No. 18-8988

IN THE SUPREME COURT OF THE UNITED STATES

AIRRINGTON L. SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment allowed a police officer to stop and frisk petitioner based on reasonable suspicion that he was carrying a concealed weapon, in a State where carrying a concealed weapon is presumptively unlawful.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Iowa):

United States v. Sykes, No. 17-cr-2009 (Oct. 4, 2017)

United States Court of Appeals (8th Cir.):

United States v. Sykes, No. 17-3221 (Jan. 30, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29-36) is reported at 914 F.3d 615. The order of the district court (Pet. App. 20-28) is not published in the Federal Supplement but is available at 2017 WL 2514953. The report and recommendation of the magistrate judge (Pet. App. 2-19) is not published in the Federal Supplement but is available at 2017 WL 1455968.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2019. The petition for a writ of certiorari was filed on April

23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced him to 46 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 29-36.

1. Shortly before midnight one night in December 2016, a police officer in Waterloo, Iowa was dispatched to a laundromat where a woman reported finding a loaded handgun magazine in a laundry basket. Pet. App. 3, 30. The woman explained that the only other people in the laundromat at the time were two men dressed in black, that those men had stood near the basket where she had found the magazine, and that the men were still in the laundromat. Ibid.

The officer entered the laundromat and began walking toward the two men, one of whom was petitioner. Pet. App. 30. Petitioner turned and walked away, but the officer intercepted and stopped him. Ibid. Saying "I have my homies," petitioner pointed toward his waist. Id. at 23. The officer then patted petitioner down and discovered a handgun in his pants pocket. Id. at 30.

2. A grand jury in the Northern District of Iowa returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 29. Petitioner moved to suppress the gun, asserting that it was the fruit of an unlawful stop and frisk. He did not dispute that the officer had reason to believe that he was armed, but contended that the stop violated the Fourth Amendment because the officer did not have reasonable suspicion that he lacked a permit to carry a concealed firearm. Pet. App. 25. The magistrate judge recommended denying the motion, id. at 2-19, and the district court adopted that recommendation, id. at 20-28.

The district court found that the police officer had reasonable suspicion to stop petitioner, explaining that the concealed carrying of a firearm "is presumptively illegal in Iowa" and that the possession of a permit is only "an affirmative defense." Id. at 26 (citing Iowa Code § 724.4(1) (2016)). The court also found that the police officer was permitted to frisk petitioner, because the officer had "reasonable suspicion that [petitioner] was armed and dangerous." Id. at 27. The court stressed that the encounter "happened late at night and involved unusual circumstances," and that "when [petitioner] walked toward the back of the laundromat [the officer] became concerned that [petitioner] may have been attempting to ready a weapon." Ibid.

Petitioner pleaded guilty, reserving his right to appeal the denial of his motion to suppress. Pet. App. 30. The district court sentenced him to 46 months of imprisonment. Judgment 1.

3. The court of appeals affirmed the conviction and sentence. Pet. App. 29-36.

As relevant here, the court of appeals rejected petitioner's contention that "the officer lacked a reasonable suspicion that [petitioner] was committing a crime" because he "had no reason to believe that he lacked a permit for the gun." Pet. App. 30-31. The court observed that, in United States v. Pope, 910 F.3d 413 (8th Cir. 2018), petition for cert. pending, No. 18-8785 (filed Apr. 8, 2019), it had determined that "an officer in Iowa may briefly detain someone whom the officer reasonably believes is possessing a concealed weapon." Pet. App. 31 (citing Pope, 910 F.3d at 416). It explained that, because "a concealed-weapons permit is merely an affirmative defense to a charge," "an officer may presume that the suspect is committing a criminal offense until the suspect demonstrates otherwise." Ibid. (citing Pope, 910 F.3d at 415-416).

