**No. _____**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**ANTONEZ TERRIL JOHNSON**
**Petitioner**

**v.**

**UNITED STATES OF AMERICA**
**Respondent**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

This Court has held, in several traffic stop cases, that investigatory stops based on probable cause can violate the Fourth Amendment in scope and duration under the standard set in *Terry v. Ohio*, 392 U.S. 1 (1968). This writ of certiorari asks whether the same applies to pedestrian stops based on probable cause or whether, as the Eleventh Circuit held in this case, *United States v. Johnson*, No. 17-13726, 2018 WL 4846324 (11th Cir. Oct. 4, 2018), those stops equate to an arrest, which relinquishes courts from inquiring into the reasonableness of the scope and duration of the stop.

## PARTIES TO THE PROCEEDING

Mr. Antonez Terril Johnson is the Petitioner. He was the defendant - appellant below. The United States of America is the Respondent and was the plaintiff - appellee below.

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**IN THE SUPREME COURT OF THE UNITED STATES**

**ANTONEZ TERRIL JOHNSON**
**Petitioner**

**v.**

**UNITED STATES OF AMERICA**
**Respondent**

# PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Mr. Antonez Terril Johnson, respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit entered on October 4, 2018.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, affirming Mr. Johnson's conviction and the denial of his motion to suppress, can be found at *United States v. Johnson*, No. 17-13726, 2018 WL 4846324 (11th Cir. Oct. 4, 2018). It is document 1A in the Appendix.

The district court's denial of Mr. Johnson's motion to suppress was entered orally during the suppression hearing. A copy of the Suppression Hearing Transcript is document 2A in the Appendix.

## JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on October 4, 2018. (App. 1A) Mr. Johnson invokes this Court's jurisdiction under 28

U.S.C. §1254(1), having timely filed this petition for a writ of certiorari within ninety days of the Eleventh Circuit's Judgment.

## CONSTITUTIONAL PROVISION INVOLVED

Mr. Johnson's Petition for a Writ of Certiorari involves the Fourth Amendment's right to be free from unreasonable searches and seizures:

U.S. Const. Amend. IV

> 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 OF THE CASE

### 1. Mr. Johnson was subjected to a pedestrian *Terry* stop.

On the night of November 2, 2015, a Mobile, Alabama police officer, Johnny Duval, received a call from a nursing home about a suspicious person looking through the windows of employees' cars. The caller said the suspicious person was a black male. While enroute to the nursing home, Officer Duval saw a car go around a couple walking in the street toward the nursing home. The couple was Mr. Antonez Terril Johnson and a woman.

Mr. Johnson and the woman were walking along a portion of Springdale Boulevard and the Interstate 65 service road. There are no sidewalks in this area. Officer Duval did not know if Mr. Johnson or the woman was walking in the center lane when a car went around them. During the subsequent suppression hearing, Officer Duval testified that he believed the couple, by walking in the street, had

blocked traffic, in violation of Code of Alabama Section 13A-11-7(a)(5) (disorderly conduct). He testified, however, that he stopped them out of concerned for their safety because, two weeks prior, he worked a traffic accident involving a pedestrian that was hit by a car.

Officer Duval ordered Mr. Johnson and the woman to step to the back of the police car. They did so. Officer Duval asked them where they were coming from, and they replied from a nearby, 24 hour Walmart. That Walmart was in full view of the officer since it was a few feet away from where the stop was made. Although Mr. Johnson and his companion did not have Walmart bags, Officer Duval testified that their purchases could have been in their pockets or in the backpack Mr. Johnson was carrying.

Officer Duval got Mr. Johnson and his companion's names and dates of birth. Then, he handcuffed them and called for back-up. Officer Duval testified that he handcuffed them for his safety because "It's, you know, two against one." Shortly afterward, a second police officer arrived as back-up. Although Officer Duval was no longer outnumbered, Mr. Johnson and the woman remained handcuffed and were also separated and locked inside separate police cars. At some point, Officer Duval completed a warrant check and learned that Mr. Johnson had no warrants.

While handcuffed and about to be locked inside Officer Duval's patrol car, Officer Duval sought Mr. Johnson's consent to search his backpack because, as he testified, he routinely searches everyone "before they go in the back of [his] patrol car, because [he has] had stuff get put in the back of [his] patrol car." According to Officer

Duval, he asked Mr. Johnson if he had anything illegal and Mr. Johnson replied, "no. My homeboy told me to get it (the backpack), and you can search it."

