No.

IN THE
SUPREME COURT OF THE UNITED STATES

ZAHKUAN BAILEY-SWEETING,
PETITIONER

V.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT

On Petition for a Writ of Certiorari to the
Massachusetts Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Mr. Zahkuan Bailey-Sweeting was a passenger in a car stopped by three police officers for a minor traffic infraction. At the time of the traffic stop, the officers had received no reports of any criminal activity.

Under these circumstances, did the pat-frisk of Mr. Bailey-Sweeting violate his right to be free from unreasonable searches under the Fourth and Fourteenth Amendment where Mr. Bailey-Sweeting did not do or say anything suspicious, but rather, the police suspected, based only on an admitted "hunch", that a fellow passenger's conduct, provoked by a pattern of police harassment, was an effort to distract them?

RELATED PROCEEDINGS

Massachusetts Trial Court, Superior Court Department, Bristol County:
Commonwealth v. *Sweeting-Bailey*, No. 1873CR00090 (Aug. 30, 2018)

Massachusetts Appeals Court:
Commonwealth v. *Sweeting-Bailey*, No. 2019-P-0992 (Dec. 2, 2020)

Massachusetts Supreme Judicial Court:
Commonwealth v. *Sweeting-Bailey*, No. SJC-13086 (Dec. 22, 2021)

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INTRODUCTION

In *Terry* v. *Ohio*, 392 U.S. 1, 21 & 24 (1968), and *Ybarra* v. *Illinois*, 444 U.S. 85, 93-94 (1979), this Court held that in the absence of probable cause to believe a crime has been committed, a police officer may conduct a pat-frisk of an individual only if he has reasonable suspicion based on specific and articulable facts that the individual is armed and presently dangerous. Petitioner Zahkuan Bailey-Sweeting[1] respectfully seeks a writ of certiorari because a closely divided Massachusetts Supreme Judicial Court (SJC) ignored that well-established precedent. The SJC held that under the Fourth Amendment, a police officer may pat-frisk an individual, who has done nothing at all, merely because he is in the company of a person whose reaction to a pattern of police harassment has aroused police suspicion, based on nothing more than an inarticulate "hunch."

The state court's interpretation of the Fourth Amendment contradicts this Court's precedent, which permits the significant government intrusion of a pat-frisk only in "narrowly drawn" circumstances. *Terry*, 392 U.S. at 27. The SJC's contrary interpretation of the Fourth Amendment in these frequently occurring circumstances, traffic stops, demands this Court's attention.

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[1] The state court reversed the Defendant's surname to Sweeting-Bailey based upon how it appeared in the indictment. The correct order is Bailey-Sweeting.

OPINIONS BELOW

The SJC decision affirming the denial of the Petitioner's motion to suppress and his conviction on direct appeal appears at Appendix A and is reported at 488 Mass. 741, 178 N.E.3d 356 (2021). The Massachusetts Appeals Court's decision affirming the denial of the Petitioner's motion to suppress and his conviction appears at Appendix B and is reported at 98 Mass. App. Ct. 862, 159 N.E.3d 205 (2020). The superior court's decision denying the Petitioner's motion to suppress appears at Appendix C and is unpublished. The order of the SJC denying a motion for reconsideration is unpublished and appears at Appendix E.

JURISDICTION

The SJC entered judgment on December 22, 2021. It denied a motion for reconsideration on February 14, 2022. This petition is filed within 90 days of the denial of that motion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS 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.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., AMEND XIV, SECTION I.

STATEMENT OF THE CASE

On March 15, 2018, the Petitioner was indicted for possession of a loaded large capacity firearm, in a vehicle, without a license. MASS. GEN. LAWS ANN. Ch. 269, §§ 10(a),(m) and (n). Police found the gun during a warrantless pat-frisk conducted during a traffic stop.

On June 12, 2018, the Petitioner filed a motion to suppress the firearm, asserting its seizure violated the Fourth and Fourteenth Amendment. App. D-1. A Massachusetts Superior Court judge held an evidentiary hearing on June 20th and 22nd, 2018. (Suppression Hearing Transcript volumes 1 and 2.[2]) On July 20, 2018, the court denied the motion, making oral findings. App. C-1.

