No. 20-733

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

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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INTRODUCTION

The Framers were concerned about general warrants and included a word in the Fourth Amendment that is at the center of this case: "particularly." And that word has continued to be central to the particularity requirement of *Terry* stop decisions for over half a century.

Here, it is the lack of particularity that is the most prominent feature in this case and the two cases that give rise the circuit split: *United States v. Delaney*, 955 F.3d 1077 (D.C. Cir. 2020) and *United States v. Curry*, 965 F.3d 313 (4th Cir. 2020). In all three cases, police stopped individuals not because of any reasonable suspicion about criminal conduct by a particular person, but because of where they happened to be and when: out at night, near the sound of gunshots.

The government tries to downplay this circuit split by painting this case as just another "factbound" decision relying on the totality of circumstances. But the government overlooks that the most significant factor relied on by the majority here is one that the government never raised: that the sound of gunshots created its own "emergency." According to the majority, such an emergency allowed every other factor to be viewed through the lens of a less demanding reasonable-suspicion test—one that needed "less substantiation." App. at 12.

But a ruling that the sound of gunshots creates an "emergency" must be examined closely for what it does to the Fourth Amendment. It lowers the *Terry*

standard so that anyone in an undifferentiated group may be stopped because they were near the sound of gunshots. The courts in *Delaney* and *Curry* rejected that. The majority here did not. And the confusion arising from these conflicting opinions should be resolved now in this case.

ARGUMENT

A. The pivotal facts of *Delaney*, *Curry*, and this case are all essentially the same.

The government argues that there is no circuit split here because the facts of this case differ from those in *Delaney* and *Curry*. Gov't Br. at 9-11. Yet this argument requires focusing on minor factual differences so that the trees obscure the forest. In all three cases, each defendant was stopped—not because of any particularized suspicion that they themselves had committed or were about to commit a crime—but because they were out at night and were close to the sound of gunshots. In each case, the same unparticularized showing that allowed each defendant to be stopped would have allowed anyone else in the same area to be stopped.

1. *Delaney*.

In *Delaney*, the D.C. Circuit reversed the district court's denial of a motion to suppress and held that these factors did not justify a stop under *Terry v. Ohio*, 392 U.S. 1 (1968): (1) the officers encountered the

defendant and passenger within one city block of where they heard repeated and close-by gunshots; (2) they encountered them about one minute after hearing the sound of shots; (3) the officers "saw no one else in the parking lot or while driving from the first parking lot where they heard the shots"; and (4) the defendant and passenger "exhibited very strange behavior when the officers approached them." 955 F.3d at 1085.

The court emphasized that being close to the sound of gunshots did not create a reasonable suspicion particular to the defendant: "[n]othing differentiated Delaney from any other individual that the officers might have encountered nearby, except that the officers saw him first." *Id*. at 1086. Rather, "the officers merely encountered Delaney in 'close vicinity' to where the officers estimated the shots originated from." *Id.* The court concluded that though the evidence indicated that "criminal activity was afoot broadly," that raised no suspicion that the defendant himself was engaged in any criminal conduct. *Id.* at 1087. The court stressed that "specificity" is "*the central teaching of [the Supreme Court's] Fourth Amendment jurisprudence*" and "specificity is precisely what is missing here." *Id.* at 1087 (quoting *Terry*, 329 U.S. at 21 n.18) (emphasis in text, internal quotation marks omitted).

The government claims that being a passenger in the first car that Officer Ellefritz saw was a suspicious factor. Gov't Br. at 10. But like the parked car in *Delaney*, nothing distinguished Rickmon's car from any other except that it happened to be the first car

that Officer Ellefritz encountered. As Chief Judge Wood pointed out in her dissent after listing a variety of reasons that someone may have been out at that time, "The time of day, and the fact that the road was largely empty, do not add up to anything." App. 19.

Further, Rickmon's car was not the only car or pedestrian near the sound of gunshots. The 911 call stated that there were other cars leaving the area and also an unidentified Black man running north. App. at 2. In addition, a group of about 15 to 20 people were gathered about 300 feet away at the end of North Ellis Street. App. at 3.