Officer Duval removed Mr. Johnson's backpack, locked him inside a patrol car, and then searched the backpack. There was a .357 revolver and two, unfired shell casings in the backpack. A check of the revolver serial number revealed that it was stolen. Thereafter, only Mr. Johnson was arrested and taken to jail. His female companion was allowed to leave.

Officer Duval testified that Mr. Johnson and his companion were compliant during the entire *Terry* stop. They were never aggressive. During the stop, Mr. Johnson asked Officer Duval why he was being stopped and occasionally interrupted questions. Officer Duval characterized this as "nervous" behavior, but testified that he never suspected Mr. Johnson and the woman of being engaged in any criminal activity other than walking in the street.

While being transported to the police station, Mr. Johnson told Officer Duval that he was recording their encounter. After Mr. Johnson reached police station headquarters, Officer Duval searched Mr. Johnson's person and found a white cellphone.

**2. During district court proceedings, Mr. Johnson's motion to suppress was denied. Subsequently, he was sentenced to 46 months of imprisonment.**

Mr. Johnson was charged in a one count federal indictment, in the U.S. District Court for the Southern District of Alabama, with being a felon in unlawful possession

of a firearm. After indictment, he filed a motion to suppress, asserting that the circumstances of his *Terry* stop violated the Fourth Amendment.

An evidentiary hearing was held, during which only Officer Duval testified. At the conclusion of testimony, the district court entered an oral order denying the motion to suppress based on two findings: (1) because Officer Duval had probable cause to arrest Mr. Johnson for disorderly conduct,[1] all of the officer's actions during the stop were lawful and (2) Mr. Johnson consented to the search of his backpack.

Mr. Johnson pleaded guilty to being a felon in unlawful possession of a firearm under the terms of a written plea agreement that preserved his right to appeal the denial of his motion to suppress. He was sentenced to 46 months' imprisonment and three years of supervised release. He timely appealed his conviction.

**3. Mr. Johnson unsuccessfully appealed the district court's denial of his motion to suppress.**

Mr. Johnson's appeal challenged his *Terry* stop on the following grounds:

- Officer Duval exceeded the scope of the *Terry* stop when he handcuffed and detained Mr. Johnson despite having no reasonable suspicion that Mr. Johnson was dangerous or committing any crimes other than the minor violation that prompted the *Terry* stop.

[1] *Lansdell v. State*, 25 So. 3d 1169, 1181 (Ala. Crim. App. 2007)("[T]o be guilty of disorderly conduct, [under Alabama Code Section 13A-11-7(a)(5)], a person must intend to cause public inconvenience, annoyance, or alarm or to recklessly create a risk of such" by "[o]bstruct[ing] vehicular or pedestrian traffic, or a transportation facility.").

- Officer Duval unreasonably prolonged the *Terry* stop and detained Mr. Johnson in handcuffs and inside a patrol car, in violation of the Fourth Amendment.
- The scope and intrusiveness of the stop exceeded what was reasonably necessary to ensure Officer Duval's safety.
- Mr. Johnson's consent to search his backpack was invalid because it was sought after he was handcuffed, detained, and about to be locked inside a patrol car.
- The search of the backpack exceeded the limits set in *Terry*.
- The search of Mr. Johnson's backpack was not lawful under the search incident to arrest exception because neither of the two historical rationales for the exception were present at the time of the search.

Following oral argument, the Eleventh Circuit issued a written opinion holding that the *Terry* stop and search was lawful because Officer Duval had probable cause to arrest Mr. Johnson and Mr. Johnson consented to the search.

> The parties present two issues on appeal. First, the parties dispute whether the search of defendant's backpack can be upheld as a search incident to arrest. Second, the parties dispute whether the search can be upheld on the alternative ground that after Officer Duval handcuffed defendant as part of a *Terry* stop, defendant consented to the search of his backpack. For reasons stated below, we need not directly address these two issues. Instead, we find that the search of defendant's backpack must be upheld because (1) when Officer Duval initially stopped defendant, he had probable cause to believe that defendant had violated Alabama's disorderly conduct statute and (2) after Officer Duval arrested defendant by handcuffing him, defendant consented to the search of his backpack.[2]

[2] *United States v. Johnson*, No. 17-13726, 2018 WL 4846324 at *2 (11th Cir. 2018).

