NO. _______________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

Airrington Sykes - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

(1) Whether law enforcement can presume any concealed carry of a firearm is unlawful and conduct a *Terry* stop when the state statute does not criminalize the concealed carry of a firearm with a permit?

(2) Whether the *Terry* frisk analysis is a two-part test, requiring law enforcement to have reasonable suspicion that an individual is both armed *and* dangerous, and that law enforcement cannot assume anyone who is armed is automatically dangerous?

[1] The undersigned has recently filed a petition for writ of certiorari, raising these virtually identical questions, in *Temarco Pope, Jr. v. United States*, 18-8785.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Airrington Sykes, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 17-3221, entered on January 30, 2019.

OPINION BELOW

On January 30, 2019, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is published and available at 914 F.3d 615.

JURISDICTION

The Court of Appeals entered its judgment on January 30, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

Iowa Code § 724.4

> 1. Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.
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> 4. Subsections 1 through 3 do not apply to any of the following:
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> i. A person who has in the person's possession and who displays to a peace officer on demand a valid permit to carry weapons which has been issued to the person, and whose conduct is within the limits of that permit. A person shall not be convicted of a violation of this section if the person produces at the person's trial a permit to carry weapons which was valid at the time of the alleged offense and which would have brought the person's conduct within this exception if the permit had been produced at the time of the alleged offense.

STATEMENT OF THE CASE

On March 2, 2017, Mr. Sykes was indicted in the Northern District of Iowa on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), & 924(a)(2). (DCD 2).[2] The basis for this charge was a firearm discovered on Mr. Sykes's person after a *Terry* stop and frisk at a laundromat.

Mr. Sykes filed a motion to suppress, arguing that the stop and frisk violated the Fourth Amendment. (DCD 11). Mr. Sykes argued that law enforcement lacked reasonable, articulable suspicion of criminal activity to justify the stop and frisk. (DCD 11). The government argued that law enforcement had reasonable suspicion that Mr. Sykes violated Iowa's carrying weapons statute, Iowa Code § 724.4(1). (DCD 14). While § 724.4 states that the statute does not apply to individuals who have a concealed carry permit, the government asserted law enforcement could presume Mr. Sykes did not have a valid permit. (DCD 14). A hearing was held on the motion. The following is a summary of the evidence presented at the hearing.

On December 4, 2016, at roughly midnight, Angie Lindsey called 911 to report that she found a handgun magazine in a laundry basket at Clean Laundry, a laundromat in Waterloo, Iowa. (Supp. Tr. p. 5). Clean Laundry is a 24-hour laundromat. (Supp. Tr. p. 6). The parking lot of the laundromat was well lit. (Supp. Tr. p. 6). The laundromat itself was also well lit. (Supp. Tr. p. 6).

[2] In this petition, the following abbreviations will be used:
"DCD" - district court clerk's record, followed by docket entry and page number, where noted;
"Def. Ex. A" – Defense DVD Suppression Hearing Exhibit, followed by video number; and
"Supp. Tr." – Suppression hearing transcript, followed by page number.

Waterloo Police Officer Ryan Muhlenbruch responded to the 911 call. He arrived at the laundromat eight minutes after the call. (Supp. Tr. p. 28-29). Officer Muhlenbruch met Ms. Lindsey in the parking lot. (Supp. Tr. p. 6-7). The conversation between Ms. Linsdey and Officer Muhlenbruch was recorded. (See Def. Ex. A, #1). Ms. Lindsey stated that her friend removed clothing from a laundry basket. (Supp. Tr. p. 7). Ms. Lindsey heard something in the basket. (Supp. Tr. p. 8). She looked in the basket and found the handgun magazine. (Supp. Tr. p. 8).

When she found the magazine, besides her friend, only two other individuals were inside the laundromat. (Supp. Tr. p. 8). Ms. Lindsey indicated that the two other individuals had just recently walked back into the laundromat from a vehicle that was parked out front. (Supp. Tr. pp. 8-9). She pointed at two black men inside the laundromat. (Supp. Tr. p. 9). The two men were wearing black clothing. (Supp. Tr. p. 9). Ms. Lindsey indicated that the two men were “near” the laundry basket earlier, but did not indicate that the two men actually used the basket. (Supp. Tr. p. 9). Ms. Lindsey stated that she was not sure it was one of the two black males who put the magazine in the laundry basket. (Supp. Tr. p. 27). She did not state how much time had passed from when she found the magazine to when she called 911. (Supp. Tr. p. 29).