On August 30, 2018, the Petitioner entered a conditional guilty plea, pending the outcome of his appeal of the denial of the motion to suppress. Plea-Tr/6-10. On December 2, 2020, a closely divided panel of the Massachusetts Appeals Court

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[2] Citations to the Suppression Hearing Transcript shall be by volume number, 1 to 3, in chronological order for the three volumes that were transcribed (each of which was assigned "Volume I" by the court reporter). Because there are separate transcripts for the a.m. and p.m. hearing held June 22nd, they will be referenced as Tr2 and Tr3, respectively, followed by the page number(s) cited. The August 30, 2018 plea hearing will be cited as Plea-Tr/[page #].

affirmed the denial of the Petitioner's motion to suppress. The majority of three justices held that the search did not violate the Fourth Amendment. *Commonwealth* v. *Sweeting-Bailey*, 98 Mass. App. Ct. 862, 865, 159 N.E.3d 205, 209 (2020) (citing prior state court decisions that relied upon this Court's decisions interpreting the Fourth Amendment and constitutionality of pat-frisks). Two justices disagreed. *Id.* at 211[3], citing *Ybarra*, 444 U.S. at 91 and *United States* v. *Di Re*, 332 U.S. 581, 587 (1948) ("Although we cannot view the defendant's actions in isolation from Paris's behavior, the defendant's mere presence in the same car as Paris, however, was insufficient to justify a patfrisk of him [the defendant].")

The SJC granted an application for further appellate review. On December 22, 2021, in yet another closely divided decision, a majority of four justices held that the pat-frisk of the Petitioner did not violate the Fourth Amendment. *Commonwealth* v. *Sweeting-Bailey*, 488 Mass. 741, 746-747, 178 N.E.3d 356, 363 (2021) (citing this Court's decisions interpreting the Fourth Amendment and constitutionality of pat-frisks). Three justices disagreed, also citing this Court's decisions interpreting the Fourth Amendment and constitutionality of pat-frisks. *Id.* at 375 & 381-383 ("The court's view of what a police officer must believe in order to establish a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous … eviscerates the standard of a reasonable police officer and replaces it with subjective, speculative beliefs that an officer might have, contrary to [the] jurisprudence …of the United States Supreme Court under the Fourth Amendment

[3] Repeat citation of state court decisions are to the North Eastern reporter.

to the United States Constitution ….” “Even assuming that the officers’ inferences were objectively reasonable, the court makes an unjustified leap from the supposition that Paris was attempting to distract the officers to the belief that the defendant was armed and dangerous. A determination of reasonable suspicion that a suspect is armed and dangerous must be particularized and individual.”)

REASONS FOR GRANTING THE WRIT

This Court’s landmark decision in *Terry* v. *Ohio* held that in the absence of probable cause to believe a crime has been committed, a police officer may conduct a pat-down search of a person to determine if they are armed with a weapon only if the officer has a reasonable suspicion that the person “is armed and presently dangerous.” 392 U.S. at 24. The government “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* at 21. *Terry* stressed that it is “imperative that the facts be judged against an objective standard ….” *Id.*

Furthermore, police must form individualized suspicion of the suspect, based on his own conduct, and not suspicion of others. *Ybarra* v. *Illinois*, 444 U.S. 85, 94 (1979).

Finally, the police may not provoke allegedly suspicious behavior, thereby transforming ambiguous conduct into grounds for a pat frisk. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

The decision below contradicted all three of these Supreme Court precedents, fundamental to its Fourth Amendment jurisprudence.

A. The circumstances leading to the search of the Petitioner

At approximately 7:00 p.m. on February 26, 2018, three detectives from the New Bedford Police Department's Gang Unit (Det. Kory Kubik, Det. Roberto DaCunha, and Det. Gene Fortes) were driving together in an unmarked police cruiser. Tr1/6; Tr3/5. They claimed to observe one car cut another car off as it changed lanes. Tr1/6; Tr3/6. The offending car then turned right onto another street and then entered a fast-food restaurant parking lot. Tr1/7,27-28. The detectives followed but did not turn on their "blue lights" until the car turned into the restaurant parking lot. Tr1/7,27-28. As the police entered the parking lot, the driver, Alyssa Jackson, parked properly. Tr3/18.

