DOCKET NO.:

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Respondent-Plaintiff

v.

CUWAN MERRITT

Petitioner-Defendant

On Petition for a Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the level of corroboration and investigation required for reasonable articulable suspicion gives rise to a de facto arrest, which requires probable cause, and thereby a canine sniff of an individual's body incident to the de facto arrest?

PARTIES AND RELATED CASES

Cuwan Merritt is the petitioner, who was the defendant-appellant in the proceedings below.

The United States of America is the respondent, who was the plaintiff-appellee in the proceedings below.

Michael Artis, who was co-defendant and co-appellant in the proceedings below in the related case: United States of America v. Michael Artis, No. 2:17-CR-00102-DBH-001, U.S. District Court for the District of Maine. Judgment entered June 28, 2018.

The required parties were served according to Supreme Court Rule 29.

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

v.

CUWAN MERRITT

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on December 19, 2019. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court exercised original jurisdiction pursuant to 18 U.S.C. § 3231, as Mr. Merritt was indicted and convicted of offenses against the laws of the United States, 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1A-17A) United States of America v. Cuwan Merritt; Michael Artis, Nos. 18-2208 & 18-2257, U.S. Court of Appeals for the First Circuit is reported at 945 F.3d 578.

The judgment of the district court (App., infra, 18A-24A) United States of America v. Cuwan Merritt, No. 2:17-CR-00102-DBH-002, U.S. District Court for the District of Maine is not reported.

PROVISIONS OF LAW

U.S. Constitution Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This Court has upheld the protections offered by the Fourth Amendment against unreasonable searches and seizures. Petitioner Cuwan Merritt and codefendant in the proceedings below, Michael Artis, were forcibly extricated from a vehicle, de facto arrested, and as Mr. Merritt argues, without probable cause in the early morning hours of May 13, 2017, as the result of a planned vehicle stop. App. 5A. Then, Mr. Merritt was subjected to an intrusive dog sniff to his body which constituted an illegal search if not incident to arrest. Id.

United States Drug Enforcement Administration Task Force agent David Madore had devised a plan to stop a vehicle based on information from a paid confidential informant, Gary Hesketh. Id. 3A. Agent Madore had worked with Hesketh for approximately two to three months, and Hesketh had provided reliable information which had not yet led to any arrests. Id. 26A n.1. Hesketh had a criminal history of illegal drug possession, among other offenses, and was paid for providing information that aided police investigations. Id. 3A. On May 12, 2017, Hesketh informed Agent Madore that someone who Hesketh believed was a crack dealer, possibly a black male named Mayo, had called his cell phone. Id. Hesketh had loaned his cell phone to his cousin who had a drug addiction, and the caller, possibly Mayo, was trying to reach Hesketh's cousin. Id. Agent Madore had identified Mayo through prior surveillance and was aware that Mayo was a drug dealer who sold drugs in Lewiston, Maine, although he lived out of state. Id.

Hesketh reported to Agent Madore that the telephone caller requested a ride that evening, May 12, 2017, to Lewiston, Maine and that Hesketh believed the purpose of the ride was to bring a load of crack. Id. 3A-4A. Hesketh reported that the caller requested to be picked up at Boston's South Station at 7:30 p.m., after determining that location was "how far they could get." Id. 3A. The caller told Hesketh he would be "hooked up" for providing the ride, which Hesketh said meant he would receive drugs in exchange for the transportation. Id. 4A.

Agent Madore and Hesketh communicated throughout the day by phone, text, and in person. Id. Agent Madore arranged for Hesketh to go to Boston's South Station with another confidential informant, Heidi Lemieux, who Hesketh had not met before. Id. Lemieux was to drive the vehicle, which belonged to Hesketh's ex-wife, while Hesketh was to relay information by phone or text, as no law enforcement would attend. Id.

