

No. ____

October Term, 2018

IN THE
Supreme Court of the United States

SERGIO A. ZAMBRANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Fourth Amendment prohibits unreasonable searches and seizures by the Government including warrantless searches not supported by probable cause. U.S. Const., amend. IV. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court established a very limited exception to the Fourth Amendment's warrant requirement allowing a police officer, under very limited circumstances, to pat down an individual whom the officer has reasonable suspicion to believe is armed and presently dangerous. Under *Terry*, the officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.* at 30. This petition raises a very straightforward issue related to a *Terry* stop that is likely encountered frequently by police officers and which requires guidance from this Court:

Where a police officer initiates a stop of an individual pursuant to *Terry v. Ohio* and pats down the outer clothing of the individual and feels an object that appears to be a cell phone or a wallet, may the officer reach into the pockets of the individual and pull out the object to make sure it is in fact a cell phone or a wallet and not a weapon?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Part III of the Rules of the Supreme Court of the United States2

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PETITION FOR WRIT OF CERTIORARI

Mr. Sergio Zambrano, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-12377 in that court on October 9, 2018, *United States v. Zambrano*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 9, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

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
COURSE OF PROCEEDINGS AND DISPOSITION
IN THE DISTRICT COURT

Mr. Sergio Zambrano was charged in one count of a four-count indictment with conspiracy to purchase firearms by means of materially false statements, to unlawfully export those firearms from the United States to a place outside the United States without the requisite license and to conceal that unlawful exportation all in violation of 18 U.S.C. § 371. (DE 9). Following a jury trial, Mr. Zambrano was convicted of the one-count of conspiracy. (DE 118). Over defense objection, the district court sentenced Mr. Zambrano to the statutory maximum sentence of five years' imprisonment. (DE 154).

STATEMENT OF FACTS

Mr. Sergio Antonio Zambrano is a thirty-three year-old native of California. Presentence Report (PSR) at ¶ 40. Mr. Zambrano's parents were from Colombia, and they relocated there while he was growing up. PSR ¶¶ 41, 43. As an adult, he spent time both in Colombia and in South Florida. PSR ¶ 43.

Unfortunately, Mr. Zambrano began abusing alcohol and illegal drugs at the young age of thirteen. PSR ¶¶ 49, 50. Mr. Zambrano finished high school and was attending college until his father was killed in an automobile accident in 2005. PSR ¶ 52. His mother was also a passenger in that automobile and still suffers from neurological issues resulting from the accident. PSR ¶ 40. In his mid-twenties, Mr. Zambrano was the victim of a drive-by shooting in Cali, Colombia. PSR ¶ 46.

Prior to his conviction in the present case, Mr. Zambrano had no prior involvement with the criminal justice system. Mr. Zambrano has dual citizenship in the United States and in Colombia and is thus able to lawfully travel between the two countries.

In the present case, the government charged Mr. Zambrano and two co-defendants, Mejia and Roman, with a scheme whereby one of them would legally purchase a .50 caliber firearm from a licensed firearm dealer. The firearm would then be disassembled and the parts packed in boxes containing everyday items and the box would then be shipped to Cali, Colombia. (DE 9). Mr. Zambrano was only charged with being part of the conspiracy while Roman and Mejia were charged with substantive acts of purchasing a .50 caliber firearm by means of materially false information and exporting the .50 caliber firearms without the requisite license.

Roman and Mejia both entered pleas of guilty. Mr. Zambrano was the only one to proceed to trial. Prior to trial, Mr. Zambrano filed a motion to suppress evidence that he argued had been obtained in violation of his Fourth Amendment rights. Specifically, police officers approached Mr. Zambrano outside of his co-defendant's house. They patted Mr. Zambrano and then reached into his pockets and took out cell phones, a wallet and keys.

The magistrate judge held a hearing and gave an oral pronouncement following the hearing. The parties agreed that the oral pronouncement would represent the magistrate judge's report and recommendation that Mr. Zambrano's motion be denied. (DE 79:165; DE 75). The district court adopted the report and recommendation of the magistrate judge. (DE 105).

In the oral pronouncement, the magistrate judge concluded that "the initial stop was, in fact, a legitimate type *Terry* stop based on the circumstances." (DE 79:159). The magistrate judge concluded that the stop of Mr. Zambrano was proper as a *Terry* stop and that the police were justified in seizing Mr. Zambrano, patting down Mr. Zambrano, removing Mr. Zambrano's cell phones, wallet and keys from his pockets, placing those items on the roof of the car, questioning Mr. Zambrano about those items and asking for consent to further search those

items. *Id.* at 161, 162. The district court adopted the recommendation of the magistrate judge and allowed the admission of the evidence over defense objection.