The court of appeals likewise rejected petitioner's contention that, "even if the officer had reasonable suspicion to stop him, he lacked reasonable suspicion to frisk him." Pet. App. 33. The court observed that, in Pope, it had determined that "an officer may indeed frisk someone he has lawfully stopped if he reasonably believes the person is armed with a gun, regardless of

whether the person possesses the gun legally." Ibid. (citing Pope, 910 F.3d at 416-417).

Finally, the court of appeals declined to review any "Second Amendment challenge" to Iowa's concealed-carry law, noting that petitioner had "failed to raise the argument in his opening brief." Pet. App. 33.

ARGUMENT

Petitioner contends (Pet. 9-14) that a police officer may not stop a person on the basis of reasonable suspicion that the person is carrying a concealed weapon, unless the officer also has reasonable suspicion that the person lacks a concealed-carry permit. The court of appeals correctly rejected that contention in the circumstances of this case. The reasonable-suspicion standard does not require the police to investigate the validity of potential affirmative defenses before conducting an investigatory stop, and possession of a concealed-carry permit is only an affirmative defense in Iowa. The court's decision does not conflict with any decision of this Court or any other court of appeals or state court of last resort.

Petitioner also contends (Pet. 14-17) that a police officer who has stopped a person may not frisk him on the basis of a reasonable belief that the person is armed, unless the officer also has a reasonable belief that the person is dangerous. The court of appeals correctly rejected that contention as well. Under this Court's precedents, an officer's reasonable belief that a

stopped person is carrying a concealed weapon suffices to justify a frisk for the protection of the officer and the public. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals or state court of last resort. And this case would in any event be an unsuitable vehicle for addressing petitioner's general contention about frisks, because additional indicia of dangerousness, beyond the presence of a concealed firearm, supported the particular frisk in this case. This Court has previously denied review of a petition presenting a similar issue, see Robinson v. United States, 138 S. Ct. 379 (2017) (No. 16-1532), and it should follow the same course here.*

1. A writ of certiorari is not warranted to review petitioner's contention that his stop was unconstitutional.

a. In Terry v. Ohio, 392 U.S. 1 (1968), this Court "held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Terry, 392 U.S. at 30). That standard is "less demanding than * * * probable cause" and "considerably less than proof of wrongdoing by a preponderance of the evidence." Ibid.

* Similar issues are raised in the petition for a writ of certiorari in No. 18-8785, Pope v. United States.

The court of appeals here correctly recognized that the reasonable-suspicion standard does not require an officer to inquire into the availability of affirmative defenses before making an investigatory stop. "A determination that reasonable suspicion exists * * * need not rule out the possibility of innocent conduct." United States v. Arvizu, 534 U.S. 266, 277 (2002). To the contrary, even where "the conduct justifying the stop [i]s ambiguous and susceptible of an innocent explanation," "officers [may] detain the individuals to resolve the ambiguity." Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

In addition, an affirmative defense, by definition, "constitutes a separate issue" from the state's case that a defendant is guilty of a crime. Patterson v. New York, 432 U.S. 197, 207 (1977). The Sixth Amendment thus does not require the prosecution to disprove affirmative defenses to the jury beyond a reasonable doubt; rather, "the long-accepted rule [i]s that it [i]s constitutionally permissible to provide that various affirmative defenses are to be proved by the defendant." Id. at 211. Similarly, the Fifth Amendment does not require the prosecution to "anticipate affirmative defenses" before the grand jury. United States v. Sisson, 399 U.S. 267, 288 (1970). And just as the State need not preemptively rebut an affirmative defense "in the courtroom," the Fourth Amendment does not require an officer to do so "on the street," United States v. Pope, 910 F.3d 413, 416 (8th Cir. 2018), petition for cert. pending, No. 18-

8785 (filed Apr. 8, 2019) in order to conduct an investigatory stop.

