No. _____

SUPREME COURT OF THE UNITED STATES

JERMAINE TYRONE JONES, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

Frank W. Heft, Jr.
Counsel of Record
Scott T. Wendelsdorf
Office of the Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525
Frank_Heft@fd.org

Counsel for Petitioner

QUESTION PRESENTED

In *United States v. Hensley*, 469 U.S. 221 (1985), the Court held that an investigative stop can be based on reasonable suspicion of a completed felony.

This case presents the question:

> Is reasonable suspicion of a completed misdemeanor sufficient under the Fourth Amendment to justify an investigatory stop of a vehicle when there is no evidence that any occupant of the vehicle was then committing or was about to commit a crime.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are those listed in the caption of the case.

RELATED PROCEEDING

This case arises from *United States v. Jermaine Tyrone Jones*, No. 5:17-CR-00039 – TBR which is pending in the United States District Court for the Western District of Kentucky.

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Federal Statutes

State Statutes

PETITION FOR A WRIT OF CERTIORARI

In *United States v. Hensley*, 469 U.S. 221 (1985), the Court upheld an investigative stop based on reasonable suspicion of a completed felony. This case provides the Court with an opportunity to decide whether the Fourth Amendment permits an investigative stop based on reasonable suspicion of a completed misdemeanor. Accordingly, petitioner, Jermaine Tyrone Jones, 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 Sixth Circuit's opinion is reproduced in the Appendix (App.) at pp. 1-8. *See United States v. Jones*, 953 F.3d 433 (6th Cir. 2020).

The unpublished Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky denying the United States' Motion to Reconsider is reproduced at App. 9-13. *See United States v. Jones*, 2019 WL 2077778, at *1 (W.D.Ky. 2019).

The unpublished Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky granting petitioner's motion to suppress evidence is reproduced at App. 17-25. *See United States v. Jones*, 2018 WL 5796149 (W.D.Ky. 2018).

JURISDICTION

The district court had original jurisdiction under 18 U.S.C. §3231. The Sixth Circuit issued its opinion on March 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is timely filed in conformance with the Court's Miscellaneous Order issued on March 19, 2020. *See* 589 U.S. _____.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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 case stems from an investigatory traffic stop which resulted in petitioner, Jermaine Jones, being charged with felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1) and §924(a)(2). (Record (R.) 1, Indictment, Page ID# 1).

Petitioner moved to suppress evidence of the gun on the ground that the stop of the vehicle in which he was a passenger was not made with probable cause or reasonable suspicion to believe that he had been or was engaged in or about to be engaged in criminal activity. (R.45, Motion to Suppress, Page ID# 44-45). The following evidence was heard during the suppression hearing.

On August 30, 2017, Officer Andrew Parrish, a police officer in Paducah, Kentucky, responded to a call about a disturbance at Ms. Tierica McKinney's residence. She told Officer Parrish that when she got home from work her ex-boyfriend, petitioner Jermaine Jones, was there and she tried to get him to leave. Petitioner did not live at her home but had some possessions there. (Record (R.) 30, Transcript of Suppression Hearing (TR Hrng.), Page ID# 68-69).[1] Petitioner left Ms. McKinney's house before Officer Parrish arrived. *Id*. at 68-69, 73. She said petitioner was in a white Suburban vehicle driven by William Snipes. *Id*. at 69.

Ms. McKinney told Officer Parrish that petitioner poured laundry detergent all over her couch and threw a soda can and a plastic bottle of dishwashing liquid at her. The soda can hit her vehicle but she was hit in the back by the plastic bottle. She complained of pain and twice lifted her shirt to show Officer Parrish where the bottle struck her. (R.30, TR Hrng., Page ID# 68-70, 73). Officer Parrish did not see any indication of physical injury, bruising, or other trauma and he did not call an ambulance or have Ms. McKinney medically examined. *Id*. at 81-82. Ms. McKinney was concerned that petitioner would return to her home. (R.32, DEX 2, Body Camera 1236 at 00:04:40-50, 00:10:00-15, 00:13:35-40).[2]

[1] The transcript of the suppression hearing is available on the district court's electronic record – No. 5:17-cr-39. *See* R.30, Page ID# 65-91.
[2] DVDs made from the responding officers' body cameras were introduced into evidence as Defense Exhibits (DEX) 1 and 2. (R.30, TR Hrng. Page ID# 84).