## REASONS FOR GRANTING THE WRIT

### I. Decades of precedent establish that *Terry* stops based on probable cause can violate the Fourth Amendment in scope and duration.

*Terry* stops are investigatory, citizen-police encounters that can be based on reasonable suspicion or probable cause. Although police are afforded more leeway when stops are based on probable cause, the encounter can still violate the Fourth Amendment in scope and duration.[3] For example, investigatory stops based on probable cause "violate[ ] the Constitution's shield against unreasonable seizures" when they last longer than necessary to process the minor violation that prompted the stop.[4] These unconstitutional extensions typically occur when police investigate crimes, other than the one prompting the stop, in the absence of reasonable suspicion that the citizen is involved in other crimes.[5] Stops violate the Fourth Amendment when police search a citizen in the absence of objectively reasonable suspicion that he is armed and dangerous.[6]

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[3] *Rodriguez v. United States*, 135 S. Ct. 1609, 1621 (2015).
[4] *Id.* at 1612.
[5] *Id.* at 1616-17 ("The question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation, therefore, remains open for Eighth Circuit consideration on remand.").
[6] *Pennsylvania v. Mimms*, 434 U.S. 106, 111–12 (1977) (finding that the search of a citizen for weapons during a traffic stop, which was prompted by probable cause to arrest for an expired tag, was lawful where a bulge in the citizen's jacket permitted the officer to conclude that the citizen was armed and posed present danger to officer safety.); see also *Arizona v. Johnson*, 555 U.S. 323, 327 (2009) (holding that "[t]o justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.").

Because investigatory stops based on probable cause can run afoul of the Fourth Amendment, this Court has always evaluated them under *Terry v. Ohio*.[7] Hence, after concluding that an initial stop is valid because it was based on probable cause, this Court has always questioned whether the stop was reasonable in scope and duration. This Court has not held that when probable cause prompts an investigatory stop there is no need to consider whether the execution of the stop violated the Fourth Amendment. In fact, for over four decades, this Court has said the opposite.

In *Pennsylvania v. Mimms*, where an officer executed a traffic stop based on probable cause to arrest for driving with an expired license tag, this Court held that the officer's search of the motorist was reasonable under the Fourth Amendment because he had an objectively reasonable belief that the motorist was armed and dangerous.[8] In *Berkemer v. McCarty*, this Court stated that "[w]e of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."[9]

In *Knowles v. Iowa*, where a traffic stop was based on probable cause to arrest for speeding, this Court held that the stop violated the Fourth Amendment because the police officer conducted a full search of the car in the absence of either of the two historical rationales for search incident to arrest: officer safety and preservation of

[7] 392 U.S. 1 (1968).
[8] 434 U.S. 106, 109–110 (1977).
[9] 468 U.S. 420, 439 n. 29 (1984).

evidence.[10] In *Illinois v. Caballes*, where an officer initiated a traffic stop based on probable cause to arrest for speeding, this Court considered whether the use of a drug detection dog during the stop violated the Fourth Amendment and concluded that it did not.[11] This Court noted, however, that while "the initial seizure of respondent when he was stopped on the highway was based on probable cause and was concededly lawful," "[i]t is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."[12]

In *Arizona v. Johnson*, this unanimous Court considered a stop based on probable cause that "the vehicle's registration had been suspended for an insurance-related violation," as an investigatory stop rather than an arrest.[13] And, in *Rodriguez v. United States*, where a traffic stop was based on probable cause to arrest for driving on a highway shoulder, this Court held that an officer violated the Fourth Amendment when he prolonged the stop 7 to 8 minutes to conduct a dog sniff search.[14]

Although "[t]he *Terry* analysis, [was] developed in reaction to encounters among police and pedestrians, [it] also applies in the context of a traffic stop,"[15] and vice versa. Thus, there is no doubt that the aforementioned precedent, while made

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[10] 525 U.S. 113, 118-19 (1998) (citing *United States v. Robinson*, 414 U.S. 218 (1973)).
[11] 543 U.S. 405 (2005).
[12] *Id.* at 407.
[13] 555 U.S. 323, 327 (2009).
[14] 135 S.Ct.1609 (2015).
[15] *United States v. Hammond*, 890 F.3d 901, 905 (10th Cir. 2018)(citing *Arizona v. Johnson*, 555 U.S. 323, 330 (2009)).

in the context of vehicle *Terry* stops based on probable cause, applies equally to pedestrian *Terry* stops based on probable cause.

