfield*, 136 S. Ct. at 2175. The Court thus looks first to the common law in determining when such searches are lawful. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (observing that the Court seeks "guidance from the founding era" concerning searches incident to arrest before turning to other interpretive methods).

At common law, a search incident to arrest was lawful only where the person being searched had already been arrested. As then-Judge Cardozo explained, a warrantless search of a person who had *not* been arrested would be a trespass, because the searcher had no right to conduct the search. *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1928); *see also United States v. Jones*, 565 U.S. 400, 405 (2012) (noting the close relation between common-law trespass and the permissibility of searches before the second half of the 20th century). "Search of the person becomes lawful," Cardozo continued, only "when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body

of the accused to its physical dominion." *Chiagles*, 142 N.E. at 584. *See also Closson v. Morrison*, 47 N.H. 482, 484 (N.H. 1867) ("an officer would also be justified in taking from a person *whom he had arrested* for crime, any deadly weapon he might find upon him") (emphasis added); 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* 471 (1866) ("The officer who arrests a man on a criminal charge should consider the nature of the charge; and, if he finds about the prisoner's person, or otherwise in his possession," fruits or evidence of the crime, "he may take the same."); Francis Wharton, *A Treatise on Criminal Pleading and Practice* 45 (1880) ("Those arresting a defendant are bound to take from his person any articles which may of use as proof in the trial.").

When the Court began considering searches incident to arrest under the Fourth Amendment, the Court, relying on such common law authorities, consistently stated that the search must be during or after the arrest. The first of these cases was *Weeks v. United States*, 232 U.S. 383, 392 (1914) (emphasis added), in which the Court discussed the government's right "to search the person of the accused *when legally arrested*, to discover and seize the fruits or evidences of crime." Not long after, the Court held: "*When a man is legally arrested* for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized." *Carroll v. United States*, 267 U.S. 132, 158 (1925) (emphasis added).

The Court has taken the same view ever since. *See, e.g.*, *Agnello v. United States*, 269 U.S. 20, 30

(1925) (referring to "[t]he right without a search warrant contemporaneously to search persons lawfully arrested"); *Marron v. United States*, 275 U.S. 192, 198-99 (1927) (having made an arrest, officers "had a right without a warrant contemporaneously to search"); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (referring to "[t]he authority of officers to search one's house or place of business contemporaneously with his lawful arrest"); *Trupiano v. United States*, 334 U.S. 699, 708 (1948) (noting that a search incident to arrest "grows out of the inherent necessities of the situation at the time of the arrest" and that a prerequisite for the search is "a lawful arrest"); *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950) ("Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest."); *Preston v. United States*, 376 U.S. 364, 367 (1964) ("when a person is lawfully arrested, the police have a right, without a search warrant, to make a contemporaneous search of the person of the accused"); *Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."); *Chimel v. California*, 395 U.S. 752, 762-63 (1969) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested"); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) ("The basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession."); *United States v. Robinson*, 414 U.S. 218, 236 (1973) ("it is the fact of custodial arrest

which gives rise to the authority to search"); *Gustafson v. Florida*, 414 U.S. 260, 265 (1973) (to permit a search incident to arrest, "[i]t is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest, and placed the petitioner in custody."); *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979) ("The fact of a lawful arrest, standing alone, authorizes a search."); *Illinois v. Lafayette*, 462 U.S. 640, 644 (1983) ("immediately upon arrest an officer may lawfully search the person of an arrestee"); *Gant*, 556 U.S. at 338 ("The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations."); *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (referring to the government's right "to search the person of the accused when legally arrested") (citation and internal quotation marks omitted).

In short, the Court has always understood the exception to the warrant requirement for searches incident to arrest to encompass searches during or after an arrest, not searches before an arrest. As Justice Scalia aptly summarized these cases, "[t]he fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging." *Thornton v. United States*, 541 U.S. 615, 630 (2004) (Scalia, J., concurring in the judgment).

2. *Rawlings v. Kentucky* can be misinterpreted as authorizing searches incident to arrest that precede the arrest.

The lower court conflict can largely be traced to a single sentence in *Rawlings v. Kentucky*, 448 U.S. 98 (1980). *Rawlings* involved two principal issues, neither of which concerned the timing of searches incident to arrest. The first issue was whether the defendant had standing to contest a search of someone else's purse, where the purse contained drugs belonging to the defendant. *Id.* at 104-06. The Court held that the defendant did not have standing. *Id.* at 106. The second issue was whether the defendant's admission that he owned the drugs was the fruit of his illegal detention. *Id.* at 106-110. The Court found that it was not. *Id.* at 110.

Having resolved these two issues, the Court devoted only a single paragraph, the last substantive paragraph of the opinion, to the defendant's claim that a search of his person had been unlawful. *Id.* at 110-11. When the police found the drugs in the purse and the defendant admitted that he owned them, the police began the process of arresting him. *Id.* at 101. During that process, they searched him and found a knife and a large sum of cash. *Id.* After the search, the police "placed [the defendant] under formal arrest." *Id.* The defendant argued that the knife and the cash should have been suppressed at trial. *Id.* at 110.

The Court disposed of this argument in two sentences, the second of which would sow considerable confusion in the lower courts. The Court held:

> 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.

Id. at 111.