When Hesketh arrived at South Station in Boston, Massachusetts, around 7:30 p.m., he informed Agent Madore that the "target" was running late. Id. Agent Madore advised the two informants they could return to Maine or wait, and they chose to wait. Id. Hesketh called Agent Madore from a gas station where they had stopped after leaving South Station around 10:00 p.m., and reported that the target arrived, but was accompanied by a second black male. Id. Hesketh also reported that Mayo, who he originally believed was the caller, was not there. Id. 4A-5A.

Agent Madore had requested Hesketh text updates of the vehicle's location, so Hesketh notified Agent Madore when the vehicle carrying the four people

reached various mile markers, and Agent Madore notified Hesketh that law enforcement would be waiting for the vehicle to come through. Id. 5A. Agent Madore had arranged for at least four police cars with at least eight officers, and a state trooper with a drug-detecting dog, to set a traffic stop off Exit 75 of the Maine Turnpike, which is the exit the vehicle was taking. Id. 5A, 27A.

At some time after midnight, the vehicle was pulled over at the arranged location. Id. 5A. Officers had weapons drawn during the takedown and were ready to break the vehicle's windows when the doors were not immediately unlocked. Id. 42A. The two passengers were forcibly extricated from the back seat of the vehicle and Mr. Merritt was taken to the ground, cuffed, then patted down by uniformed officers. Id.

The two passengers were then taken to the front of the vehicle, where the drug-detecting dog's handler had the dog sniff the two men and a law enforcement officer. Id. 28A. The sniff was intrusive and took place by the handler manually directing the dog's attention up the mens' bodies from their feet to their pants pockets, sniffing one man's crotch area and one man's front pocket area. Id. The dog alerted to drugs on the two men but not on the law enforcement officer standing next to them. Id. The dog did not search the vehicle's exterior for drugs. Id.

The two men were searched, and the codefendant, Artis, was immediately arrested for crack cocaine discovered on him. Id. 5A. Mr. Merritt was later arrested, at 1:00 a.m., and taken to the Androscoggin County Jail. Id. There, Mr. Merritt was

more thoroughly searched and corrections officers discovered crack cocaine on Mr. Merritt's person. Id. 5A- 6A.

Mr. Merritt was indicted for possession with intent to distribute the drugs seized as a result of the vehicle stop, a violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Id. 6A. Mr. Merritt filed a Motion to Suppress, arguing the officers lacked probable cause to arrest him. Id. The court held an evidentiary hearing on the Motions to Suppress, and issued an oral order denying the Motions to Suppress, concluding the agents had the requisite "reasonable suspicion" sufficient for a *Terry* stop and detention. Id. 40A. Artis filed a Motion for Clarification of Suppression Order and the district court issued an Order reserving ruling on the question of whether the stop and detention of Mr. Merritt was a de facto arrest which would have required probable cause. Id. 40A-45A.

After the parties submitted briefs, the district court issued a Decision and Order on the Motion for Clarification stating the evidentiary record supported that the agents had probable cause to arrest Mr. Merritt when they stopped the vehicle, mooting the issues of whether the take-down was a de facto arrest and whether the canine sniff was an intrusive unlawful search. Id. 25A-36A.

Petitioner seeks review of the First Circuit Court of Appeals' decision affirming the United States District Court for the District of Maine's Decision and Order denying Petitioner/defendant and codefendant's motions for suppression and denying Mr. Merritt's motion in limine to exclude statements made by Mr. Merritt, Artis, and Hesketh. Id. 17A. The First Circuit applied the totality of the

circumstances standard in upholding the district court's determination that the police had probable cause to arrest Mr. Merritt. Id. 8A -13A. The First Circuit likewise rejected challenges to the evidence admitted at Mr. Merritt's trial, even though sentencing directly contradicted evidence of a conspiracy. Id. 13A-17A.

ARGUMENT

I. The First Circuit Incorrectly Determined Uncorroborated Information Constitutes Probable Cause to Search or Arrest Without a Warrant, Which Is Inconsistent with the Fourth Amendment's Protection Against Unreasonable Searches and Seizures.