## II. Federal and state courts are split on whether pedestrian *Terry* stops based on probable cause equate to arrests or are investigatory stops subject to scope and duration limitations prescribed by *Terry*.

### A. The Eleventh, Seventh, and Eighth Circuits hold that pedestrian *Terry* stops based on probable cause equate to arrest.

In the instant pedestrian stop case, the Eleventh Circuit Court of Appeals held that while "the initial encounter between Officer Duval and [Mr. Johnson] . . . [was] an investigatory detention or *Terry* stop," because the officer initiated that stop based on "probable cause to arrest [Mr. Johnson for a minor offense] . . . *Terry* and the ordinary limits of investigatory detentions do not apply."[16] Thus, the court explicitly decided that it "need not directly address" any of arguments raised by the parties regarding the reasonableness of the scope and duration of Mr. Johnson's stop.[17] Because the Eleventh Circuit concluded that Mr. Johnson's stop equated to arrest, the police officer's use of handcuffs, detention of Mr. Johnson inside a patrol car, and search of Mr. Johnson's backpack was lawful.[18]

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[16] *Johnson*, 2018 WL 4846324 at *3.
[17] *Id.* at *2.
[18] Although the Eleventh Circuit's opinion strongly implies that the police officer's actions in this case were lawful under the search incident to arrest exception, the Eleventh Circuit declined to address this issue despite it being raised by the parties in the briefs and at oral argument. The Eleventh Circuit also held that the search was lawful because Mr. Johnson consented to the search, but the court declined to address Mr. Johnson's arguments that his consent was invalid.

The Seventh Circuit has held, in both pedestrian and vehicle *Terry* stops, that when the stop is based on probable cause, it equates to arrest. In *United States v. Childs,* the Seventh Circuit upheld a traffic stop initiated after police observed two traffic violations.[19] Holding that police questioning during the traffic stop was lawful despite it being unrelated to the reason for the stop, the Seventh Circuit concluded that "[p]robable cause ma[d]e[] all the difference—and as *Whren v. United States*, 517 U.S. 806 (1996), shows, traffic stops supported by probable cause are arrests, with all the implications that follow from probable cause to believe that an offense has been committed."[20] Since "police had probable cause to believe that the car's driver, and Childs himself, had committed traffic offenses, [t]hat justified arrests, which ma[d]e it unnecessary for [the Seventh Circuit] to decide whether and if so how the 'scope' limitation for *Terry* stops differs from the 'duration' limitation."[21]

This year, in *United States v. Lopez*, the Seventh Circuit reversed the denial of an appellant's motion to suppress where the appellant had been stopped and searched on the street based on a police hunch that proved to be incorrect.[22] Finding that the pedestrian stop had not been based on reasonable suspicion, the court noted that "[p]robable cause, by contrast, justifies a custodial arrest and prosecution, and arrests are fundamentally different from *Terry* stops."[23]

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[19] 277 F.3d 947, 949 (7th Cir. 2002).
[20] *Id.* at 953.
[21] *Id.*
[22] 907 F.3d 472 (7th Cir. 2018).
[23] *Id.* at 486 (citing *United States v. Childs*, 277 F.3d 947, 952 (7th Cir. 2002) (*en banc*)).

The Eighth Circuit agrees. In *United States v. Pratt*, police initiated an investigatory stop after the appellant was observed walking in the street in an area with sidewalks, in violation of both a municipal ordinance and state law.[24] The Eighth Circuit upheld the stop and search of the appellant, reasoning that "a seizure of a person predicated upon probable cause is properly regarded as an arrest, [and] is fully supported by case law in the analogous forum of traffic stops."[25] Applying this analysis, the Eighth Circuit concluded that "because the officers had probable cause to arrest [the appellant], *Terry* [was] inapplicable" and the search was lawful under the search incident to arrest exception.[26]

Relying, in part, on the Eighth Circuit's decision in *Pratt*, the Supreme Court of Louisiana, in *State v. Green*, held that an investigatory stop based on probable cause that the defendant violated municipal and state criminal codes by "walking in the middle of the right hand lane of a major thoroughfare" entitled the officer to search the defendant incident to arrest.[27] The creation of this separate legal standard for investigatory stops of pedestrians based on probable cause does not align with *Terry* and its progeny.

