_____

No.

_____

IN THE
SUPREME COURT OF THE UNITED STATES

MAURICE FREEMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

Rebecca L. Kurz
Assistant Federal Public Defender
1000 Walnut, Suite 600
Kansas City, Missouri 64106
(816) 471-8282
Becky_Kurz@fd.org
Attorney for Petitioner

QUESTIONS PRESENTED

1. Does the rule of *Michigan v. Summers*, 452 U.S. 692 (1981), which permits police officers executing a search warrant to detain occupants of a residence to be searched without reasonable suspicion or probable cause of criminal activity, extend to individuals on a public street near the residence?

2. What does the term "immediate vicinity" mean, as used in *Bailey v. United States*, 568 U.S. 186 (2013), in which this Court said, "[t]he categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched."

TABLE OF CONTENTS

Page

INDEX TO APPENDIX

Table of Authorities

Cases

Statutes

Rules

Other

_____

No.

_____

IN THE
SUPREME COURT OF THE UNITED STATES

MAURICE FREEMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

Petitioner, Maurice Freeman, respectfully asks this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered on July 10, 2020, affirming the district court's judgment.

OPINION BELOW

The Eighth Circuit's opinion affirming the judgment of the district court is published at *United States v. Freeman*, 964 F.3d 774 (8th Cir. 2020), and is attached as Appendix A. A copy of the order denying the petition for rehearing is

attached as Appendix B.

JURISDICTION

Jurisdiction in the United States District Court for the Western District of Missouri was under 18 U.S.C. § 3231, because Mr. Freeman was charged and convicted of an offense against the United States, i.e., unlawful possession of a firearm having previously been convicted of a felony offense, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Mr. Freeman appealed from his conviction and sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291. The Eighth Circuit denied the appeal on July 10, 2020. The Eighth Circuit denied rehearing on August 24, 2020.

Under Sup. Ct. R. 13.3 and 30, this petition is filed within ninety days of the date on which the Court of Appeals entered its order denying Mr. Freeman's petition for rehearing. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment 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 persons or things to be seized.

U.S. Const., Amend. IV.

STATEMENT OF THE CASE

A. Testimony and Evidence Presented during the District Court Proceedings on Mr. Freeman's Motion to Suppress

On December 6, 2017, law enforcement officers were preparing to execute a search warrant at 625 South 14th Street, St. Joseph, Missouri (DCD 30, Supp. Tr. at 5).[1] The police were looking for Derrick Ashley, Jr., and a second individual, who were suspects in a bank robbery and a shooting (DCD 30, Supp. Tr. at 5-6, 61-62). The search warrant pertained only to the shooting, not the robbery, and identified the place to be searched and things to be seized as "625 S 14th street St. Joseph MO. A white/yellow two story residence on the North East corner of S 14th street and Locust. To search for and seize evidence related to the crime of Unlawful use of a firearm" (Addendum at 20, 23). The warrant did not authorize the seizure of any person or any vehicle (Addendum at 23).

Beginning at 10:00 a.m., Detective Blaine Seymour surveilled the residence to determine whether Ashley, Jr. was inside and relayed his observations to other

[1] The district court document is referenced as DCD.

officers who were in the process of preparing a search warrant application (DCD 30, Supp. Tr. at 39-40, 63). As Seymour drove to the residence in an unmarked vehicle, he passed two middle-aged black males—later identified as Derrick Ashley, Sr. and Maurice Freeman—in a silver Pontiac Grand Prix parked on the east side of 14th Street behind a tan Buick (DCD 30, Supp. Tr. at 39-40). Neither man fit the description of the robbery suspects (DCD 30, Supp. Tr. at 55). Seymour parked a short distance away where he could see the residence (DCD 30, Supp. Tr. at 42-43). Thirty to forty-five minutes later, Seymour saw Ashley, Jr. leave the residence, approach the Pontiac, and speak briefly with the two men (DCD 30, Supp. Tr. at 44). The men in the Pontiac left shortly thereafter (DCD 30, Supp. Tr. at 45).

