NO. _____

In The
Supreme Court of the United States

JARODERICK HARDY,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to *Terry v. Ohio*, 392 U.S. 1, 22 (1968) and its progeny, law enforcement officers may conduct a brief, investigative stop when, under the totality of the circumstances, the officers have a particularized and objective basis for suspecting the particular person stopped of criminal activity. In the opinion below, the Eleventh Circuit determined that a *Terry* stop was justified because: (1) the officer was responding to a "prowler" call in a high crime area; (2) the defendant was wearing all black clothing at 1:30 AM on a weeknight; (3) the defendant was the only person in "close proximity" to the caller's house; and (4) the officer found it implausible that the defendant would walk 1.5 miles at 1:35 in the morning to buy cigarillos.

The question presented is: where the facts show that the defendant was walking on a sidewalk 0.3 miles away from an indescribable noise in the 911 caller's yard—that might have been a person, animal, or vehicle—and there was no other physical descriptor or reason to believe the defendant made the noise or committed any crime, can the Eleventh Circuit's reasonable suspicion determination be reconciled with *Terry* and its progeny?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Jaroderick Hardy*, No. 18-cr-168, U.S. District Court for the Middle District of Alabama. Judgment entered on Nov. 19, 2018.
- *United States v. Jaroderick Hardy*, No. 18-14884, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on Mar. 17, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Jaroderick Hardy respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision below is unpublished. *United States v. Hardy,* 806 Fed. App'x 718 (11th Cir. 2020) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The district court's order denying Mr. Hardy's motion to suppress is unreported. *United States v. Hardy*, 2018 WL 3742455 (M.D. Ala. 2018). The order is included in Petitioner's Appendix. Pet. App. 1b.

The report and recommendation of the magistrate judge, which recommended that Mr. Hardy's motion to suppress be granted, is unreported. *United States v. Hardy*, 2018 WL 4677833 (M.D. Ala. 2018), *rejected by* 2018 WL 3742455. The recommendation is reproduced in the Petitioner's Appendix. Pet. App. 1c.

JURISDICTION

The Eleventh Circuit's opinion in this case was issued on March 17, 2020. *See* Pet. App. 1a. No rehearing was sought, rendering the petition for writ of certiorari due on or before June 15, 2020. However, due to public health concerns relating to the COVID-19 pandemic, this Court entered an order, extending the deadline to file the petition to 150 days from the date of the lower

court judgment. The certiorari petition is now due on August 14, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the U.S. Constitution protects the "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST., amend. IV.

STATEMENT OF THE CASE

In May 2018, a federal grand jury returned an indictment against Mr. Jaroderick Hardy, charging him with a single count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

Subsequently, Mr. Hardy filed a motion to suppress, arguing that: (1) Montgomery Police Department ("MPD") Officer Joshua Howell lacked reasonable suspicion to initiate a *Terry* stop on November 8, 2017; and (2) as a result, the exclusionary rule required suppression of all physical and testimonial items obtained as a result of the *Terry* stop and illegal seizure.

The government responded in opposition, and a magistrate judge conducted a hearing on the motion to suppress. At this hearing, the evidence established that, on November 8, 2017 at 1:21 A.M, a resident of West Wilding Drive, in Montgomery, Alabama, called 911. The resident told the 911 dispatcher that she could hear "somebody" outside her home, and this was the third night that she had heard similar noises. The caller did not look outside,

and did not provide a description of what she heard. The unexplained noise could have been made by a man, a woman, a vehicle, or an animal.

Officer Howell was dispatched to the area, and treated the situation as a "prowler" call. Officer Howell arrived at the caller's residence at 1:28 A.M. He did not see anything amiss, nor did he make contact with the caller. So, Officer Howell continued to drive around the block, and headed back out of the neighborhood the way he came in. After approximately seven minutes of driving, Officer Howell observed Mr. Hardy walking on the sidewalk. Mr. Hardy was wearing black clothing, and was 0.3 miles away from the West Wilding residence. Mr. Hardy was not breaking any laws, and there were "zero physical descriptors" that would have allowed the officer to conclude that Mr. Hardy was associated with the West Wilding 911 call. It was, however, a neighborhood that Officer Howell considered to be "high crime."

