No. _____

In The

Supreme Court of the United States

TERRILL A. RICKMON, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court has long recognized that without a warrant, police must have an "individualized suspicion" to stop a particular person. This is the familiar standard established in *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Earlier this year, the District of Columbia Circuit and a divided en banc court of the Fourth Circuit ruled that the sound of gunshots were insufficient grounds to stop anyone nearby. In this case, however, a divided panel of the Seventh Circuit concluded that the sound of gunshots created an "emergency" that justified stopping the first car that the police spotted leaving the area.

This question is presented for review:

Does the sound of gunshots create an emergency so that the "individualized suspicion" required by *Terry* attaches to anyone near the shots?

RELATED CASES

United States v. Rickmon, No. 18-CR-10046, United States District Court for the Central District of Illinois. Judgment entered on May 31, 2019.

United States v. Rickmon, No. 19-2054, United States Court of Appeals for the Seventh Circuit. Judgment entered on March 11, 2020.

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The district court's opinion is unreported. App. 22. The Seventh Circuit's majority and dissenting opinions are reported at 952 F.3d 876. App. 1.

JURISDICTION

The petitioner here, Terrill Rickmon, Sr., timely filed a petition for rehearing *en banc* which was denied on June 25, 2020. App. 28. Based on the Court's March 19, 2020 order, the time for Rickmon to petition for certiorari was extended to November 23, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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. U.S. CONST. AMEND. IV.

STATEMENT OF THE CASE

A. Rickmon is stopped and arrested while riding in a car near the sound of gunshots.

Like many police departments across the country, the Peoria Police Department uses a technology called "ShotSpotter" to detect the sound of gunshots. App. 1. On July 29, 2018, at 4:40 a.m., Officer Travis Ellefritz received a ShotSpotter alert in his car reporting gunshots coming from 2203 North Ellis Street in Peoria. *Id.* at 2. A police dispatcher also contacted Officer Ellefritz and stated, "[c]ars en route to Ellis. There are several cars leaving but seen going northbound on McClure." *Id.* The dispatcher reported "a black male on foot who ran northbound towards McClure." *Id.*

About five minutes later, the dash camera on Officer Ellefritz's squad car video recorded his travel toward North Ellis Street. The camera first shows him turning off his car lights, then turning on to North Ellis Street. App. 23. There, he saw a car approaching him. From this vantage point, he could not tell from which street address the car would have been coming. *Id*. It appeared to come from the left side of the street and just turning onto the street. *Id.* Other than the fact that the vehicle was leaving the general vicinity of North Ellis, he had no specific information about it.

Upon seeing the lights down the street, Officer Ellefritz turned on his emergency lights and veered his car into the path of the oncoming car to stop it. App. 3. He then shouted, "stay where you are!" The car stopped. *Id.* Officer Ellefritz drew his gun. *Id*.

Rickmon was riding in the passenger seat. He and the driver kept their hands up until police backup arrived. *Id*. Rickmon also stated that he had been shot in the leg. After making the stop, Officer Ellefritz searched the car and found a pistol under the passenger seat where Rickmon had been sitting. *Id*. at 4. He was then arrested and charged as a felon in possession of a firearm. *Id*.

B. A divided Seventh Circuit rules that the sound of gunfire created an "emergency" that justified the stop.

Rickmon moved to suppress the evidence of the gun under his seat. At the hearing on this motion, Officer Ellefritz admitted that he would have stopped anyone in "that general area," including "an innocent person", a club patron, "a Peoria Journal Star [delivery] person," or even a person "going to an early mass." 7th Cir. Doc. 14 at 67-69 (suppression hearing transcript). The district court denied his motion and Rickmon appealed. App. 27.

In a 2-to-1 decision, the Seventh Circuit affirmed. App. 1. In reaching this decision, the court *sua sponte* raised a ground to justify the stop that the government had not raised and that neither side had addressed in their briefs: namely, that the sound of gunshots from the ShotSpotter system created an "emergency." *Id.* at 11-12. That supposed emergency along with the fact that it was late at night, Rickmon was emerging from the vicinity of the reported shots, and the area was

known for frequent gunshot reports, justified stopping the car in which Rickmon was riding—though the court could point to nothing suspicious in particular about the car. *Id.* at 12-15.