At trial, the government presented evidence that in August of 2014, an international shipping company detected something odd in a package that was to be mailed to Cali, Colombia. (DE 186:32). The package was stated as containing a part for a vehicle. An x-ray scan detected something else in the package. In fact, inside the package, in addition to the car part, a cargo hitch carrier, was part of a firearm. The shipping bill showed that the package was sent by a Cesar Correa to be mailed to a Romand Arenas in Cali, Colombia. *Id.* at 36.

A federal agent investigated the discovery. (DE 187:33). The agent noted that the box contained the barrel for a .50 caliber firearm and that the serial number on the barrel had been obliterated. *Id.* at 34-36. The investigation, based on a container used to ship the firearm part, led to a Walmart in South Florida. *Id.* at 50. Video surveillance of the Walmart for August 2, 2014, showed Mejia and Mr. Zambrano purchasing a telescope and a cargo hitch carrier. *Id.* at 55-79. The agent also testified that Mr. Zambrano's passport listed his full name as Sergio Antonio Zambrano Correa and that Correa was associated with an address similar to the one in the airbill. *Id.* at 81, 82. The investigation also showed that Mr. Zambrano had shipped a box purporting to contain a hammock using the name Cesar Correa. *Id.* at 90-97.

The government also presented evidence that in August of 2014, Colombian authorities discovered several boxes in a house in Cali, Colombia that contained firearms parts. (DE 187:2-7). One box contained a telescope, a receipt for the telescope from Walmart and parts for a .50 caliber firearm. *Id.* at 9, 10. Another box contained a hammock and parts for a .50 caliber firearm. *Id.* at 10, 11. The shipping bill showed that the boxes were shipped by a Cesar Correa. *Id.* at 11.

The government agent also testified that his investigation revealed several packages that were sent by a Cesar Correa from the United States to Cali, Colombia in 2013 and 2014. *Id.* at 97-106. The packages were listed as containing telescopes, exercise equipment and other similar items. *Id.*

Mr. Zambrano and the government entered into a stipulation of evidence that was presented to the jury. (DE 187:108). Specifically, the parties stipulated that the firearms in question were articles on the munitions list posted in the code of federal regulation, and thus, those articles required a license to export. *Id.* The parties further stipulated that neither Mr. Zambrano nor his co-defendants had the requisite license to export those items. The parties stipulated that the firearms dealers from whom Mejia and Roman purchased firearms were federally-licensed firearms dealers. *Id.* Finally, the parties stipulated to the various times in 2013 and 2014 that Mr. Zambrano traveled between Colombia and the United States. *Id.*

A federal agent testified that on March 24, 2016, he and other agents went to the home of Mejia in Coral Springs, a residential suburb in South Florida. (DE 188:49). At around 8:30 a.m., the agent saw what he described as a "Hispanic male" leaving the house. *Id.* at 47. The agent testified that he mistakenly believed the person to be Mejia when in fact it was Mr. Zambrano. The agent testified that as they approached Mr. Zambrano, they called him Mejia and he immediately corrected them saying he was in fact Mr. Zambrano. The officer patted down Mr. Zambrano. He then reached into his pockets and removed the contents of his pockets – cell phones, a wallet and keys. Those objects were placed on the roof of the police car.

The agents then interrogated Mr. Zambrano about those and asked whether they could further search those items. A search of the cell phones revealed nothing incriminating. A search

of the wallet revealed a receipt for a storage unit and a receipt for a hotel room. The agents also discovered an entry code for the storage facility.

Armed with that information, the agents went to the storage facility. They requested a ladder from an employee and used it to look through the high windows of the storage unit. Through the window, they could see firearms and storage cases. The agents used that information to obtain a search warrant for the storage unit. Inside the unit, agents discovered firearms, AR-15 rifles.

The agents also used the information in Mr. Zambrano's pockets to go to the hotel on the receipt. There, they found Mejia in a room rented by Mr. Zambrano.

The government also presented testimony that Mejia and Roman purchased .50 caliber firearms from a federally-licensed firearms dealer. For each purchase, either Roman or Mejia stated on the required federal form that he was the actual purchaser of the firearm in question.