Mr. Raekwan Paris was in the front passenger seat. Tr1/8. Mr. Bailey-Sweeting and Mr. Carlos Cortes were in the back seat. Tr1/15-16. As the police exited their cruiser, Mr. Paris exited Ms. Jackson's car. Tr1/13; Tr3/8. The detectives immediately recognized Paris. Tr1/8; Tr2/6; Tr3/9.

A year and half earlier, New Bedford police had arrested Paris for possession of a firearm found in a vehicle. Tr1/12; Tr3/9-11. Further, these same three officers had all repeatedly stopped Paris and questioned him previously. Tr1/12; Tr2/7; Tr3/12. Two of the detectives testified they had done so on "numerous" occasions. Tr2/7; Tr3/9. Despite these frequent stops, aside from the single eighteen-month-old

firearm charge, the detectives did not report having ever charged or cited Paris for any other criminal or civil infractions.

When Paris stepped out of Ms. Jackson's parked car, the police ordered him to get back into the car. Tr2/8; Tr3/12. Instead, Paris repeatedly asked the police why they were stopping him this time. Tr2/8,9,10,12; Tr3/12,14. He also complained that they were harassing him. Tr2/8-10,12; Tr3/12-14,18,29. Detective DaCunha testified that Paris was using an "authoritative voice," not "shouting" and was pacing back and forth, and "flailed his arms a few times, kind of like 'Why are you stopping us?'" Tr3/12-13.

Detective Kubik, initially, testified that one of the other detectives told Paris that "it was a traffic stop" and to get back in the car. Tr1/12-13. On cross-examination, however, Kubik stated that none of the officers explained to him that they were making a traffic stop. Tr1/31.

Detectives Fortes and DaCunha corroborated Kubik's admission on cross-examination. They both testified that when Paris stepped out of the car, DaCunha twice told him to get back in but not the reason for the stop. Tr2/8; Tr3/12. And yet, every officer admitted that Paris repeatedly asked the reason for the stop and why he needed to get back into the car. Tr1/30; Tr2/8,9,10,12; Tr3/12,14.

Despite this, the state court found that the police had told Paris this was a traffic stop. *Commonwealth* v. *Sweeting-Bailey*, 488 Mass. at 748, 178 N.E.3d at 365 ("The officers informed Paris that it was a traffic stop, but Paris refused to get in the vehicle when the officers instructed him to do so multiple times.")

The police admitted that they did not turn on their blue lights until Ms. Jackson had pulled into the restaurant parking lot, Tr1/27-28, and so it was not obvious that the stop was for a previous improper lane change. Moreover, because it was 7:00 p.m., there was nothing inherently suspicious about entering a restaurant parking lot at that time. Also, given Paris's extensive experience with these Gang Unit officers, it was reasonable to infer that the stop was not for a traffic violation, since he knew they were in the Gang Unit and traffic enforcement is not the primary responsibility of a Gang Unit. In short, Paris's initial reaction, asking for an explanation for the stop, was reasonable, not suspicious.

Instead of explaining the basis for the stop, the officers "escorted" Paris to the back of the car. Tr3/13. Detective Kubik testified that at that point, Paris was "displaying some characteristics of someone who may become combative." Tr1/14. Specifically, Paris placed his feet one in front of the other, clenched his fists, and stared at one officer. Tr1/14; Tr3/34. For these reasons, an officer handcuffed and pat-frisked him but found no weapon. Tr3/33.

Kubik admitted that when he had stopped Paris a year and a half earlier, recovered a gun from the car Paris had just exited, and arrested him, Paris had been "calm" and "not very talkative". Tr1/11. Accordingly, Paris's expression of frustration at being stopped this time was very different. Tr1/12; Tr2/7; Tr3/12,28.

Despite their contrary prior experience, the officers testified that they developed a speculative admitted "hunch" that Paris's decision to exit the car and demand an explanation for the stop was actually an attempt to distract their

attention from some criminal behavior, such as contraband in the car, possibly a firearm. Tr1/20,35; Tr2/17; Tr3/18.

No one testified that any of the other occupants of the car did or said anything suspicious or that made the police nervous or concerned for their safety. To the contrary, the police testified that Bailey-Sweeting sat quietly in the car and did nothing suspicious. Tr1/18; Tr3/27-28.

