No. 14-5273

In the Supreme Court of the United States

GREGORY N. CARTER,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
STEVEN T. OETTING
Deputy Solicitor General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
RENÉ A. CHACÓN
Supervising Deputy Attorney General
Counsel of Record
BRUCE ORTEGA
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1335
e-mail: bruce.ortega@doj.ca.gov
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the California Court of Appeal permissibly rejected petitioner's claim that he was detained in violation of the Fourth Amendment based on the state law ground that petitioner forfeited that claim by conceding in preliminary proceedings that he had been lawfully detained.

2. Whether the California Court of Appeal's application of state forfeiture doctrine violated the Fourth or Fourteenth Amendment under *Hicks* v. *Oklahoma,* 447 U.S. 343, 346 (1980).

3. Whether the California Court of Appeal correctly held that a pat-down search of petitioner, which led to the discovery of a firearm, was permissible because the totality of the circumstances supported officer safety concerns.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATEMENT

1. Shortly after one o'clock in the morning on January 2, 2012, Daly City Police Officer Korey Sprader was driving a marked patrol car through a high-crime area, where several violent crimes had taken place. Clerk's Transcript (C.T.) 33. Sprader personally had investigated robberies in the area and a homicide had occurred there in 2011. C.T. 16, 33.

Officer Sprader had a green light to turn left from John Daly Boulevard onto Mission Street. C.T. 17-18, 19. Sprader partially completed his turn and saw petitioner crossing Mission Street in a "dangerous fashion." C.T. 15, 19-21. Petitioner was jaywalking. C.T. 27. Sprader elaborated: "[T]he way he was crossing, if I hadn't been paying attention, I could have hit him." C.T. 20. Sprader stopped, exited his vehicle, and contacted petitioner. C.T. 20.

Officer Sprader asked petitioner for identification. C.T. 21, 27-28. Petitioner said he did not have any identification with him. C.T. 21, 28. Sprader asked his name, and petitioner answered, "Gregory Carter." C.T. 21. Sprader spoke with petitioner further and asked if he could search him. Petitioner said no. C.T. 21. The men continued talking a little bit, and Sprader requested a cover officer from dispatch. Officer Kim arrived within five minutes. C.T. 21-22.

Upon Officer Kim's arrival, Officer Sprader simultaneously pat searched petitioner for weapons and identification. C.T. 22, 29-30. Petitioner wore

bulky clothing—a sweatshirt with a leather jacket over it, and two pairs of pants. C.T. 23, 24-25, 30.

Officer Sprader had petitioner place his hands behind his back. C.T. 23. Sprader patted down petitioner's outer clothing from petitioner's shoulders. Within minutes of beginning the patdown, Sprader reached into one of petitioner's jacket pockets and removed a San Francisco Police Department "booking sheet." C.T. 23, 29, 31-32. The paper had petitioner's photo, name, and birthdate on it. C.T. 23-24, 29.

Officer Sprader testified: "I continued with my pat search, but I did not go inside his pockets or search—I no longer searched for ID. I just continued with my pat-down." C.T. 24. Petitioner moved his hands from behind his back several times and placed them at his side. Sprader had to remind petitioner to move his hands behind his back. C.T. 24.

Officer Sprader felt what he believed was a gun handle in petitioner's front waist. Sprader lifted up petitioner's sweatshirt and saw a pistol in petitioner's waistband. C.T. 24-25. The gun held five bullets. C.T. 25, 27.

The record does not reflect when Officer Sprader formally arrested petitioner. The arrest was not for jaywalking. C.T. 50.

2. Petitioner was charged by felony complaint with possession of a firearm by a felon, felony concealment of a firearm, and carrying a loaded firearm in public. C.T. 1-3.