Officer Parrish believed Ms. McKinney's statements were corroborated by the laundry soap that was poured on her couch, and a soda can and a bottle of dishwashing liquid that were found outside the house. (R.30, TR. Hrng., Page ID# 73, 80-81). The bottle was not seized as evidence although Officer Parrish thought it was used in the alleged assault. *Id*. at 81. In compliance with departmental policy, Officer Parrish filled out a form used in domestic violence matters to put victims in touch with a social service agency. *Id*. at 70, 75-76. He told Ms. McKinney about the formal process to evict him. (R.30, TR. Hrng., Page ID# 84). They also discussed pressing charges and getting an Emergency Protective Order (EPO). *Id*. at 84-85; R.32, DEX 2, Body Camera 1236, 00:14:30-00:15:40, 00:18:14-50, 00:25:07-35, 00:26:19-38.

As Officer Parrish prepared to leave Ms. McKinney's house in his patrol car, he saw a white Chevy Suburban with two, black male occupants. (R.30, TR. Hrng., Page ID# at 71). He "got behind that vehicle and initiated a traffic stop ***to further investigate the allegations*** made by Ms. McKinney." *Id*. (Emphasis added). Officer Parrish approached the passenger's side of the vehicle and said, "Hey Jermaine, how's it going man?" Petitioner responded, "Alright." Officer Parrish asked him, "What happened earlier?" Petitioner said he and Ms. McKinney had a back-and-forth verbal argument. *Id*. at 71-72; R.32, DEX 2, Body Camera 1308 at 00:42:00:01:50, 00:02:40-00:03:30).

Officer Parrish told petitioner to get out of the vehicle so he could ask more questions. When petitioner did so, they went to Parrish's patrol car where Parrish patted him down but found nothing. Officer Parish further questioned petitioner and arrested him for fourth degree assault – a misdemeanor. (R.32, DEX 2, Body Camera 1308 at 00:03:30-00:05:02, 00:07:25-50. Petitioner was handcuffed and Officer Parrish patted him down a second time and again found nothing. *Id*. at 00:07:25-50, 00:08:24-10:31; App. 3.

Officer Parrish said the arrest was based on the dispatch to Ms. McKinney's residence, her statement about petitioner, and the physical pain in her back. (R.30, TR Hrng., Page ID# 71-72). He stated he would not have made a traffic stop if he did not believe a crime occurred at Ms. McKinney's residence "not long before" the stop. *Id*. at 76. He believed he had probable cause for the arrest. *Id*. at 76-77.

Officer Parrish acknowledged that he made the stop to further investigate Ms. McKinney's allegations. Based on those allegations, he had already made up his mind to arrest petitioner when he was stopped and that was true when he began to question him. (R.30, TR Hrng., Page ID# 77). In explaining why he thought it necessary to "further investigate," if he had already made up his mind that there was probable cause to arrest petitioner, Officer Parrish said he wanted "to afford [Mr. Jones] an opportunity to speak" so he questioned him about what happened at Ms. McKinney's house. Officer Parrish said although petitioner was not free to leave the

traffic stop, he did not advise him of his *Miranda* rights when he began to question him. *Id*. at 77-79.

After being placed in the patrol car, petitioner told the officers that the handcuffs were too tight. When he was removed from the vehicle, Officer Parrish saw a handgun in the back of the patrol car. (R.32, DEX 2, Body Camera 1308 at 14:20-16:35; App. 3).

The district court granted the suppression motion. (App. 17-25). The first issue was whether the investigative stop was lawful and the second issue was whether Officer Parrish had probable cause to arrest petitioner without a warrant. (App. 21-22). The court found it significant that Officer Parrish testified that he "stopped the Suburban for no other reason than 'to further investigate the allegations made by Ms. McKinney.'" *Id*. at 21. *See also* R.30, TR Hrng. Page ID# 71. That testimony made it clear that Officer Parrish "stopped Jones because he suspected him of fourth-degree assault in violation of Kentucky Revised Statute [KRS §] 508.030." (App. 24). The court concluded that reasonable suspicion of a completed misdemeanor, like fourth degree assault, is not sufficient under the Fourth Amendment to justify an investigatory stop. *Id*. at 22.