The First Circuit affirmed the district court's finding that Agent Madore's pre-arranged vehicle stop had the requisite probable cause to search and seize Mr. Merritt, which it determined mooted the issue of whether the Terry stop was actually a de facto arrest. App. 13A. A de facto arrest requires more than reasonable articulable suspicion to detain an individual, and without the analysis of whether the de facto arrest required more than reasonable suspicion, the court also determined the issue of whether the subsequent dog sniff was an unlawful search incident to an unlawful de facto arrest was therefore moot. See App. 13A.

The district court originally found the stop was justified under the reasonable articulable suspicion standard to conduct an investigative search without a warrant commonly referred to as a Terry stop. App. 29A. See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). However, Mr. Merritt contends the pre-arranged take-down was a de facto arrest, which required probable cause rather than a reasonable articulable

suspicion. The First Circuit did not distinguish between the level of corroboration required for probable cause compared to reasonable articulable suspicion, because it incorrectly determined the agents had probable cause to seize Mr. Merritt at the time of the stop. The distinction between corroborative information required for probable cause and for reasonable articulable suspicion is an important federal question the Supreme Court should address to ensure protections from unreasonable searches and seizures under the Fourth Amendment.

A. The Circuit Court Should Have Found Mr. Merritt was Subjected to an Illegal De Facto Arrest Based on the Totality of Circumstances.

In its oral ruling during the evidentiary hearing on the Motion to Suppress, the district court analyzed the stop as an investigatory stop, or Terry stop, finding the officers had reasonable articulable suspicion to stop the vehicle and investigate the confidential informant Hesketh's information. App. 40A-45A. The district court later determined that officers had probable cause to stop the vehicle without any further investigation, which the circuit court affirmed. App. 1A. Before police conduct a search, the general rule is the officers must have probable cause and a warrant. Terry v. Ohio, 392 U.S. 1, 20-21 (1968). In Terry, this Court created an exception wherein police may "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,' even if the officer lacks probable cause." United States v. Sokolow, 490 U.S. 1, 7 (1989) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). This Court (Thomas, J.) has articulated probable cause to search or arrest requires

"a probability or substantial chance of criminal activity." District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018). In this case, the First Circuit erred in finding the agents adduced sufficient evidence to support a finding of both reasonable articulable suspicion and probable cause required for the de facto arrest of Mr. Merritt, as the agents ultimately used the lower standard of a Terry stop to effectuate a de facto arrest without a warrant and without probable cause.

The facts of this case clearly support that the planned vehicle stop was a de facto arrest.[1] The First Circuit found a determination of whether the detention was merely investigatory or a de facto arrest requiring probable cause unnecessary. While this Court held there are "no scientifically precise benchmarks for distinguishing between temporary detentions and de facto arrests," Terry, at 20, this Court established a totality of the circumstances analysis. See Berkemer v. McCarty, 468 U.S. 420, 442 (1984). In determining whether a detention amounted to a de facto arrest, this Court analyzes "whether the detention of respondent was reasonably related in scope to the circumstances which justified it initially." United States v. Montoya De Hernandez, 473 U.S. 531, 542 (1985).

This Court has often used the temporariness of the investigative stop as a key determinative factor in the totality of the circumstances analysis; here, however, common sense dictates that Mr. Merritt's detention was "tantamount to being under arrest" when he was forcibly removed from a vehicle that was

[1] Here, at least eight uniformed officers with weapons drawn surrounded the vehicle and were prepared to break the vehicle's windows with a baton. App. 5A, 42A. Mr. Merritt was forcibly removed from his car, patted down on the ground with his face in the pavement, then handcuffed. Id.

surrounded by officers with weapons drawn, then patted down while being held to the ground and handcuffed. Berkemer v. McCarty, 468 U.S. 420, 442 (1984); see App. 5A, 42A; see also United States v. Sharpe, 470 U.S. 675, 685 (1985) ("common sense and ordinary human experience must govern over rigid criteria").