Between 11-14 minutes after the 911 call—and a completely indeterminate amount of time after the noise near the residence—Officer Howell stopped his vehicle, and approached Mr. Hardy. Officer Howell asked Mr. Hardy where he was going, and Mr. Hardy responded that was headed back to his mother's house after walking to the store to buy a cigarillo. Officer Howell believed this response to be evasive, because the nearest open store was 1.5 miles away. However, Officer Howell did not ask any investigative questions to clarify Mr. Hardy's destination, or whether he had been in the

vicinity of the West Wilding address. As they spoke, Mr. Hardy held a cigarillo in one hand, and retrieved a cell phone from his pocket with the other.

Officer Howell asked Mr. Hardy if he was armed, and Mr. Hardy said "no." Officer Howell asked another question, which prompted Mr. Hardy to respond that he could provide his ID number. Officer Howell stated that he wanted to be sure that Mr. Hardy was unarmed, and Mr. Hardy responded that he "ain't got nothing on me." Officer Howell did not observe any weapon-shaped bulges or other objective evidence consistent with an armed individual. Nevertheless, Officer Howell ordered Mr. Hardy to "stand still," and conducted a pat down search of Mr. Hardy's person. This search revealed a firearm in Mr. Hardy's waistband.

Following an evidentiary hearing, the magistrate judge recommended that Mr. Hardy's motion to suppress be granted, because there was no reasonable, articulable suspicion that would justify the *Terry* stop. *Hardy*, 2018 WL 4677833 at *4.

The district court disagreed, and entered an order denying Mr. Hardy's motion to suppress. *Hardy*, 2018 WL 3742455 at *6. The court explained that the encounter became a seizure when Officer Howell ordered Mr. Hardy to "stand still." However, the court determined that, cumulatively, the following facts were sufficient to support a finding that Officer Howell had a reasonable suspicion that Mr. Hardy was involved in criminal activity:

> (1) Officer Howell was responding to a 911 call that someone was outside of a resident's home; (2) the call was made at 1:21 a.m. on

> a weeknight in a high crime neighborhood; (3) after seeing no one else in the area, Officer Howell located the defendant in close temporal and geographical proximity to the residence; (4) the defendant was wearing all black clothing; (5) the defendant was evasive and provided an unbelievable story about making an hour long walking trip to a store to get cigarillos.

Thereafter, Mr. Hardy entered into a conditional guilty plea. Mr. Hardy agreed to plead guilty to the indictment, but reserved his right to appeal the district court's adverse ruling on his motion to suppress. Ultimately, the district court sentenced Mr. Hardy to 15 months' imprisonment.

Mr. Hardy appealed, challenging the district court's determination that the *Terry* stop conducted by Officer Howell was supported by reasonable suspicion.

Following oral argument, the Eleventh Circuit rejected Mr. Hardy's arguments, and affirmed the district court's denial of his motion to suppress. *Hardy*, 806 Fed. App'x at 722. The Court explained that there was reasonable suspicion for a *Terry* stop and the search of Mr. Hardy's person, because:

> First, Officer Howell was not in the neighborhood based on a mere "hunch" but was responding to a specific type of 911 call, a "prowler" call. Such calls were not uncommon for that area, which had a high rate of property crime. Second, Hardy's all black clothing—while it could be innocuous—raised Howell's suspicions when observed at 1:30 a.m. on a weeknight. According to Howell, dark clothing was something that officers dealt with daily when responding to criminal calls at nighttime. In other words, someone who was committing or likely to commit property crimes (i.e, a "prowler") would likely be wearing all black at that time of night. Third, Hardy was the only person that Howell encountered during his drive through the neighborhood, and he was in close proximity to the caller's house. This, too, would have likely raised suspicions about whether he could have been responsible for the "prowler" noises that the caller had heard. Finally, Hardy's