Chief Judge Wood dissented. In her dissenting opinion, she argued that stopping Rickmon amounted to "a general warrant, precisely the evil that the drafters of the Fourth Amendment wanted to avoid." App. 16. She maintained that: "The only thing that distinguished the car Ellefritz chose to stop was that it existed, and that it was the only car on the street at that early hour of the morning." *Id.* at 18. Her opinion also pointed out that "virtually nothing connected those sounds [gunshots] with the car he decided to stop, or indeed with any car at all—it was as likely that the shooter had retreated into a nearby house or fled on foot (as the 911 caller indicated)." *Id.*

Rickmon petitioned for a rehearing en banc which was denied with Chief Judge Wood voting to grant the petition.

REASONS FOR GRANTING THE WRIT

A. The majority's opinion creates a circuit split on this question: Does an individualized suspicion attach to everyone near the sound of gunshots?

The Fourth Amendment permits investigative traffic stops like the one in this case "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 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). For such stops, the officer must have a "reasonable suspicion to believe that criminal activity may be afoot." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citation and internal quotation marks omitted). "While 'reasonable suspicion' is a less demanding standard than probable cause . . . the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000). Specifically, the "officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity." *Id*. at 123-24 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)) (internal quotation marks omitted).

Earlier this year, the D.C. and Fourth Circuits addressed similar cases in which defendants were arrested as felons in possession of firearms because they were near where police heard gunshots. In both cases, the court reached conclusions directly conflicting with the majority's decision here.

1. The D.C. Circuit holds that gunshots are not a license to stop anyone nearby.

In *United States v. Delaney*, 955 F.3d 1077 (D.C. Cir. 2020), police officers were patrolling a residential area on New Year's Eve and heard gunfire shortly after midnight in multiple directions, several of which they

believed were "close by." *Id*. at 1079. About a minute later, the officers shined a spotlight on a row of parked cars in a lot and noticed that a car next to a building contained two persons who were kissing. *Id*. at 1079-80. Officers approached the driver and instructed him to open the door. *Id*. at 1080. They detained the driver and recovered a pistol under the passenger area along with gun casings. *Id*.

In reversing the district court's denial of a motion to suppress, the D.C. Circuit held that "the officers merely encountered [defendant] in 'close vicinity' to where they estimated the shots originated from" and "[n]othing differentiated" him "from any other individual that the officers might have encountered nearby, except that the officers saw him first." *Id*. at 1086.

The court also rejected the government's argument that the sound of gunshots allowed anyone nearby to be stopped: "On the government's account, the officers would have had reasonable suspicion to stop any and every individual they encountered in 'close vicinity' to the shots." *Id*. at 1087. The court concluded that though the evidence indicated that criminal activity was afoot broadly, that did not allow them to stop the defendant since there was no suspicion that he was engaged in any wrongdoing, and stressed that "specificity is precisely what is missing here." *Id.*

2. The Fourth Circuit holds that gunshots do not create "exigent circumstances."

In *United States v. Curry*, 965 F.3d 313 (4th Cir. 2020) (en banc), the court rejected an argument that the sound of gunshots gave rise to "exigent circumstances" that "would create a sweeping exception to *Terry*" and which would "swallow *Terry* whole." *Id*. at 316.

In *Curry*, officers were patrolling a housing community when they heard what they thought were gunshots. *Id*. at 316. Within about a minute, they found five to eight men in an open field walking away from where officers believed shots were fired. *Id*. at 317. The officers received no description of the suspects, but approached and stopped those in the field. *Id*. Though the men did not act with any suspicious movements, an officer approached the defendant who "was taken to the ground." *Id.* That action produced a gun and defendant was charged as a felon in possession of a firearm. *Id*.

The district court granted the defendant's motion to suppress because the stop could not be justified by any "particularized suspicion" for the defendant as required by *Terry* or by any "exigent circumstances." *United States v. Curry*, No. 3:17-cr-130, 2018 WL 1384298 **11-12 (E. D. Va. Mar. 19, 2018). The government appealed and conceded that the stop was not justified under *Terry*. *United States v. Curry*, 937 F.3d 363, 368 n.2 (4th Cir. 2019). Instead, it argued that the gunshots triggered the exigent circumstances doctrine. *Id.*

at 372. In a two-to-one decision, the Fourth Circuit held that the sound of gunshots created exigent circumstances sufficient to stop the defendant and reversed. *Id.* at 372-77.