Read out of context, the second of these two sentences seems to say that a search incident to arrest may precede the arrest. As we will see, this sentence has caused many lower courts to hold that the order of the search and the arrest is irrelevant—that the police are entitled to search first, see what they find, and arrest later. But when the sentence is read *in* context, this interpretation is untenable. In *Rawlings*, the police were in the midst of arresting the defendant when they searched him. The police had already read *Miranda* warnings to the defendant. *Id.* at 100. The defendant had already admitted that he was the owner of 1,800 tablets of LSD and several other vials of controlled substances. *Id.* at 101. The search in *Rawlings* was *during* the arrest, not before.

As the Court described the facts in *Rawlings*, after conducting the search of his person, the police placed the defendant "under formal arrest." *Id.*; *see also id.* at 111 ("the formal arrest followed quickly on the heels of the challenged search"). The Court did not explain what it meant by the term "formal arrest," but in context, the Court clearly meant that after conducting the search, the police completed the pro-

cess of arrest by taking the defendant into custody. *Rawlings* holds that the police may search the defendant before they *finish* an arrest, not before they start one.

The parties in *Rawlings* did not even litigate the issue of whether a search incident to arrest may precede the arrest. Petitioner Rawlings did not argue that the search was unlawful on the ground that it preceded the arrest. Brief for Petitioner, *Rawlings v. Kentucky*, No. 79-5146 (Feb. 6, 1980). Respondent Kentucky did not address the issue either. Brief for Respondent, *Rawlings v. Kentucky*, No. 79-5146 (Feb. 29, 1980). The *Rawlings* Court could not have intended to upend the traditional rule that a search incident to arrest must take place during or after the arrest.[1]

Any doubt on this score should have been dispelled by *Knowles v. Iowa*, 525 U.S. 113 (1998). In *Knowles*, the state relied on *Rawlings* to argue that a search incident to arrest may precede the arrest, so long as an officer has probable cause to make the arrest. Brief for Respondent, *Knowles v. Iowa*, No. 97-7597 (Aug. 24, 1998), at 21-22; *see also Knowles*, 525 U.S. at 115-16 (noting the Iowa Supreme Court's

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[1] Justice Marshall, joined by Justice Brennan, dissented from the two principal holdings of *Rawlings*, but their dissenting opinion does not even mention the Court's brief discussion of searches incident to arrest. *Rawlings*, 448 U.S. at 114-21 (Marshall, J., dissenting). This further suggests that the *Rawlings* Court did not think it was overruling prior cases and newly authorizing searches incident to arrest that take place before the arrest, because Justices Marshall and Brennan would surely have dissented from such a holding as well.

holding 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"). The Court rejected this argument. The Court held that the rationales for searches incident to arrest—"(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial," *id.* at 116—apply only once the suspect has actually been arrested. *Id.* at 117-18. Before an arrest, the Court held, "the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all." *Id.* at 119.

Knowles should have cleared up any misunderstandings of *Rawlings*. By the time *Knowles* was decided, however, many of the lower courts had already misinterpreted *Rawlings* to allow searches incident to arrest that precede the arrest. They would continue to misinterpret *Rawlings* even after *Knowles*.

B. The extent of the conflict

In the years since *Rawlings* and *Knowles*, the lower courts have divided into two camps. Many jurisdictions have relied on *Rawlings* to conclude that a search incident to arrest may precede the arrest. Many other jurisdictions, however, recognize that *Rawlings* did not change the traditional requirement that a search incident to arrest must take place during or after the arrest, not before.

1. Many jurisdictions, relying on *Rawlings*, hold that a search incident to arrest may precede the arrest.

Colorado is just one of many jurisdictions that have misunderstood *Rawlings*—even after *Knowles*—to hold that a search incident to arrest may precede the arrest. In these jurisdictions, so long as the police have probable cause to arrest a person before they search, they may conduct a search incident to arrest and only then decide whether to make the arrest.

In *United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007) (en banc), for example, the en banc D.C. Circuit thoroughly reviewed *Rawlings* and *Knowles*, *id.* at 838-42, and concluded: "even if *Knowles* could be taken by implication to call *Rawlings* into question, we are not at liberty to disregard the Supreme Court's straightforward statement that it is not 'particularly important that the search precede the arrest rather than vice versa.'" *Id.* at 841 (citing *Rawlings*, 448 U.S. at 111). The D.C. Circuit accordingly rejected the defendant's argument that a search incident to arrest may not precede the arrest, "because we believe this case is controlled by *Rawlings*." *Powell*, 483 F.3d at 838.

The en banc D.C. Court of Appeals reached the same conclusion in *United States v. Lewis*, 147 A.3d 236 (D.C. Ct. App. 2016) (en banc). In the course of a detailed discussion of *Rawlings* and *Knowles*, *id.* at 239-45, the en banc court concluded that "*Rawlings* is now deeply entrenched in the law. It has been cited, and treated as a holding, in many lower-court decisions," a circumstance that "preclude[d] this court

from disregarding the principle announced by the Supreme Court in *Rawlings*." *Id.* at 242. The D.C. Court of Appeals therefore approved searches incident to arrest in which "(a) the search precedes the arrest for the offense at issue; and (b) it is unclear whether the officer intended to arrest the suspect before conducting the search." *Id.* at 239.

