No. _____

In the
Supreme Court of the United States

ANDREW MCKINLEY,
Petitioner,
v.

CHRISTOPHER LEE-MURRAY BEY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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June 10, 2020

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QUESTIONS PRESENTED

Question 1

Does the Equal Protection clause require an officer who initiated a pre-contact investigation for non-race related reasons to break off the investigation upon discovering the subject is a member of a different race?

Question 2

Does the limited appellate jurisdiction of a qualified immunity appeal prevent review of whether a Plaintiff has proffered sufficient statistical evidence to sustain a claim of indirect race based discrimination?

Question 3

Have law enforcement officers in the Sixth Circuit lost the qualified immunity protection to be reasonably mistaken in making Fourth Amendment determinations as to the Constitutional propriety of initiating a stop for an investigatory detention afforded to officers in the other circuits?

PARTIES TO THE PROCEEDING BELOW

The Petitioner is Andrew McKinley, Defendant-Appellant below.

Eric Eisenbeis and Megan McAteer were also Defendants-Appellants below, but are not parties to this Petition.

Adam Falk, Charter Township of Canton, Michigan, City of Livonia were Defendants below.

RULE 29.6 STATEMENT

Andrew McKinley is an individual governmental employee. There are no Rule 29.6 issues to disclose.

LIST OF DIRECTLY RELATED PROCEEDINGS

Christopher Lee-Murray Bey v. Adam Falk and Charter Township of Canton, Michigan (18-1376); *Andrew McKinley, Eric Eisenbeis, and Megan McAteer* (18-1285), docket numbers Nos. 18-1285/1376, Opinion of the Sixth Court of Appeals (January 6, 2020).

Christopher Lee-Murray Bey v. Adam Falk, Canton Charter Township, City of Livonia, Andrew McKinley, Eric Eisenbeis, and Megan McAteer, the United States District Court Eastern District of Michigan, Southern Division's Order Denying Defendants' Motion for Rehearing or Reconsideration Per LR 7.1(h), No. 14-13743 [#55].

Christopher Lee-Murray Bey v. Adam Falk, Canton Charter Township, City of Livonia, Andrew McKinley, Eric Eisenbeis, and Megan McAteer, the United States District Court Eastern District of Michigan, Southern Division's Order Denying in Part Defendants' Motion for Summary Judgment, No. 14-13743 [#38, 39].

Christopher Lee-Murray Bey v. Adam Falk and Charter Township of Canton, Michigan (18-1376); *Andrew McKinley, Eric Eisenbeis, and Megan McAteer* (18-1285), the Court of Appeals Order Denying Petition for Rehearing in the United States Court of Appeals for the Sixth Circuit docket numbers Nos. 18-1285/1376 (January 14, 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andrew McKinley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The original Opinion of the Court of Appeals is cited as Christopher Lee-Murray Bey v. Adam Falk and Charter Township of Canton, Michigan (18-1376); Andrew McKinley, Eric Eisenbeis, and Megan McAteer (18-1285), docket numbers Nos. 18-1285/1376 (January 6, 2020) and is reproduced at App 1-59. The Opinion has been designated for publication. The United States District Court Eastern District of Michigan, Southern Division's Order Denying Defendants' Motion for Rehearing or Reconsideration Per LR 7.1(h) [#55] is unreported and reproduced at App 60-67. The United States District Court Eastern District of Michigan, Southern Division's Order Denying in Part Defendants' Motion for Summary Judgment [#38, 39] is unreported and reproduced at App 68-107. The Court of Appeals Order Denying Petition for Rehearing in the United States Court of Appeals for the Sixth Circuit docket numbers Nos. 18-1285/1376 (January 14, 2020) and is reproduced at App 109-110.

JURISDICTION

The Sixth Circuit entered the Order on January 6, 2020. See App 1-59. A timely Motion for Panel Rehearing was filed on January 9, 2020 and denied by Order emailed on January 14, 2020. See App 109-110. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

Respondent Christopher Lee Murray Bey seeks damages for alleged violations of Fourth Amendment and Fourteenth Amendment rights pursuant to 42 U.S.C. §1983. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and affects, against unreasonable searches and seizures shall not be violated…." The Fourteenth Amendment provides that "[n]o state shall… deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Christopher Lee-Murray Bey was arrested by an officer of the Canton Township Police Department for possessing a concealed weapon without a permit on March 16, 2013. Charges were dropped after a suppression hearing when the arresting officer could not articulate the facts creating reasonable suspicion to support the stop that lead to the discovery of the undisputed unlawful weapon possession. That officer initiated contact with Mr. Bey at the request of Petitioner, Livonia Police Sergeant Andrew McKinley, who led the undercover team that had been investigating Mr. Bey. The Prosecutor did not call any Livonia Police to the stand at the suppression hearing, and thus no one with knowledge could articulate their suspicions and underlying facts.