Officer Muhlenbruch called for backup. (Supp. Tr. p. 10). Eventually, Officer Luke Lamere arrived on the scene. (Supp. Tr. p. 10). The officers entered the laundromat. (Supp. Tr. p. 11). Officer Muhlenbruch wore a body camera, and the

recording was entered into evidence. (Def. Ex. A). When they entered, five people were inside the laundromat. (Supp. Tr. p. 12). Two people were standing at the front of the laundromat. (Supp. Tr. p. 12). A man in a tan coat, as well as the two black males, were standing in the back of the laundromat. (Supp. Tr. p. 12).

One of the black males, later identified as Mr. Sykes, walked away. (Supp. Tr. p. 13). Mr. Sykes entered the laundromat bathroom and attempted to shut the door. (Supp. Tr. p. 15). Officer Muhlenbruch grabbed the door handle just before it closed. (Supp. Tr. p. 15). Mr. Sykes was not trying to hide anything and made no furtive movements while inside the bathroom. (Supp. Tr. p. 26). Mr. Sykes did not try to close the door after Officer Muhlenbruch grabbed the door handle. (Supp. Tr. p. 26).

Officer Muhlenbruch then grabbed Mr. Sykes's sweatshirt and told him to "come on out here one second." (Def. Ex. A, #2 2:41). Once Mr. Sykes was outside of the bathroom, Officer Muhlenbruch again placed his hand on Mr. Sykes's arm and started turning him around. (Def. Ex. A, #2 2:45). Officer Muhlenbruch told Mr. Sykes he was going to pat him down. (Def. Ex. A, #2 2:45). Officer Muhlenbruch testified that in response, Mr. Sykes said "I have my homies" and pointed to his waist area. (Supp. Tr. p. 16). Officer Muhlenbruch interpreted this statement to mean that Mr. Sykes was possibly armed with a firearm. (Supp. Tr. p. 17). In his written report on the encounter, Officer Muhlenbruch wrote, "I had [Mr. Sykes] face

the wall and started a pat-down for weapons. Mr. Sykes then started mumbling something." (Supp. Tr. p. 27).

The pat-down revealed a firearm. (Supp. Tr. p. 17). Mr. Sykes was arrested. (Supp. Tr. p. 17). Officer Muhlenbruch interviewed Mr. Sykes. (Supp. Tr. p. 17). Mr. Sykes acknowledged that he had a prior felony. (Supp. Tr. p. 18). Mr. Sykes stated the firearm belonged to his friend he was with, Michael Liggons. (Supp. Tr. p. 18). Liggons was not wearing a belt at the time, so it was difficult for him to hold the firearm. (Supp. Tr. p. 18).

Meanwhile, Liggons spoke with Officer Lamere. (Supp. Tr. pp. 47-48). Liggons immediately claimed ownership of the firearm to Officer Lamare. (Supp. Tr. p. 47-48). Liggons indicated that he asked Mr. Sykes to hold the firearm because Liggons did not have a belt on his waistband and he did not want to leave it in his car. (Supp. Tr. p. 48). Liggons had a valid permit to carry. (Supp. Tr. p. 48).

After the hearing, the magistrate judge filed a report and recommendation, finding that the motion to suppress should be denied. (DCD 19; App'x 2). First, the magistrate judge held that the stop was justified by reasonable suspicion that Mr. Sykes possessed a firearm. (DCD 19; App'x 9-12). The court found this was reasonable suspicion of a violation of Iowa carrying weapons statute, which prohibits the concealed carrying of firearms in certain locations if the possessor does not have a concealed carry permit. (DCD 19; App'x 9-12). The magistrate court found the stop was still lawful even though an individual does not violate the

statute if he or she has a concealed carry permit, and law enforcement had no basis to believe Mr. Sykes's potential possession was unlawful. (DCD 19; App'x. 9-12).