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[24] 355 F.3d 1119, 1120 (8th Cir. 2004).
[25] *Pratt*, 355 F.3d at 1123.
[26] *Id.* at 1124.
[27] 79 So. 3d 1013, 1014 (La. 2012)("The officer therefore lawfully stopped defendant for commission of a misdemeanor offense in his presence, and we need not decide here whether the initial stop alone could be fairly characterized as an arrest for Fourth Amendment purposes because it was based on probable cause, entitling the officer to conduct an immediate search of defendant as an incident thereto.")(citing *United States v. Pratt*, 355 F.3d 1119 (8th Cir. 2004)).

### B. The Ninth and Tenth Circuits hold that pedestrian *Terry* stops based on probable cause are subject to the scope and duration limits set by *Terry*.

In *United States v. Luckett,* the Ninth Circuit held that a pedestrian *Terry* stop violated the Fourth Amendment despite the fact that it was based on probable cause.[28] In *Luckett*, police observed the appellant commit a jaywalking offense. Once the appellant was stopped, he admitted committing the offense. The appellant gave police five forms of identification, not including a driver's license. After the police issued a traffic citation, they continued to detain the appellant to conduct a warrant check solely because the appellant had no driver's license. The Ninth Circuit held that this additional detention was unreasonable because "the Fourth Amendment required that the length and scope of the detention be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.'"[29] Thus, "this standard permit[ed] a police officer to detain an individual stopped for jaywalking only the time necessary to obtain satisfactory identification from the violator and to execute a traffic citation."[30]

The Tenth Circuit, in *United States v. Burleson*, upheld a pedestrian *Terry* stop based on probable cause only after determining that the stop was objectively reasonable in scope and duration.[31] Police had initiated the stop after observing the

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[28] 484 F.2d 89 (9th Cir. 1973).
[29] *Luckett,* at 90–91 (9th Cir. 1973) (citing *Terry v. Ohio*, 392 U.S. 1, 16, 19 (1968)).
[30] *Id*. at 91.
[31] 657 F.3d 1040 (10th Cir. 2011).

appellant and two companions walking in the middle of the street, in violation of a New Mexico statute and a Roswell, New Mexico ordinance. Although the appellant's companions were allowed to leave, he was arrested after a criminal background check proved that he had outstanding warrants. On appeal, neither party disputed that the stop was justified since it was based on probable cause that the appellant had committed a pedestrian traffic violation. The Tenth Circuit reviewed only whether the appellant was lawfully detained while an officer checked his name for warrants.

Applying *Terry*, the Tenth Circuit concluded that the scope of the stop was lawful because the police "had not completed the *Terry* stop by the time he requested the warrants check," and it was "objectively reasonable for an officer in that situation to assess the circumstances and then decide whether to issue each individual a written traffic citation or to let them go with a verbal warning."[32] The duration of the investigative detention was found reasonable because "only three to five minutes elapsed between the beginning of the stop and the point at which dispatch informed [the officer] that [the appellant] might have an outstanding warrant," which was "well within an objectively reasonable time for [the] [o]fficer [ ] to have performed the permissible investigatory tasks."[33]

Relying on Tenth Circuit precedent, the District of New Mexico reasoned, in *United States v. Reyes-Vencomo*, that "[t]he *Terry v. Ohio* framework applies whether [a] traffic stop is based on probable cause or reasonable suspicion."[34] Therefore, "[a]

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[32] *Burleson*, 657 F.3d at 1048.
[33] *Id.* at 1049.
[34] 866 F. Supp. 2d 1304, 1329 (D.N.M. 2012).

court must examine 'both the length of the detention and the manner in which it was carried out,' 'keeping in mind that an officer may extend the duration and scope of the initial detention based on 'an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring.'"[35]