Despite this, based on their admittedly speculative suspicion of Paris's behavior, the officers removed and pat-frisked the driver, Tr1/21, then Mr. Cortes, Tr1/22, and finally, Petitioner, Bailey-Sweeting. Tr1/22-23. Police found a gun in his waistband and arrested him. *Id.*

B. The inference the officers drew from the fellow passenger's behavior was <u>not objectively reasonable</u>

To justify a pat-frisk, the police "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. Here, each officer admitted that, but for Paris's behavior, they would not have pat-frisked anyone else in the car. Tr1/38; Tr2/16; Tr3/27-28. But as the dissent in the state court's decision explained, Paris's reaction

> … did not lead to a reasonable, objective inference that he was attempting to distract the officers from a weapon concealed in the vehicle. … Indeed, the officers who conducted the stop and testified at the hearing on the motion to suppress *had specific, actual knowledge and experience to the contrary.* On a prior occasion when Paris actually had concealed a firearm in a vehicle, he calmly and cooperatively walked

> back to the vehicle …. [W]hatever the officers *speculated* were Paris's motives for his unusual and confrontational behavior on this occasion were subjective, and too *speculative* to permit a reasonable inference.

Commonwealth v. *Sweeting-Bailey,* 488 Mass. at 772-773, 178 N.E.3d at 382-383 (Gaziano, J. dissenting) (emphasis added). In her separate dissent, Chief Justice Budd similarly noted: "where what an officer infers merely has some conceivable connection to the facts before the officer, that inference is *pure speculation* and cannot justify a patfrisk." *Id.* at 375 (Budd, C.J. dissenting) (emphasis added), citing *Terry*, 392 U.S. at 28 ("officer's suspicion that person is armed must be more than 'the product of a volatile or inventive imagination'").

Moreover, the speculative inference these officers drew from Paris's complaints of police harassment was objectively unreasonable for a second reason. As the officers' own testimony showed, they *had* been harassing Paris, therefore, his demand for an explanation of their conduct was reasonable.

Long ago, this Court recognized that police may not provoke ambiguous conduct, and then cite that conduct as justification for a search or seizure. In *Wong Sun* v. *United States*, this Court rejected the government's claim that the suspect's attempt to evade authorities established probable cause to arrest after an agent first pretended to be a customer of the suspect's laundry service and then revealed their true identity. 371 U.S. at 484 (otherwise "a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked"). Indeed, this case is even more extreme because the police relied on Paris's reaction to their pattern of provocative

conduct as a justification for searching, not just Paris, but his travelling companions, who had, by all accounts, done nothing suspicious.

C. The government failed to establish the officers had an "individualized" suspicion of the Petitioner

Whether or not the police speculation about Paris's reaction to the stop was reasonable, there was simply no evidence that *Petitioner* was armed and presently dangerous. *Ybarra* v. *Illinois*, 444 U.S. 85, 94 (1979) ("[t]he 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or *suspicion directed at the person to be frisked* ….") (emphasis added). *Terry*, 392 U.S. at 24 (under certain narrow circumstances, the Fourth Amendment permits the warrantless search of a citizen "*whose suspicious behavior* he is investigating at close range ….") (emphasis added). Rather, there is no dispute that only *Paris's* behavior aroused the officers' suspicion.

In *Ybarra*, police executed a search warrant in a tavern based on probable cause to believe that the bartender was selling heroin. *Id*. at 90. They found twelve people inside. *Id.* at 97. The officers pat-frisked all of the patrons, finding heroin on Ybarra. *Id.* at 89–91, 93. This Court held that the pat-frisk of Ybarra violated the Fourth Amendment because the government presented no evidence that Ybarra was armed and dangerous; he "gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening." *Id.* at 93. The majority rejected the dissent's argument that a protective pat-frisk of Ybarra for weapons was

justified based merely upon his association with "those who trade in narcotics". *Id.* at 97 (Burger, C.J., dissenting).

The same is true of Petitioner. Like Ybarra, he "gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening." *Id.* at 93.

In *Ybarra*, this Court explained that "each patron" that entered the tavern "was clothed with constitutional protection against an unreasonable search or an unreasonable seizure [and that] *individualized* protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the" bartender. *Id.* at 91-92 (emphasis added). "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91.

In *Ybarra*, the Court relied upon its prior decision in *United States* v. *Di Re,* 332 U.S. 581 (1948). Di Re was a passenger in a vehicle driven by someone who sold counterfeit gasoline ration coupons to an informant. *Id*. at 594. This Court held that his mere presence at the apparent scene of a crime (the vehicle) did not permit police to search him. *Id*.