Many other courts have relied on *Rawlings* to reach the same conclusion. *See United States v. Currence*, 446 F.3d 554, 557 (4th Cir. 2006) (citing *Rawlings* for the proposition that "a search can occur before an arrest is actually made"); *United States v. Montgomery*, 377 F.3d 582, 586 (6th Cir. 2004) (citing *Rawlings* for the proposition that "the search-incident-to-a-lawful-arrest rule also permits an officer to conduct a full search of an arrestee's person *before* he is placed under lawful custodial arrest"); *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004) (citing *Rawlings* for the proposition that "it is not particularly important that the search preceded the arrest rather than vice versa"); *United States v. Torres-Castro*, 470 F.3d 992, 997 (10th Cir. 2006) ("We have followed *Rawlings* to allow searches of vehicles and persons prior to an arrest.").

See also Adams v. State, 815 So. 2d 578, 582 (Ala. 2001) (citing *Rawlings* to approve a search where the officer, "before conducting the search, had probable cause to arrest" the defendant, but arrested him only after the search revealed marijuana in the defendant's pocket); *Jenkins v. State*, 978 So. 2d 116, 126 (Fla. 2008) (citing *Rawlings* for the proposition that "it is permissible for a search incident to arrest to be conducted prior to the actual arrest, provided that

probable cause to arrest existed prior to the search, and the fruits of the search were not necessary to establish probable cause"); *State v. Horton*, 625 N.W.2d 362, 364 (Iowa 2001) (citing *Rawlings* to approve a search of a defendant arrested only after a search incident to arrest revealed marijuana in the defendant's pocket); *State v. Conn*, 99 P.3d 1108, 1113 (Kan. 2004) (citing *Rawlings* for the proposition that "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") (citation, brackets, and internal quotation marks omitted); *Williams v Commonwealth*, 147 S.W.3d 1, 8-9 (Ky. 2004) (citing *Rawlings*, *id.* at 9, for the proposition that "[a] warrantless search preceding arrest is reasonable under the Fourth Amendment so long as probable cause to arrest existed before the search, and the arrest and search were substantially contemporaneous," *id.* at 8); *State v. Sherman*, 931 So. 2d 286, 292-95 (La. 2006) (citing *Rawlings*, *id.* at 292, and concluding that "all that is necessary is a finding that an arrest *could* have occurred in order for the exception to the warrant requirement to apply," *id.* at 295); *State v. O'Neal*, 921 A.2d 1079, 1087 (N.J. 2007) (citing *Rawlings* to support the conclusion that "[i]t is the right to arrest, rather than the actual arrest that must pre-exist the search") (citation and internal quotation marks omitted); *State v. Overby*, 590 N.W.2d 703, 706 (N.D. 1999) (citing *Rawlings* to approve "a warrantless search preceding arrest"); *State v. Freiburger*, 620 S.E.2d 737, 740 (S.C. 2006) (citing *Rawlings* for the proposition that

"[a] warrantless search which precedes a formal arrest is valid if the arrest quickly follows"); *State v. Smith*, 851 N.W.2d 719, 726 (S.D. 2014) (citing *Rawlings* to approve a search conducted 27 minutes before the arrest); *State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Ct. Crim. App. 1999) (citing *Rawlings* for the proposition that "[i]t is irrelevant that the arrest occurs immediately before or after the search, as long as sufficient probable cause exists for the officer to arrest before the search"); *State v. Sykes*, 695 N.W.2d 277, 283 (Wis. 2005) (citing *Rawlings* and concluding that "when a suspect is arrested subsequent to a search, the legality of the search is established by the officer's possession, before the search, of facts sufficient to establish probable cause to arrest followed by a contemporaneous arrest").

In the decision below, the Court of Appeals relied on Colorado precedent to the same effect. App. 7a; *see also People v. Sutherland*, 683 P.2d 1192, 1196 (Colo. 1984) (citing *Rawlings* to hold that "[t]he fact that the search preceded the arrest rather than vice versa is not controlling"). These jurisdictions interpret *Rawlings* to allow the police to search a suspect, see what they find, and then decide whether to make an arrest, so long as the police had probable cause to make the arrest before they conducted the search. In these jurisdictions, an ostensible search incident to arrest is more accurately termed a search incident to probable cause, because probable cause is all the police need to conduct the search.

2. Many other jurisdictions recognize that *Rawlings* did not abrogate the traditional requirement that a search incident to arrest take place during or after the arrest.

In several other jurisdictions, by contrast, a search incident to arrest must take place during or after the arrest, not before. These jurisdictions recognize that *Rawlings* did not change the traditional rule, under which it is the fact of an arrest that justifies a search incident to arrest. Mere probable cause to arrest is not enough.