Second, the court found the frisk was lawful. The court determined that the evidence provided reasonable suspicion that Mr. Sykes was armed, so the frisk was lawful. (DCD 19; App'x 15-18).

Mr. Sykes filed objections to the report and recommendation. (DCD 26). The district court adopted the report and recommendation and denied the motion to suppress. (DCD 31; App'x 20). The district court essentially followed the legal analysis of the magistrate court. (DCD 31; App'x 20).

On appeal to the Eighth Circuit, Mr. Sykes challenged the denial of his motion to suppress. The Eighth Circuit Court of Appeals affirmed. *United States v. Sykes*, 914 F.3d 615 (8th Cir. 2019). First, the court relied on its recently issued decision in *United States v. Pope,* 910 F.3d 413 (8th Cir. 2018)[3], to hold that the stop was lawful. *Id.* at 617. The Court held, as it did in *Pope*, that because having a valid permit is an affirmative defense, law enforcement does not have to presume that an individual had a valid permit to carry. *Id.*

Next, the Court rejected Mr. Sykes's argument that a *Terry* frisk is a two-part test, and that armed does not automatically mean dangerous. *Id.* at 419. Relying on *Pope*, the panel held that law enforcement only need reasonable suspicion that an individual has a firearm to justify a *Terry* frisk. *Id.*

[3] As mentioned, at the time of filing, a petition for writ of certiorari is pending in this case.

REASONS FOR GRANTING THE WRIT

In recent years, as the carrying of firearms becomes more common, state and federal courts have struggled with how to balance law enforcement's need to investigate crimes against the expanding right to bear arms. Specifically, state and federal courts are split on whether law enforcement can presume any concealed carry of a firearm is unlawful to justify a *Terry* seizure, including in jurisdictions like Iowa where having a concealed carry permit is an affirmative defense to a criminal statute. Additionally, courts are split as to whether a *Terry* frisk is justified whenever an individual is armed, without a separate indication that the individual is dangerous. This Court should grant the petition for writ of certiorari to resolve these splits.

Further, the Eighth Circuit's decision is inconsistent with the changing landscape of concealed carry laws around the country. After this Court's decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008), states are enacting less strict concealed carry laws. *Jeffrey Bellin, The Right to Remain Armed*, 93 Wash. U. L. Rev. 1, 42 (2015). Thirteen states do not even require a permit to lawfully concealed carry. NRA-ILA, *Gun Right to Carry Laws*, https://www.nraila.org/gun-laws (last visited Apr. 4, 2019). This Court should grant the petition to ensure that Fourth Amendment jurisprudence is in line with the changing landscape of our nation's gun laws, and to ensure that case law on Fourth Amendment rights does not allow law enforcement to infringe on citizen's Second Amendment rights.

I. LAW ENFORCEMENT CANNOT PRESUME THAT ANY CONCEALED CARRY OF A FIREARM IS UNLAWFUL AND CONDUCT A *TERRY* STOP WHEN THE STATE STATUTE DOES NOT CRIMINALIZE THE CONCEALED CARRY OF A FIREARM WITH A VALID PERMIT.

The Eighth Circuit Court of Appeals held that law enforcement can presume that any concealed carry of a firearm in the State of Iowa is unlawful because having a valid permit is an affirmative defense to Iowa's carrying weapons statute. Iowa Code § 724.4 states, in relevant part:

> 1. Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.
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> 4. Subsections 1 through 3 do not apply to any of the following:
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> > i. A person who has in the person's possession and who displays to a peace officer on demand a valid permit to carry weapons which has been issued to the person, and whose conduct is within the limits of that permit. A person shall not be convicted of a violation of this section if the person produces at the person's trial a permit to carry weapons which was valid at the time of the alleged offense and which would have brought the person's conduct within this exception if the permit had been produced at the time of the alleged offense.

This Court should grant the petition and find that law enforcement cannot presume possession is unlawful in states like Iowa where having a concealed carry permit makes the possession lawful.

After this Court's decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008), which recognized that the Second Amendment conferred an individual's right to keep and bear arms, more states are loosening their laws on the concealed possession of a firearm. Jeffrey Bellin, *The Right to Remain Armed*, 93 Wash. U. L. Rev. 1, 42 (2015). In turn, courts are acknowledging that the possession of a firearm cannot be the basis for a *Terry* stop in states that allow individuals to carry a concealed firearm with a permit, because the possession of a firearm is not inherently illegal.