The Fourth Circuit granted a rehearing en banc. In a nine-to-six decision, it affirmed the district court and held that the sound of gunshots did not give rise to exigent circumstances. *Curry*, 965 F.3d at 315-16. In reaching this conclusion, the court observed that the exigent circumstances doctrine is a "narrow" exception that applied only to a "few . . . emergency conditions." *Id.* at 321 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984)). The court stated that these narrow exceptions include (1) the need to "pursue fleeing suspect," (2) the need to "protect individuals who are threatened with imminent harm," or (3) the need "to prevent the imminent destruction of evidence." *Id.* at 321 *(*quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018)). Further, the requirement that the circumstances present a true "emergency" is strictly construed, meaning that "an emergency must be 'enveloped by a sufficient level of urgency.'" *Id.* at 322 (quoting *United States v. Yengel*, 711 F.3d 392, 397 (4th Cir. 2013)).

The court also observed that ordinarily "[w]arrantless searches of persons," as opposed to homes, are "governed by the law of arrests as well as the *Terry* line of cases which is itself an exception to the Fourth Amendment's warrant requirement." *Id.* at 323 (citing *Terry*). The "relatively few" cases that do apply the exigent circumstances doctrine to warrantless searches

of persons are confined to situations such as vehicle checkpoints in which officers have "specific information about the crime and the suspect before engaging in a suspicionless search." *Id.* at 324. In contrast, because the officers in *Curry* had no specific information about the suspect, the court concluded that the "sound of gunshots could not have given the officers that knowledge here." *Id.* at 325.

At the end of its opinion, the court emphasized why requiring specific information about a particular suspect was vital to the safeguards of the Fourth Amendment: "Allowing officers to bypass the individualized suspicion requirement based on the information they had here—the sound of gunfire and the general location where it may have originated—would completely cripple a fundamental Fourth Amendment protection and create a dangerous precedent." *Id.* at 326.

3. The majority opinion here conflicts with the D.C. and Fourth Circuits.

In both *Delaney* and *Curry*, the courts rejected any notion of a watered-down version of *Terry*—in which the sound of gunshots casts its own net of suspicion over all who may stand, walk, or drive nearby. In direct conflict with *Delaney* and *Curry*, the majority opinion here effectively creates its own diluted *Terry* standard.

Here, unlike *Curry*, the government never argued for the less-demanding exigent circumstances standard, and instead, tried to justify the stop under the more-demanding test of *Terry.* But in attempting to

justify the stop under *Terry*, the majority opinion raised an argument *sua sponte* that neither side argued—and asserted that every ShotSpotter report should be treated as an anonymous tip that generates not just a sound, but an "emergency." App. 10.

Yet a true emergency is limited to threats of imminent harm. ShotSpotter systems, however, merely report sounds. They neither discern what is or what is not a real emergency nor do they provide the necessary individualized suspicion as to who in particular may have committed a crime. What is more, there is no guarantee that the sounds that a ShotSpotter system detects will in fact be a gunshot.

Moreover, anonymous tips must be proven to be reliable. And that requires reliability in more than just a general sense. Rather, it requires reliability in the sense that a particular person has committed a crime, that is, a specific "assertion of illegality, not just in its tendency to identify a person." *Florida v. J. L.*, 529 U.S. 266, 272 (2000) (rejecting that *Terry* has a "firearm exception" allowing anonymous tips based on "bare-boned tips about guns").

Here, however, the only corroboration that the majority offered was a single 911 call that merely added that unidentified cars were leaving the area where shots were heard. App. 2. The 911 call provided no more individualized suspicion than did the ShotSpotter report. A bare-boned tip from a ShotSpotter report does not become any more reliable with an equally bare-boned 911 call. Neither provide what this Court

requires: a specific "assertion of illegality." *J. L.*, 529 U.S. at 272. In fact, not to require such individualized suspicion for stops near gunshots would result in the very sort of automatic firearm exception that this Court has already rejected in *J. L.*—and that it cautioned "would rove too far." 529 U.S. at 272.

Further, the practical effect of treating such technology as an anonymous tip is undercut by Officer Ellefritz's own admission that he would have stopped anyone in "that general area," including "an innocent person", a club patron, "a Peoria Journal Star [delivery] person," or even a person "going to an early mass." 7th Cir. Doc. 14 at 67-69 (suppression hearing transcript). But stopping anyone simply because they happen to be in a suspected area elevates mere proximity to a crime over the requirement of individualized suspicion of wrongdoing. The Court has never allowed that. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (finding no reasonable suspicion for a *Terry* pat down because "mere propinquity to others independently suspected of criminal activity" is not enough); *see also City of Indianapolis v. Edmonds*, 531 U.S. 32, 37 (2000) (search and seizure is unreasonable without "individualized suspicion of wrongdoing").

The particularity requirement has always been at the core of the Fourth Amendment. *See Terry*, 392 U.S. at 21 n.18 ("The demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."). It is the particularity requirement that guards against police stopping any suspicionless

person who happens to be near an area where a crime is suspected. *Wardlow*, 528 U.S. at 124 ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.").