The California Supreme Court recently considered the issue at length in *People v. Macabeo*, 384 P.3d 1189 (Cal. 2016). In *Macabeo*, the state relied on *Rawlings* to contend that the police can search incident to arrest before the arrest, so long as they have probable cause to arrest. *Id.* at 1195. The California Supreme Court rejected this argument. *Id.* at 1195-97. "The People read far too much into the *Rawlings* comment about the order in which discovery of probable cause is made and the effectuation of a formal arrest takes place," the court explained. *Id.* at 1195. "Indeed," the court continued, "the People's expansive understanding of *Rawlings*, that probable cause to arrest will always justify a search incident so long as an arrest follows, is inconsistent with *Chimel* [*v. California*, 395 U.S. 752 (1969),] and [*United States v.] Chadwick*[, 433 U.S. 1 (1977)]. It is also in tension with the reasoning in *Knowles v. Iowa*." *Id.* at 1195-96. The California Supreme Court concluded: "These authorities make clear that *Rawlings* does *not* stand for the broad proposition that probable cause to ar-

rest will always justify a search incident as long as an arrest follows." *Id.* at 1197. The correct rule, the court held, is that "[w]hen a custodial arrest is made, and that arrest is supported by independent probable cause, a search incident to that custodial arrest may be permitted, even though the formalities of the arrest follow the search." *Id.* at 1196.

The Maryland Court of Appeals has likewise held, on a few occasions, that "'[i]t is axiomatic that when the State seeks to justify a warrantless search incident to arrest, it must show that the arrest was lawfully made prior to the search.'" *Bailey v. State*, 987 A.2d 72, 95 (Md. 2010) (quoting *Bouldin v. State*, 350 A.2d 130, 132 (Md. 1976)). "Of course," the Court of Appeals has observed, "the right to arrest is not equivalent to making an arrest; the record must satisfactorily demonstrate that an arrest was in fact consummated before a warrantless search incident thereto may be found to be lawful." *Bouldin*, 350 A.2d at 133. The Maryland Court of Appeals requires an arrest, not merely probable cause to make an arrest, because "[w]here there is no custodial arrest," the "underlying rationales for a search incident to an arrest do not exist." *Belote v. State*, 981 A.2d 1247, 1252 (Md. 2009). *See also State v. Funkhouser*, 782 A.2d 387, 403-09 (Md. Ct. Spec. App. 2001) (explaining Maryland's view in great detail).

Several other jurisdictions similarly require that a search incident to arrest take place during or after an arrest, not before. *See Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003) ("a *Belton* search [i.e., a search of a vehicle incident to arrest] may not be conducted as part of a mere traffic stop, even if there

is … probable cause to arrest the driver for the traffic violation. In order to conduct a *Belton* search, the occupant of the vehicle must actually be held under custodial arrest."); *Commonwealth v. Craan*, 13 N.E.3d 569, 574-75 (Mass. 2014) ("A search incident to arrest, as the name suggests, may be effected without a warrant when an arrest has taken place …. Where no arrest is underway, the rationales underlying the exception do not apply with equal force."); *State v. Crutcher*, 989 S.W.2d 295, 302 (Tenn. 1999) ("If law enforcement officers intend to justify a search as incident to an arrest, it is incumbent upon them to take some action that would indicate to a reasonable person that he or she is under arrest. … Moreover, we are not prepared to hold that the police may conduct a warrantless search merely because they have probable cause to arrest the suspect."); *Lovelace v. Commonwealth*, 522 S.E.2d 856, 859-60 (Va. 1999) (rejecting "the Commonwealth's position that the presence of probable cause for an arrest, rather than an actual custodial arrest, determines the reasonableness of a search").

In these jurisdictions, the police must actually arrest a person before they can search incident to arrest. Mere probable cause to arrest is not enough. If the search in our case had taken place in any of these jurisdictions, it would have been unlawful, because Officer Schenk searched Jacqueline Heaven's purse before he placed her under arrest. App. 2a ("The search of Heaven's purse did not reveal any shoplifted items, but revealed drugs and drug para-

phernalia. Officer Schenk then placed Heaven under arrest.").[2]

This conflict has existed, and has been noticed, for several years. *See* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 Yale L. & Pol'y Rev. 381, 406 (2001) (describing the issue as "a crucial doctrinal question now dividing the courts"); Marissa Perry, *Search Incident to Probable Cause?: The Intersection of* Rawlings *and* Knowles, 115 Mich. L. Rev. 109, 110 (2016) ("The issue has also divided the lower courts."). There is no reason to allow it to percolate any longer, because the issue has been thoroughly addressed by the lower courts.

II. The issue is of great practical importance.

This issue arises frequently, because the police search virtually everyone they arrest. Indeed, alt-

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[2] The New York Court of Appeals takes an intermediate position, in which the search can take place before the arrest only if the officer *intended* to make the arrest before he performed the search. In New York, "the 'search incident to arrest' doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the 'search incident' exception is to be applied." *People v. Reid*, 26 N.E.3d 237, 240 (N.Y. 2014); *see also People v. Evans*, 371 N.E.2d 528, 531 (N.Y. 1977) ("To adopt the proposition that the search was valid because there was probable cause to arrest puts the cart before the horse. An arrest is an essential requisite to a search incident, otherwise once probable cause existed a potential arrestee would be fair game for any intrusions the police deem appropriate for however long they allow him to remain at large.").

hough searches incident to arrest are, in a doctrinal sense, exceptions to the warrant requirement, "the label 'exception' is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." *Riley*, 134 S. Ct. at 2482.

The two sides of the conflict yield very different views of police authority to conduct warrantless searches. In the jurisdictions that allow searches before arrests, the police may search anyone whom they have probable cause to arrest. In the jurisdictions that allow searches only during and after arrests, the police may search only the people they have actually arrested. There is a huge practical difference between these two rules, because the police actually arrest only a small fraction of the people whom they have probable cause to arrest. There are two principal reasons why this is so.