The district court noted that *United States v. Hensley*, 469 U.S. 221 (1985) "is restricted to felonies" and does not extend to misdemeanors." (App. 22). Based on that holding and relying on several Sixth Circuit cases, the district court concluded

that "the Sixth Circuit is more likely to find an investigative stop based on a completed misdemeanor unreasonable under the Fourth Amendment." *Id*. at 24.[3] Accordingly, the gun was suppressed as evidence. *Id*.

The government asked the district court to reconsider whether the stop was a part of an investigation into an ongoing misdemeanor offense, and, if so, whether the stop was supported by reasonable suspicion. (App. 14).

The district court found that Officer Parrish did not stop petitioner to investigate an ongoing crime. (App. 11). Officer Parrish's testimony showed that he "pulled Jones over to investigate McKinney's allegations of the completed domestic violence that had occurred earlier that day[.]" *Id*. at 12. The court cited the following colloquy between the prosecutor and Officer Parrish to support its finding:

> Q. Officer Parrish, to sum this up, at the time that you initiated the traffic stop on the vehicle that was operated by Mr. Snipes and Mr. Jones was the passenger, did you believe that a crime ***had just taken place*** not long before at Ms. McKinney's residence?
>
> A. Yes, sir. If not, I would not have initiated that traffic stop.
>
> Q. All right. And prior to you making the decision to place Mr. Jones under arrest for assault fourth degree, domestic violence, did you believe that you had probable cause to prove that Mr. Jones had ***committed*** that crime?
>
> A. Again, yes, sir. If I did not believe that, I would not have effected that arrest.

[3] In light of that ruling, the district court did not address the issue of whether there was probable cause for a warrantless misdemeanor arrest. (App. 24).

(App. 12-13) (Court's emphasis). *See also* R.30, TR Hrng., at 76-77. The court concluded, "Parrish's testimony makes clear that Parrish believed a crime to have just taken place, and Jones had committed it—not that a crime was ongoing, and Jones was committing it." (App. 13). Thus, the motion to reconsider was denied. *Id*.

The Sixth Circuit held that the Fourth Amendment does not bar "investigatory stops prompted by a completed misdemeanor." *United States v. Jones*, 953 F.3d 433, 434 (6th Cir. 2020) (App. 2). The court found its ruling was supported by *Hensley*.

The Court held in *Hensley*, 469 U.S. at 229, that "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a ***completed felony***, then a *Terry* [*v. Ohio*, 392 U.S. 1 (1968)] stop may be made to investigate that suspicion." (Emphasis added). The Sixth Circuit acknowledged that *Hensley* left open the question whether "*Terry* stops to investigate all past crimes, however serious, are permitted." *Jones*, 953 F.3d at 436 (App. 4) citing *Hensley*, 469 U.S. at 229. The court noted that other courts of appeals "follow the *Hensley* facts-and-circumstances test in considering the misdemeanor side of the problem." *Jones*, 953 F.3d at 436 (App. 4-5). *See United States v. Hughes*, 517 F.3d 1013, 1017–18 (8th Cir. 2008); *United States v. Grigg*, 498 F.3d 1070, 1076–77, 1081 (9th Cir. 2007); *United States v. Moran*, 503 F.3d 1135, 1141–43 (10th Cir. 2007).

The Sixth Circuit eschewed *Hensley's* bright-line test in part because of what it characterized as "the elusive and evolving nature of the felony-misdemeanor distinction and its disappearance in some instances." *Jones*, 953 F.3d at 436 (App. 5). The court was concerned that the line between felony and misdemeanor offenses has become blurred and it could be difficult for police to distinguish between them in deciding whether to make a stop. "Today, serious crimes are usually felonies, but not always." *Id*. at 436 (App. 5). In the court's view:

> The better rule in this setting is not bright in either direction. It does not say that officers always may make a *Terry* stop of an individual known to have completed a misdemeanor, as *Hensley* permits for completed felonies. And it does not say that officers never may make a *Terry* stop of an individual known to have completed a misdemeanor. It instead falls back on reasonableness, balancing the interests in public safety and personal liberty. The inquiry turns not on whether the suspect already completed a crime. It turns on the nature of the crime, how long ago the suspect committed it, and the ongoing risk of the individual to the public safety.

Jones, 953 F.3d at 437 (App. 6).