Mr. Bey contends that the stop was unlawful racial profiling in violation of his rights under the Fourth Amendment prohibition against unreasonable seizures and the Fourteenth Amendment prohibition against

the denial of equal protection. Mr. Bey's complaint was made solely on his own race-based assumptions: Mr. Bey and his companions are black; Sgt. McKinley and all of the officers involved are white. Therefore, it must have been race. However, he admits to having no knowledge of what the Petitioner knew, what the Petitioner had been thinking, or why the Petitioner did what he did.

Pretrial discovery revealed the circumstances from both Plaintiff's and Petitioner's perspectives. The Petitioner's narrative was developed for Rule 56 purposes in avoidance of material factual controversies, accepting Plaintiff's fact based testimony as true, but also in reliance of the uncontested fact testimony put forth by the officers.

After a late night dinner in a restaurant in the southeastern Oakland County community of Ferndale, Plaintiff and his companions embarked on a quest to find an all-night store where they could buy space heaters. They crossed through many local jurisdictions to communities in northwestern Wayne County, making numerous stops in Livonia. The very late time of night and poor weather, combined with the condition of their vehicle (a 13 year old minivan), caught the attention of Petitioner who was heading a special operations detail of the Livonia Police Department on the lookout for recent nighttime store related criminal activity.

The team, working in separate individually driven vehicles, followed the mini-van, making observations and gathering information. The mini-van made a variety of stops at both open and closed stores. The

officers observed a temporary paper tag in the van's rear window instead of a traditional license plate. A check of the temporary tag on the Secretary of State's data base did not show the van as a registered vehicle.

At some point after commencement of the surveillance, one or more of the officers saw the occupants of the mini-van as they walked from or to their vehicle outside one of the stores. For the first time, the officers learned the subjects' race. Recall, Petitioner McKinley commenced the surveillance without knowing the race of the occupants of the van. The surveillance continued as they followed the mini-van into Canton Township, Michigan.

Mr. Bey and his companions entered a Walmart. McKinley ordered one of the team to observe them in the store and report back to him. In keeping with protocol, the Livonia officers contacted the Canton Township Police, requesting uniformed officers to be nearby if contact was requested.

The reported manner in which Bey shuffled credit cards at the checkout was consistent with both a legitimate purchase and credit card fraud. Based upon the aggregation of all observations, suspecting that retail fraud may have taken place, Petitioner issued a request to the Canton Township officers to make contact[1]. The contact took the form of a *Terry* stop or

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[1] The officers testified that in their training and experience criminals will use unregistered vehicles to evade detection. The unregistered 13 year old mini-van fell within this description. It was the middle of the night and the team had been briefed that there had been late night criminal activity at commercial stores.

investigatory detention while Mr. Bey and his companions were getting into their motor vehicle in the store parking lot.

At the very initial stages, Mr. Bey properly informed the Canton Township officers that he possessed a concealed weapon on his person. He consented to the officer's request to secure the weapon. Although no evidence of retail fraud was discovered, the weapon was not licensed and Bey was arrested. His vehicle was left in the custody of his companions who were free to go.

During the course of the prosecution, Mr. Bey moved to suppress the evidence of the gun. At the hearing, the Wayne County Prosecutor only produced the arresting Canton Township officers who lacked the facts known by the Livonia police officers. Without those observations, no factual basis for reasonable suspicion could be articulated. The motion to suppress was granted and consequently the criminal case was dismissed.

Sometime later, Mr. Bey commenced this suit against Canton Township and the Canton Township

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They observed the 13 year old mini-van make numerous stops at open and closed stores. As they followed the mini-van, they observed it dramatically change its direction. That would be consistent with making a wrong turn but also with known techniques to elude or at least draw out a tail (a following undercover police car). It was readily admitted in the record that none of these observations revealed the frank commission of a crime and further could be explained by innocent activity. And the same can be said for the credit card shuffling observed at the cash register.

arresting officer. Subsequently, he amended the Complaint to include the City of Livonia and "Officer John Does No. 1." After informal exchanges of information between counsel, and per stipulation, Mr. Bey filed a Second Amended Complaint to include the three named Livonia Special Operations officers, including the Petitioner.

After sufficient discovery, all Defendants brought respective summary judgment motions. The Livonia officers argued that each was entitled to evaluation of their individual actions under qualified immunity. Petitioner argued that under the Fourth Amendment he only directed that the Canton Township officers make contact. He did not request detention.[2] Additionally, Petitioner argued that there was reasonable suspicion supported by articulable facts to justify a brief detention on two grounds: (a) the collective observations of the subjects' activities; and (b) the unregistered status of Mr. Bey's motor vehicle.