Moreover, the government's argument here is essentially the same as it made in *Delaney* and that the court rejected: it would allow police to stop "any and every individual they encountered in 'close vicinity' to the shots." 955 F.3d at 1087. And here, there was no more reasonable suspicion to stop anyone walking or driving on or near North Ellis—including those at the end the street—than there would have been to stop anyone at or near the parking lot in *Delaney*. This Court has never allowed such unparticularized stops that would be "virtually random seizures." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) ("The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.").

Attempting to further distinguish *Delaney*, the government argues that New Year's Eve is a time when people may be expected to be out celebrating. Gov't Br. at 9. But it omits that the defendant's car in *Delaney* was hardly at a place of usual New Year's Eve celebration: the only occupied car in a "narrow parking lot" close to an adjacent building "in a residential area east of the Anacostia River." *Delaney*, 955 F.3d at 1079. Moreover, debating whether the only occupied car in a parking lot on New Year's Eve is less suspicious than a car driving at 4:40 in the morning is beside the point.[1] What matters here is that there was no individualized suspicion of criminal conduct specific to the occupants of either car. Both were simply in the first cars that the police encountered after hearing gunshots.

2. *Curry*.

The government argues that *Curry* should not qualify as a circuit split because the court only rejected the exigent circumstances exception. Gov't Br. at 11. But the government overlooks that the *Terry* decision and its underlying principles were central to *Curry*'s analysis and its ultimate conclusion. *Id.* at 320, 327-31.

In *Curry*, the court pointed out that the officers had no specific information about the suspect and concluded that the "sound of gunshots could not have given the officers that knowledge here." *Id.* at 325. The

[1] Officer Ellefritz admitted that after the taverns in Peoria close at 4:00 a.m., there is an increase in traffic. 7th Cir. Doc. 14; Tr. at 37.

court underscored that its ruling could only be understood in the context of *Terry*: "While the Supreme Court did not apply the exigent circumstances exception in *Terry*, its ruling was premised on the same general type of 'exigenc[y]' that exists here—namely, the need to 'discover [] . . . weapons which might be used to harm the officer or others nearby.'" *Id.* at 329. (quoting *Terry*, 329 U.S. at 26).

What is more, *Curry* relied on *Terry* to effectively reject a key part of the majority's analysis in this case: that the sound of gunshots creates its own emergency. The court stressed that allowing gunshots to give rise to "exigent circumstances" "would create a sweeping exception to *Terry*" which would "swallow *Terry* whole." *Id*. at 316. In reaching this conclusion, the court observed that exigent circumstances is a "narrow" exception that applied to "few . . . emergency conditions" such as a fleeing suspect, the need to protect individuals from imminent harm, or to prevent the imminent destruction of evidence. *Id.* at 321 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984)).

This Court too has recognized that the exigent circumstances exception is confined to genuine emergencies such as entering a premises: (1) to provide "emergency aid" to an injured person or prevent imminent injury, (2) in "hot pursuit" of a fleeing suspect, or (3) to prevent the imminent destruction of evidence. *Kentucky v. King*, 563 U.S. 452, 460 (2011) ("emergency" and "exigent circumstances" used interchangeably). Yet the government does not cite any decision, other than the majority opinion here, in

which a court has held that the sound of gunshots creates its own emergency that puts a heavy weight on the scales of any reasonable-suspicion analysis by requiring "less substantiation."

Finally, the government claims that the sound of gunshots created an emergency because of what the majority referred to as an "inherent danger." Gov't Br. at 7. Yet it offers no explanation as to how Officer Ellefritz faced any greater danger while driving his squad car before stopping Rickmon than the officers did in either *Curry* or *Delaney*. To be sure, there are cases which may pose inherent dangers such as the case cited by the majority here (App. at 9-10, 14), *United States v. Brewer*, 561 F.3d 676, 679 (7th Cir. 2009), where officers needed to enter a building complex with potentially hidden dangers. But that is not this case nor was it the case in *Curry* or *Delaney*.

B. The other factors fail to diminish the circuit split here.

In addition to the majority's reliance on an emergency, it also relied on four other factors in its totality of circumstances analysis. App. 9-15. Yet missing from all these factors, individually or collectively, is that they still do not add up to any particularized showing that Rickmon, or anyone else down the block on North Ellis had committed a crime—any more than the defendants had in *Delaney* or *Curry*.