While a split exists, many courts acknowledge that when possession is inherently lawful under state law, police officers cannot assume that any possession is unlawful.[4] For example, the Sixth Circuit found that the possession of a firearm cannot justify a stop and frisk in Ohio, because an individual can lawfully possess a firearm with a permit. *Northrup v. City of Toledo Police Dept.*, 785 F.3d 1128, 1131-34 (6th Cir. 2015). The circuit rejected that firearm possession was enough for a stop, noting that "[t]o allow stops in this setting 'would effectively eliminate Fourth

[4] Several cases have held that information that an individual possesses a firearm, without any indication that the possession is unlawful, cannot provide reasonable suspicion of criminal activity to justify the stop. *Northrup v. City of Toledo Police Dept.*, 785 F.3d 1128 (2015); *United States v. Black,* 707 F.3d 531, 540 (4th Cir. 2013); *United States v. King,* 990 F.2d 1552, 1559 (10th Cir. 1993) ("In a state such as New Mexico, which permits persons to lawfully carry firearms,[allowing a seizure] would effectively eliminate Fourth Amendment protections for lawfully armed persons."); *State v. Williamson,* 368 S.W.3d 468, 480 (Tenn. 2012); *Commonwealth v. Hawkins,* 692 A.2d 1068 (Pa. 1997); *Commonwealth v. Couture,* 552 N.E.2d 538, 540 (Mass. 1990); *Regalado v. State*, 25 So.3d 600, 604 (Fla. Dist. Ct. App. 2009). Other courts have held, or at least hinted, that law enforcement can presume the possession is unlawful. *United States v. Gatlin,* 613 F.3d 374 (3d Cir. 2010); *Schubert v. City of Springfield,* 589 F.3d 496, 501 (1st Cir. 2009); *United States v. Montague*, 437 F. App'x 833, 835-36 (11th Cir. 2011).

Amendment protections for lawfully armed persons.'" *Id.* at 1132 (quoting *United States v. King*, 990 F.2d 1552, 1559 (10th Cir. 1993)). The circuit also rejected the government's argument that law enforcement could presume the possession was unlawful:

> What about the possibility that Northrup was not licensed to carry a gun or that he was a felon prohibited from possessing a gun? Where it is lawful to possess a firearm, unlawful possession "is not the default status." . . . There is no "automatic firearm exception" to the *Terry* rule. *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

Id. The Fourth Circuit has similarly reasoned:

> [W]here a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states. ... Here, [the defendant's] lawful display of his lawfully possessed firearm cannot be the justification for [his] detention.

United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013).

Courts apply these principles even when states outlaw the concealed carry of a firearm, but make having a concealed carry permit an affirmative defense. For example, the Supreme Court of Pennsylvania found firearm possession was insufficient to justify a stop, even though Pennsylvania generally prohibits the concealed carry of a firearm, 18 Pa. C.S.A. § 6108, and having a license to carry a concealed weapon is only an affirmative defense to that charge. *Commonwealth v. Poindexter,* 375 A.2d 384, 386-87 (Pa. Super. Ct. 1977) (reversed on other grounds in 399 A.3d 390). The court stated: "Even if the Constitution of Pennsylvania would permit such invasive police activity as the Commonwealth proposes—which it does

not—such activity seems more likely to endanger than to protect the public. Unnecessary police intervention, by definition, produces the possibility of conflict where none need exist.” *Commonwealth v. Hawkins*, 692 A.2d 1068, 1071 (Penn. 1997).

Similarly, the Supreme Judicial Court of Massachusetts, which also generally prohibits the concealed carry of a firearm but makes having a permit an affirmative defense, rejected the distinction drawn by the Eighth Circuit. *Commonwealth v. Couture*, 552 N.E.2d 538, 540 (Mass. 1990). The court stated:

> Where the defendant at trial has had every opportunity to respond to the Commonwealth's charge that the defendant was unlawfully carrying a handgun, where the defendant need only produce that slip of paper indicating that he was licensed to carry that gun, and where instead the defendant produces no evidence to that effect, the jury are entitled to presume that the defendant indeed did not have a license to carry the gun, and the Commonwealth need present no additional evidence to prove that point. This scenario is a far cry from a defendant who, having merely been seen in public with a handgun, and without any opportunity to respond as to whether he has a license, is forced out of his vehicle at gunpoint and subjected to an invasive search. Th[at having a permit is an affirmative defense] does not make an open target of every individual who is lawfully carrying a handgun.