The Sixth Circuit cited several factors to balance the security and liberty interests involved in the stop: 1) Does the stop promote the interest of crime prevention? 2) Does it further public safety? How strong is the government's interest in solving crimes and bringing offenders to justice; and 3) would restraining police action until after probable cause is obtained unnecessarily hinder the investigation or allow a suspect to flee in the interim? *Jones*, 953 F.3d at 437-38 (App. 6) quoting *Hensley*, 469 U.S. at 228-29 (internal quotation marks omitted). Based on those

considerations, the Sixth Circuit concluded that the stop did not violate the Fourth Amendment. *Id*. at 438 (App. 6-7).

REASONS FOR GRANTING THE PETITION

Reasonable suspicion of a completed misdemeanor is not sufficient under the Fourth Amendment to justify an investigatory stop of a vehicle when there is no evidence that any occupant of the vehicle was then committing or was about to commit a crime.

The Fourth Amendment allows "brief investigative stops" when "a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Navarette v. California*, 572 U.S. 393, 396–97 (2014) quoting *United States v. Cortez*, 449 U.S. 411, 417–418 (1981) and citing *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Cortez*, 449 U.S. at 417.

Reasonable suspicion requires "some minimal level of objective justification" for making an investigatory stop. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citations and internal quotation marks omitted). It must be supported by "articulable facts that criminal activity may be afoot." *Id*. Although reasonable suspicion is less than the level of suspicion necessary for probable cause, it must "be something more than an inchoate and unparticularized suspicion or hunch." *Id*. "The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of

information possessed by police and its degree of reliability.'" *Navarette*, 572 U.S. at 397 quoting *Alabama v. White*, 496 U.S. 325, 330 (1990).

"[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a ***completed felony***, then a *Terry* stop may be made to investigate that suspicion." *Hensley*, 469 U.S. at 229 (emphasis added). As previously noted, the Court did not decide in *Hensley*, 469 U.S. at 229, "whether *Terry* stops to investigate all past crimes, however serious, are permitted." As the district court succinctly put it here, "*Hensley* is restricted to felonies—it does not extend to misdemeanors." (App. 22) citing *Hensley*, 469 U.S. at 229. In the instant case, however, the Sixth Circuit has extended *Hensley* to completed misdemeanors.

In *Hensley*, 469 U.S. at 223, "a wanted flyer" was circulated to multiple police departments. They were advised that Hensley was wanted for investigation of an aggravated robbery. The flyer also warned that Hensley should be considered armed and dangerous. *Id*. Police eventually stopped Hensley's vehicle on the basis of the warrant. He was arrested after two guns were found in the vehicle. *Id*. at 223-25.

This Court upheld the vehicle stop and seizure of the guns. *Hensley*, 469 U.S. at 226, 236. The Court noted that its prior opinions "have suggested that some investigative stops based on a reasonable suspicion of past criminal activity could withstand Fourth Amendment scrutiny." *Hensley*, 469 U.S. at 227 citing *e.g.*, *United*

States v. Cortez, 449 U.S. at 417, n. 2 and *United States v. Place*, 462 U.S. 696, 702 (1983) (other citations omitted). Such cases "suggest that the police are not automatically shorn of authority to stop a suspect in the absence of probable cause merely because the criminal has completed his crime and escaped from the scene." *Hensley*, 469 U.S. at 228.

To identify the limits on stops to investigate past criminal activity, the Court applied the same test

> used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes. That test, which is grounded in the standard of reasonableness embodied in the Fourth Amendment, balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.

Hensley, 469 U.S. at 228. Applying that balancing test to investigatory stops of past crimes, the Court concluded that probable cause to arrest is not always required. *Id*.

In the instant case, the Sixth Circuit has extended *Hensley's* holding to completed misdemeanors. But the reasons the court offered to reject *Hensley's* bright-line test are unpersuasive and will not only lead to more litigation on suppression issues but also fail to provide the clarity needed by police to comply with the Fourth Amendments requirements on investigatory stops.[4] One concern

[4] The Sixth Circuit has previously held that police may make an investigatory stop when they have reasonable suspicion of an ongoing crime whether it be a felony or misdemeanor. *United States v. Simpson*, 520 F.3d 531, 539, 541 (6th Cir. 2008) citing *Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004). *See also*

expressed by the Sixth Circuit is what it characterized as "the elusive and evolving nature of the felony-misdemeanor distinction and its disappearance in some instances." *Jones*, 953 F.3d at 436 (App. 5). Essentially the court is saying that distinction between felonies and misdemeanors has become so blurred that police officers cannot be expected to know the difference. Petitioner's case, however, shows the flaw in that justification for expanding *Hensley's* holding because under Kentucky law felony and misdemeanor assault are easily distinguished.