Put another way, if the evidence relied on for a stop does nothing more than justify stopping anyone in the area, then that is a sure sign that it fails the particularity test. A suspicion so broad that it would permit police to stop a substantial portion of the lawfully walking or driving public is not reasonable. *See Reid v. Georgia*, 448 U.S. 438, 441 (1980) (limiting the scope of an unreasonable seizure when the category would include a large number of presumably innocent people).

Chief Judge Wood's dissent emphasized the same basic principle:

> My colleagues also stress that Ellefritz believed that he was responding to an emergency, because gunshots always connote emergency. Perhaps they do. But how much does this prove? Would it have entitled the police to force their way into every house on North Ellis, to make sure that the shooter was not threatening anyone in those houses? Would it have allowed the police to stop any and every car they saw within 1,000 feet of the point that ShotSpotter identified? My answer to both those questions is no.

App. 20 (Wood, C.J., dissenting).

By the majority's reasoning, police may not only indiscriminately stop persons standing, walking, or driving within earshot of what they perceive to be gunfire. They may, as Chief Wood pointed out, also enter homes in the general vicinity. No Fourth Amendment decision of this Court has ever allowed anything close to that nor have any of its recognized emergency exceptions.

Of course, weighing the totality of the circumstances for a *Terry* stop does not mean ignoring gunshots. But the majority decision here goes far beyond simply including gunshots in the totality of circumstances. Instead, the majority has created a new exception to *Terry* such that anything that even sounds like a gunshot may be treated as an "emergency." And that "emergency" in turn overshadows the need for real individualized suspicion and becomes a heavy weight on the scale for stopping anyone nearby. Eroding the individualized-suspicion test in such a way leads down a path that allows for stops based on what may resemble a later-day "general warrant."[1]

[1] As noted in *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018), the Fourth Amendment was adopted "as a 'response to the reviled 'general warrants' . . . which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." (internal citations omitted).

B. This case is well-suited to resolve this conflict among the circuits.

The facts of this case are straightforward and undisputed. And they closely parallel the similar gunshot cases decided in *Delaney* and *Curry*. As a result, the conflict between the D.C. and Fourth Circuits on the one hand, and the Seventh Circuit on the other, about whether gunshots create an emergency when applying the *Terry* test is unmistakable. And this case is well-suited to resolve that conflict.

Moreover, this conflict has serious nationwide consequences for all those living in high-crime areas or those living near ShotSpotter systems—which may be one and the same. ShotSpotter technology is now in place in over 100 cities across the country[2] and it is not foolproof—with false positives ranging from thirty to seventy percent.[3] Allowing the majority decision to stand would effectively deem the residents of such areas to be "less worthy of Fourth Amendment protection by making them more susceptible to search and seizure by virtue of where they live." *Curry*, 965 F.3d at 331. And the "demographics of those who reside in high crime neighborhoods often consist of racial

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[2] https://www.shotspotter.com/cities/

[3] *See* Matt Drange, We're Spending Millions On This High-Tech System Designed To Reduce Gun Violence. Is It Making A Difference?, FORBES (Nov. 17, 2016), https://www.forbes.com/sites/mattdrange/2016/11/17/shotspotter-struggles-to-prove-impact-as-silicon-valley-answer-to-gun-violence/#6f5d4d8c31cb ("Of the thousands of ShotSpotter alerts in these cities, police were unable to find evidence of gunshots between 30%-70% of the time.").

minorities and individuals disadvantaged by their social and economic circumstances." *Id.* (quoting *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013)). ShotSpotter itself is often placed in these areas because they are considered to be high crime.[4]

All of this points to a readily identifiable circuit split of national importance. Persons walking or driving the streets of the District of Columbia or the states encompassing the Fourth Circuit will continue to be protected by the individualized-suspicion standard established by *Terry* when gunshots are heard in their neighborhood.

But for those living in the states comprising the Seventh Circuit, they will have lost that protection. They will be subject to a new standard in which the sound of every gunshot is deemed an emergency. The safeguards of *Terry*'s individualized-suspicion standard will remain in name only and will be effectively overridden by a gunshot-emergency exception. The Court should grant review to ensure that the Fourth Amendment does not mean one thing in Washington, D.C., and Richmond, and something entirely different in Peoria.

[4] ShotSpotter "uses artificial intelligence-driven analysis to dynamically direct patrol resources to areas of greatest risk, improve officer accountability and deter crime." https://www.shotspotter.com/company/

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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