Petitioner moved at the preliminary hearing to suppress evidence obtained during the search. C.T. 4, 11. During the hearing, petitioner's counsel twice conceded that petitioner had jaywalked and that his initial detention was therefore lawful. C.T. 35, 37; see C.T. 44 (magistrate stating there was no need to address validity of initial detention because it had been conceded). At the conclusion of the hearing, the magistrate denied the suppression motion and held petitioner to answer the charges against him. C.T. 58-61.

On April 9, 2012, an information was filed charging petitioner with felony possession of a firearm by a felon, felony concealment of a firearm, and felony carrying a loaded firearm in public. C.T. 5-7. The information alleged numerous probation-disqualifying prior felony convictions, two prior prison term enhancements, and one prior felony strike. C.T. 7-10. Petitioner pleaded not guilty and denied the priors. C.T. 64.

Petitioner renewed his suppression motion in the superior court. C.T. 67-78, 94. At the hearing, petitioner again did not argue that his initial detention was improper, and did not challenge assertions by the prosecutor and the court that the detention was valid. C.T. 67, 78 (defense failed to ague an unconstitutional detention); Volume 2 Reporter's Transcript (2 R.T.) 16 (defense counsel remained silent when the prosecutor represented the defense stipulated to the constitutionality of the detention), 18 (defense counsel remained silent when superior court stated there was "no question"

that the detention was "appropriate"). After the hearing, the court denied the motion. C.T. 95; 2 R.T. 26.

Petitioner and the prosecution entered into a negotiated disposition on July 2, 2012. Petitioner pleaded no contest to the count 1 charge of felony possession of a firearm by a felon, and he admitted his ineligibility for probation, his two prior prison terms, and his prior strike. In exchange for his plea, the court dismissed counts 2 and 3 on the prosecution's motion and struck the prior prison terms. Petitioner was promised that the court would not impose a prison sentence longer than thirty-two months and would consider dismissing the prior strike. C.T. 90-92, 96-97; 3 R.T. 30-38.

On September 27, 2012, the court dismissed the prior strike, suspended the imposition of sentence, and granted petitioner three years' probation with conditions that included a nine-month jail term modifiable to a residential drug program. C.T. 121-24; 5 R.T. 53-57.

3. Petitioner appealed, contending that the lower court erred in denying his motion to suppress the loaded firearm Officer Sprader seized from his pocket.

The California Court of Appeal affirmed the judgment against petitioner in an unpublished opinion. Pet. App. 37-42. In stating the standard of review, the court referred to the State's rule that, on appeal following a renewed motion to suppress evidence submitted in the superior court on the preliminary examination transcript (Cal. Penal Code § 1538.5(f),

(i)), the court of appeal disregards the findings of the superior court and reviews directly the determination of the magistrate at the preliminary hearing. *People* v. *Nonnette*, 221 Cal. App. 3d 659, 664 (1990).

The court of appeal rejected petitioner's challenges to his detention and his pat-down search. First, the court of appeal rejected petitioner's attack on the detention for jaywalking, holding that petitioner had forfeited that claim at the preliminary examination where he "conceded both the jaywalking violation and the validity of his initial detention." Pet. App. 40. Second, the court held that despite the existence of a "close issue," Sprader had sufficient cause under the totality of the circumstances to pat search petitioner for weapons and, thus, the officer's seizure of the firearm was constitutional. Pet. App. 41-42. The court held further that Officer Sprader's search of petitioner's pocket for identification could not be justified by concerns for officer safety; however, "the improper search for identification does not invalidate the evidence revealed by his simultaneous frisk for weapon." Pet. App. 41-42. The court observed: "Officer Sprader began frisking defendant for weapons before he located the booking slip, and, as defendant acknowledges, there is no evidence that finding the booking slip influenced his continuation of the weapons search." The court also stated that the record did not indicate petitioner's detention was unduly prolonged by Sprader's improper search for identification. *Id.* The California Supreme Court denied review. Pet. App. 45.

ARGUMENT

Petitioner challenges only the application in his case of settled principles of state and federal law. His contentions do not warrant review by this Court.

