No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN EDWARD MCINTYRE,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Whren v. United States*, 517 U.S. 806 (1996), this Court held that for purposes of the Fourth Amendment, a police officer's subjective motivation for conducting a traffic stop is irrelevant as long as there was an objectively reasonable basis for doing so. Should this holding be overruled in cases where a traffic stop is the result of a targeted criminal interdiction operation, specifically aimed at ferreting out crime in high crime neighborhoods?

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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit can be found at *United States v. McIntyre,* 2022 WL 325467, and is set forth at App. 1.

JURISDICTION

On February 3, 2022, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming McIntyre's conviction and sentence. App. 1. This Court has jurisdiction pursuant to 28 U.S.C.§ 1254(1).

Since the opinion was filed on February 3, 2022, the deadline to file this petition is May 4, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS 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 the persons or things to be seized."

STATEMENT OF THE CASE

In *Whren v. United States*, 517 U.S. 806, 813 (1996), this Court explained that the constitutional reasonableness of a traffic stops does not depend on the actual motivations of the individual officers involved. *Whren's* per se rule prohibits any inquiry into not only the subjective intention of an officer, but also forbids an objective examination of the totality of the circumstances. *Id.* The continued use of this approach ignores the deployment of highly targeted mobile criminal interdiction units by the police in high crime neighborhoods. The raison d'être of

this specialized unit is not traffic enforcement. It exists solely to conduct opportunistic policing of general crime, particularly with regard to firearms and drugs, by creating what amounts to a rolling roadblock in economically disadvantaged parts of this country's metropolitan areas.

The issue presented in the instant case arose following a targeted traffic stop of petitioner's motor vehicle which resulted in the seizure of drugs and a firearm. During the evening of January 12, 2020, officers from the Special Crimes Apprehension Team (SCAT) -- a ten-man, fully staffed unit that investigates street level narcotics crimes -- was on its way to a high crime neighborhood in order to conduct a "knock and talk" investigation. ROA.97-98, 112-113. The officers, along with a drug sniffing K-9 and its handler, travel as a team and stay in close proximity. *Id.* While in route on this particular occasion, one of the officers observed a vehicle which he knew to be associated with petitioner, John McIntyre, the subject of an open investigation involving the distribution of methamphetamine in the area. ROA.123. The officer then observed the vehicle commit a traffic violation by crossing the centerline of the roadway. ROA.123. Upon seeing the violation, the officer made a traffic stop. ROA.99, 124.

The officer asked McIntyre for consent to search the vehicle, but McIntyre refused. ROA.40. At this point, the officers called for the K-9 unit, which had been traveling with the unit. ROA.40. The dog alerted and a search of the vehicle ensued. ROA.40. The officers seized a quantity of drugs, a handgun and $ 2,185.00 dollars in cash. ROA.40-41.

As a result of the search, the Government sought and obtained an indictment against McIntyre. ROA.12; R.E. at Tab 3. The grand jury charged McIntyre with one count of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vii); one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) and one count of felon in possession of a firearm in violation of

18 U.S.C. § 922(g)(1). ROA.12.

Following his indictment, McIntyre filed a motion to suppress the evidence seized in connection with the traffic stop. ROA.25. In the motion, he claimed that the SCAT team which stopped him was primarily engaged in the business of drug interdiction and stopped him without probable cause to believe a traffic offense had been committed. ROA.25. The Government opposed the motion, arguing that the deputies had reasonable suspicion to perform the traffic stop. While arguing that the deputies had reasonable suspicion to perform the traffic stop, the Government cited *Whren* for the proposition that "[t]he actual motivation for the stop does not affect the reasonableness of the stop." ROA.32.

Following a hearing, the U.S. Magistrate Judge issued a Report and Recommendation recommending that McIntyre's motion to suppress be denied. App. 4 – 11. In support of its recommendation, the Report and Recommendation (R & R) found that the traffic stop was reasonable, the time of detention was reasonable, and the vehicle search was supported by probable cause. App. 4 – 11. With regard to the reasonableness of the traffic stop, the R & R cited *Whren* for the proposition that "the decision to stop an automobile is reasonable when the police have probable cause to believe that a traffic violation has occurred." App. 7; ROA.

Following the issuance of the R & R, the defendant filed objections arguing that the traffic stop which occurred in this case was entirely pretextual, pointing out that the SCAT team used the stop as a guise to conduct a warrantless search of a vehicle they believed to be associated with the drug trade in the local area. ROA.48.

Acknowledging the continuing validity of *Whren*, McIntyre asserted that *Whren* was incorrectly decided and should be overruled, pointing out that in the 25 years since *Whren* was decided, police departments have increasingly used traffic stops in "high crime neighborhoods"

and on the interstate as an investigatory tool to search for evidence of criminal wrongdoing. ROA.48. McIntyre further argued that "[i]f police officers are allowed to make seizures for traffic infractions so minor that no reasonable officer would make the stop, the Fourth Amendment warrant requirement becomes meaningless for anyone who travels in a vehicle." ROA.49. McIntyre noted that he made the objection to preserve the issue for further review. ROA.48. The district court adopted the R & R and denied McIntyre's motion to suppress without further comment. App. 3.