Here, the magistrate judge, district court, and court of appeals have all determined that, under Iowa state law, carrying a concealed weapon is presumptively criminal and that possessing "a concealed-weapons permit is merely an affirmative defense to a charge." Pet. App. 31; see id. at 12, 26. Petitioner does not appear to contest that interpretation of state law, and, in any event, this Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals." Pembaur v. City of Cincinnati, 475 U.S. 469, 484 n.13 (1986). And on that understanding of state law, the Fourth Amendment allowed the officer to stop petitioner based on the officer's reasonable belief that petitioner was carrying a concealed weapon, without requiring the officer to anticipate and reject potential affirmative defenses, such as the possession of a permit.

b. The decision below does not conflict with the decision of any other court of appeals or state court of last resort. The only other court of appeals to have considered the issue in a published opinion agrees that, in a state where "carrying a concealed handgun is a crime to which possessing a valid license is an affirmative defense," the police may stop a person "based solely on the information that [the person] was carrying a concealed handgun." United States v. Gatlin, 613 F.3d 374, 378

(3d Cir.), cert. denied, 562 U.S. 1015 (2010); see also United States v. Montague, 437 Fed. Appx. 833, 835-836 (11th Cir. 2011) (per curiam) (reasoning in an unpublished opinion that police may stop a person on the basis of "reasonable suspicion that he was carrying a concealed weapon," notwithstanding that "proof of a license may be raised as an affirmative defense"), cert. denied, 562 U.S. 1272 (2012).

Petitioner errs in contending (Pet. 10 & n.4) that the decision below conflicts with the decisions of other federal courts of appeals in United States v. Black, 707 F.3d 531 (4th Cir. 2013), Northrup v. City of Toledo Police Department, 785 F.3d 1128 (6th Cir. 2015), and United States v. King, 990 F.2d 1552 (10th Cir. 1993). As the Eighth Circuit explained in Pope, the "situations" in those cases differ from "the situation [it] face[d]" here. 910 F.3d at 415. Specifically, in each of those three cases, the stopped individual was engaging in activity that was presumptively lawful under state law, not an activity that was presumptively criminal but for which he might have an affirmative defense. In Black, the police stopped a person for openly "display[ing]" a firearm in North Carolina, a State that "permit[s] its residents to openly carry firearms." 707 F.3d at 540. In Northrup, the police stopped a person for "open possession of a firearm" in Ohio, a State that had "made open carry of a firearm legal" and that "does not require gun owners to produce or even carry their licenses for inquiring officers." 785 F.3d at 1131-1132. And in

King, police in New Mexico stopped a person for carrying a weapon in his car, even though New Mexico "permit[ted] motorists to carry loaded weapons, concealed or otherwise, in their vehicles." 990 F.2d at 1555.

Petitioner likewise errs in contending (Pet. 10 n.4) that the decision below conflicts with Commonwealth v. Couture, 552 N.E.2d 538 (Mass. 1990). Although the Massachusetts Supreme Judicial Court concluded in that case that "[t]he mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun," id. at 541, it did so in the context of a statutory scheme that differs markedly from Iowa's. In Massachusetts, unlike in Iowa, "[c]arrying a gun" -- even if "concealed" -- "is not a crime"; only "[c]arrying a firearm without a license (or other authorization) is." Commonwealth v. Alvarado, 667 N.E.2d 856, 859 (Mass. 1996). As a result, the carrying of a concealed firearm is not presumptively unlawful in Massachusetts, as it is in Iowa.

Petitioner also errs in contending (Pet. 10 n.4) that the decision below conflicts with the decisions of state courts of last resort in State v. Williamson, 368 S.W.3d 468 (Tenn. 2012), and Commonwealth v. Hawkins, 692 A.2d 1068 (Pa. 1997). In both Williamson and Hawkins, the state courts invoked their state constitutions, rather than resting on the Fourth Amendment alone. See Williamson, 368 S.W.3d at 473 & n.3 (relying on the "Tennessee Constitution" and explaining that "[the] state constitution has

been interpreted to offer more protection than the corresponding provisions of the Fourth Amendment in some contexts"); Hawkins, 692 A.2d at 1071 (relying on "the Constitution of Pennsylvania"). Moreover, in both Williamson and Hawkins, the state courts found that the investigatory stops at issue were unlawful largely on the ground that the police had relied on unreliable and uncorroborated anonymous tips -- not on the ground that the police must anticipate affirmative defenses when gauging reasonable suspicion. See Williamson, 368 S.W.3d at 483 (explaining that "the anonymous report of an armed party, absent corroboration and other indicia of reliability as to criminal activity, did not establish reasonable suspicion"); Hawkins, 692 A.2d at 658 (explaining that "the police acted on an anonymous tip and had no basis for believing that the tip was reliable").