By not making a determination of whether Mr. Merritt was de facto arrested, the First Circuit bypassed the glaring deficiencies in the information known by the government at the time of the stop and failed to address that the government learned no new information at any time prior to the stop. This distinction is key because it allowed the government to illegally detain Mr. Merritt, based solely on uncorroborated information that did not rise to the level of probable cause. Then, without any investigation and without any need to alter their response to "the demands of any particular situation," officers arrested Mr. Merritt. United States v. Place, 462 U.S. 696, 709 n.10 (1983). The officers did not respond to circumstances justifying the stop, they orchestrated a take-down and executed it without any investigation, which was necessary for the probable cause required to protect Mr. Merritt's rights under the Fourth Amendment.

While the district court originally relied on Hesketh's information for reasonable articulable suspicion, the agents' corroboration, or lack thereof, fell well short of the standard required for probable cause. District of Columbia v. Wesby, states that "to determine whether an officer had probable cause for an arrest, 'we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police

officer, amount to probable cause." District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (quoting Maryland v. Pringle, 540 U.S. 336, 371 (2003)). Probable cause "must be assessed on the basis of the totality of the circumstances." Maryland v. Pringle, 540 U.S. 336, 372 n.2 (2003). While the Court has "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach," this case does not require the court to make any such rule or test. Florida v. Harris, 568 U.S. 237, 244 (2013). Rather, this case gives this Court the opportunity to uphold the principles of the Fourth Amendment by determining a Terry stop cannot amount to a valid de facto arrest that allows for a search incident to arrest when officers do not investigate nor corroborate any information, and indeed planned the de facto arrest based on less than probable cause.

B. The Circuit Court Erred when It Found Officers had Probable Cause to Arrest Because Officers Did Not Conduct Any Independent Corroboration of Alleged Illegal Activity.

In Beck v. Ohio, this Court (Whittaker, J.) stated "[a]n arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964). In Illinois v. Gates, this Court (Stevens, J.) applied a "substantial basis" standard of review to determine whether probable cause exists in warrant cases. Illinois v. Gates, 462 U.S. 213, 239 (1983). Further, the Supreme Court has stated a

preference for search warrants, as well. See Aguilar v. Texas, 378 U.S. 108, 110-11 (1964), abrogated on other grounds by Gates, 462 U.S. at 230. "[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." United States v. Ventresca, 380 U.S. 102, 106 (1965). Here, although Agent Madore had enough time to devise a plan to find a confidential informant driver and pair her with Hesketh to drive from Maine to Boston, Massachusetts, and coordinate multiple police officers and a drug detection dog unit to surround an exit off the highway in the early morning hours, he did not seek an arrest or search warrant to allow for a magistrate to predetermine if the level of probable cause was sufficient. Instead, the government approached the take-down as a Terry stop which turned into a de-facto arrest, which blurred the lines between the two standards as they relate to information from confidential informants.

This Court places a high value on police's corroborative efforts in assessing confidential informant tips. See Draper v. United States, 358 U.S. 307 (1959) (finding probable cause to arrest without a warrant based on informant's hearsay when the officer independently corroborated the information). "It is enough, for purposes of assessing probable cause, that '[corroboration] through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.'" Gates, at 244-245 (quoting Jones v. United States, 362 U.S. 257, 269, 271 (1960)). Here, Agent Madore did nothing to reduce the chances of a reckless arrest, as he did not corroborate the probability of wrongdoing, only that Hesketh predicted someone had requested a ride from a

certain location, and Hesketh's prediction of the details was certainly not accurate given two individuals arrived, and hours later than Hesketh originally indicated.