Fifteen to twenty minutes later, Seymour saw a maroon Cadillac Escalade park behind the tan Buick in front of the residence (DCD 30, Supp. Tr. at 45, 55-56). Derrick Ashley, Sr. and Juanisha Ashley got out of the Cadillac and appeared to have a brief argument, before Juanisha went inside the residence (DCD 30, Supp. Tr. at 45-46). Seymour lost sight of Ashley, Sr., but assumed he returned to the Cadillac (DCD 30, Supp. Tr. at 46). Ten minutes later, the Pontiac returned and parked behind the Cadillac (DCD 30, Supp. Tr. at 46). Ashley, Jr. exited the residence and walked to the Pontiac where he picked up a large bag of dog food

and went back inside (DCD 30, Supp. Tr. at 47).

Other officers soon arrived in an armored vehicle called a Bearcat, having obtained a search warrant for the residence (DCD 30, Supp. Tr. at 48). Even though the search warrant did not authorize the search of any vehicles or the seizure of any person, Seymour's "responsibility was to secure any people in those vehicles" (DCD 30, Supp. Tr. at 48; Addendum at 23). At the suppression hearing, Seymour claimed that he smelled a strong odor of "fresh" marijuana as he walked past the Buick and the Escalade, towards the Pontiac (DCD 30, Supp. Tr. at 49, 56, 59). When Seymour reached the Pontiac, at least three or four other officers were around the vehicle (DCD 30, Supp. Tr. at 49). One of them opened the driver's door and Seymour reached in, grabbed Mr. Freeman's wrist, and handcuffed him (DCD 30, Supp. Tr. at 49). Seymour then took Mr. Freeman to the Bearcat and stood with him while other officers secured the residence (DCD 30, Supp. Tr. at 50).

Seymour admitted on cross-examination, however, that his report regarding the events did *not* say that he smelled marijuana as he walked past the Buick toward the Pontiac (DCD 30, Supp. Tr. at 59). According to Seymour's report, he smelled marijuana when the door to the Pontiac was opened (DCD 30, Supp. Tr. at 59). Also on cross-examination, Seymour agreed that "the occupants of the silver

Pontiac couldn't really go anywhere," because "there were marked and unmarked vehicles behind the Pontiac on 14th Street" and "[t]he Bearcat at the end of 14th Street and Locust" (DCD 30, Supp. Tr. at 60).

Sergeant Steve McClintick testified that after the search warrant was obtained, he and six or seven officers rode to the scene in the Bearcat (DCD 30, Supp. Tr. at 6-7). On the way, they learned that there was a tan Buick, a red Cadillac Escalade, and a silver Pontiac parked on the street (DCD 30, Supp. Tr. at 7). The Bearcat was parked on 14th Street facing north, almost directly in front of the house to be searched (DCD 30, Supp. Tr. at 8, 18, 23). McClintick and two other officers, in uniform with large tactical vests marked "police," walked north "up the middle of 14th Street clearing each car at that point to identify and locate and detain anybody that was in the vehicles" (DCD 30, Supp. Tr. at 8-9, 10-11, 30-31). The cars were parked facing south on 14th Street, which is a one-way street (DCD 30, Supp. Tr. at 16, 25). McClintick testified that anytime a person is outside a structure to be searched, "we're going to, we approach them, detain them" for officer safety (DCD 30, Supp. Tr. at 9).

The Buick and Escalade were empty (DCD 30, Supp. Tr. at 9). While standing at the back of the Escalade, McClintick saw two black males in the Pontiac looking toward the sidewalk at other officers (DCD 30, Supp. Tr. at 9-10).

McClintick testified that he could smell marijuana (DCD 30, Supp. Tr. at 9). McClintick testified that the driver was leaning forward with his hands near the floorboard, either retrieving something or concealing something (DCD 30, Supp. Tr. at 10-11). McClintick ordered the men to put their hands up, and they complied (DCD 30, Supp. Tr. at 10).

McClintick, accompanied by one officer, opened the passenger door, ordered Ashley, Sr. to get out of the Pontiac, and handcuffed him, while officers on the driver's side did the same with Mr. Freeman (DCD 30, Supp. Tr. at 12). McClintick recalled that three to five officers were present, armed with assault rifles held in "a low ready position" (DCD 30, Supp. Tr. at 30-31). Officers were also behind the Pontiac (DCD 30, Supp. Tr. at 32-33). McClintick testified that Mr. Freeman would not have been able to drive forwards or backwards (DCD 30, Supp. Tr. at 33). After they were handcuffed, both men were taken to the Bearcat (DCD 30, Supp. Tr. at 12-13).