With respect to the Equal Protection claim, there is no direct evidence that race was a factor. Petitioner argued that the statistics advanced by Mr. Bey fail as a matter of law to demonstrate any discrimination. Namely, they do not establish a *prima facie* case needed to go any further in an equal protection claim. As a matter of law, those statistics do not make the minimum showing of either discriminatory impact or

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[2] As the lower courts concluded there was a fact question of whether McKinley requested contact or a stop, this case should proceed on the premise that he requested a stop in avoidance of factual controversy.

purposeful discriminatory intent. Additionally, the City of Livonia sought summary judgment of all claims advanced against it and in particular under *Monell v. Department of Social Services,* 436 U.S. 658; 93 S. Ct. 2018 (1978). The City argued the absence of any basis in the record to show a custom, policy or practice driving either alleged 4th or 14th Amendment violations.

While the trial court granted summary judgment as to the City of Livonia, it denied as to all the other Defendants. After the trial court denied motions for rehearing or reconsideration, the individual Defendants from both Livonia and Canton Township brought appeals of the qualified immunity denials to the Sixth Circuit.

The Sixth Circuit affirmed the denial of immunity as to the Petitioner recognizing he was the decision maker regarding the surveillance and the request to have Canton Township police encounter the subjects. For the same reasons the denials of qualified immunity for all of the other individual officers were reversed.

As to Mr. Bey's Fourth Amendment claim, the Court of Appeals dramatically departed from the practice consistently applied in the other circuits. In short, rather than analyzing "reasonable suspicion" based upon the totality of the officers' enumerated and articulated facts, the Court instead looked at the facts in isolation to reach the conclusion that they were individually inadequate to support reasonable suspicion. There was no deference paid to the officers' training and experience. The Court rejected that, at worst, Sgt. McKinley was reasonably mistaken in concluding there was a sufficient basis to make contact

with Mr. Bey under the 4th Amendment. There was no clearly established law demarking the boundary between what is and what is not constitutional to offer guidance to McKinley. The significance goes beyond a mere legal mistake destroying the immunity from suit offered by qualified immunity for Petitioner. In this precedent setting case the Court of Appeals has demonstrated that, in the Sixth Circuit, there is no immunity for a *Terry* stop based upon articulable facts that fall short when those facts are considered individually rather than in the aggregate.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three intertwined reasons. Each will be addressed with its own particular emphasis to punctuate its unique impact upon the Sixth Circuit.

1. POST-*BEY*, ALL WHITE LAW ENFORCEMENT OFFICERS IN THE 6TH CIRCUIT MUST BREAK OFF RACE-NEUTRAL PRE-CONTACT INVESTIGATIONS ONCE THEY LEARN THEIR SUBJECTS ARE PEOPLE OF COLOR OR FACE TORT LIABILITY FOR A CONSTITUTIONAL VIOLATION.

This published decision dramatically departs from Sixth Circuit precedent and profoundly conflicts with at least six (6) other circuits. Prior to this decision, the Sixth Circuit adhered to the notion that Equal Protection jurisprudence prohibits investigations initiated solely for reasons of race. *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997). Departing from this standard, and rendering actionable an Equal

Protection claim merely when a difference between races is evident, the Sixth Circuit now abandons the balanced constitutional analysis that gave rise to *Avery,* an approach which has enjoyed faithful adherence in the other Circuits.

Avery drew from this Honorable Court's reasoning in *United States v. Brignoni-Ponce*, 422 U.S. 873; 95 S. Ct. 2574 (1975). *Brignoni-Ponce* rejected as unconstitutional the use of race alone, manifested in that case by the defendant's apparent Mexican ancestry, to justify a stop, even in an area close to the Mexican border known for illegal immigration. *Brignoni-Ponce*, 423 U.S. at 885-86.

Avery extended the *Brignoni-Ponce* principle to pre-contact investigations challenged on Equal Protection principles recognizing that the 14th Amendment has no seizure provision as compared to the 4th Amendment. *Avery*, 137 F.3d at 353. So have at least three other Circuits; *Brown v. City of Oneonta*, 235 F.3d 769, 777 (2d Cir. 2000); *Sanchez v. Sessions*, 885 F.3d 782, 791-92 (4th Cir. 2018); and *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982).

With this precedential binding decision, the Sixth Circuit warps the reasoning in *Brignoni-Ponce* and *Avery* beyond recognition. Now, the Sixth Circuit finds that where the presence of a racial difference between officer and pre-contact subject is merely added to existing race neutral factors, that is enough to sustain equal protection viability. However, *Brignoni-Ponce* and *Avery* had expressly rejected such a notion. *Brignoni-Ponce*, 422 U.S. at 884-86; *Avery*, 137 F.3d at 353. This decision hampers law enforcement by

mandating a break off of pre-contract surveillance once the officers learn a subject belongs to a different race.