The Court moved away from a two-prong test of Aguilar and Spinelli v. United States in Illinois v. Gates, stating, the two-pronged test elements of "the informant's 'veracity' or 'reliability' and his 'basis of knowledge' . . . are better understood as relevant considerations in the totality-of the circumstances analysis that traditionally has guided probable-cause determinations." Illinois v. Gates, 462 U.S. 213, 233, 38 (1983) (citing Aguilar v. Texas, 378 U.S. 108; Spinelli v. United States, 393 U.S. 410 (1969)). In Illinois v. Gates, the informant tip was an anonymous letter sent to a police department and provided nothing to show the informant's reliability or honesty, and also gave no indication for a basis of knowledge. Gates, at 225. Here, Agent Madore had worked with Hesketh for two to three months, but the district court noted none of Hesketh's information had led to an arrest at the time of the stop. App. 26A. Furthermore, while Agent Madore did not seek a search or arrest warrant, he also relied solely on hearsay, which ordinarily "is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." Id. at 241.

Hesketh's basis of knowledge was merely his criminal past and his assumptions that a caller was a drug dealer based on the caller's phone number which he believed had previously contacted his cousin, who was a drug addict. Hesketh then asserted the caller's request for a ride to Lewiston, Maine, and that Hesketh would be "hooked up" for providing said ride meant the caller was a drug

dealer. Hesketh provided no basis for this knowledge, which was underscored by the fact that the meeting time was incorrect, the person he believed was the caller did not arrive at Boston's South Station, and two individuals arrived instead of one. Hesketh's tip, which was solely hearsay, didn't prompt Agent Madore to corroborate on his own or at the very least investigate once more information was known to him, despite Hesketh never stating to Agent Madore that drugs were mentioned during the communication or during the ride. The government did not have probable cause to believe that criminal activity would be uncovered at a take-down of the two passengers in the vehicle, which is possibly the reason a warrant was not sought and why the government attempted to justify the de facto arrest and search as valid investigation during a Terry stop.

In Florida v. J.L., the government had reasonable articulable suspicion to make an investigatory stop when "a tip [was] reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Florida v. J.L., 529 U.S. 266, 272 (2000). In this case, Hesketh's tip was neither reliable in its assertion that narcotics were involved, as drugs were never mentioned and Hesketh's information had not yet led to any arrests, nor was the tip able to identify any person. Arguably, the only articulable suspicion Agent Madore could provide for justifying a Terry stop is association with Hesketh. In Sibron v. New York, an officer did not have probable cause to search Sibron when an officer was not acquainted with Sibron and had no information concerning him but merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. Sibron v. New York, 392 U.S.

40, 45 (1968). The facts of this case parallel Sibron, wherein the police did not know the identity of Mr. Merritt, and did not know whether he had any connection to criminal drug activity other than his relation to Hesketh. "The inference that persons who talk to narcotics addicts are engaged in criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." Id. at 47. The officers made no independent inquiries into the information Hesketh offered, and therefore had no probable cause to arrest Mr. Merritt at the time of the stop.

The circuit court also noted that the government argued they had probable cause to arrest for conspiracy. However, as shown supra § I, because the government did not have probable cause to search or arrest, the government could also have no probable cause to arrest for conspiracy.[2]

II. This Case is an Excellent Vehicle for Safeguarding Fourth Amendment Protections Through Determining the Difference in the Level of Corroboration and Investigation Required for Reasonable Articulable Suspicion Versus Probable Cause.