> account of how he had gone to the store to purchase cigarillos, though possible, seemed unlikely. Evidence in the record showed that the only store open at the time was a mile and a half—or a thirty-minute walk—away from the caller's house. This meant that when Howell encountered Hardy, Hardy would have been on the tail end of an hour-long round trip to the store just to purchase a few cigarillos at 1:35 in the morning on a weeknight. It was reasonable for Howell to have viewed Hardy's story with at least some skepticism.

Id. at 721.

The Eleventh Circuit explained that each of these factors "served to *increase* Officer Howell's already heightened suspicions (from the 911 call) and did little to point to Hardy's non-involvement in the purported "prowler" incident." *Id.* at 722. Acknowledging that Mr. Hardy's behavior was "open to innocent explanations," the court found that Officer Howell was nevertheless permitted to seize him in order to "resolve the ambiguity" created by his actions. *Id.*

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's decision is contrary to, or misapphrehends a crucial aspect of, *Terry* and its progeny.

The Fourth Amendment protects the "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST., amend. IV. Ordinarily, a warrantless search or seizure is *per se* unreasonable. *See Katz v. United States*, 389 U.S. 347, 357 (1967) ("Over and over again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,

and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specially established and well delineated exceptions") (quotation and citation omitted).

However, police may conduct a brief, investigatory *Terry* stop if "the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). This Court's precedent is clear: in determining whether a *Terry* stop is justified, the totality of the circumstances—the whole picture—must be taken into account. *Navarette v. California*, 572 U.S. 393, 397 (2014) (citing *United States v. Cortez*, 449 U.S. 411 (1981)). Based upon that whole picture, the detaining officers must have "a *particularized and objective basis for suspecting the particular person stopped of criminal activity*." *Id.* at 396 (emphasis added). Accordingly, an individual's presence in a high crime area, standing alone, is "insufficient to support a reasonable particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at 124.

As noted previously, the Eleventh Circuit determined in the opinion below that Officer Howell possessed reasonable suspicion to conduct a *Terry* stop because: (1) Officer Howell was responding to a "prowler" call in a neighborhood with a high rate of property crimes; (2) Mr. Hardy was wearing all black clothing at 1:30 AM on a weeknight; (3) Mr. Hardy was the only person Officer Howell encountered during his drive through the neighborhood,

and he was in "close proximity" to the caller's house; (4) Mr. Hardy's account that he had gone to the store to purchase cigarillos, though possible, seemed unlikely given that it would have been an hour-long walk at 1:35 in the morning. *Hardy*, 806 Fed. App'x. at 721.

This conclusion either misapprehends—or is contrary to—several crucial aspects of this Court's Fourth Amendment jurisprudence. Specifically, in reviewing whether Officer Howell had reasonable suspicion to conduct a *Terry* stop, the appellate court was required to consider—not just whether Officer Howell subjectively believed that Mr. Hardy was behaving suspiciously or evasively—but the *totality of the circumstances*—including those facts objectively indicating that Mr. Hardy had no connection to the noise in the 911 caller's front yard. *See Cortez*, 449 U.S. at 417-19.

Looking at the facts leading up to the seizure through an objective lens, Mr. Hardy was walking on a sidewalk 0.3 miles away from an indescribable noise made at a completely indeterminable time prior to the 911 call. The substance of the 911 call was relayed to Officer Howell, and Officer Howell understood from the 911 call that the resident "heard what she thought was someone" in her yard, and it could very well have been an animal, or a vehicle, or a person of any race, gender, age, height, or weight.[1] Officer Howell then