Several state jurisdictions agree that when probable cause supports an investigatory stop of a pedestrian, the scope and duration of the stop must remain reasonable under the Fourth Amendment. In *State v. Nichols*, the Fifth District Court of Appeals of Florida cited *Terry* to hold that where an officer had probable cause to stop the defendant for jaywalking, the officer was permitted to conduct a pat-down search because "the officer's observation of a bulge in the defendant's waistband created an objectively reasonable suspicion that the defendant was armed with a dangerous weapon and posed a threat to the officer's safety."[36] In *State v. Barros*, the Supreme Court of Hawai'i held that a police warrant check during a pedestrian stop, initiated after the defendant was observed violating a state jaywalking statute, was reasonable because it was "completed entirely within the time required for [police] to issue the citation;" the officer did not "prolong impermissibly the stop in order to allow dispatch to complete the warrant check he requested;" and "there [was] no indication that [the] [o]fficer [ ] requested any information other than what was necessary to facilitate the warrant check."[37] In reaching this conclusion, the court reasoned that "[i]n order to pass constitutional muster, the length of time [police] could permissibly

[35] *Reyes-Vencomo*, 866 F. Supp. 2d at 1329 (internal citations omitted).
[36] 52 So. 3d 793, 796 (Fla. Dist. Ct. App. 2010).
[37] 98 Haw. 337, 342 – 43 (Haw. 2002).

detain [the defendant] must have been 'no greater in intensity than absolutely necessary under the circumstances.'"[38] And in *State v. Turner*, where police stopped and searched a defendant after observing him commit a jaywalking offense, the Nebraska Court of Appeals held that "the [subsequent] pat-down search was beyond that permissible under *Terry v. Ohio*, 392 U.S. 1 (1968) and *Minnesota v. Dickerson*, 508 U.S. 366 (1993).[39]

**C. The Sixth Circuit has adopted a unique test for reviewing investigatory stops.**

Unlike the aforementioned jurisdictions, the Sixth Circuit has adopted its own unique test for reviewing investigatory stops. "This circuit has developed two separate tests to determine the constitutional validity of vehicle stops: an officer must have probable cause to make a stop for a civil infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation."[40] Only after this threshold inquiry is made does the Sixth Circuit move on to consider whether the investigatory stop meets the standard set by *Terry*.[41]

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[38] *Barros*, 98 Haw. at 342 – 43.
[39] No. A-99-461, 1999 WL 1338330, (Neb. Ct. App. Oct. 12, 1999).
[40] *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008)(citing *Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n. 6 (6th Cir.2004); see also *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012).
[41] *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012) ("Having disposed of the alleged civil infraction, the pertinent Fourth Amendment framework for the initial stop is therefore the reasonable suspicion standard. The reasonableness of a traffic stop is measured by the same standards set forth for investigatory stops in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny. *United States v. Everett*, 601 F.3d 484, 488 (6th Cir.2010).")

The Sixth Circuit has held that when an investigatory stop for a civil traffic violation is based on probable cause, the stop remains subject to the scope and duration limits set by *Terry v. Ohio*.[42] The Sixth Circuit has also held that when an investigatory stop of a criminal offense is based on probable cause, the stop equates to an arrest that allows police to hold the stopped person indefinitely.[43]

The Sixth Circuit applies its standard to traffic and pedestrian stops. For example, in *United States v. Chambers*, police had probable cause to initiate a pedestrian stop of the appellant for a civil infraction after he was observed walking down the middle of a street in an area with sidewalks, in violation of Michigan law.[44] After the police told the appellant he was being stopped for walking in the street, they asked for consent to conduct a pat down search, and the appellant agreed. A gun was found in the appellant's pants pocket, and he was charged with being a felon in possession of a firearm.

On appeal, the appellant attacked the stop on two grounds: (1) that the police did not have probable cause to believe that he had committed a civil infraction because, although he was walking in the street, it was only because the sidewalks were not passable; and (2) his consent to the pat down was not voluntary, but merely

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[42] *Blair*, 524 F.3d at 750 ("Although we have assumed that the stop was supported by probable cause, we must address the *Terry* issue to determine the permissible scope of the stop.").
[43] *United States v. Davis*, 430 F.3d 345, 353–54 (6th Cir. 2005)("Probable cause to believe that a traffic violation has occurred is unlike probable cause to believe that a criminal violation has occurred and thus does not allow the police to detain a suspect indefinitely.").
[44] 646 F. App'x 445 (6th Cir. 2016).

acquiescence to police authority.[45] Finding no clear error in the district court's factual determinations, the Sixth Circuit upheld the legality of the stop and pat down.[46] In doing so, the court relied on its precedent that "[p]olice may effect a stop where they have probable cause to believe a person has committed a civil infraction."[47]

Presumably, an investigatory stop of a civil infraction based only on reasonable suspicion is an illegal stop regardless of its scope and duration. The Sixth Circuit has acknowledged, that "[w]hether the police may stop a vehicle based on mere reasonable suspicion of a civil traffic violation is the subject of a conflict [with]in [its own] case law."[48] Nevertheless, the Sixth Circuit's analysis of investigatory stops does not align with *Terry*, which allows police to make an investigatory stop of a traffic violation, civil violation, or criminal violation based on either reasonable suspicion or probable cause.