Whether officers corroborate information before determining it gives probable cause to arrest is an important federal question. The lack of information about the caller's identity and relationship reported to agents, the lack of Hesketh's credibility

[2] The First Circuit defines participation in a drug conspiracy as "a knowing and intentional agreement between two or more persons to commit the specific offense alleged." United States v. Dellosantos, 649 F.3d 109, 115 (1st Cir. 2011). The key here is that the government had no probable cause that either individual in the vehicle had or were going to commit any offense based on the information they had at the time of the stop, therefore any agreement was merely to travel together, which is surely not a crime.

and veracity as shown by the changing locations, arrival time, and the arrival of two individuals instead of one, and the agents' failure to corroborate a probability or substantial chance of criminal activity makes this case an ideal platform for the Court to distinguish between the standards of probable cause, as the First Circuit erroneously found, and reasonable articulable suspicion. In applying the totality of the circumstances analysis, this Court has "consistently recognized the value of corroboration of details of an informant's tip by independent police work." Illinois v. Gates, 462 U.S. 213, 241 (1983). Whereas in Gates, the officers obtained a warrant, here, officers acted on reasonable articulable suspicion to conduct an investigatory stop; yet immediately acted on probable cause without any corroboration or investigation. The circuit developed a non-exhaustive list of factors in determining an informant's reliability, including:

> (1) the probable veracity and basis of knowledge of the informant; (2) whether an informant's statements reflect first-hand knowledge; (3) whether some or all of the informant's factual statements were corroborated wherever reasonable and practicable; (4) whether a law enforcement officer assessed, from his professional standpoint, experience, and expertise, the probable significance of the informant's information.

United States v. White, 804 F.3d 132, 137 (1st Cir. 2015) (justifying probable cause for the warrantless search and seizure of a vehicle pursuant to the automobile exception). Here, the government asserts the factor that Hesketh was a paid criminal informant is sufficient credibility of his reliability and basis of knowledge, both for reasonable articulable suspicion and probable cause. Hesketh's information had not yet led to any arrests, even though Agent Madore testified to his reliability. App. 26A. This simply bypasses the circuit's own factors for determining reliability

and the Supreme Court's efforts to uphold police corroboration and investigation to find probable cause to arrest or search as in Draper or Gates. In both of those cases, the informant's reliability was corroborated through the ability to predict actions that suggested criminal activity, yet here any corroboration was not achieved by the agents' independent work, and was found only through unreliable predictions that a ride was requested to Lewiston, Maine from Boston South Station.

No precedent distinguishes the probable cause and reasonable articulable suspicion standards under a confidential informant corroboration lens, and as applied in this case, the standards are rendered meaningless without direction from this Court. When officers do not investigate nor corroborate any information during a Terry stop, and indeed planned the de facto arrest before they initiated the stop, they violate the Fourth Amendment by bypassing the probable cause requirement to search or seize an individual. Because officers made no efforts to corroborate an informant's tip based solely on hearsay and with little to no reliability, this Court must draw a line requiring independent investigation or corroboration before a Terry stop gives rise to probable cause.

III. The Dog Sniff of Mr. Merritt's Body was an Unreasonable Search Inconsistent with this Court's Rulings to Protect Against Unreasonable Searches and Seizures.

The District Court reasoned that the facts of this case did not fit into either Terry or Caballes for determining whether the dog sniff was intrusive. The First Circuit did not discuss the intrusiveness of the dog sniff because it determined, in

error, that the entire stop was supported by probable cause. A "search occurs when government action infringes upon an individual's reasonable expectation of privacy." Segura v. United States, 468 U.S. 796, 820 (1984). When the individual "subjectively desires to preserve something as private[,] and such expectation is one that society is prepared to recognize as reasonable," this Court held a reasonable expectation of privacy exists. Smith v. Maryland, 442 U.S. 735, 740 (1979). This Court determined in Illinois v. Caballes, that a drug detection dog sniff of a vehicle exterior during a traffic stop was not a constitutionally-protected search. Illinois v. Caballes, 543 U.S. 405 (2005). This Court reasoned that a dog sniff of a vehicle "compromises no legitimate privacy interest." Id. at 408. However, in Florida v. Jardines, this Court determined that when a drug detection dog sniffed within the curtilage of a home, a person's expectation of privacy was compromised, and the sniff constituted a search. Florida v. Jardines, 569 U.S. 1 (2013). Concurring Justices likened the dog sniff to an invasion of a person's privacy through the use of specialized technology. Id. at 14 (Kagan, J., concurring) (citing Kyllo v. United States, 533 U.S. 27, 40 (2001)). In this case, the dog sniff, which was not incident to a lawful arrest, see supra § I, compromised Mr. Merritt's reasonable expectation of privacy and therefore was an illegal search.