First degree assault requires the infliction of serious physical injury (among other elements). *See* Ky.Rev.Stat. (KRS) §508.010(1)(a) and (b). Second degree assault also requires serious physical injury, KRS §508.020(1)(a) and (c) or the intentional infliction of physical injury "by means of a deadly weapon or a dangerous instrument." *See* KRS §508.020(1)(b). Third degree assault involves conduct against designated groups of persons, *e.g.*, peace officers, firefighters, employees of detention facilities, or EMS personnel. *See* KRS §508.025(1)(a)(1), (1)(a)(2), (1)(a)(4), and (1)(a)(5). Those three offenses are felonies.

A person is guilty of fourth degree assault – a misdemeanor – when he "intentionally or wantonly causes physical injury to another person; or …With

---

United States v. Roberts, 986 F.2d 1026, 1030 (6th Cir. 1993). In petitioner's case, the Sixth Circuit noted that *Gaddis*, 364 F.3d at 771 n.6 and *Roberts*, 986 F.2d at 1030, said in *dicta* that police may not conduct a *Terry* stop to investigate a completed misdemeanor. *Jones*, 953 F.3d at 438 (App. 7).

recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument." *See* KRS §508.030(1)(a) and (b). Ms. McKinney told Officer Parrish that petitioner hit her in the back with a plastic bottle of dish washing liquid. Ms. McKinney showed Officer Parrish where she was struck but he did not see any injury at that time. Thus, the circumstances presented a case of fourth degree assault. That misdemeanor was a completed offense when Ms. McKinney was struck by the bottle. Kentucky law allows peace officers to make a warrantless arrest for a misdemeanor only if it is committed in the officer's presence. *See* KRS §431.005(1)(d).[5] Officer Parrish was obviously aware of the law because he advised Ms. McKinney about pressing charges and obtaining an Emergency Protective Order. *See* Statement of the Case, p. 4.

As Officer Parrish prepared to leave Ms. McKinney's house in his patrol car, he saw a white Chevy Suburban with two, black male occupants. (R.30, TR. Hrng., at 71, 77). Officer Parrish explained, "I got behind that vehicle and initiated a traffic

[5] KRS §431.005 states in relevant part: "(1) A peace officer may make an arrest … (d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his or her presence[.]" KRS 431.060(2) provides that a misdemeanor is an offense "punishable by confinement other than in the penitentiary[.]"

There is an exception to KRS §431.005(1)(d). *See* KRS §431.005(2)(a) which states: "Any peace officer may arrest a person without warrant when the peace officer has probable cause to believe that the person has intentionally or wantonly caused physical injury to a family member, member of an unmarried couple, or another person with whom the person was or is in a dating relationship."

stop ***to further investigate the allegations*** made by Ms. McKinney." *Id*. (Emphasis added). As shown in the Statement of the Case (pp. 7-8), Officer Parrish did not stop petitioner to investigate an ongoing crime. (App. 11). His testimony showed that he made the traffic stop "to investigate [Ms.] McKinney's allegations of the completed domestic violence that had occurred earlier that day[.]" *Id*. at 12. Moreover, Officer Parrish's testimony shows that he did not believe that he had probable cause to make a warrantless arrest under KRS §431.005(2)(a) because he "initiated a traffic stop to further investigate the allegations made by Ms. McKinney." (R.30, TR Hrng. at 71).

Officer Parrish was well aware of the distinction between felony assault and misdemeanor assault. His recognition of the difference between those offenses is manifested in the Uniform Citation (Government Exhibit (GEX) 1) he completed in connection with his investigation. The citation clearly reflects that petitioner was charged with fourth degree assault – a misdemeanor – on August 30, 2017." (R.30, TR Hrng. at 74, 76; App. 26). The facts here show that the Sixth Circuit's concern about the difficulty police officers might have in distinguishing a felony from a misdemeanor for purposes of a *Hensley* stop is greatly exaggerated.