Mr. Zambrano did not testify on his own behalf. Following the jury trial, Mr. Zambrano was convicted on the one count of conspiracy. (DE 118).

Prior to sentencing, Mr. Zambrano filed objections to the presentence report and requested a downward variance from the otherwise applicable advisory sentencing range. (DE 146). The sentencing court overruled Mr. Zambrano's objections, denied his request, and sentenced Mr. Zambrano to the statutory maximum sentence of 60 months' imprisonment. (DE 154).

On appeal, Mr. Zambrano argued that the police violated his constitutional rights when they patted him down and immediately reached into his pockets pulling out cell phones, a wallet and keys. Specifically, Mr. Zambrano argued that the search and seizure exceeded the limits established by this Court in *Terry v. Ohio*. Mr. Zambrano also argued that the evidence, even

when viewed in the light most favorable to the government, was insufficient to convict him of willfully exporting prohibited defense items. Specifically, Mr. Zambrano argued that the evidence proved at most that he acted in a belief that what he was doing was unlawful where the willfulness element required proof of an intentional violation of a known legal duty.

The Eleventh Circuit Court of Appeals affirmed Mr. Zambrano's convictions. As to the *Terry* claim, the Court of Appeals held that the police were justified, under *Terry*, in reaching into Mr. Zambrano's pockets and pulling out cell phones, a wallet and keys based on the testimony of the officer that anything can be a weapon. As to the evidence on willfulness, the Eleventh Circuit held that the evidence provided a reasonable inference that Mr. Zambrano knew that what he was doing in concealing the firearm parts in shipments out of the country was illegal and that the government did not have to prove that Mr. Zambrano knew what specific law he was violating.

REASONS FOR GRANTING THE WRIT

The officer's warrantless search and seizure in reaching into Mr. Zambrano's pockets and pulling out cell phones, a wallet and keys, exceeded the very limited exception established by this Court's decision in *Terry v. Ohio* where the officers could not tell by patting the outside of Mr. Zambrano's clothes that he had a weapon, and the search was based instead on a general belief that an object that feels like a cell phone or a wallet can actually turn out to be a weapon.

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of person or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). "[W]here a police officer observes **unusual conduct** which leads him reasonably to conclude in light of his experience that criminal activity may be afoot **and** that the persons with whom he is dealing may be **armed and presently dangerous**, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, . . . he is entitled for the protection of himself and others in the area to conduct a **carefully limited search of the outer clothing of such persons in an attempt to discover weapons** which might be used to assault him." *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (emphasis added). "If a police officer lawfully pats down a suspect's **outer clothing and feels an object whose contour or mass makes its identity immediately apparent**, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (emphasis added).

Here, Mr. Zambrano was unlawfully seized and searched when he exited the home of Mejia, one of his co-defendants. Property was unlawfully removed from his pockets and he was

unlawfully interrogated about that property. That unlawfully seized property and the information that flowed from it became a key part of the government's case against Mr. Zambrano.

Viewed in the light most favorable to the government, the evidence presented at the suppression revealed a warrantless search that went beyond what is authorized under a valid *Terry* stop. Officers gathered early in the morning with the objective of apprehending Mejia. They were shown a photograph that contained both Mejia and Mr. Zambrano and were told which of the two was Mejia. The officers went to Mejia's home where they saw a Latino male exit the house and walk to a vehicle registered to Mejia. The officers believed the individual was Mejia when in fact it was Mr. Zambrano. A police officer blocked the driveway with a police car and an officer approached the individual.

The officer who approached Mr. Zambrano testified that he yelled out Mejia's name and that Mr. Zambrano immediately corrected him telling the officer that he was in fact Mr. Zambrano. The officer patted down the outside of Mr. Zambrano's clothes and then immediately reached into his pockets and removed cell phones, a wallet and keys. Despite prompting from the prosecutor, the officer could not recall whether Mr. Zambrano informed him of his real identity before the officer began the pat-down or after. The government thus failed to prove that the officers were still working under a mistaken belief that Mr. Zambrano was Mejia when the pat-down and search began.