First, every day the police witness countless minor offenses being committed—far too many to arrest in every case, or even in most cases. As Justice Jackson put it, "[w]e know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning." Robert H. Jackson, *The Federal Prosecutor*, 31 Am. Inst. Crim. L. & Criminology 3, 5 (1940). In many circumstances it would be an unwise allocation of police resources to arrest everyone who could conceivably be arrested. To make an arrest takes time and effort that is often better spent on other tasks.

Second, every day the police encounter many people who have outstanding arrest warrants, typically

for minor matters such as traffic offenses and the inability to pay small fines. The police arrest only a small fraction of such people. To pick just one example, in New York City the police made 277,461 arrests in 2015. N.Y. State Division of Criminal Justice Services, *Adult Arrests: 2007-2016*, www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf. That year, the police in New York City had probable cause to make at least 1.2 million arrests, because that was the number of outstanding arrest warrants in the city's database. *Utah v. Strieff*, 136 S. Ct. 2056, 2073 (2016) (Kagan, J., dissenting). Just in New York City, in a single year, for this reason alone, there were nearly a million people the police had probable cause to arrest but did not arrest.

Some of the courts that have allowed searches based merely on probable cause to arrest appear to have believed, erroneously, that when the police have probable cause to arrest, an arrest will inevitably follow. *See, e.g.*, *Smith*, 389 F.3d at 951 ("A search incident to arrest need not be delayed until the arrest is effected."). If one has this belief, one can easily conclude that it make no practical difference whether the search or the arrest comes first, because the defendant would have been arrested anyway.

But this belief is incorrect. The police do not arrest everyone they have probable cause to arrest. Indeed, it is very likely that of the people whom the police have probable cause to arrest, most are never arrested.

In jurisdictions that allow searches incident to probable cause, rather than requiring an actual arrest as a prerequisite for the search, anyone who

commits a minor traffic violation may be searched without a warrant, and the police can await the results of the search before deciding whether to make the arrest. By contrast, in the jurisdictions that require searches incident to arrest to take place during or after arrests, the police would not even stop most such motorists, because a pre-arrest search would be unlawful and it would be impractical to arrest so many people.

The split over how to interpret *Rawlings* thus has serious practical consequences.

III. The decision below is incorrect: A search incident to arrest must take place during or after the arrest, not before.

The decision below is incorrect. The reasons that officers are allowed to search arrestees without a warrant simply do not apply when there has not yet been an arrest. This is why the Court has always required searches incident to arrest to take place during or after the arrest, not before.

For centuries, there have been three justifications for searches incident to arrest. First, "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." *Chimel*, 395 U.S. at 763. Second, "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." *Id.* Third, an arrestee has "reduced privacy interests upon being taken into police custody." *Riley*, 134 S. Ct. at 2488. *See also Robinson*, 414 U.S.

at 234 ("The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial."); *Gant*, 556 U.S. at 338 ("The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.").

These rationales are not present (or at least are present to a far lesser degree) when a person has not yet been arrested. First, a person who is not being arrested is very unlikely to use a weapon to attack a police officer—certainly far less likely than a person who *is* being arrested. People who are not being arrested have every right to possess weapons, assuming they are complying with relevant laws. The police have no authority to disarm such people, without first making an arrest.

Second, a person who is not being arrested is very unlikely to destroy her own property to prevent its use at trial—again, far less likely than someone who *is* being arrested. "Where there is no formal arrest," the Court has explained, "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." *Cupp*, 412 U.S. at 296. A person not being arrested has little expectation of being tried, so she lacks any substantial incentive to destroy her own property.

Third, a person who is not being arrested has not lost any interest in or expectation of privacy. An arrestee should expect to be searched. A person who is not being arrested is an ordinary citizen, who enjoys

the full measure of privacy that any other citizen enjoys.

Colorado, like the other jurisdictions on Colorado's side of the conflict, has lost sight of the purposes served by allowing warrantless searches incident to arrest. These jurisdictions have untethered the doctrine from the reasons the doctrine exists. Warrantless searches are lawful during or after an arrest. Before an arrest, they are not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COLORADO COURT OF APPEALS

Court of Appeals No. 14CA0961
El Paso County District Court No. 13CR4796
Honorable David S. Prince, Judge

The People of the State of Colorado,
Plaintiff-Appellee,

v.

Jacqueline Heaven,
Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE FOX
Bernard and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced October 13, 2016

Date Filed: October 28, 2016

Cynthia Coffman, Attorney General, Megan C. Rasband, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, John Plimpton, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Jacqueline Heaven, appeals the judgment of conviction entered on jury verdicts finding her guilty of possession of a controlled substance and possession of drug paraphernalia. She contends that the trial court erred in denying her pretrial mo-

tion to suppress evidence found during a warrantless search of her purse. We disagree and affirm.

I. Background

¶ 2 Police Officer Schenk responded to a report of shoplifting at a large retailer. After speaking with the retailer's loss prevention officer, who had observed Heaven concealing items in her purse and in a bag, Officer Schenk detained Heaven and searched her purse, discovering drug paraphernalia, including a syringe loaded with methamphetamine. Heaven was charged with attempted theft, possession of a controlled substance, and possession of drug paraphernalia.