Detective Aaron King was also conducting surveillance in case Seymour needed backup, but he was not in view of the residence (DCD 30, Supp. Tr. at 63). When King heard Seymour's radio transmission that he had spotted Ashley Jr. at the residence, King went to the Law Enforcement Center to contact the prosecuting attorney about obtaining a search warrant (DCD 30, Supp. Tr. at 64). King

returned to the area and saw that Ashley Jr., Ashley Sr., and Mr. Freeman were in custody behind the Bearcat (DCD 30, Supp. Tr. at 66-67). King testified that when he arrived, Sergeant McClintick pulled him to the side and told him to search the Pontiac, because "when they took Mr. Freeman and Derrick, Sr. out of the vehicle they could smell marijuana coming from the vehicle" (DCD 30, Supp. Tr. at 68).

King could smell marijuana as he opened the car door to search the Pontiac (DCD 30, Supp. Tr. at 68, 72). In the center console, King found a small, closed pill bottle containing a bag of marijuana (DCD 30, Supp. Tr. at 68-69, 72). He found a firearm underneath the driver's seat (DCD 30, Supp. Tr. at 69).

Captain Christopher Collie arrived and saw that Ashley, Jr. and Mr. Freeman were in custody (DCD 30, Supp. Tr. at 77). Collie instructed officers to have Mr. Freeman's Pontiac towed to the Buchanan County Strike Force garage (DCD 30, Supp. Tr. at 80). Collie testified that the Pontiac was in the "general area" of the residence that was searched (DCD 30, Supp. Tr. at 87). He said that the Pontiac "was three car lengths from the residence, I guess" (DCD 30, Supp. Tr. at 87). Collie acknowledged that the Pontiac was not included in the search warrant affidavit as an item to be searched (DCD 30, Supp. Tr. at 87).

Mr. Freeman was indicted for unlawful possession of a firearm having previously been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and

924(a)(2) (DCD 10, Indictment at 1-2). Mr. Freeman retained counsel who filed a motion to suppress all evidence obtained as a result of Mr. Freeman's detention by law enforcement officers (DCD 21, Motion to Suppress). The evidence Mr. Freeman sought to suppress included a small amount of marijuana and a firearm found in the vehicle he was driving, a statement he gave to police following his arrest, and some methamphetamine found during a strip search following his arrest (DCD 21, Motion to Suppress at 2).

After hearing the testimony summarized above, the magistrate judge issued a report recommending that the motion to suppress be denied (DCD 36, R&R at 12; Addendum at 7-18). Defense counsel did not file objections to the Report and Recommendation. The district court issued an order adopting the Report and Recommendation (DCD 36, Order at 1; Addendum at 19).

Mr. Freeman and the government entered a plea agreement in which Mr. Freeman reserved the right to file an appeal from the denial of his motion to suppress evidence (DCD 64, Plea Agreement at 9). Mr. Freeman pled guilty, and on May 9, 2019, the court sentenced Mr. Freeman to 37 months' imprisonment and three years of supervised release and entered its judgment (DCD 80, Plea Tr. at 1, 15; DCD 81, Sent. Tr. at 11-12; DCD 72, Judgment). On May 22, 2019, Mr. Freeman filed a timely notice of appeal (DCD 75, NOA).

B. The Eighth Circuit upheld the seizure of Mr. Freeman, applying the principles set forth in *Michigan v. Summers* and *Bailey v. United States* in an *ad hoc* fashion, balancing the governmental interests in officer safety, facilitating the completion of the search, and preventing flight, against Mr. Freeman's liberty interest.

The Eighth Circuit applied a balancing test and determined that *Michigan v. Summers*, 452 U.S. 692 (1981) and *Bailey v. United States*, 568 U.S. 186 (2013) permitted the detention of Mr. Freeman. *United States v. Freeman*, 964 F.3d at 779-80. The Eighth Circuit panel said that "[w]hen determining whether a detention is permissible," it has considered the character of the official intrusion and its justification. *Id*. at 777. "When weighing the character of the intrusion, the [Supreme] Court has examined the intrusiveness of the detention and the stigma the detention carried." *Id*. According to the Eighth Circuit, this Court has "identified three justification that support a detention: 'officer safety, facilitating the completion of the search, and preventing flight.'" *Id*., citing *Bailey*, 568 U.S. at 194 and *Summers*, 452 U.S. at 702-04.