2. A writ of certiorari is also not warranted to review petitioner's contention that his frisk was unconstitutional.

a. In Terry, this Court held that, once the police lawfully stop a person for questioning, the police may, "for the protection of the police officer," frisk the suspect for "weapons," so long as the officer "has reason to believe that he is dealing with an armed and dangerous individual." 392 U.S. at 27. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Ibid.

The court of appeals correctly determined that, under this Court's precedents, reasonable suspicion that a person possesses a concealed weapon can itself justify a safety-based frisk during a lawful stop, irrespective of whether the officer has notice of additional indicia of dangerousness or whether possession of the weapon may be legal. In Terry itself, this Court upheld the frisk of a lawfully stopped suspect because "a reasonably prudent man would have been warranted in believing [the suspect] was armed and thus presented a threat to the officer's safety." 392 U.S. at 28 (emphasis added). In other words, "the danger" in Terry was found in the presence of a weapon during a forced police encounter." United States v. Robinson, 846 F.3d 694, 699–700 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 379 (2017). Similarly, in Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam), this Court determined that an officer was justified in frisking a lawfully stopped suspect because he saw a bulge in the suspect's jacket pocket; the bulge "permitted the officer to conclude that [the suspect] was armed and thus posed a serious and present danger." Id. at 112 (emphasis added).

It makes sense that a police officer may frisk for weapons during a lawful investigatory stop. The Fourth Amendment demands that searches and seizures be reasonable, and it is reasonable for a police officer to "tak[e] steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." Terry, 392 U.S. at

23. Moreover, the seizure of a firearm during an investigatory stop is inherently temporary. If the lawful stop proceeds in the ordinary course and the police do not uncover evidence of a crime, the officer must return the firearm to the individual when the stop ends and the individual departs. The interest in protecting the lives of police officers justifies such brief and limited seizures.

Petitioner errs in contending (Pet. 15) that the possession of a firearm cannot itself justify a frisk because carrying a gun is "an inherently lawful" activity. As an initial matter, "possession of a concealed handgun in Iowa is presumptively illegal," Pet. App. 12 -- not "inherently lawful." More fundamentally, this Court has made it clear that a police officer's authority to frisk a stopped suspect for weapons does not turn on whether state law allows the carrying of the weapons. In Adams v. Williams, 407 U.S. 143 (1972), the Court observed that "[t]he purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law." Id. at 146. And in Michigan v. Long, 463 U.S. 1032 (1983), the Court upheld the search of a passenger compartment for weapons where officers reasonably suspected that the driver possessed a knife, which the Court "[a]ssum[ed], arguendo, that [he] possessed lawfully." Id. at

1052 n.16. The Court explained that, in Adams, it had "expressly rejected the view that the validity of a Terry search depends on whether the weapon is possessed in accordance with state law." Ibid.

b. The court of appeals' decision does not conflict with the decisions of other courts of appeals or state courts of last resort. The Fourth Circuit, the only other court of appeals that has addressed the issue, has rejected petitioner's theory. See Robinson, 846 F.3d at 700 ("[T]he risk of danger is created simply because the person, who was forcibly stopped, is armed.").