At its core, Constitutional concerns seek to strike a balance between the imperatives of proactive law enforcement against the rights of individuals. See e.g. *Terry v. Ohio*, 392 U.S. 1, 24-25; 88 S. Ct. 1868 (1968). In *Brignoni-Ponce*, this Court noted the limited intrusion occasioned by a *Terry* stop as balanced against the state's interest in investigating the signs of criminal activity. Police officers need not shrug and allow a crime to occur or let a criminal escape due to lack of probable cause to arrest.

> On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response.... A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Brignoni-Ponce, 422 U.S. at 881 (citing *Adams v. Williams*, 407 U.S. 143, 145-146; 93 S. Ct. 1921 (1972).

In *Brignoni-Ponce* this Court explained that numerous reasons could justify a stop when looked at together. 422 U.S. at 884-86. Presenting a stark contrast to *Bey*, the facts in *Brignoni-Ponce* did not include any listing of multiple reasons to consider. "In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants." *Id.* at 885-886.

Drawing upon this, *Avery* extended the thinking to pre-contact surveillance and consensual encounters, state action that does not involve the "seizure" prohibition of the 4th Amendment. Under the Equal Protection Clause, the action is unconstitutional "…when the sole factor grounding the suspicion is race…." *Avery* at 354.

However, the jurisprudence of the Sixth Circuit has now eliminated the significance of the word "sole". Race is often perceptibly present. It cannot be escaped. *Brignoni-Ponce* and *Avery* properly prohibit its sole use as a driver for investigation. But its mere presence? Indeed, the Petitioner in this case did not even articulate race as a basis for suspicion. Nowhere is race mentioned as a reason for suspicion. Mr. Bey did nothing more than assume race was a factor. He could point to no fact.

These issues were expressly discussed by the Second Circuit in *Brown v. City of Oneonta*, 235 F.3d 769 (2d Cir. 2000) as *En Banc* review was debated. Those discussions, preserved in published decisions, flowed from a sweep where police stopped every African-American they could find in a small town that may have met the description of an alleged criminal. The Plaintiff and at least one Second Circuit Court Judge advocated for full extension of equal protection guarantees to investigations and consensual discourse short of detention and arrest. As Chief Judge John M. Walker Jr. wrote in his concurring opinion:

> I believe that any benefits from extending equal protection guarantees to such situations, where the citizen who is questioned is not deprived of

> his liberty even for a brief period of time and remains free at all times to walk away from the officer, are outweighed by the additional costs to effective law enforcement. Officers rely on their ability to act on non-articulable hunches, collected experience, intuition, and sense impressions--all of which are crucial in carrying out a criminal investigation. Officers would be forced to justify these intuitive considerations in order to meet an accusation that race was the sole factor motivating the encounter. The unworkability of such a regime is self-evident. 235 F.3d 769, 776-777 (2d Cir. 2000).

The Fourth Circuit also adheres to the *Avery* application, prohibiting stops occasioned solely by race or ethnicity. *Sanchez v. Sessions*, 888 F.3d 782, 791-792 (4th Cir. 2018). The Ninth Circuit likewise follows the *Avery* analysis holding that race cannot be the sole factor, but it may be relevant amongst other factors, *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982). Demonstrating a growing split between Federal Circuits, the Sixth Circuit does not stand alone with its decision in *Bey*. The Eighth Circuit does not limit the taint of race to circumstances where it is the sole reason for initiating action. *United States v. Clay*, 640 F.2d 157, 159-60 (8th Cir. 1981).

> Although color of skin is an identifying factor, this court has consistently rejected the use of race in combination with other factors to justify investigative searches and seizures.

Clay, 640 F.2d at 159-160.

Whether race is a sole factor or one among many is a significant distinction. The significance grows where race is not even a factor but merely an after-the-fact observation of the individual under suspicion. Allowing race to become a factor merely by its presence creates impossible problems when attempting to strike the balance between the interests of the individual and the state. In the instant case, there is no evidence that Petitioner actually used Mr. Bey's race as a factor for formulating reasonable suspicion. Instead, it has become a part of the equation for no reason other than the fact that the police officers are white and Mr. Bey is black.

The result of the lower court's opinion is that, in order to abide by the Sixth Circuit's newly initiated application of the Equal Protection Clause, police officers must break off surveillance upon discovering that the subjects are of a different race or ethnicity. This further begs the question of whether officers have to break off their investigation if they and the subjects are of the same ethnicity, assuming they are all minorities. Would it matter if it was a minority community or a majority community? Must officers be teamed in multi-ethnic groups to avoid the race taint? In the words of Chief Judge Walker in *Brown v. City of Oneonta*, *supra*, "the unworkability of such a regime is self-evident."

Sixth Circuit Judge Boggs authored a concurrence in *Avery* which highlights the problems when going beyond race as a sole factor.