Mr. Zambrano filed a motion to suppress the items taken from his pockets and any statements made when he was questioned about those items. The district court denied the motion based on a determination that the warrantless search and seizure was allowed under *Terry*. On appeal, the Eleventh Circuit affirmed also finding that the warrantless search and seizure was allowed under *Terry*. Specifically, the Eleventh Circuit ruled as follows:

Here, Agent Lopez testified during the suppression hearing that when he conducted the pat-down of Zambrano, he felt “bulky items.” And though Lopez stated that he did not know what the objects in Zambrano’s pockets were, he testified that he thought the items could have been a weapon. Lopez also testified that this belief was the reason he pulled the items out of Zambrano’s pockets. After that, Lopez placed the items (consisting of four cellphones, a wallet, and keys) on the hood of the car. While the items turned out not to be weapons, it would not have been unreasonable for Lopez to believe they were under the circumstances. Lopez explained in his testimony, “[W]e get all sorts of bulletins with what weapons may be. You have cell phones that are guns. You have knives that are credit cards, sir.” And in this case, he was dealing with an arms trafficker and felt hard, bulky items in his pocket. Under the circumstances, that the items were in fact cell phones does not negate the reasonableness of his belief that they could have been weapons.

Id. at *6. The officer thus felt an object that felt like a cell phone. The officer believed, in general, that anything can be a weapon or at least that a cell phone can be a firearm. And the Eleventh Circuit held that such a belief justifies a warrantless search under *Terry*.

But contrary to the Eleventh Circuit’s ruling, a *Terry* stop does not provide the police with *carte blanche* to search an individual. *Terry* only authorizes a “**carefully limited** search of the **outer clothing** of such persons in an attempt to discover **weapons** which might be used to assault him.” *Terry*, 392 U.S. at 30. The search of Mr. Zambrano here clearly went beyond that authorized under *Terry*. The police officers here, approached Mr. Zambrano, and conducted a pat down of his outer clothing for weapons, as authorized by *Terry*. However, the officers did not feel an object that appeared to be a weapon such as a firearm or knife. Instead the officer felt “bulky items.” The officer reached into Mr. Zambrano’s pockets and pulled out cell phones, a wallet and keys, objects that are clearly not weapons. The officer testified that although the objects did not feel immediately identifiable as weapons he took them out because he had been told generally, not in relation to this case, that everyday objects like cell phones and credit cards can in fact turn out to be weapons. According to the officer, an object that appears to be a cell phone can actually be a firearm and an object that appears to be a credit card can actually be a

knife. In addition, the officers compounded the unlawful search by then interrogating Mr. Zambrano about those objects that they unlawfully pulled out of his pockets including a request to further search those items.

In the wallet, the police found a receipt to a storage facility and a receipt to a hotel room. One of the keys illegally taken from Mr. Zambrano's pocket was a key to a storage unit at the storage facility. There was also a code to enter the storage facility.

That evidence, which the police would not have discovered absent the unconstitutional search and seizure, became key pieces of evidence against Mr. Zambrano and directly lead the police to other key evidence used against Mr. Zambrano.

The receipt to the storage facility led the police to the storage facility. Once there, they used a ladder to look through a window of the storage unit where Mejia stored firearms, firearms parts and shipping containers. The receipt was also used by the government to argue that Mr. Zambrano was the one who rented the storage unit which allowed the government to argue knowledge and intent. The access code to the storage facility and the key to the storage unit likewise allowed the government to argue that Mr. Zambrano had access and control to the unit and its contents. The receipt for the hotel led the police to the hotel where Mejia was staying. The fact that Mr. Zambrano was the one that rented the hotel room allowed the government to further its argument that Mr. Zambrano was part of the conspiracy and to argue that he was equally culpable.

The seizure and search of Mr. Zambrano's person was an unreasonable search and seizure in violation of the Fourth Amendment. Although *Terry* allows a very limited exception, the requirements of *Terry* were clearly not present here and the court below erred in holding that the *Terry* exception applied. The evidence, and any information and evidence that flowed from

it, should have been suppressed. The failure to suppress that evidence severely prejudiced Mr. Zambrano and it is highly unlikely he would have been prosecuted, let alone convicted, absent that evidence.

The holding of the Eleventh Circuit, that *Terry* allows an officer to pat down an individual and when the officer feels an object that feels like a common object, such as a cell phone or a wallet, *Terry* authorizes the officer to reach into the individual's pockets and remove that common object to determine whether it is in fact a weapon disguised as common object, completely obliterates the holding of *Terry*. This Court must issue a writ of certiorari to the Eleventh Circuit to ensure that the strict limitations of *Terry* are adhered to and that proper guidance is provided to police officers facing similar circumstances.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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