Petitioner's challenge to his initial detention is procedurally barred. At the preliminary hearing, petitioner's counsel twice conceded that the initial detention was legal because petitioner had jaywalked. The California Court of Appeal accepted this judicial admission and concluded that petitioner was therefore barred from challenging the legality of the detention. That application of an accepted legal doctrine of forfeiture under state law does not violate any principle of due process.

The court of appeal also reasonably concluded that the detaining officer had a constitutionally sufficient basis for conducting a pat-down search to ensure officer safety. Among other things, the detention occurred late at night in an area known for violent crime, including a fairly recent murder; the area was heavily trafficked by pedestrians, which heightened the danger to the officer from others who might be in the area; petitioner was wearing bulky clothing; and petitioner claimed to be unable to produce identification. Nothing in the state court's unpublished decision addressing this fact-bound issue merits further review by this Court.

I. THE COURT OF APPEAL'S REJECTION OF PETITIONER'S CHALLENGE TO THE CONSTITUTIONALITY OF HIS INITIAL DETENTION RESTS ON AN INDEPENDENT STATE PROCEDURAL GROUND

Petitioner argues that Officer Sprader "wrongly believed" that petitioner jaywalked, and in turn, that the prosecution did not sustain its burden of proving that Officer Sprader had sufficient cause to detain petitioner in the first instance. Pet. 9-11. That argument turns on a question of state jaywalking law that the California Court of Appeal did not reach, and would not warrant this Court's review even if it were properly presented. In fact, however, the claim is not properly before this Court, because the state court refused to consider it on the permissible state-law ground that in pretrial proceedings petitioner conceded both the jaywalking violation and the legality of the initial detention. See Pet. App. 40.

This Court does not review the judgment of a state court which rests upon a state law ground that is both independent of federal law and adequate to support the judgment. See, e.g., *Fox Film Corp*. v. *Muller*, 296 U.S. 207, 210 (1935); *Murdock* v. *City of Memphis*, 87 U.S. 590, 635 (1874); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 207 (9th ed. 2007). This doctrine applies to both substantive and procedural state law grounds. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991).

The state courts were entitled to treat as binding petitioner's express concession, in the proceedings before a magistrate in which petitioner made

his first motion to suppress, that his initial detention was lawful. Indeed, this Court has likewise routinely barred parties from relitigating claims they judicially conceded in prior proceedings. See, e.g., *Loughrin* v. *United States,* 134 S.Ct. 2384, 2389 n.3 (2014) (noting petitioner waived argument by conceding it in the district court); *Christian Legal Society Chapter of the University of California, Hastings College of the Law* v. *Martinez,* 561 U.S. 661, 677-78 (2010) ("factual stipulations are 'formal concessions ... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case.'"); *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 263 (1881) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.").

Thus, although petitioner challenges whether sufficient evidence demonstrated that he committed a state jaywalking violation (Pet. 9-11), that question is not properly before the Court. The California Court of Appeal properly applied state law in accepting petitioner's concession, and his claim is procedurally barred.[1]

---

[1] Because the legality of the initial detention here was conceded as a matter of state law, there is likewise no question concerning whether Officer Sprader acted on the basis of a mistake of law. See Pet. 11. There is accordingly no reason to hold this case pending resolution of the question presented in *Heien* v. *North Carolina*, No. 13-604 (argued Oct. 6, 2014).

II. PETITIONER'S CHALLENGE TO THE COURT OF APPEAL'S FORFEITURE FINDING PRESENTS NO SUBSTANTIAL QUESTION FOR REVIEW

Petitioner raises two challenges to the state court's imposition of a procedural forfeiture bar. First, he asserts that the court of appeal's reliance on *People* v. *Williams*, 20 Cal. 4th 119, 136 (1999), to hold that he forfeited his appellate challenge to the constitutionality of his detention for jaywalking "was contrary to prior judicial decisions applying waiver doctrine under California Penal Code section 1538.5," the state statute governing motions to suppress. Pet. 18-25. Second, he argues that the state appellate court violated his due process and equal protection rights to avail himself of appellate opportunities made available by state law, by making an "inapt use of the waiver doctrine to interpret" California Penal Code sections 1538.5 and 1237.5 (which allow a defendant to plead guilty but then appeal the denial of a motion to suppress). Pet. 25-28. Neither of these contentions merits review.