> On the one hand, even if a hypothetical defendant were to present compelling evidence

that officers "noticed" or "targeted" or "pursued" or "investigated" a person solely because of his race, would suppression be the proper remedy, when the "pre-contact" activity that could be described by those words leads to evidence of crime? I am not sure of the answer to that question. Although the court hypothesizes that equal protection violations could occur at the pre-contact stage (and the court's language is notably hypothetical-- "what of a case"; "what about a situation"; "a case could be made"; "may be found"), the court never discusses whether such violations could result in the suppression of evidence otherwise lawfully obtained.

On the other hand, the contours of the violation are difficult to discern in the abstract. In a paradigmatic case, an officer on routine foot patrol walks east on First Street, behind two men, one black and one white. First Street dead-ends into Main, so at the corner of First and Main each man, and the officer, must turn right or left. The black man turns one way; the white man turns the other. The officer chooses to turn the corner to follow one of the men and, when questioned later, candidly admits that he had no reason for deciding to go right rather than left save the race of the man who also turned that way. However, within a block of turning the corner, the officer sees the man rob a store, and arrests the man. My intuition is that the

> evidence of that robbery could not be suppressed.

Avery, 137 F.3d at 358 (Boggs, J Concurring).

In light of the Sixth Circuit's decision in *Bey*, the hypothetical concerns raised by Judge Boggs have now materialized as ripe. In order to conduct themselves constitutionally, police must break off their pre-contact activities notwithstanding non-race related reasons. This is an important split between the Circuits that warrants review.

2. THE LIMITED APPELLATE JURISDICTION OF A QUALIFIED IMMUNITY APPEAL SHOULD NOT PREVENT REVIEW OF WHETHER A PLAINTIFF HAS PROFFERED STATISTICAL EVIDENCE SUFFICIENT TO SUSTAIN A CLAIM OF INDIRECT RACE BASED DISCRIMINATION.

Mr. Bey presented generalized statistical evidence to show discriminatory impact and discriminatory intent. While the statistics were accepted as true, Petitioner argued that the statistics substantively did not meet the necessary burden as a matter of law. Petitioner's arguments drew upon precedent from this Supreme Court and as universally applied in circuit and trial courts in all the other circuits. Curiously, in keeping with that established jurisprudence, the Sixth Circuit majority expressed its deep skepticism for the merit of Mr. Bey's statistical argument. Still, they gave it the credit of gravitas notwithstanding its gossamer presentation. They declined to rule on the legal issue, characterizing it as one beyond the reach of their

appellate jurisdiction. They could only review discretely legal issues as this matter came before them as an appeal from a denial of qualified immunity, a collateral order. The legal question the panel evaded was simply, as a matter of law, could the statistics, accepted as accurate, make the necessary showing of discrimination.

In ruling this way, the Sixth Circuit has now exposed all governmental employees to bare claims of statistically based discrimination, claims which in every other Circuit would be dismissed upon review of the same caliber of statistics. The bar has been lowered. It has sunk below the other circuits. The question here is whether it is so low as to hamper legitimate law enforcement.

Statistical cases have been held to a very high standard. They can too easily be used to conclude something is invidious, when at worst, it is unexplained. *McClesky v. Kemp*, 481 U.S. 279, 313; 107 S. Ct. 1756 (1987). Drawing upon history and precedent, the Seventh Circuit case of *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2000) provides the compass points for analysis that have been universally drawn upon for analysis ever since.

In *Chavez*, the Seventh Circuit confronted a statistically based allegation that a state wide program of the Illinois State Police employed race based discriminatory tactics for determining whom to take interest in, which included traffic stops. Much narrower tightly focused statistics than those offered by Mr. Bey were developed and subject to expert analysis to demonstrate the required showing. And

they did not meet the bar for showing either discriminatory effect or purposeful discriminatory intent.

Chavez noted that if it could be proven, utilizing race to determine whom to stop would violate the Equal Protection Clause. *Chavez*, 251 F.3d at 636 (citing *Whren v. United States*, 517 U.S. 806, 813; 116 S. Ct. 1769 (1996)). To do that, a claimant must show both the existence of a discriminatory effect and that such was motivated by purposeful discrimination. *Chavez*, 251 F.3d at 636 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272-74; 99 S. Ct. 2282 (1979); *Arlington Heights v. Metro. Housing Dev. Corp*., 429 U.S. 252, 264-66; 97 S. Ct. 555 (1977); *Washington v. Davis*, 426 U.S. 229, 239-42; 96 S. Ct. 2040 (1976).

A key component of discriminatory effect requires comparison between members of different classifications, demonstrating that similarly situated persons are treated differently. *Chavez*, 251 F.3d at 636 (citing *United States v. Armstrong* 517 U.S. 456, 467; 116 S. Ct. 1480 (1996)). Critically, the *Chavez* Court emphasized: "The statistics proffered must address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." *Chavez*, 251 F.3d at 638 (citing *Schweiker v. Wilson*, 450 U.S. 221, 233; 101 S. Ct. 1074 (1981)). If the statistics fail to make that disparity clear, then they cannot meet that critical relevant non-discardable burden. *Chavez*, 251 F.3d at 639-40; citing *Armstrong*, 517 U.S. at 458.