Hensley established a bright-line test that police officers can easily apply. That test should not be expanded because, as discussed below, extending it to a completed misdemeanor will obliterate any limits on making investigatory stops and will result in more litigation not only on the validity of the stop but also on the evidence

supporting the underlying offense. Under the Sixth Circuit's approach, where would the line be drawn between valid and invalid investigatory stops? The line has already been drawn in *Hensley* and should be maintained because it can easily be followed and applied by law enforcement officers. Beyond that, the Sixth Circuit has not offered sufficient reasons to abandon it. If *Hensley* is extended to completed misdemeanors, does that mean an investigatory stop can be made if the police have a reasonable suspicion that a vehicle's occupant has committed ***any*** completed misdemeanor such as non-support (KRS §530.050) or trespass (KRS §511.060)?

Under the Sixth Circuit's approach there are no limits on a police officer's ability to make an investigatory stop based on reasonable suspicion that the occupant of a vehicle has committed a completed misdemeanor. Any misdemeanor can be the basis of an investigatory stop. The Sixth Circuit's approach thus expands *Hensley's* reach to encompass all misdemeanors.

The Court noted in *Hensley*, 469 U.S. at 228, that

> the factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct. This is because the governmental interests and the nature of the intrusions involved in the two situations may differ.

The Sixth Circuit concluded from the factors in *Hensley's* balancing test that the investigatory stop in petitioner's case did not violate the Fourth Amendment. *Jones*, 953 F.3d at 437-38 (App. 6). The Sixth Circuit, however, does not appear to have

taken into account the difference between an investigatory stop for a completed crime and a stop involving ongoing criminal activity. As the Court observed in *Hensley*, 469 U.S. at 228,

> A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards.

The same considerations apply to public safety and "the strong government's interest in solving crimes and bringing offender to justice." *Id*. at 229. Those factors are weightier when the defendant is suspected of having committed a felony. Given the serious nature of felony offenses, the *Hensley* factors are well suited to ensure that an investigatory stop for a completed felony comports with the Fourth Amendment. But, as shown above, the objectives of an investigatory stop for a completed felony are not necessarily applicable to a completed misdemeanor.

To support its ruling, the Sixth Circuit cited decisions from other courts of appeals that have addressed "the *Hensley* facts-and-circumstances test in considering the misdemeanor side of the problem." *Jones*, 953 F.3d at 436. *See United States v. Hughes*, 517 F.3d at 1017–18; *United States v. Grigg*, 498 F.3d at 1076–77, 1081; *United States v. Moran*, 503 F.3d at 1141-43. Those decisions, however, underscore the burden imposed on lower courts if *Hensley's* holding is extended to completed misdemeanors.

In *Moran*, police received a complaint that the defendant was trespassing on private land. When the defendant's vehicle was stopped later that day, he told the officer that he had been bow hunting. In addition to the bow and arrows in the vehicle, the officer saw a rifle that the defendant said belonged to his girlfriend. The defendant was charged with being a felon in possession of a firearm. 503 F.3d at 1138-39. In a motion to suppress, the defendant argued that the stop was unconstitutional because the "police may stop an individual based on suspicion of past criminal activity only when the crime at issue is a felony offense" and here "the officers were investigating a completed misdemeanor[.]" *Id*. at 1140.

The Tenth Circuit upheld the stop. The court found that the circumstances "implicate a strong governmental interest in solving crime and bringing offenders to justice because the alleged underlying criminal activity posed an ongoing risk to public safety." *Moran*, 503 F.3d at 1142. The court noted that there had been an "alleged history of confrontation and threats, combined with the specific nature of the trespass (*i.e.*, for the purpose of hunting) and the likelihood that the alleged criminal activity would recur, created a situation 'involving a threat to public safety[.]'" *Id*. quoting *Hensley*, 469 U.S. at 229. Thus, '"it is in the public interest that the crime be solved and the suspect detained as promptly as possible.'" *Id*. But the court did not articulate a broad rule of law. "[W]e stress the limited and fact-dependent nature of our holding. We do not suggest that all investigatory stops based

on completed misdemeanors are reasonable or even that any stop based on a completed criminal trespass is *per se* reasonable." *Moran*, 503 F.3d at 1143.

In *Hughes*, 517 F.3d at 1015, the police received an anonymous complaint that "suspicious parties" were on the property of an apartment complex which was "in a high crime area[.]" The parties were described as two black males. The officer who responded, saw the defendant, "another male, and a female standing a few feet from a bus stop across the street from the apartment complex." *Id*. He stopped the three people and questioned what they were doing. He frisked them and found several live rounds of ammunition in one of the defendant's pockets. *Id*. The defendant was charged with being a felon in possession of ammunition. *Id*. "The district court found reasonable suspicion to justify a *Terry* stop because: (1) the area was a high crime area, and (2) Hughes matched the description given by dispatch." *Id*. at 1016.