The cases on which petitioner relies (Pet. 14 n.5) are largely inapposite. In two of the cases -- Northrup, supra, and State v. Serna, 331 P.3d 405 (Ariz. 2014) -- the police lacked the reasonable suspicion needed to stop the suspect in the first place. In Northrup, the Sixth Circuit concluded that the police could not stop a person simply for carrying a firearm openly, where state law "permit[ted] the open carry of firearms." 785 F.3d at 1131. Similarly, in Serna, the Supreme Court of Arizona concluded that the police could not stop a person simply for carrying a firearm, because Arizona "freely permits citizens to carry weapons, both visible and concealed." 331 P.3d at 410. This case, in contrast, involves a frisk in the course of an investigatory stop found to be valid.

In another of the cases cited by petitioner, State v. Bishop, 203 P.3d 1203 (Idaho 2009), the police properly stopped the

suspect, but lacked reasonable suspicion that the suspect was carrying weapons. The court in that case emphasized that the officer "did not report observing any unusual bulges in [the suspect's] clothing or other facts that would have indicated that [the suspect] was carrying a weapon." Id. at 1220. The officer asserted that the suspect "could possibly" have been armed, but the court determined that "an officer's bare assertion that a suspect 'could possibly' be carrying a weapon" could not alone justify a frisk. Id. at 1219 n.13. In this case, by contrast, the courts below found that the officer had reason to believe that petitioner was armed. See Pet. App. 5, 18, 27.

The Seventh Circuit's decision in United States v. Leo, 792 F.3d 742 (2015), is similarly inapposite. In that case, the police seized the defendant on suspicion of attempted burglary with a gun, frisked him without finding a weapon, handcuffed his hands behind his back, and then opened and emptied a backpack that was no longer within his reach, finding a firearm. Id. at 744-745. The defendant did not dispute that the police could lawfully frisk him and "pat[] down the backpack to search for weapons." Id. at 749. The defendant instead raised, and prevailed on, the argument that officer-safety concerns did not justify opening and emptying the backpack, which was outside the defendant's reach at the time of the search. Id. at 749-752. The decision does not conflict with -- indeed, the defendant's concession is consistent with --

the decision below, which involves a frisk of the suspect's person rather than the opening and emptying of an inaccessible backpack.

Finally, in State v. Vandenberg, 81 P.3d 19 (2003), the Supreme Court of New Mexico upheld a police officer's protective frisk of the occupants of a vehicle that had been stopped for speeding, because the suspects' movements in the car gave the officer cause to believe that they were "armed and dangerous, justifying a protective frisk for weapons." Id. at 27. Petitioner appears to rely on two sentences in the opinion in which the court stated that an officer may search a stopped suspect only if the person is "both armed and presently dangerous," rather than "either armed or dangerous." Id. at 25. But those sentences were unnecessary to the court's decision, which found that the police had reason to believe that the suspects were both armed and dangerous. Id. at 27. And petitioner identifies no decision of that court finding a Fourth Amendment violation in circumstances like those here, in contravention of the precedents of this Court.

c. In all events, this case would be an unsuitable vehicle for addressing the frisk issue, because the police officer in this case had reason to believe both that petitioner was armed and that he was dangerous. As the district court observed, "[t]he encounter * * * happened late at night"; it "involved unusual circumstances" ("a loaded magazine for a firearm being left in a laundry basket"); and, when the officer saw petitioner "walk[ing] toward the back of the laundromat," "he became concerned that [petitioner] may have

been attempting to ready a weapon by locking himself in the bathroom." Pet. App. 27. Petitioner therefore would not be entitled to relief even on the rule he seeks.

3. Petitioner suggests that the stop and frisk in this case also violated his "Second Amendment rights," Pet. 8, by making the exercise of Second Amendment rights "contingent upon the forbearance of" his Fourth Amendment rights, Pet. 16 (citation omitted). This Court, however, is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and its ordinary practice "precludes a grant of certiorari" to review contentions that were "'not pressed or passed upon below,'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). The court of appeals expressly refused to address petitioner's Second Amendment argument, observing that "he failed to raise the argument in his opening brief." Pet. App. 33. No sound basis exists for this Court to address petitioner's forfeited Second Amendment argument in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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