The element of purposeful discriminatory intent focuses on the decision maker, here the Petitioner.

Chavez, 251 F.3d at 645 (citing *McClesky v. Kemp*, 481 U.S. 279, 292; 107 S. C.t 1756 (1987). While there are any number of ways to demonstrate purposeful discrimination, "[o]nly in 'rare cases [has] a statistical pattern of discriminatory impact demonstrated a constitutional violation…." *Chavez* 251 F.3d at 647 (Citing *McClesky*, 481 U.S. at 293 n12). Statistical demonstrations that are merely consistent with discriminatory effect are woefully inadequate, failing to demonstrate purposeful discrimination. *Id.* (citing *Washington*, 426 U.S. at 242).

In contrast with this high burden, the Sixth Circuit is now satisfied that Mr. Bey has met both burdens. The totality of what he presents by way of statistics, however, neither addresses similarly situated people or purposeful intent. They are nothing more than observations made from 30,000 feet which yield no conclusions at all. The first is that the percentage of black people arrested by Livonia police is higher than the percentage of black people who live in Livonia.[3]

These statistics should not pass muster as a matter of law. They measure the number of black people arrested by the Livonia Police. There was no analysis of circumstances, arrest categories let alone an examination of similarly situated circumstance. There was no distinction made for arrests made for crimes

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[3] It is not clear if the racial make-up of the Livonia Police Department was part of the analysis, but it was in the record. In any event, the assertion that there were few to no black police officers in the Livonia Police Department is not disputed. It is also not disputed that there was no evidence of racial animus presented by any Livonia Police Officer.

committed in the presence of an officer as contrasted with those made upon a warrant issued after investigation and a probable cause determination. There was no distinction made between domestic dispute based arrests as compared to arrests for retail frauds, drug charges, or illegal weapons. It is simply a number of arrests, showing what percentages of those arrests were of a particular racial class. Standing by itself, this figure has no meaning, let alone any bearing on a relevant component of discriminatory effect.

Mr. Bey holds these arrest numbers up against the percentage of black residents of the City of Livonia. Without any expert analysis or case law, Mr. Bey assumes that the percentage of black residents of the City must equal the percentage of black people arrested by the Livonia Police Department. But these two figures have no meaningful correlation. These are ingredients of two different recipes. Mr. Bey's approach assumes that the City of Livonia Police will only arrest residents of the City of Livonia. Livonia is not a walled city. It has two interstate highways, multiple industrial and commercial facilities providing venues for employment and consumption for people throughout the region. The number of arrests of all types involves many, many more than just those who happen to reside in Livonia. Indeed, neither Mr. Bey nor his companions are residents of Livonia. Thus, the measure of black arrests against the measure of black residents is an empty, meaningless irrelevant consideration. What Mr. Bey has offered is miles short of what was presented in *Chavez*, which was very much more narrowed to an analysis of specific circumstances, finely honed in an effort to demonstrate similarly

situated people of different races were treated differently. The *Chavez* statistics still did not show discriminatory effect.

And the demonstration of purposeful discriminatory intent is not even microscopic. It is absent from anything gleanable from these statistics. And the Sixth Circuit would allow such wanting proofs to go to the jury notwithstanding their woeful inadequacy because they have declared it beyond their appellate reach – a new and unique parameter.

The *Bey* majority classified the decision as being one of factual sufficiency that belonged exclusively to the trial court and could not be touched in a qualified immunity appeal. Although citing to Sixth Circuit precedent, those cases present examples where there is some assessment of factual controversy or otherwise some viewing of a disputed fact in a light not favorable to a non-moving party. *DiLuzio v. Village of Yorkville*, 796 F.3d 604 (6th Cir. 2015); *Farm Labor Org. Comm. v. Ohio State Hwy. Patrol*, 308 F.3d 523 (6th Cir. 2002); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *United States v. Travis (Travis II),* 62 F.3d 174 (6th Cir. 1995). Those cases are in keeping with the general rule that factual controversies are anathema to appellate jurisdiction over qualified immunity appeals. They are more finely tuned examples of that general rule's application. What the Sixth Circuit is doing here is abdicating its role to adjudicate discrete issues of law. This error is not what drives this Petition as much as how this error is both ensconced within a precedential binding decision that conflicts with how this is handled in other circuits.

The *Chavez* court noted that the trial court was allotted a significant measure of discretion in the weight to be afforded to statistical evidence. "Determining the validity and value of statistical evidence is firmly within the discretion of the district court, and we will reverse its finding only if they are clearly erroneous." *Chavez*, 251 F.3d at 641 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 287-90; 102 S. Ct. 1781 (1982). If there is no factual controversy attendant to the issue, then the quest ion of whether a lower court's ruling was clearly erroneous is truly a question of law. It is an archetypical question of law. And as framed in *Bey* it merely asks the question: can these statistics viewed in a light most favorable to Mr. Bey's case establish discriminatory effect and discriminatory intent? They do not.