## III. Whether pedestrian *Terry* stops based on probable cause do or do not equate to arrest is a question of exceptional importance.

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[45] Although citations to *Terry v. Ohio* appear in the appellant's brief, he does not specifically challenge the legality of the stop under *Terry*. See *United States v. Chambers*, 2015 WL 4985559 (6th Cir. 2015)(Appellant Brief).
[46] *Chambers*, 646 F. App'x at 447, 448.
[47] *Id*. at 446 (citing *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012).
[48] *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008) (comparing *Weaver v. Shadoan*, 340 F.3d 398, 407–08 (6th Cir. 2003) (upholding stop where police had reasonable suspicion of civil infraction) with *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir.2000) (invalidating stop where police did not have probable cause to believe a traffic infraction had occurred)); see also *United States v. Westmoreland*, 224 F. App'x 470, 473 (6th Cir. 2007)("Caselaw in this circuit is in conflict as to whether an officer must possess 'probable cause' as opposed to only 'reasonable suspicion' in believing that a traffic violation has occurred before stopping the vehicle in question.").

Courts that equate a pedestrian *Terry* stop based on probable cause to an arrest create a different legal standard for investigatory stops that is not supported by this Court's precedent. This separate standard is unwarranted and unnecessarily confusing for police making quick decisions on the street and for judges deciding the constitutionality of those decisions after the fact.[49] This standard subjects pedestrians to the kinds of prolonged detentions and extended searches that this Court explicitly prohibits during investigatory stops.[50] And, it does not align with federal precedent differentiating *Terry* stops from arrest when actual police conduct during the stop resembles traditional indicia of arrest.

Courts have held that (1) police use of handcuffs; (2) police use or display of a weapon; (3) ordering a citizen to lay on the ground; (4) detention of a citizen inside a police vehicle; and (5) detaining a citizen at the scene of a stop does not transform it into a *de facto* or full blown arrest.[51] If this restrictive police conduct does not

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[49] See *Kentucky v. King*, 563 U.S. 452, 466 (2011)(striking down the use of a reasonable foreseeability test when determining whether a warrantless home search was constitutional because the test "create[d] unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges.").

[50] See *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

[51] *United States v. Rasberry*, 882 F.3d 241, 248 (1st Cir. 2018) (reasoning that "although often indicative of an arrest, "neither the use of handcuffs nor the drawing of a weapon necessarily transforms a valid *Terry* stop into a *de facto* arrest" (internal citations omitted); *Oliveira v. Mayer*, 23 F.3d 642, 651 (2d Cir. 1994)("The fact that the plaintiffs' car was blocked by a number of police vehicles, and that the police approached the stopped vehicle with guns drawn, does not change the analysis. In *United States v. Perea*, 986 F.2d 633 (2d Cir.1993), where '[g]overnment cars ... blocked [a] cab in front and back and on one side, and the agents approached the cab, some with guns drawn,' *id.* at 636, we nonetheless 'note[d] our agreement with the district court's ruling that the initial stop of the livery cab was not an arrest but rather a *Terry* stop.' . . . Moreover, 'a person is not under arrest simply

transform an investigatory stop into an arrest, it does not make sense that the existence of probable cause to initiate the stop does equate to arrest. Furthermore, this standard allows courts to bypass *Terry* and sanction intrusive, coercive police conduct during investigatory stops. Such was the situation in the instant case.