Id. at 540-41.

The Eighth Circuit’s decision also ignores the reality of concealed-carry laws. Obtaining a concealed-carry permit in Iowa, and in many other states, does not appear to be difficult. While some states grant authorities discretion when deciding whether to issue a concealed-carry permit, Iowa is considered a “shall-issue” state. *See* NRA-ILA, *Gun Right to Carry Laws*, https://www.nraila.org/gun-laws (last

visited Apr. 3, 2019); U.S. Gov't Accountability Office, Gun Control: States' Laws and Requirements for Concealed Carry Permits Vary Across the Nation 76, p. 9 (2012), *available at* https://www.gao.gov/products/GAO-12-717. "Shall issue" means "permitting officials must grant an application for handgun carry permits so long as the applicant satisfies certain objective criteria, such as a background check and completion of a safety course." *Drake v. Filko,* 724 F.3d 426, 440-41 (3d Cir. 2013) (Hardiman, J., dissenting) (describing the landscape of state laws on handgun possession). In total, twenty-eight states are "shall issue" states. NRA-ILA, *Gun Right to Carry Laws*, https://www.nraila.org/gun-laws (last visited Apr. 3, 2019). Thirteen states do not require a permit to concealed carry. *Id.* As one scholar has noted, "the assumption that the mere possession of a firearm constitutes a crime is crumbling." Jeffrey Bellin, *The Right to Remain Armed*, 93 Wash. U. L. Rev. 1, 31 (2015).

Refusing to allow law enforcement to assume those who possess firearms do so unlawfully will not leave law enforcement without any remedy. Nothing prevents officers from attempting to initiate a consensual encounter to ascertain whether an individual is dangerous and/or has a valid concealed carry permit. *Northrup*, 785 F.3d at 1133. Finally, this case presents a proper vehicle for resolving this court split, as the only basis for the seizure of Mr. Sykes was his firearm possession. No other crimes were suspected. Therefore, this Court should grant the petition for writ of certiorari. This Court must reverse the denial of the

motion to suppress, and the evidence discovered after the frisk and any subsequent statements must be suppressed under the fruit of the poisonous tree doctrine. *United States v. Wheat,* 278 F.3d 722, 726 (8th Cir. 2001) (citing *Wong Sun v. United States,* 371 U.S. 471, 484 (1963)); *see also United States v. Yousif,* 308 F.3d 820, 832 (8th Cir. 2002) ("Verbal statements obtained as a result of a Fourth Amendment violation are as much subject to the exclusionary rule as are items of physical evidence discovered during an illegal search.").

II. THE *TERRY* FRISK ANALYSIS IS A TWO-PART TEST, REQUIRING LAW ENFORCEMENT TO HAVE REASONABLE SUSPICION THAT AN INVIDUAL IS BOTH ARMED *AND* DANGEROUS AND LAW ENFORCEMENT CANNOT ASSUME ANYONE WHO IS ARMED IS AUTOMATICALLY DANGEROUS.

The Eighth Circuit ruled that if law enforcement has reasonable suspicion that an individual is armed, that this individual is automatically dangerous, and a frisk is justified. An intrusive frisk requires more than information that an individual is armed; law enforcement must have reason to believe an individual is both armed **and dangerous.** Again, federal circuit courts and state appellate courts are split on this issue.[5] This Court should hold that "armed" does not

[5] Several courts have held that being "armed" does not automatically make one dangerous. *Northrup v. City of Toledo Police Dept.*, 785 F.3d 1128 (2015); *United States v. Leo*, 792 F.3d 742, 748 (7th Cir. 2013); *State v. Serna,* 331 P.3d 405, 410 (Ariz. 2014); *State v. Bishop,* 203 P.3d 1203 (Idaho 2009); *State v. Vandenberg,* 81 P.3d 19, 25 (N.M. 2003). Other courts have held that armed automatically means dangerous. *United States v. Robinson*, 846 F.3d 694 (4th Cir. 2017), *cert denied*, 2017 WL 2692399 (2017); *United States v. Rodriguez,* 739 F.3d 481, 491 (10th Cir. 2013); *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007), *cert denied*, 552 U.S. 1313 (2008); *People v. Colyar,* 996 N.E.2d 575, 587 (Ill. 2013).

automatically mean "dangerous" and that those who possess firearms can always be subjected to an intrusive frisk.