3. LAW ENFORCEMENT OFFICERS IN THE SIXTH CIRCUIT HAVE LOST THE QUALIFIED IMMUNITY PROTECTION AFFORDED TO OFFICERS IN THE OTHER CIRCUITS TO BE REASONABLY MISTAKEN IN MAKING FOURTH AMENDMENT DETERMINATIONS.

The Sixth Circuit Court of Appeals decision in the instant matter demonstrates a dramatic departure from not only what had been well-settled law on an important matter within the Sixth Circuit, but also from a number of other circuits within the United States. In *United States v. Sokolow*, 490 U.S. 1 (1989), this Honorable Court granted certiorari to review the Ninth Circuit Court of Appeals' reversal of the District Court's denial of the defendant's motion to suppress

evidence. *United States v. Sokolow*, 831 F.2d 1413 (9th Cir. 1987). In this Court's opinion, the Ninth Circuit's decision created "serious implications for the enforcement of the federal narcotics laws." *Id*. at 7-8.

> The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.' *Gates*, *supra*, at 232. We think the Court of Appeals' effort to refine and elaborate the requirements of 'reasonable suspicion' in this case creates unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment. In evaluating the validity of a stop such as this, we must consider 'the totality of the circumstances -- the whole picture.' (Citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

In *Untied States v. Arvizu*, 534 U.S. 266 (2002), this Court once again granted certiorari from the Ninth Circuit, this time following the Court of Appeals' reversal of the District Court's denial of the defendant's motion to suppress drug evidence found as the result of a traffic stop. Finding that the Court of Appeals had wrongfully engaged in "fact specific weighing of circumstances" this Court stated:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. See, *e.g., Cortez*, 449 U.S. at

> 417-418. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' *Id*. at 418. See also *Ornelas v. United States*, 517 U.S. 690, 699, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996) (reviewing court must give 'due weight' to factual inferences drawn by resident judges and local law enforcement officers). Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, *Terry*, *supra*, at 27, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard, *Sokolow*, *supra*, at 7." 534 U.S. at 273-274.

From *Sokolow, supra,* and *Arvizu*, *supra*, the "totality of the circumstances" analysis had become well-established as the test to be utilized in evaluating whether a police officer had "reasonable suspicion" to support a stop. In *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997), the Sixth Circuit adopted the "totality of circumstance" standard laid out in *Cortez* and *Sokolow*:

> While it is true that none of these facts alone is incriminating or illegal, and we are very reluctant to ascribe criminal intent to scenarios that are similar to innocent acts of the general public, we must look at the totality of the circumstances in determining whether or not the detention of the bag was supported by

> reasonable suspicion. *United States v. Cortez*, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 101 S. Ct. 690 (1981); see also *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989) (found that factors which are not by themselves proof of any illegal conduct and quite consistent with innocent travel can also have probative significance and taken together can amount to reasonable suspicion). We believe the combined factors in this case provided the officers with sufficient suspicion to hold the bag briefly in order to allow a police dog to sniff it. Accordingly, the district court did not err in finding reasonable suspicion. (Emphasis added).

United States v. Villalobos, 161 F.3d 285, 288 (5th Cir. 1998): "Reasonable suspicion is a fact-intensive test; each case must be examined from the totality of the circumstances known to the agent, and the agent's experience in evaluating such circumstances."

United States v. Zapata-Ibarra, 212 F.3d 877, 881 (5th Cir. 2000): "Our analysis is not limited to any one factor; rather, reasonable suspicion is a fact-intensive test in which we look at all circumstances together to 'weigh not [the] individual layers but the laminated total'."

United States v. Guerrero-Barajas, 240 F.3d 428, 433 (5th Cir. 2001): "No single fact is determinative of the outcome of a reasonable suspicion analysis."

United States v. Espinosa-Alvarado, 302 F.3d 304, 307 n.6 (5th Cir. 2002): "*Arvizu* simply clarified the principle that reviewing courts 'must look at the

totality of the circumstances of each case' when making reasonable-suspicion determinations, making clear that a 'divide-and-conquer' style analysis is inappropriate."

United States v. Myers, 308 F.3d 251, 276 (3d Cir. 2002): "In evaluating the totality of the circumstances in a given case, a court may not consider each fact in isolation."