1. The majority admits there was no evidence of a "high-crime area."

The majority relied on a statement from Officer Ellefritz that he once patrolled the area around North Ellis Street and estimated that he responded to shots-fired calls in that area once a night. App. at 14. But the majority conceded that there was "no evidence in the record that this was a so-called 'high-crime area.' " *Id.* Instead, it relied solely on Officer Ellefritz' "personal knowledge of criminal activity in that part of Peoria." *Id.*

But however the area around North Ellis might be characterized, being present in such an area is not enough by itself to create a reasonable suspicion under *Terry*. As the court in *Curry* recognized, the fact that there had been several shootings near the public housing community in recent weeks "did not provide the officers with the type of specific information that would be necessary to justify a suspicionless seizure, even when combined with the other pertinent facts." 965 F.3d at 331. The court stated that, "[t]o do so would deem residents of Creighton Court—or any other high-crime area—less worthy of Fourth Amendment protection by making them more susceptible to search and seizure by virtue of where they live." *Id.* The same may be said of the residents of Peoria who live near North Ellis Street.

2. The remaining factors do not minimize the circuit split.

The majority and the government also rely on three other factors: (1) the 911 call, (2) that Rickmon's car was the only one on the street, and (3) it was early Sunday morning. App. at 9-15; Govt Br. at 7-8. First, none of these factors, even when considered together, come close to being an individualized showing that a particular person had committed or was about to commit a crime.

The 911 call offered no more information than the ShotSpotter report, except to add that unidentified cars were driving away and a Black man was running north. If anything, the 911 call only confirmed that Rickmon's car was not the only one nearby. What is more, the time from when the shots were reported and Rickmon was stopped was over five minutes—longer than the one minute in *Delaney* and *Curry*. Further, the officers in *Delaney* and *Curry* heard the shots themselves, rather than from a technological device such as ShotSpotter.

Additionally, being in the only car on the street in the early hours of the morning does not differ materially from the defendant in *Delaney* being in the only occupied car in a parking lot at midnight or the defendant walking away from the shots in *Curry*. In all three cases, there was no particularized showing that the defendants had committed a crime—anymore than anyone else nearby. They were all stopped because

they were out at night and close to where gunshots were heard.

The cases that the government cites, *United States v. Arvizu*, 534 U.S. 266 (2002) and *United States v. Sokolow*, 490 U.S. 1 (1989) (Gov't Br. at 6-7), if anything, only provide examples of when the totality of circumstances would provide a reasonable suspicion that a particular person had engaged in criminal conduct. In *Arvizu*, the Court looked to several factors showing that a minivan was engaged in drug smuggling, such as traveling on an unpaved road often used by smugglers to avoid a police checkpoint as well as the suspicious actions of the van's occupants. 534 U.S. at 268-71. The Court held that these factors, directed at the actions of this van alone, could not be considered in isolation and held that they satisfied the reasonable-suspicion test. *Id.* at 277. Such detailed particularity as to the vehicle in *Arvizu* is far removed from stopping the first car encountered on a street or in a parking lot.

Similarly, in *Sokolow*, law enforcement agents relied on specific actions by one defendant that pointed to him being a drug smuggler—even fitting a "drug courier profile[]." *Sokolow*, 490 U.S. at 4-5, 10. This suspicious conduct included paying for a plane ticket from Honolulu to Miami with a roll of $20 bills, checking no luggage for a stay of 48 hours, and appearing nervous during the trip. *Id.* at 4-5.

In both *Arvizu* and *Sokolow*, law enforcement officers put together information that built a case of

suspicious conduct by a particular defendant. But the assembling of such factors directed at a particular defendant was missing in both *Delaney* and *Curry* as well as this case.

C. This circuit split should be resolved now and in this case.

With the decisions in *Delaney* and *Curry* on the one hand, and the majority opinion here, on the other, law enforcement and judicial systems across the nation now face conflicting answers to critical questions that may arise when police hear gunshots. First, does the sound of a gunshot create an emergency that gives rise to a new and less-demanding *Terry* standard? And second, does that lesser standard mean that those who stand, walk, or drive near the sound of gunshots may be stopped, even without any individualized showing that they themselves have committed or are about to commit a crime?

The Seventh Circuit has effectively answered both questions yes. The D.C. and Fourth Circuits have answered those questions no.

The confusion arising from these conflicting answers should not be allowed to continue for years to come. Fourth Amendment freedoms across the nation will hinge on how these questions are answered. They should be resolved now and in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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