The Eighth Circuit reversed the order denying the defendant's motion to suppress. *Hughes*, 517 F.3d at 1016. There were no facts to "support a reasonable suspicion that a crime was currently taking, or about to take, place." *Id*. To justify the stop, "the officer must have been investigating a past crime but the dispatch "did not provide any details regarding what was suspicious about these parties other than that they were trespassing" which is a misdemeanor. *Id*. at 1017.

The Eighth Circuit "decline[d] to adopt a *per se* rule that police may never stop an individual to investigate a completed misdemeanor." *Hughes*, 517 F.3d at 1017. The court explained that "the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Id*. (citation and internal quotation marks omitted). "Under this test, the nature of the misdemeanor and potential threats to citizens' safety are important factors." *Id*. "On the facts here, the governmental interest in investigating a previous trespass does not outweigh [the defendant's] personal interest." *Id*. at 1018. "There may be cases where a *Terry* stop is justified to investigate [a] completed trespass, such as where there is a strong threat to public safety," but the facts here did not indicate "such a threat." *Id*.

The police in *Grigg*, 498 F.3d at 1072-73, stopped the defendant's vehicle after receiving a complaint that he "had been playing his car stereo at an excessive volume earlier in the day." The defendant was charged with having "an unregistered automatic firearm" that was discovered by police during the investigatory stop. Relying on *Hensley*, the district court denied Grigg's motion to suppress. *Id*. at 1074.

In reversing the denial of the suppression motion, the Ninth Circuit noted that state court cases were split on *Hensley's* reach "with the decisive issue being the dangerous nature of the underlying misdemeanor that gave rise to the *Terry* stop."

Grigg, 498 F.3d at 1078 (citing cases). Those cases were "instructive because they illuminate the rule we derive from *Hensley* that a court reviewing the reasonableness of an investigative stop must consider the nature of the offense, with particular attention to any inherent threat to public safety associated with the suspected past violation." *Grigg*, 498 F.3d at 1079–80.

The Ninth Circuit noted that the distinction between felonies and misdemeanors "amounts to a legislative recognition that the public concerns served by warrantless misdemeanor arrests are in some degree outweighed by concerns for personal security and liberty." *Grigg*, 498 F.3d at 1080 (citation and internal quotation marks omitted). Thus, in the context of a *Terry* stop for a completed misdemeanor a court "should tend to give primary weight to a suspect's interests in personal security, while considering the law enforcement's interest in the immediate detention of a suspect is not paramount." *Id*. The court declined

> to adopt a *per se* standard that police may not conduct a *Terry* stop to investigate a person in connection with a past completed misdemeanor simply because of the formal classification of the offense. We think it depends on the nature of the misdemeanor.

Id. at 1081. Consequently, the court adopted

> the rule that a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger (*e.g.*, drunken and/or reckless driving), and any risk of escalation (*e.g.*, disorderly conduct, assault, domestic violence).

Id. Applying that rule the court concluded that the investigatory stop was not reasonable because playing a car stereo too loud is "exceedingly harmless past misdemeanor conduct." *Id*.

As the Sixth Circuit noted, applying *Hensley's* facts-and-circumstances test "sometimes comes out on the side of the government" (*Moran)*, "sometimes on the side of the defendant" (*Grigg* and *Hughes*). *Jones*, 953 F.3d at 436 (App. 4-5). That observation, however, is a reason to maintain *Hensley's* bright-line rule. The Sixth Circuit has expanded *Hensley* to reach all misdemeanors. That approach is overbroad. But even if *Hensley* is limited to completed misdemeanors that are a "threat to public safety." How will that be determined?

Under Kentucky law, for example, there are misdemeanor drug offenses (trafficking in a controlled substance in the third degree – KRS §218A.1414(1) and (2)(a)(1) and (b)(1); misdemeanor sex offenses (*e.g.*, sexual abuse in the second degree – KRS §510.120(3), indecent exposure – KRS §510.148(2)(a) and (b); KRS §510.150.150(2); assault related misdemeanors (terroristic threatening in the third degree – KRS §508.080(2), criminal abuse in the third degree – KRS §508.120(2); and inchoate misdemeanor offenses such as attempt (KRS §506.010(4)(d) and (e)).