United States v. Ramos, 629 F.3d 60, 65-66 (1st Cir. 2010):

> The thrust of Ramos's argument is that, on the facts stated above, there was no reasonable suspicion justifying the "seizure," the reference to Middle Eastern appearance could not supply the missing ingredient, and any consideration of the fact that Ramos appeared to be 'Middle Eastern' was impermissible and tainted the district court's conclusion. We disagree.
>
> The initial premise of Ramos's argument appears to be that only the particular circumstances directly related to the seizure are relevant. Not so. That premise runs afoul of two established strands of Fourth Amendment law. The first strand is that whether the seizure violated the Fourth Amendment must be evaluated against the "totality of the circumstances," rather than by a "divide-and-conquer" approach. *Arvizu*, 534 U.S. at 274; *United States v. Wright*, 582 F.3d 199, 205, 212-213 (1st Cir. 2009) (finding circumstances combined to support reasonable suspicion, even though most of those circumstances were

> potentially innocent when considered individually). The second strand is that weight must be given to police officers' training and experience. See *Ornelas*, 517 U.S. at 700 (finding in probable cause context that "a police officer may draw inferences based on his own experience"); *Wright*, 582 F.3d at 207 (stating that police officers' subjective inferences are relevant to the extent they reflect officers' experience and expertise). It was entirely appropriate on these facts to consider the larger context.

United States v. Arnott, 758 F.3d 40, 44 (1st Cir. 2014):

> The totality of the circumstances includes, but is not limited to, "various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *United States v. Cortez*, 449 U.S. 411, 418; 101 S. Ct. 690; 66 L. Ed. 2d 621 (1981).
>
> In the last analysis, reasonable suspicion is more a concept than a constant: it deals with degrees of likelihood, not with certainties or near certainties. It makes due allowance for the need for police officers to draw upon their experience and arrive at inferences and deductions that "might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273; 122 S. Ct. 744; 151 L. Ed. 2d 740 (2002) (quoting *Cortez*, 449 U.S. at 418). (Emphasis added).

United States v. Tiru-Plaza, 766 F.3d 111, 121 (1st Cir. 2014):

> Certainly, facts like the late hour (11:00 p.m.) and number of passengers in the car (four), when each is taken alone, create no suspicion of criminal activity. But a number of innocuous facts viewed together may form the basis of reasonable *suspicion*. *See, United States v. Wright*, 582 F.3d 199, 212 (CA 1 2009); *Ruidíaz*, 529 F3d at 30. And although Morales's inability to provide the officers with a driver's license and a legible car registration could admit of several potentially innocent explanations, these facts might also reasonably give rise to a suspicion of criminal activity. See, *Terry*, 392 U.S. at 27 (permitting police officers to draw "reasonable inferences" based on their experience); *Arnott*, 758 F.3d 40, 44; 2014 WL 2959288 at 3 (stating that "reasonable suspicion . . . deals with degrees of likelihood, not with certainties or near certainties," and allows "police officers to draw upon their experience and arrive at inferences and deductions"). (Emphasis added).

The foregoing cases make it clear that for several years now a majority of circuits, including the Sixth Circuit, employed a "totality of the circumstances" analysis giving great deference to the training and experience of police officers. Now, in a sudden reversal of course, the Sixth Circuit's published opinion below runs roughshod over what had once been well-settled in this circuit and creates a clear split from the other circuits. Although the Sixth Circuit Court of Appeals

started off with a "tip of the hat" to the legal principles of *Cortez*, *Sokolow* and *Arvizu*, it ultimately and unfortunately did exactly the opposite of what it emphasized in *Avery* by ignoring the totality of the factors presented to Petitioner in favor of individual or specific facts outside the totality. The Court of Appeals failed to demonstrate or pay any deference to the Petitioner's training and experience as a veteran police officer, or conduct an analysis of the totality of the circumstances presented to Sgt. McKinley. Again, this decision not only represents a departure from Sixth Circuit case law, but case law in the other circuits.

Post-*Bey*, a new set of rules has been created for law enforcement officers serving the states comprising the Sixth Circuit compared with police officers serving in the other circuits. The end result being, contrary to *Terry*, police officers within the Sixth Circuit are no longer permitted to "draw reasonable inferences" based on their training and experience. *Terry*, 392 U.S. at 27. Incompatible with *Terry, supra*, and *Arnott, supra*, "reasonable suspicion" within the Sixth Circuit has reverted to becoming more of a constant than a concept, dealing with degrees of likelihood, not with certainties or near certainties. *Cf. Arnott*, 758 F.3d at 44. No longer is "due allowance" made for the need of police officers "to draw upon their experience and arrive at inferences and deductions that might well elude an untrained person." *Arvizu*, 534 U.S. at 273; *Arnott*, at 44. In the end, police officers within the Sixth Circuit are no longer entitled to qualified immunity if their determination of what constitutes "reasonable suspicion" to initiate contact or make a stop turns out to be incorrect. Such a hamper upon law enforcement

officers is not only unworkable but a complete reversal of long-standing legal principles which must be corrected.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner respectfully requests that this most Honorable Court grant his petition, and grant certiorari to review the Sixth Circuit Court of Appeals opinion.

Respectfully submitted,

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