Petitioner's first assertion is based solely on a question of state law, which is not an appropriate basis for certiorari. In any event, the court of appeal did not misapply California law. California has a legitimate interest in not allowing piecemeal litigation and requiring the accused to raise all suppression issues in a single hearing before the factfinder. In petitioner's case, the factfinder was the magistrate at the preliminary examination, not the superior court judge conducting a review of the transcript of the

magistrate's ruling. Cal. Penal Code § 1538.5(i). In any event, petitioner argues that the state court of appeal misapplied state law to hold his appellate attack on the constitutionality of the detention forfeited. That is, petitioner is seeking a decision from this Court to vindicate petitioner's understanding of the state's case law construing its suppression statute. Whatever the merits of that argument, it does not present a question that is appropriate for resolution by this Court.

Petitioner's complaint that the court of appeal's application of a state forfeiture doctrine "interfered" with his appeal and violated his rights to due process and equal protection (Pet. 25-28) is not well-founded. Unlike in *Hicks* v. *Oklahoma,* 447 U.S. 343, 346 (1980), where Oklahoma conceded that under state law only the jury could impose sentence and therefore the defendant had a state-created liberty interest, in this case a California court has permissibly construed and applied state law in determining whether an argument was properly preserved for appellate review. See Pet. App. 40. This Court has "no basis for disputing this interpretation of state law," and there is no violation of any state-created liberty interest. See *Clemons* v. *Mississippi,* 494 U.S. 738, 747 (1990); *Cabana* v. *Bullock*, 474 U.S. 376, 387 & n.4 (1986).

III. THE COURT OF APPEAL'S DETERMINATION THAT THE POLICE HAD AN OBJECTIVELY REASONABLE SUSPICION THAT PETITIONER WAS ARMED AND DANGEROUS PRESENTS NO SUBSTANTIAL QUESTION FOR REVIEW

Finally, petitioner argues that Officer Sprader "lacked reasonable suspicion" that petitioner "was armed and dangerous after stopping him for jaywalking," and that the officer's decision to conduct a pat-down search "was unreasonable under the Fourth Amendment." Pet. 13-18. The California Court of Appeal correctly applied the relevant constitutional principles to the facts of petitioner's case, and its decision does not warrant further review. [2]

The state appellate court concluded that, while this was "a close case," Officer Sprader "had sufficient cause to frisk defendant for weapons." Pet. App. 40, citing, inter alia, *Terry* v. *Ohio*, 392 U.S. 18, 27 (1968). As the court of appeal reasoned, Officer Sprader was justified in believing a frisk was warranted in part out of concern for officer safety because: (i) the detention occurred in an area known for violent crime, including a fairly recent murder; (ii) the area was heavily trafficked by pedestrians, which heightened the

---

[2] Although not presented as a separate question, petitioner also argues that, even if Officer Sprader validly detained him for jaywalking, because the officer did not arrest him for that offense, both the "continued detention" and the pat search that revealed his firearm "violated the Fourth Amendment." Pet. 11-13. As petitioner acknowledges (Pet. 12), the California Court of Appeal declined to reach the issue; and petitioner failed to present it to the California Supreme Court in his petition for review. For both reasons, this case presents no question relating to a search incident to arrest. Similarly, although petitioner briefly contends the search was unreasonably prolonged because there was no longer a reason to take him into custody once the officer discovered evidence of petitioner's identity (Pet. 12), that claim misapprehends the basis for the state court decision. The court sustained the pat search as a frisk for weapons, not a search incident to arrest. Discovery of the booking sheet with petitioner's name on it did not reduce the justification for completing a safety frisk, or prolong the frisk in any significant manner.

danger to the officer from others who might be in the area; (iii) petitioner was wearing bulky clothing; and (iv) petitioner was unable to produce identification. The court relied upon the totality of these circumstances to support its decision. Pet. App. 40-41.