A categorical rule that anyone who is armed is automatically dangerous misreads this Court's precedents. In *Terry v. Ohio,* 392 U.S. 1 (1968), the Court held that when an officer lacks probable cause to arrest a person he has legally stopped, the officer may nonetheless conduct a limited search of that person only if the officer has reason to believe the person is "armed and presently dangerous to the officer or to others." *Id.* at 24; *see Id.* at 30. The Court required lower courts to "focus[] the inquiry squarely on the dangers and demands of the particular situation," *Id*. at 18 n.15, and directed that "each case of this sort" be "decided on its own facts," *Id*. at 30. Dangerousness should not be assumed based on partaking in an inherently lawful, constitutionally protected activity.

The Eighth Circuit relied upon multiple U.S. Supreme Court cases, including *Adams v. Williams,* 407 U.S. 143 (1972) and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), to find that this Court has already held that an individual who possesses a firearm is dangerous, and law enforcement is justified in frisking the individual. *Pope,* 910 F.3d at 416-17. However, none of these cases explicitly held that armed *always* means dangerous. Again, *Terry* makes clear that each situation must be judged on the specific facts.

Regardless, if these cases do so hold, they must be reevaluated under the changing landscape of our nation's gun laws. "[A]s public possession and display of

firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt." *United States v. Williams,* 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring).

Finally, the exercise of one constitutional right should not require the waiver of another constitutional right. The adoption of a rule allowing the frisk of a person who is armed—without any indication that the person is dangerous—would mean that "individuals who carry firearms elect to subject themselves to being frisked when lawfully stopped by law enforcement officers." *Robinson*, 846 F.3d at 706 (Wynn, J., concurring). Circuit Judge Pamela Harris explained the consequences of such a broad rule:

> [I]f [those who possess firearms] are necessarily "dangerous," then the police should be free to dispense with Fourth Amendment "knock and announce" protections before entering their homes; and when armed and "therefore dangerous" citizens seek to assemble in public, their First Amendment rights may be restricted based on the risk they are conclusively presumed to pose a risk to public safety. . . . If a police officer reasonably believes that a suspect poses a "threat of serious physical harm," he may use deadly force to protect himself . . . ."

Robinson, 846 F.3d at 711 (Harris, J., dissenting). "When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d. Cir. 1977); *see also Miller v. Smith,* 115 F.3d 1136, 1150-51 (4th Cir. 1997) ("Forcing an [individual] to choose between two rights guaranteed by the Constitution results in the denial of one right or the other . . . [and] affronts our notions of basic fairness."). Possession of a firearm should not establish "dangerousness" on its own.

Because possession of a firearm alone is insufficient to justify a *Terry* frisk for weapons, other facts must establish that an individual is armed and dangerous. Here, other facts present do not indicate that Mr. Sykes was dangerous, and the Eighth Circuit did not so hold. *Sykes*, 914 F.3d at 619.

Finally, the frisk was unlawful because other less intrusive actions were available to law enforcement. "[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Here, law enforcement could have simply questioned Mr. Sykes about the potential firearm. *Jones,* 606 F.3d at 968.

Because law enforcement lacked reasonable suspicion to justify the frisk, the evidence discovered after the frisk and any subsequent statements must be suppressed under the fruit of the poisonous tree doctrine. *Wheat,* 278 F.3d at 726 (citing *Wong Sun,* 371 U.S. at 484); *see also Yousif,* 308 F.3d at 832 ("Verbal statements obtained as a result of a Fourth Amendment violation are as much subject to the exclusionary rule as are items of physical evidence discovered during an illegal search.").

CONCLUSION

For the foregoing reasons, Mr. Sykes respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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