The Eighth Circuit panel concluded that because "[t]he officers were seeking Ashley, the suspect of a gun shooting and bank robbery," the execution of the search warrant could "'give rise to sudden violence or frantic efforts to conceal . . .

evidence.'" *Id*., citing *Summers*, 452 U.S. at 702. The court observed that "Ashley's accomplice was still at large and the police observed Ashley twice interacting with the Pontiac's passengers." *Id*. The court noted that Mr. Freeman's vehicle was parked "within the line of sight of [the] dwelling." *Id*., citing *Bailey*, 568 U.S. at 201. According to the court, if Mr. Freeman and Ashley, Sr. had been armed, they would have posed a real threat to the safe and efficient execution of the search warrant. *Id*., citing *Bailey*, at 201. Given the threat posed by Mr. Freeman and Ashley, Sr., their connection to the residence to be searched, and the dangerous suspect inside the residence, "a concern of officer safety justified the brief detention which occurred here." *Id*.

Drawing from *Bailey's* observation that if occupants were permitted to wander around the premises to be searched, they could interfere with the orderly completion of the search by hiding or destroying evidence, distracting the officers, or simply getting in the way, the Eighth Circuit panel said that Mr. Freeman's detention was permissible even though he was not in the residence, because he could have exited his vehicle and interfered with the search for and arrest of Ashley Jr. *Id*. Although the interest in preventing flight was not a factor "[o]n these facts," it did not "outweigh the first two interests here." *Id*.

The court observed that Mr. Freeman, unlike Mr. Summers, "had neither the

protections that a search warrant provides nor did he face the liberty infringement one creates." *Id*. "*Bailey* analysis does not turn on the presence of a warrant," according to the Eighth Circuit, "[r]ather, in analyzing the intrusion on liberty, the [Supreme] Court has focused on the facts surrounding the detention and the 'stigma associated with the search.'" *Id*. at 779-80, citing *Bailey*, 568 U.S. at 200. "Considering the instant facts," the court said that the intrusion on Mr. Freeman's liberty and the associated stigma was unlike cases in which the individuals involved "were driving away from the home and were already well beyond its premises before police officers stopped them and brought them back to the house." *Id*. at 780.

The court thought that Mr. Freeman suffered no significant intrusion on his liberty, because he "was sitting in his car parked near the premises to be searched when the stop occurred; he continued sitting in the car after he was blocked in"; and his detention "did not alter his course of conduct." *Id*. The court acknowledged that Mr. Freeman "no longer had a choice to immediately leave the scene," but the "impingement of his liberty" differed materially from the individuals in *Bailey* who were chased down, handcuffed publicly, placed in a marked patrol car, and carried a mile to the home being searched. *Id*. The fact that officers approached Mr. Freeman's vehicle with guns drawn was not a serious

intrusion, because their guns were not trained on the car or Mr. Freeman, but merely in the "low and ready" position. *Id.* Thus, "an onlooker would not necessarily think that the Pontiac's occupants were the targets of the police activity." *Id.*

The court disagreed with Mr. Freeman's argument that *Summers* was a categorical rule and that to be detained a person must be both an occupant of the home and within the immediate vicinity of the home. *Id*. The court said that even if *Summers* is a categorical rule, Mr. Freeman misconstrued it, because an occupant is a person within the immediate vicinity of the premises to be searched. *Id*. at 780-81.

Quoting *Bailey*, the court said in a close case a court may consider "a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors. *Id*. at 781, *Bailey*, 568 U.S. at 201.

Applying these factors, the court noted that Mr. Freeman was within the line of sight of the residence and posed a real threat to the safe and efficient execution of the warrant. *Id*. Furthermore, even though he was not within the lawful limits

of the premises, he was close enough to gain easy access to the home, thus he was an occupant "under his proffered categorical rule." *Id*.

The court further stated that even if the "occupant" and "immediate vicinity" questions are separate requirements; other courts had determined that persons similarly situated to Mr. Freeman were occupants. *Id*., citing *Burchett v. Kiefer*, 310 F.3d 937, 943 (6th Cir. 2002) and *United States v. Jennings*, 544 F.3d 815, 818-19 (7th Cir. 2008). Assuming without deciding that the officers detained Mr. Freeman when they blocked his car from moving, i.e. prior to smelling marijuana, the court concluded that Mr. Freeman's detention was lawful under *Summers* and *Bailey*. *Id*. at 781, n. 5. The Honorable David Stras, Circuit Judge concurred in the judgment, but said the court's discussion of the *Summers* line of cases and the suggestion that the court was not bound to apply *Summers* as a categorical rule were confusing, because *Summers* was a categorical rule, as stated in *Bailey* and *Muehler v. Mena*, 544 U.S. 93, 98 (2005).