¶ 3 Before trial, Heaven moved to suppress the evidence discovered in her purse, arguing that it was the fruit of an unlawful search. At the hearing on her motion, Officer Schenk testified that, when he arrived at the scene, he contacted the retailer's loss prevention officer, who had detained Heaven just inside the main door of the store. The loss prevention officer told Officer Schenk that he had observed Heaven conceal several items in her purse and in a separate bag in her shopping cart.

¶ 4 Officer Schenk testified that he might have told Heaven that she was under arrest for shoplifting, but could not recall with certainty. He further testified that he "detained [Heaven] for shoplifting" and took her to a nearby office, where he "immediately" sat her down and searched her purse and person. The search of Heaven's purse did not reveal any shoplifted items, but revealed drugs and drug paraphernalia. Officer Schenk then placed Heaven under arrest.

¶ 5 Officer Schenk also testified that, after he brought Heaven to the office, the loss prevention officer immediately returned to Heaven's shopping cart. When the loss prevention officer came back to the office, he informed Officer Schenk that he had recovered the items he observed Heaven shoplifting. The loss prevention officer also informed Officer Schenk that "he observed [Heaven] concealing items, and then abandoning them." When asked if he was concerned about whether Heaven had a weapon in her purse, Officer Schenk testified that he is "always concerned about that," but did not indicate that he suspected Heaven had a weapon.

¶ 6 The prosecutor argued that the search of Heaven's purse was a search incident to arrest, and therefore exempt from the warrant requirement. Defense counsel urged the court to find that Heaven was not under arrest at the time of the search because Officer Schenk "didn't tell her she was under arrest, you're not free to leave, we're charging you with shoplifting."

¶ 7 After making factual findings, the court denied Heaven's suppression motion on the ground that the search was performed incident to a lawful arrest.

II. Discussion

¶ 8 Heaven contends that the trial court applied an erroneous legal standard in determining that she was under arrest when the search occurred. In particular, she argues that the court applied the "not free to leave" standard applicable to an investigatory detention. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *People v. Brown*, 217 P.3d 1252, 1256 (Colo. 2009). And, she contends, because she

was not under arrest at the time her purse was searched, the trial court erred in denying her suppression motion on grounds that the evidence was lawfully seized in a search incident to arrest. We are not persuaded.

A. Standard of Review

¶ 9 In reviewing the trial court's ruling on Heaven's suppression motion, we defer to the court's findings of fact and will not disturb them unless they are unsupported by the record. *People v. Brunsting*, 2013 CO 55, ¶ 15. We review de novo, however, the trial court's legal conclusion that Officer Schenk did not violate Heaven's constitutional rights. *See id.* Likewise, we review de novo whether the trial court applied the correct legal standard in making its conclusion. *People v. Revoal*, 2012 CO 8, ¶ 9.

B. The Trial Court's Articulation of the Legal Standard

¶ 10 We begin by addressing Heaven's assertion that the trial court applied an erroneous legal standard, namely the "free to leave" standard applicable to investigatory detentions.

¶ 11 Although an arrest is a seizure, not all seizures are arrests. *People v. Tottenhoff*, 691 P.2d 340, 343 (Colo. 1984); *see also Terry v. Ohio*, 392 U.S. 1, 16 (1980). The determination of whether a person has been seized is based on the totality of the circumstances and depends on whether a reasonable person in the defendant's position would believe she was not free to leave the scene or otherwise terminate her encounter with law enforcement. *See, e.g.*, *People v. Begay*, 2014 CO 41, ¶ 14. Our supreme court has stated that "this same 'reasonable person' standard"

also controls "whether a particular form of intrusion constitutes an arrest." *Tottenhoff*, 691 P.2d at 344. That is, "if under the totality of circumstances a reasonable person in the situation of the defendant would have believed that [s]he was being arrested, rather than merely temporarily detained for a brief investigation, an arrest has occurred which must be supported by probable cause." *Id.*; *see People v. King*, 16 P.3d 807, 814 (Colo. 2001) ("Whether an encounter should be characterized as an investigatory stop or an arrest is an objective inquiry based on the totality of the circumstances.").

¶ 12 Here, the trial court found that Heaven was detained by store security, pending the arrival of the police. After Officer Schenk arrived, he took Heaven and her purse to a small office, separated from the rest of the store. The trial court found that Officer Schenk was alone with Heaven in the office, but did not handcuff Heaven or initially tell her that she was under arrest. However, the court found, Officer Schenk also did not inform Heaven that she was "free to leave, which [police officers] fairly routinely do when they are not going to arrest somebody." Thus, the court concluded, "under the objective standard [Heaven] was under arrest. She was not free to leave, and any person in that circumstance would reasonabl[y] believe [she was] not free to leave." The court went on to say, "[i]t would be a different case if the officer had said she was free to leave, which is often the factual circumstance in an evaluation, but that's not what happened here."