Here, the dog sniff was "intrusive," as determined by the district court, App. 28A, and would thereby involve Fourth Amendment protections unless it was made incident to a lawful arrest. See, e.g., Riley v. California, 134 S. Ct. 2473 (2014) (if officers had probable cause at the time of the stop, officers could search incident to a

lawful arrest). The dog sniffed Mr. Merritt's body, including his torso and crotch area, at the direction of the dog's handler. App. 28A. Because the dog's sniff was outdoors on a highway exit made after Mr. Merritt was forcibly extricated from a vehicle, was not of Mr. Merritt's belongings, was not of the exterior of the vehicle, and was at the direction of the dog's handler, it completely surpassed any reasonable person's expectation of privacy and therefore was an illegal search without a warrant or probable cause.

First, the location of the sniff sometimes plays a factor in a court's determination of whether a dog sniff rises to the level of a search, given the level of privacy reasonably expected. In United States v. Place, the individual's location in an airport was a factor in this Court's determination that the sniff was not intrusive, as individuals ordinarily do not have the same sense of privacy in a public place.[3] United States v. Place, 462 U.S. 696 (1983). The expectation of privacy in a vehicle is less than that associated with the home, see generally, Coolidge v. New Hampshire, 403 U.S. 443 (1971), yet Mr. Merritt's expectation of privacy as a passenger in the back seat of a vehicle was violated when he was forcibly removed from the back seat from officers with weapons drawn and taken to the ground. See Byrd v. United States, 138 S. Ct. 1518 (2018) (stating that passengers have an expectation of privacy in automobiles). Thus, officers forcible removal of Mr. Merritt

[3] In United States v. Esquilin, 208 F.3d 315, 318 (1st Cir. 2000), abrogated on other grounds by Missouri v. Seibert, 542 U.S. 600 (2004), the court determined, the important factor in applying Place [on the question whether a search occurred] is not whether the sniff occurs in a public place like an airport, but whether – as in an officer's 'plain view' observation of contraband – 'the observing person or the sniffing canine are legally present at their vantage when their respective senses are aroused by obviously incriminating evidence.'"

from a vehicle changes the circumstances of Mr. Merritt's expectation of privacy drastically. Further, objects belonging to the individuals were not sniffed, but the individuals' own bodies. Certainly, an individual's body is afforded a heightened privacy protection than an individual's possessions.

The dog was not directed to search the vehicle. In Illinois v. Caballes, the dog sniff of a vehicle exterior during a traffic stop was not a search. Illinois v. Caballes, 543 U.S. 405 (2005). "Government conduct that only reveals the possession of contraband [i.e. a dog's sniff for drugs] 'compromises no legitimate privacy interest.'" Id. at 408. Some circuits have extended the search to the interior of the vehicle if the dog acts instinctively, without facilitation from the handler. Compare United States v. Moore, 795 F.3d 1224 (10th Cir. 2015) (a dog's instinctual leap into the vehicle was not a search even though the dog did not first alert as it had been trained when sniffing the exterior) with United States v. Winningham, 140 F.3d 1328, 1330-31 (10th Cir. 1998) (a dog sniff of the interior of the vehicle was unlawful when officers opened the hatchback for the dog to enter without requisite reasonable suspicion). Here, however, the dog was directed by its handler to sniff Mr. Merritt's body, from his torso to his private areas, which is objectively more private than a vehicle interior.