REASONS FOR GRANTING REVIEW

This Court should grant review to address two questions. First, this Court should determine whether *Summers* permits the detention of individuals who are not occupants, or recent occupants, of the premises to be searched. This Court's precedents permitting detentions incident to the execution of a search warrant

have involved persons who were occupants, or very recent occupants, of the premises to be searched at the time the search was executed. *Summers*, 452 U.S. at 693 (detention of resident as he descended the front steps of his home); *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (detention of resident inside the home to be searched); *L.A. County v. Rettele*, 550 U.S. 609 (2007) (detention of family inside the home to be searched).

Mr. Freeman was not an occupant of the residence to be searched but was parked on a public street about three car lengths down from the residence. This Court's guidance is needed as to whether *Summers* applies to a person who is not a current occupant of the place to be searched.

Second, this Court should grant review to address the question left open in *Bailey*—the meaning of "immediate vicinity" as that term is used in the context of a detention incident to the execution of a search warrant. *Bailey* was not a close case because the individuals were detained a mile away from the premises to be searched, "a point beyond any reasonable understanding of the immediate vicinity of the premises in question." 568 U.S. at 190, 201. The Court said, "this case presents neither the necessity nor the occasion to further define the meaning of immediate vicinity." *Id*. at 201.

The Court's guidance is needed to determine what constitutes the

geographical boundary that defines the immediate vicinity of the premises that is being searched. In *Bailey*, the Court suggested factors that, in a close case, may be considered in determining whether an occupant was detained in the immediate vicinity of the premises to be searched. The suggested factors include the lawful limits of the premises, whether the occupant was in the line of sight of his dwelling, and the ease of reentry from the occupant's location. The latter two factors address residents of a dwelling who have access to the home, but provide no guidance as to the general public or nearby neighbors.

This Court should grant certiorari because the Eighth Circuit's opinion replaces *Summers*' categorical rule with a balancing test, weighing the interests of the police officers against the intrusion on an individual's liberty, that is inappropriate for the detention of someone who is not an occupant of the premises to be searched. The application of such a test is at fundamental odds with the general rule that detentions without reasonable suspicion or probable cause to believe that the person is involved in criminal activity violate the Fourth Amendment. *Summers* permits detentions of innocent persons, but only if the person is an occupant of the premises to be searched pursuant to a valid warrant. Permitting the detention of people on sidewalks, public streets, or neighboring properties, as the Eighth Circuit's opinion does, is a dangerous precedent that

should be reviewed by this Court.

ARGUMENT

A. This Court's precedents permitting detentions incident to the execution of a search warrant have involved persons who were occupants, or very recent occupants, of the premises to be searched at the time the search was executed.

In *Michigan v. Summers*, this Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. 692, 705 (1981). The Court limited its holding to the detention of "occupants" and to cases in which the authorized search was for contraband, as opposed to evidence. *Id*. at 705, n. 20. The rule was said to be categorical, requiring no *ad hoc* determination, "because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id*. at 705, n. 19.

In *Summers*, no Fourth Amendment violation occurred when police officers with a warrant to search the defendant's residence for narcotics detained the defendant as he descended the front steps of his home and required him to re-enter and remain in the home for the duration of the search. *Id*. at 693-694. After

finding narcotics in the home and determining that Mr. Summers lived in the residence, the police arrested him, searched his pockets, and found heroin. *Id*. at 693. The Court determined that the search of the defendant's person was reasonable. *Id*. at 701-05.

"Of prime importance" to the Court's analysis was the fact that a neutral and detached magistrate had authorized a substantial invasion of the resident's privacy, such that the detention of the resident during the course of the search was less intrusive than the search itself. *Id*. at 701. The type of detention was unlikely to be exploited by the officers, because the information they sought would normally be obtained through the search, not the detention. *Id*. And, because the detention occurred in the resident's own home, any additional stigma beyond that of the search was minimal and involved "neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Id*. at 702.

Law enforcement officers had a legitimate interest in preventing flight in the event incriminating evidence was found, and in preventing any "sudden violence or frantic efforts to conceal or destroy evidence." *Id*. The existence of a search warrant provides "an objective justification for the detention," because "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime." *Id*. at 703. The connection of an occupant to the

home to be searched gives "the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id*. at 703-04.