Following the denial of his motion to suppress, the defendant entered a conditional guilty plea reserving his right to appeal the district court's denial of his motion to suppress. ROA.154, 183. At sentencing, the district court sentenced McIntyre to the mandatory minimum 120-month sentence with regard to the charge of possessing methamphetamine with intent to distribute. App. 13. It also imposed the 60-month mandatory minimum sentence with regard to the charge of possessing a firearm in connection with a drug trafficking offense. App. 13.

At the Fifth Circuit, McIntyre reiterated his arguments regarding the constitutionality of the traffic stop, but conceded that his argument was foreclosed by this Court's opinion in *Whren.* The Fifth Circuit accepted McIntyre's concession that his argument was foreclosed by *Whren* and denied his appeal. App. 1.

REASONS FOR GRANTING THE WRIT

Since this Court's decision in *Whren v. United States*, 517 U.S. 806, 813 (1996), the observation of a traffic violation by a police officer renders a stop and seizure *per se* reasonable under the Fourth Amendment. This per se rule prohibits a subjective inquiry into officer's reasons for making the stop and forbids an objective examination of "the totality of the circumstances." Such approach is out-of-plumb with this Court's subsequent decision in *Indianapolis v. Edmond*,

531 U.S. 32 (2000) which prohibited the use of vehicular road blocks as pretexts for general criminal investigation. In *Edmond*, this Court found that it had the authority and the obligation to examine the purpose of a vehicular checkpoint and determine the legitimacy of that purpose. *Id.* at 47. *Edmond* rejected Indianapolis' argument that its drug interdiction checkpoint program was valid because it also included a license and sobriety check. *Id.* at 47. The Supreme Court rejected the particular argument, writing:

> "If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a [pretextual] license or sobriety check. For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program."
>
> *Id.*

Indianapolis' drug interdiction checkpoint program failed Fourth Amendment muster because its primary motivation was enforcement of general criminal laws. *Id.* at 44, 48. The use of traffic stops in high crime neighborhoods, like the one used in this case, is tantamount to creating a rolling roadblock whose primary purpose is to enforce firearm and drug laws. They skirt the holding in *Edmond* by effectively allowing special teams of police officers to flood high crime neighborhoods and ferret out crime. The use of such rolling roadblocks should be prohibited by the Fourth Amendment.

The per se approach of *Whren* has also been questioned by jurists. Most recently, for example, in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), Justice Ginsberg, in a concurrence issued in connection with an action brought against the police in the context of a claim under 42 U.S.C. § 1983, questioned the continuing validity of the high court's ruling in *Whren,* as follows:

> The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in

> *States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), and follow-on opinions, holding that "an arresting officer's state of mind ... is irrelevant to the existence of probable cause," *Devenpeck v. Alford,* 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). See, *e.g.,* 1 W. LaFave, Search and Seizure § 1.4(f), p. 186 (5th ed. 2012) ("The apparent assumption of the Court in *Whren,* that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality."). I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry. Given the current state of the Court's precedent, however, I agree that the disposition gained by plaintiffs-respondents was not warranted by "settled law." The defendants-petitioners are therefore sheltered by qualified immunity.
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> *Wesby*, 138 S.Ct. at 594.

Insofar as scholars are concerned, the "response to *Whren* has been overwhelmingly critical (internal quotation deleted)." *An Empirical Assessment of Pretextual Stops and Racial Profiling*, Stephen Rushin & Griffin Edwards, 73 Stan. Law Rev. 637, 640 (2021). Chief among these critiques is the proposition that allowing "police officers to engage in pretextual traffic stops contribute[s] to a statistically significant increase in racial profiling of minority drivers." *Id.* at 643. In order to provide a level of empirical analysis to this proposition, Rushin and Edwards, the authors of the Stanford Law Review article published earlier this year, analyzed over 8,000,000 traffic stops in the State of Washington between 2009 and 2015. *Id.* at 643-44. This particular timeframe was chosen because between 2009 and 2012, pretextual stops were effectively prohibited by state law. In 2012, a modified version of a pretextual stop was permitted to resume under state law. *Id.* After conducting their analysis, Rushin and Edwards observed that their "findings are consistent with one of the most common critiques of the *Whren* decision: that it leads to racial discrimination in policing. *Id.* at 644.

In this case, the traffic stop conducted by the Ouachita Parish Sheriff's Special Crimes Apprehension Team (SCAT) was not performed for traffic enforcement reasons. Rather, the officers were part of a criminal interdiction unit tasked with conducting a "knock and talk"

investigation in a high crime neighborhood. ROA.122. While in route, one of the officers observed a vehicle which he knew to be associated with McIntyre, who was the subject of an open investigation involving the distribution of methamphetamine in the area. ROA.123. When one of the members of the team observed McIntyre's vehicle commit a traffic violation, a drug investigation began. The traffic violation served as a mere pretext for the officers to stop the vehicle and find a way to conduct a general, exploratory search in violation of the Fourth Amendment's warrant requirement. The Ouachita Parish SCAT teams' use of tactics to create a rolling roadblock is permissible under *Whren*, but in irreconcilable tension with this Court's decision in *Edmond*. This Court should grant certiorari for the purpose of overruling *Whren* in cases where specialized units use tactics tantamount to conducting a rolling roadblock.

CONCLUSION

For all of the above and foregoing reasons, Petitioner JOHN EDWARD MCINTYRE prays that this Court grant his petition and issue a briefing schedule.

RESPECTFULLY SUBMITTED,

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