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because he is placed in a police patrol car.'"); *United States v. Johnson*, 592 F.3d 442, 448 (3d Cir. 2010)("We have recognized that 'the vast majority of courts have held that police actions in blocking a suspect's vehicle and approaching with weapons ready, and even drawn, does not constitute an arrest *per se*.' Nor does placing a suspect in handcuffs while securing a location or conducting an investigation automatically transform an otherwise-valid *Terry* stop into a full-blown arrest.")(internal citation omitted);*United States v. Manbeck*, 744 F.2d 360, 377 (4th Cir. 1984)("This court refuses to recognize a rule that all detentions in a patrol car are per se arrests. Indicia associated with arrest are often identified by their restrictive or coercive nature, and, admittedly, there are certain inherently coercive aspects to being placed in a patrol car; but the *Terry* doctrine allows police officers the use of 'a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official show of authority, the use of physical force to restrain him, and the search of the persons for weapons.'")(citing *Kolender v. Lawson*, 461 U.S. 352 (1983)); *United States v. Campbell*, 178 F.3d 345 (5th Cir. 1999)(holding that "[i]nvestigatory stop of defendant for 10 to 25 minutes, during which police officer drew his weapon, ordered defendant to lie on ground, handcuffed defendant, and frisked defendant, did not amount to arrest."); *Matz v. Klotka*, 769 F.3d 517 (7th Cir. 2014)(holding that police officers did not exceed scope of permissible *Terry* stop by drawing weapons and handcuffing driver for short period); *United States v. Miles*, 247 F.3d 1009, 1013 (9th Cir. 2001)("We have permitted the use of intrusive means to effect a stop where the police have information that the suspect is currently armed or the stop closely follows a violent crime. Under such circumstances, holding a suspect at gunpoint, requiring him to go to his knees or lie down on the ground, and/or handcuffing him will not amount to an arrest.")(internal citation omitted);*United States v. Shareef*, 100 F.3d 1491, 1506 (10th Cir. 1996)("The officers were entitled to display their weapons, to separate defendants from their vehicles, to conduct a pat down search, and to restrain the defendants with handcuffs until the officers had completed securing all the defendants.");*United States v. Blackman*, 66 F.3d 1572, 1576 (11th Cir.1995)("In addition, this Court has said the fact that police handcuff the person or draw their weapons does not, as a matter of course, transform an investigatory stop into an arrest.").

Despite acknowledging that Officer Duvall's stop of Mr. Johnson was an investigatory *Terry* stop, the Eleventh Circuit bypassed the entire *Terry* analysis of the scope and duration of the stop by equating it to arrest. Officer Duval's evidentiary hearing testimony confirmed that Mr. Johnson and his companion were not suspected of committing any crime other than the minor violation (walking in the street) that prompted the stop; they were entirely compliant during the stop; and were not suspected of being dangerous or a threat to the officer. Yet, the Eleventh Circuit sanctioned police use of handcuffs and detention of Mr. Johnson and his companion inside separate patrol cars without considering whether this was objectively reasonable under the Fourth Amendment. The Eleventh Circuit upheld the search of Mr. Johnson's backpack on the grounds that his consent to the search was valid even though the police did not seek consent until after Mr. Johnson had been separated from his companion, handcuffed, and about be locked inside a patrol car.

To resolve the confusion among the federal and state jurisdictions regarding the proper analysis of *Terry* stops based on probable cause, this Court should grant certiorari.

## CONCLUSION

For the foregoing reasons, this Court should grant Mr. Johnson's Petition for Writ of Certiorari.

**No. _____**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**ANTONEZ TERRIL JOHNSON**
**Petitioner**

**v.**

**UNITED STATES OF AMERICA**
**Respondent**

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**PROOF OF SERVICE**

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I, Patricia Kemp, appointed to represent the petitioner under the Criminal Justice Act, do swear and declare that on this date, December 18, 2018, as required by the Supreme Court Rule 29, I have served the *Motion for Leave to Proceed In Forma Pauperis*, *Petition for a Writ of Certiorari*, and *Appendix* on each party to the above proceeding or that party's counsel, and every other person required to be served, including the Solicitor General and Assistant United States Attorney for the Southern District of Alabama, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them, and with first class postage prepaid.

The name and address of those served are as follows:

Christopher Bodnar, Esq.
Assistant United States Attorney
U.S. Attorney's Office
Southern District of Alabama
63 S. Royal St., Rm. 600
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Solicitor General
U.S. Department of Justice
Room 5616
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Washington, D.C. 20530-001

I have served the Supreme Court of the United States via Federal Express, overnight at the following address:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully Submitted,

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