In *Muehler v. Mena*, police officers detained Iris Mena and several others while executing a search warrant at the residence they occupied. 544 U.S. 93, 95 (2005). The officers were looking for a gang member involved in a recent drive by shooting and had reason to believe he lived at the residence. *Id*. Mena filed a lawsuit, pursuant to 42 U.S.C. § 1983, against the officers involved and, after a jury trial, was awarded damages. *Id*. at 96-97. The Ninth Circuit affirmed, concluding that Mena should have been released as soon as it became clear that she posed no threat to the officers. *Id*. at 97. This Court vacated the judgment, concluding that Mena's detention in handcuffs for the length of the search, and the officers questioning of her regarding her immigration status did not violate the Fourth Amendment. *Id*.

The Court said that Mena's detention, under *Summers,* was plainly permissible, because an "officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id*. at 98, citing *Summers*, 452 U.S. at 705, n. 19. Mena's detention for the duration of the search was

reasonable because "a warrant existed to search [the residence] and she was an occupant of that address at the time of the search." *Id*. Inherent in the authorization to detain an occupant of a place to be searched is the authority to use reasonable force to effectuate the detention. *Id*. at 98-99.

In *Los Angeles County, California v. Rettele*, police officers executed a valid search warrant for a residence at which the police believed four African-American suspects in a fraud and identity-theft crime ring would be found. 550 U.S. 609, 609-10 (2007). Unknown to the police prior to executing the warrant, the residence had been sold and was occupied by a Caucasian family. *Id*. at 611. Officers ordered the family out of their beds and held them at gunpoint for a few moments before allowing them to put on some clothes. *Id*. The police detained the family for less than 15 minutes while they ascertained that none of the African-American suspects were in the home. *Id*. at 611, 615. Realizing their mistake, the officers apologized and left the residence. *Id*. The family filed a lawsuit against the county and the sheriff's department, pursuant to 42 U.S.C. § 1983, alleging that the warrant had been obtained in a reckless fashion and the search and detention were unreasonable. *Id*. at 612.

In a *per curiam* opinion, this Court reversed the judgment of the Ninth Circuit, which had concluded that the officers violated the Fourth Amendment,

because they did not immediately stop the search once they realized the family could not be the African-American suspects for whom they were looking, and were not entitled to qualified immunity. *Id*. at 610. The Court applied the *Summers* and found that the orders by the police to the occupants were permissible, and perhaps necessary, to protect the safety of the deputies. *Id*. at 614. The Court found that the detention did not include an unreasonable use of force or restraints that caused unnecessary pain or were imposed for a prolonged and unnecessary time. *Id*. at 614. The Court said, "When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm . . .the Fourth Amendment is not violated. *Id*. at 616.

In *Bailey v. United States*, the Court considered whether *Summers* could "justify detentions beyond the immediate vicinity of the premises being searched." 568 U.S. 186, 194 (2013). In that case, officers with a valid search warrant watched as two men left the residence to be searched in a car. *Id*. at 190. Both men matched a confidential informant's description of the man from whom the informant had purchased drugs at the residence. *Id*. Officers followed the two men for about a mile, pulled the vehicle over, frisked the men, and returned them to the residence, where other officers had found drugs and guns. *Id*. at 190-91. The officers recovered from Mr. Bailey's pocket a set of keys that they later

learned opened the door of the residence. *Id*. at 191. Mr. Bailey moved to suppress the keys and statements he made when stopped by the officers. *Id*. at 191.

The Court concluded that *Summers* did not justify Mr. Bailey's detention. It limited the categorical rule of *Summers* to the "immediate vicinity" of the premises to be searched. *Id*. at 201. "Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification." *Id*. "Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe." *Id*.

The Court explicitly refused to allow detentions of individuals outside the immediate vicinity on the theoretical risk that "a departing occupant might notice the police surveillance and alert others still inside the residence." *Id*. at 197. The Court explained that if the *Summers* rule was extended in this fashion, "the rationale would justify detaining anyone in the neighborhood who could alert occupants that the police are outside, all without individualized suspicion of criminal activity or connection to the residence to be searched." *Id*. The Court also said, "[a] general interest in avoiding obstruction of a search, however, cannot justify detention beyond the vicinity of the premises to be searched." *Id*.