¶ 13 We agree that the trial court did not clearly articulate the legal standard for arrest set forth in *Tottenhoff*. However, whether a suspect is "clearly not

free to depart and pursue [her] own affairs" is a factor in determining whether the suspect would objectively believe that she was under arrest. *See Tottenhoff*, 691 P.2d at 344; *cf. People v. Stephenson*, 159 P.3d 617, 620 (Colo. 2007) ("The touchstone of custody is significant curtailment of the defendant's freedom of action that is equivalent to a formal arrest."). Thus, we cannot conclude that the court's articulation of the "free to leave" standard was in error, in particular where, as here, (1) the parties introduced the "free to leave" language in their argument to the court and (2) the court twice correctly indicated that whether a person is told they are free to leave is a factual consideration in determining whether that person is under arrest.

C. Search Incident to Arrest

¶ 14 We likewise reject Heaven's assertion that, because she was not placed under arrest until after Officer Schenk searched her purse, the search could not be justified by the search incident to arrest exception to the warrant requirement.

¶ 15 A warrantless search is presumptively unreasonable under the Fourth Amendment to the United States Constitution and article II, section 7, of the Colorado Constitution. *People v. Blackmon*, 20 P.3d 1215, 1218 (Colo. App. 2000). A search incident to a lawful arrest, however, constitutes an exception to the warrant requirement. *Id.* this exception allows law enforcement officers, in making a lawful arrest, to search an arrestee's person and the area within the arrestee's immediate control. *People v. Gothard*, 185 P.3d 180, 184 (Colo. 2008); *see Chimel v. California*, 395 U.S. 752, 762-64 (1969). That is, during a search incident to a lawful arrest, an officer may ex-

tend his search to articles on or near a suspect. *People v. Marshall*, 2012 CO 72, ¶ 16.

¶ 16 A search incident to a lawful arrest must be substantially "contemporaneous with or immediately following the arrest." *Gothard*, 185 P.3d at 184. Contrary to Heaven's argument, a search does not become unreasonable merely because it is conducted before a suspect is actually placed under formal arrest. *See People v. Rios*, 43 P.3d 726, 730 (Colo. App. 2001) (noting that where a police officer had reasonable grounds before the search to make an arrest, the search does not become unreasonable simply because the defendant was not yet under arrest at the time it was conducted); *see also People v. Novitskiy*, 2012 COA 213, ¶ 4 n.2; 2 Joseph G. Cook, *Constitutional Rights of the Accused* § 4:50 (3d ed. 1996) ("Numerous decisions by lower courts indicate that a search preceding an arrest is permissible if the two are substantially contemporaneous and if it is clear that the officer had probable cause to arrest prior to the search."). Thus, if an officer is "entitled to make an arrest on the basis of information then available to the officer, there is nothing unreasonable in the officer's conducting a search before, rather than after, the actual arrest." *People v. Barrientos*, 956 P.2d 634, 636 (Colo. App. 1997).

¶ 17 Whether an officer is entitled to make a warrantless arrest depends on an analysis of probable cause. *People v. Trusty*, 53 P.3d 668, 673 (Colo. App. 2001). And if an arrest is not supported by probable cause, then evidence obtained incident to that arrest must be suppressed. *King*, 16 P.3d at 813. Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to

support a reasonable belief that a crime has been or is being committed by the person arrested. *Id.*; *see also People v. Vaughn*, 2014 CO 71, ¶ 15. In determining whether there was probable cause to arrest, a court considers the totality of the circumstances known to the officer at the time of the arrest. *Trusty*, 53 P.3d at 673. Sufficient probable cause exists if the officer reasonably believed that the person arrested committed a crime. *Id.* When an identified citizen eyewitness provides police with information regarding a crime, "that information is presumed sufficiently reliable to establish probable cause for an arrest." *People v. Valencia*, 257 P.3d 1203, 1208 (Colo. App. 2011).

¶ 18 Here, based solely on the loss prevention officer's report that he observed Heaven concealing items in her purse and in another bag, Officer Schenk had probable cause to arrest Heaven and search her, incident to the lawful arrest, for the stolen items. *See Novitskiy*, ¶¶ 12, 19 (although information received from a citizen informant requires an analysis of the informant's basis of knowledge, such knowledge is typically not lacking when the informant is an eyewitness to the purported crime). That Officer Schenk's search preceded his formal arrest of Heaven is not determinative of the lawfulness of the search, where the two were substantially contemporaneous and probable cause to arrest was clear. *See id.* at ¶ 4, n.2; *Barrientos*, 856 P.2d at 636.

¶ 19 We are not persuaded otherwise by Heaven's assertion that "Officer Schenk did not have probable cause to search the purse because he had been told by the loss prevention officer that Heaven had abandoned the items she initially concealed in her purse."

The timing of when the loss prevention officer told Officer Schenk that he saw Heaven abandoning the items is not entirely clear from the record. But the record permits an inference that Officer Schenk did not know that Heaven had abandoned the items until after he searched her purse. In any event, even if Officer Schenk was informed that Heaven had abandoned the items before he searched her purse, he had probable cause to arrest her based on the loss prevention officer's observation that she had initially concealed them in her purse and bag. *See, e.g.*, *People v. Rosario*, 585 N.E.2d 766, 768 (N.Y. 1991) (holding that the "fellow officer" rule, under which police officers are entitled to rely on a communication from another officer and to act upon it when making an arrest, applies when the communication comes from a noncommissioned auxiliary officer). Therefore, he was permitted to search her purse as a search incident to arrest. *See People v. Bischofberger*, 724 P.2d 660, 665 (Colo. 1986) ("[A] search of the arrestee's person requires no independent justification, and the searching officer may seize and examine weapons, contraband, or other articles which the officer reasonably believes to be related to criminal activity even though these articles do not directly relate to the offense for which the arrest itself was effected."); *Rios*, 43 P.3d at 730 ("[A search incident to arrest] need not be limited to a mere pat-down of the arrestee's outer clothing, but may extend to pockets and other containers, open or closed, found on the person of the arrestee or within his or her immediate reach.").