Following the Sixth Circuit's broad approach, which allows an investigatory stop for any completed misdemeanor, will lead courts and law enforcement officers down a slippery slope if they have to categorize the types of misdemeanors that

justify an investigatory stop. That can lead to inconsistent results. Determining whether a misdemeanor is a serious offense or a "threat to public safety" is akin to using the categorical approach[6] or modified categorical approach[7] to determine whether an offense is a "crime of violence"[8] or a "violent felony."[9] That could lead to increasing litigation to determine if the misdemeanor in question is categorically a "threat to public safety" All of which illustrates why *Hensley's* bright-line rule should not be extended to completed misdemeanors.

As a final matter the Sixth Circuit found that Officer Parrish had probable cause to arrest petitioner for fourth degree assault. *Jones*, 593 F.3d 438-39. (App. 7-8). The evidence, however, does not support that conclusion because it does not show that Ms. McKinney sustained an injury that falls within the scope of the fourth degree assault statute KRS §508.030(1)(a). (*See* p. 14, *supra.*).

"Physical injury" is defined as "substantial physical pain or any impairment of physical condition[.]" *See* KRS §500.080(13). Ms. McKinney did not call the police because she had been injured but because she could not get petitioner to leave her residence. (R.32, DEX 2, Body Camera 1234 at 00:01:05-38). She told Officer Parrish that petitioner threw a plastic bottle of dishwashing liquid that burst open

---

[6] *Taylor v. United States*, 495 U.S. 575, 577 (1990).
[7] *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016).
[8] *See e.g.*, 18 U.S.C. §16.
[9] *See e.g.*, 18 U.S.C. §924(e)(2)(B).

when it hit her in the back. She lifted her shirt to show the officer where the bottle struck her and complained of back pain. The bottle was found in her front yard. (R.30, TR Hrng., Page ID# 68-69, 72-73, 80-82; R.32, DEX 2, Body Camera 1236 at 00:01:40-00:03:15, 00:27:05-25).

Officer Parrish did not see any indication that Ms. McKinney was injured. He did not call for an ambulance or have her medically examined. (R.30, TR Hrng., Page ID# 81-82). That suggests he did not believe that she was injured. Officer Parrish did not see any bruising or signs of trauma. *Id*. at 82; R.32, DEX 2, Body Camera 1236 at 00:27:05-25. He noted on the Uniform Citation (GEX 1) (App. 26) that there was no visible injury to Ms. McKinney. (R.30, TR Hrng., Page ID# 87).

Officer Parrish explained that if Ms. McKinney wanted to pursue criminal charges, she would have to follow a process and go downtown to do it. *Id*. at 00:14:30-00:15:40. If he believed that there was sufficient probable cause to justify a warrantless arrest of petitioner, he would not have told Ms. McKinney that she would have to swear out a warrant.

Furthermore, when Officer Parrish saw the vehicle with two black males in it, he "initiated a traffic stop to further investigate the allegations made by Ms. McKinney." (R.30, TR Hrng., Page ID# 71). The intent to further investigate indicates that he did not believe he had probable cause to arrest petitioner. Moreover, there was nothing that occurred after the stop that provided additional information

to establish probable cause. Petitioner did not admit to criminal conduct and there was no evidence that he was engaged in criminal activity when the stop was made. The circumstances do not support a finding that Ms. McKinney sustained a physical injury for purposes of fourth degree assault. Officer Parrish did not have probable cause to arrest petitioner for that misdemeanor offense.

Petitioner respectfully submits that his case is appropriate for a grant of certiorari because it specifically addresses the question left open in *Hensley,* 469 U.S. at 229, *i.e.*, "if the police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed [misdemeanor], then a *Terry* stop may be made to investigate that suspicion." Moreover, the facts and circumstances surrounding petitioner's case are simple and clearly frame the backdrop for answering the question presented. *Hensley's* holding presents a clear and straightforward principle of law that is easily followed and applied by law enforcement officers. The Sixth Circuit's expansion of that holding should be rejected by this Court because it will yield inconsistent results and unnecessary litigation in district courts.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

Frank W. Heft, Jr.
Counsel of Record
Scott T. Wendelsdorf
Office of the Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525
Frank_Heft@fd.org

Counsel for Petitioner