Because Mr. Bailey was detained a mile from his home, the Court said that "he was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question." *Id*. The Court declined to further define the term "immediate vicinity," but said that in future cases, courts could consider any number of factors, "including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." *Id*.

B. Extending the reach of *Summers* to non-occupants of the place to be searched allows the exception to swallow the general rule that detentions require probable cause or at least reasonable suspicion.

In general, arrests require probable cause and brief detentions to investigate suspected criminal activity require reasonable suspicion. *Summers*, 452 U.S. at 696-99. *Summers* is an exception to this general rule. The exception is permissible because, as explained above, the existence of a valid search warrant means that a neutral magistrate has found probable cause to believe that someone in the residence to be searched is committing a crime. Thus, even innocent occupants of the residence may be detained, as in *Mena* and *Rettele*.

Extending *Summers* to people like Mr. Freeman—who are not occupants of the place to be searched—would mean that officers could categorically detain,

forcibly if necessary, any person walking, driving, or parked on a public street near the residence to be searched. Neighbors standing on lawns adjacent to the residence could be forcibly detained.

If *Summers* permits the forcible detention of anyone who happens to be on a street a short distance from a residence to be searched, the justifications for the categorical exception to the probable cause/reasonable detention requirement fall away. In that instance, the existence of a search warrant—which *Summers* said was "of prime importance"—does not interpose a neutral magistrate between the police and the person detained on the street. *Summers*, 452 U.S. at 701. The detention of an occupant or resident of the premises to be searched pursuant to a warrant is usually less intrusive than the search itself, but the intrusion on the liberty and privacy of a person on the street is separate and apart from the intrusion engendered by the search. A search warrant does not authorize *any* intrusion on the liberty or privacy of the non-occupant person on the street. Significant public stigma accompanies a detention of a bystander like Mr. Freeman, who was hauled out of his car and handcuffed on a public street while surrounded by officers with assault rifles.

The factors mentioned in *Bailey* that may be considered with respect to the meaning of "immediate vicinity"—"the lawful limits of the premises, whether the

occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location"—all suggest that an "occupant" is someone who either lives in the residence to be searched or can freely enter and leave the residence. *Bailey*, 568 U.S. at 201. It contemplates that the individual is within sight of "*his* dwelling*"* or that he has means of "reentry," which suggests possessory rights or control over the residence that allows the individual to come and go freely. The factors set forth in *Bailey* do not apply to an individual parked on a public street.

C. The "immediate vicinity" of a place to be searched should not be defined so broadly that it permits the detention of any individual with a theoretical ability to interfere with the search.

The Eighth Circuit said that Mr. Freeman was parked close enough to the residence to "potentially pose[] a real threat to the safe and efficient execution of the search" and to permit "easy access to the home." *Freeman*, 964 F.3d at 781. Under the Eighth Circuit's interpretation of *Bailey*, anyone outside the lawful limits of the premises, but close enough to walk to the residence and enter it, may be detained by the police. But, once the "occupant" requirement is read out of the *Summers* exception, as the Eighth Circuit would do, there is nothing tethering the exception to any Fourth Amendment principle. No individualized suspicion is required, and the person need not be within the geographical limits established by

the search warrant.

Bailey suggests that the meaning of "immediate vicinity" is an exercise in geographical line drawing, but it does not go so far as to suggest that, as the Eighth Circuit said, its "analysis does not turn on the presence of a warrant." *Freeman*, 964 F.3d at 779. Of course, *Bailey* analysis turns on the presence of a search warrant. That is the one and only basis for the *Summers* exception. The Eighth Circuit claims that *Bailey* analysis looks instead to the intrusion on liberty and the stigma associated with the search. *Id*. Under that reasoning, police officers can detain, in handcuffs, for the duration of a search, any persons near the property line of a residence to be searched.

The Eighth Circuit wants to permit the detention of any person in the immediate vicinity of a search who might interfere with a search or who might pose a threat to an officer, but it offers no justification for such a rule. The Eighth Circuit's analysis cannot be squared with this Court's analysis in *Summers*, *Mena*, *Rettele*, and *Bailey*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

s/Rebecca L. Kurz
Rebecca L. Kurz
Assistant Federal Public Defender
Western District of Missouri
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Becky_Kurz@fd.org

APPENDIX

Appendix A – Opinion of the Eighth Circuit Court of Appeals

Appendix B – Order Denying Petition for Rehearing