Lastly, an individual's privacy interest in their personal security is afforded protection under the Fourth Amendment. Terry, at 18 n.15 ("the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the

case, a central element in the analysis of reasonableness"). After being forcibly removed from the backseat of a vehicle and de facto arrested without a warrant nor probable cause, the officers' intrusive search of Mr. Merritt by directing a dog to sniff his most private areas and his own body was clearly an invasion into his reasonable expectation of privacy and was therefore unlawful.

IV. The Circuits Need Guidance and Clarification on Whether a Dog Sniff of an Individual's Body is a Fourth Amendment Search.

Once this Court determines that the uncorroborated information did not rise to the level of probable cause by distinguishing the definition of probable cause from that of reasonable articulable suspicion, the Court will then need to address whether the dog sniff was an unlawful search. This is a novel federal issue that has not yet been addressed. The dog sniff was of an individual's body, which was intrusive. The most relative analysis this court has offered discusses a dog sniff of the curtilage of a home. See Florida v. Jardines, 569 U.S. 1 (2013) (finding the sniff a constitutionally-protected search). This Court has also stated "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). The sniff of Mr. Merritt's body, including private areas, at the direction of the dog's handler, is a clear intrusion into Mr. Merritt's expectation of privacy. When combined with the officers' actions of forcibly removing Mr. Merritt from a vehicle's back seat, forcing him to the ground to be patted down, and handcuffing him, the dog sniff search crossed the boundaries established by the Fourth Amendment so profoundly it must be addressed by this Court.

Circuits have addressed whether a dog sniff of a person's body is a search, with various determinations based on the circumstances, all before the Court's Caballes and Jardines decisions which discussed the dog sniff of a vehicle's exterior and the curtilage of a home, respectively. In United States v. Kelly, the court held that a dog sniff of an individual's body in the particular circumstances was a "routine border search, and did not require any finding of reasonable suspicion." United States v. Kelly, 302 F.3d 291, 295 (5th Cir. 2002). The Seventh Circuit determined a school's use of a dog sniff on a student's person to detect drugs was not a search.[4] Doe v. Renfrow, 631 F.2d 91, 92 (7th Cir. 1981).

In contrast, the Ninth Circuit found that the "close proximity sniffing" of students constituted a search. B.C. by & Through Powers v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1266 (9th Cir. 1999). The Fifth Circuit, which allowed evidence obtained through a dog sniff of a person at a routine border search in Kelly, made the opposite conclusion in Horton v. Goose Creek Independent School District, 690 F.2d 470 (5th Cir. 1982). In Horton, the court determined a dog's sniff of a student's person is a search. Id. The Fifth Circuit noted, "the intensive smelling of people, even if done by dogs, [is] indecent and demeaning." Id. at 478-79. The Tenth Circuit found the Fourth Amendment was implicated when a far less intrusive dog sniff search was conducted in a car's interior. United States v. Winningham, 140 F.3d 1328 (10th Cir. 1998).

[4] In Horton v. Goose Creek Independent School District, the court noted there was no evidence that the dog sniffs in Renfrow actually touched the students' bodies. 690 F.2d 470, 477-78.

This case also allows the Court to address the significance of the dog's handler. Other circuits addressed the difference between a directed search of a vehicle's interior and a sniff when a dog instinctively jumped into the interior, with no facilitation from the handler. See United States v. Lyons, 486 F.3d 367 (8th Cir. 2007) (holding no search of a vehicle interior when not facilitated by the dog's handler); United States v. Sharp, 689 F.3d 616 (6th Cir. 2012) (holding no search of a vehicle interior when not facilitated by the dog's handler). This case offers the Court the opportunity to uphold the important distinction between reasonable articulable suspicion and probable cause and determine that sniff of an individual's body is a search requiring additional protection under the Fourth Amendment.

CONCLUSION

Petitioner Cuwan Merritt respectfully prays that this Honorable Court grant *certiorari*, and reverse the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted this 18th day of March, 2020.

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