[1] As this Court has repeatedly noted, the reasonable suspicion necessary to justify a *Terry* stop "is dependent upon both the content of information possessed by police and its degree of reliability." *Navarette*, 572 U.S. at 397. Here, the Eleventh Circuit characterized the reason for Officer Howell's presence in the area as simply a "prowler" call, without addressing the totality of circumstances and the lack of meaningful information conveyed by the call. As the magistrate judge noted, "Officer Howell might as well have been looking for a ghost." *Hardy*, 2018 WL 4677833 at *3.

investigated the residence, and found no indication of any crime, person, or vehicle. Officer Howell then drove around the block, and encountered Mr. Hardy 0.3 miles away, walking on the sidewalk next to the road that is the primary means of ingress and egress to this neighborhood. Officer Howell initiated contact with Mr. Hardy, and Mr. Hardy directly answered all of his questions. Officer Howell did not ask any investigative questions regarding the West Wilding residence or property crime, but instead initiated a *Terry* stop based on his unparticularized hunch that 1.5 miles was too far to walk for a cigarillo at 1:30 AM.[2] This is not the minimal level of objective justification required by the Fourth Amendment to justify a *Terry* stop. *See Wardlow*, 528 U.S. at 123 ("While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop").

Moreover, three of the four factors that the appellate court relied on to find reasonable suspicion were not particularized and objective as to Mr. Hardy, and could have applied to virtually any person walking at night in this neighborhood. As this Court has explicitly noted, mere presence in a high crime area, standing alone, is "insufficient to support a reasonable particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at 124. Officer Howell's rote, ex post facto assertion that individuals who

[2] As noted previously, Mr. Hardy was actually holding a cigarillo for the duration of his encounter with Officer Howell.

wear black are more likely to commit property crimes likewise does nothing to supply the *particularized and objective* basis for suspecting the particular person stopped of criminal activity. And although it is true that Mr. Hardy was 0.3 miles from the 911 caller at the time he encountered Officer Howell, this was equally true of every person, vehicle, and animal within a 0.3 mile radius that could have made the unidentified noise.

The only factor specific to Mr. Hardy—that the officer found his answers to be evasive—likewise cannot supply the necessary reasonable suspicion for the *Terry* stop. Determining reasonable suspicion is an objective standard, and the question is not whether this particular officer subjectively believed that Mr. Hardy was behaving suspiciously or evasively, but whether the events leading up to the seizure—viewed from the standpoint of an objectively reasonable police officer—amount to reasonable suspicion. No reasonable officer would have found Mr. Hardy's behavior indicative of criminal activity: Officer Howell asked Mr. Hardy where he is coming from and where he is going, and Mr. Hardy responded that he was coming back from the store to his mom's house. Officer Howell asked Mr. Hardy if he had any weapons on him, and Mr. Hardy responded "no," and he "ain't got anything on him." These are direct answers to direct questions. But even if these answers could be construed as evasive, Mr. Hardy was perfectly at liberty to answer evasively, or even to refuse to answer at all. To find reasonable suspicion based on Officer Howell's subjective and irrational hunch that Mr. Hardy was armed would

place objective limits on *how* an individual is permitted to express his unwillingness to interact with police.

Finally, in determining reasonableness, the Court must balance the governmental interest involved against the constitutionally protected interest of the private citizen. *Terry*, 392 U.S. at 20-21. Here, it is hard to imagine a situation with a less compelling governmental interest. This is not a case where a murder was committed at the West Wilding residence; instead, this is a case where a resident heard a noise in her yard, which she thought was a person. Officer Howell specifically stated that the *only* reason he approached Mr. Hardy was due to his proximity to the residence. This governmental interest is simply not compelling enough to justify a seizure of any person who happens to be walking within a 0.3 mile radius of a noise in a front yard.

As a result, the Eleventh Circuit's holding conflicts with this Court's Fourth Amendment jurisprudence, and this Court's review is required to ensure that the Eleventh Circuit gives full force and effect to *Terry.* It is also required to ensure that individuals in the Eleventh Circuit are not subject to arbitrary search and seizure simply because they are walking at night in a high crime neighborhood within 0.3 miles of a noise in a front yard.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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