¶ 20 We are not persuaded by Heaven's reliance on *People v. Lewis*, 975 P.2d 160, 170 (Colo. 1999). In

Lewis, the supreme court stated that "the right to conduct a search incident to arrest only applies following a *lawful* arrest." *Id.* (emphasis added). The use of the word "lawful" was critical to the analysis because the supreme court concluded that Lewis's arrest had been *unlawful*. So, because the arrest had been unlawful, the search incident to Lewis's arrest was likewise unlawful. Although defendant urges us to read more into *Lewis*—that, to be legal, a search incident to arrest can only occur after an arrest—we think that *Lewis* was clearly focused on how the illegality of the *arrest* affected the legality of the search, and not on whether the *order* of the arrest and the search had any effect on the legality of the search.

¶ 21 Turning to this case, it is clear that the arrest was lawful: the record clearly shows that Officer Schenk had probable cause to arrest defendant. *Lewis* therefore does not dictate a different result than the one we reach based on decisions such as *Novitskiy*, *Gothard*, *Rios*, and *Barrientos*.

¶ 22 Having concluded that the search of Heaven's purse was incident to a lawful arrest, we need not address Heaven's contention that a warrant was required before Officer Schenk could search a closed container in her possession. The proposition upon which Heaven relies applies to investigatory seizures, not arrests, and is not implicated when one of the well-delineated exceptions to the warrant requirement applies. *See United States v. Place*, 462 U.S. 696, 701 (1983); *see also Horton v. California*, 496 U.S. 128, 142 n.11 (1990) ("Even if the item is a container, its seizure does not compromise the interest in preserving the privacy of its contents because it may only be opened pursuant to either a search

warrant … or one of the well-delineated exceptions to the warrant requirement.").

III. Conclusion

¶ 23 The judgment is affirmed.

JUDGE BERNARD and JUDGE RICHMAN concur.

APPENDIX B

DISTRICT COURT
El Paso County, Colorado
Plaintiff: THE PEOPLE OF THE STATE OF COLORADO
v.
Defendant: JACQUELINE HEAVEN
Division 2
Case No. 13CR4796

Reporter's Transcript
February 24, 2014

The above-entitled matter came on for proceedings on February 24, 2014, before the HONORABLE DAVID S. PRINCE, Judge of the District Court

….

THE COURT: Well, the basic facts do not appear to be in dispute. So I don't know that I need to make detailed factual findings.

The store security makes an allegation that the defendant was shoplifting. She is detained by store security. The police are called. The police arrive. The officer goes with the defendant and her purse. He takes her over to an office there in the same store. It appears to be a small room separated from the rest of the store, although I didn't get much detail on that. The impression I got is the officer is alone, although there is another officer somewhere in here. He didn't explain where the other officer was, so my impression is he was alone.

The officer never tells the defendant she is under arrest, based on the evidence that's presented. He says he doesn't remember if he told her. That's a lit-

tle vague, but I agree with the prosecution that the best interpretation is that she is not handcuffed at this point. The officer did also not tell her, you are free to leave, which they fairly routinely do when they are not going to arrest somebody. And he transports her from one place to another. She's been detained, but not arrested by the store security. She's been detained, she's not free to leave until the officer gets there. The officer then takes her to a more isolated area. And so the Court concludes that under the objective standard she was under arrest. She was not free to leave, and any person in that circumstance would reasonable believe they were not free to leave.

It would be a different case if the officer had said she was free to leave, which is often the factual circumstance in an evaluation, but that's not what happened here.

So, first the Court finds that she was under arrest.

Second, did the officer have probable cause to place her under arrest? In other words, was it a legitimate arrest? The Court finds that the evidence presented to the officer from the store security was sufficient to be probable cause for an arrest on a shoplifting charge.

The third question whether he exceeded the scope of a search incident to a lawful arrest. Mr. Ojanen properly, accurately cites the legal standards that apply, even though the case is a little bit old at this point, it's still the same standard. They have expanded on it a little bit, particularly in the context of a vehicle, and the officer may search the individual's person, and then things within grasp, and the idea

behind authorizing the search is for the officer's safety, or whoever is there, for contraband of some kind. If the officer is alone, the defendant is not handcuffed, and the purse therefore is available within easy reach, and therefore it is appropriate for the officer to search, at least for weapons at that point.

So the Court denies the motion to suppress.

APPENDIX C

Colorado Supreme Court

Certiorari to the Court of Appeals, 2014CA961
District Court, El Paso County, 2013CR4796

Petitioner: Jaqueline Heaven,

v.

Respondent: The People of the State of Colorado

Supreme Court Case No: 2016SC844

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that the said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 6, 2017.