Petitioner argues (Pet. 13, 16-17, 28) that the decision below departs from the teaching of *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), that officers may not frisk a detainee "when the only suspicious fact distinguishing the suspect from others around him is his bulky jacket." Pet. 13. It does not.

In *Ybarra*, police officers obtained a warrant to search a tavern and its bartender for evidence of possession of a controlled substance. Upon entering the tavern, the officers conducted pat searches of the customers present in the tavern, including Ybarra. Inside a cigarette pack retrieved from Ybarra's pocket, an officer found six tinfoil packets containing heroin. *Ybarra* v. *Illinois*, 444 U.S. at 88-89. This Court observed that "a person's mere propinquity to others independently suspected of criminal activity" does not give rise to probable cause, and that a search or seizure of a person must be supported by probable cause particularized with respect to that person. *Id.* at 91. This Court held that the search warrant did not permit body searches of all of the tavern's patrons and that the police could not pat down the patrons for weapons, absent individualized suspicion. *Id.* at 92. This Court concluded further that the officers did not have reasonable suspicion Ybarra was armed. As this Court noted, the lighting in the tavern was sufficient for

the police to observe the customers; the police did not recognize Ybarra or believe he had any particular reason to assault them; and Ybarra's hands were empty. Consequently, the only factor that the police could point to was that Ybarra was wearing a 3/4 length lumber jacket—clothing that was common in that part of the state during the month of March. This jacket, by itself, was not sufficient to suggest that Ybarra might have been armed and dangerous. *Id.* at 92-93.

The present case does not involve the search of a lighted tavern by as many as eight police officers. *Cf. Ybarra,* 444 U.S. at 88. *Ybarra* did not involve, as here, an officer who detained a jaywalking suspect wearing a very bulky jacket and two sets of pants in the very early morning in a heavily-trafficked area "known for violent crime, including a fairly recent murder." Pet. App. 40-41. Nor did *Ybarra* involve, as here, a detainee who "was unable to produce identification." Pet. App. 40-41. That officers did not have reasonable suspicion that a bystander like Ybarra possessed weapons suggests very little about what a reasonable officer would have been concerned about under the very different circumstances of this case.

Petitioner protests the court of appeal's reliance on his "failure to produce identification as an objective circumstance on which Sprader reasonably could have relied" in deciding to pat search for weapons. Pet. 17. First, petitioner complains that Officer Sprader did not testify that he relied on petitioner's failure to produce identification as a factor supporting his

decision to frisk petitioner. Pet. 17. Second, petitioner argues that it was not reasonable for Sprader to have feared for his safety "merely because" petitioner could not produce identification. Pet. at 17.

This Court has long held that the applicable Fourth Amendment question in cases like this one is whether an officer has an objectively reasonable basis for a stop-and-frisk. The officer's subjective motivations are irrelevant. *Whren* v. *United States*, 517 U.S. 806, 813 (1996). Furthermore, that petitioner was not able to produce identification was not the only circumstance before Officer Sprader. Again, petitioner had on a bulky jacket in a high-crime area in the very early morning. Petitioner attempts to review the circumstances supporting the pat search for weapons individually, rather than in their totality, as this Court's jurisprudence requires. On this point as on the others petitioner raises, there is no reason for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
STEVEN T. OETTING
Deputy Solicitor General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

RENÉ A. CHACÓN
Supervising Deputy Attorney General
Counsel of Record
BRUCE ORTEGA
Deputy Attorney General
Counsel for Respondent

November 13, 2014

SF2014409882
41130395.doc