The holdings in *Terry*, *Di Re* and *Ybarra* establish that, assuming these officers could have reasonably inferred that Paris was attempting to distract them from the car, that, at most, permitted a search of the car. To justify pat-frisks of the other occupants, the government needed *particularized* evidence that they were

armed and presently dangerous. As the dissent noted, "nothing in the defendant's own actions gave rise to a reasonable suspicion that he was armed and dangerous." *Commonwealth* v. *Sweeting-Bailey*, 488 Mass. at 776, 178 N.E.3d at 385 (Gaziano, J. dissenting).

In fact, even the *Ybarra* dissent's rationale for a search is lacking here. The police had no reasonable grounds, based on specific and articulable facts, much less a warrant supported by probable cause, to suspect that Paris was engaged in criminal activity at the time of the traffic stop.

D. The "totality of the circumstances" analysis does not support a reasonable suspicion that the Petitioner was armed and presently dangerous

The police testified that they pat-frisked Jackson, Bailey-Sweeting, and Cortes because Paris's behavior during this stop was different from how he reacted during their prior interactions with him. Tr1/11-12; Tr2/7; Tr3/12. They added that they had arrested Paris, a year and a half earlier, for unlawful possession of a firearm found in a vehicle, approximately one-half mile from this traffic stop. Tr1/11-12; Tr3/11.

The police also relied on information that three occupants of the car were affiliated with three different gangs. Specifically, police claimed that Paris was affiliated with the "United Front" gang which was allegedly active in the "west end" of the City of New Bedford, a quarter of a mile away from the location of the traffic stop. Tr1/37; Tr3/4,8. Police claimed that Cortes was affiliated with another

unnamed gang from another city, and that Petitioner was affiliated with yet another gang. Tr1/37.

Lastly, police cited the fact that three years earlier, while a juvenile, Petitioner had been found delinquent for a firearm offense. Tr3/18

Courts have widely recognized that a person's mere status as having a prior criminal conviction or being suspected of belonging to a gang cannot serve as the basis for reasonable suspicion that they are presently armed and dangerous and therefore subject to a *Terry*-type pat-frisk. *United States* v. *Hammond*, 890 F.3d 901, 907 (10th Cir.), *cert. denied*, 139 S.Ct. 390 (2018). "Such a rule would offend the careful balance between individual liberty and public safety that is at the heart of the Fourth Amendment." *Id.* See *United States* v. *Mathurin*, 561 F.3d 170, 177 (3d Cir. 2009) ("past criminal conviction … is not sufficient alone for reasonable suspicion" for investigatory stop); *United States* v. *Sandoval*, 29 F.3d 537, 543 (10th Cir. 1994) (criminal record alone cannot be basis for reasonable suspicion, otherwise, "any person with any sort of criminal record … could be subjected to a *Terry*-type investigative stop by a law enforcement officer at any time[.]").

This Court has explained that an individual's prior criminal conviction or gang affiliation may support a pat-frisk only where those factors interact with the circumstances of a stop in a way that justifies an officer's *individualized* suspicion that they are armed and presently dangerous. See *Arizona* v. *Johnson*, 555 U.S 323 (2009). In *Johnson*, this Court indicated the pat-frisk of the defendant, Johnson, a rear seat passenger, was constitutional where his criminal record and possible gang

affiliation interacted with his behavior at the time of the stop and other circumstances of the stop. *Id.* at 329-334. During a traffic stop, which took place near a neighborhood associated with the Crips gang, Johnson informed one of the three officers conducting the stop that he was from a town the officer "knew was home to a Crips gang" and told the officer "that he had served time in prison for burglary and had been out for about a year." *Id.* at 327-328. The officer made the following additional observations particularized to Johnson: (1) Johnson was noticeably focused on the officers; (2) he had a scanner in his pocket that, in the officer's training and experience, was suggestive of criminal activity; (3) he had no identification on him; and (4) he was wearing clothing associated with the Crips gang. *Id.* at 328. This Court held that these combined factors provided a reasonable suspicion that permitted the officer to pat-frisk Johnson. *Id.* at 329-334.

Here, the detectives relied upon the fact that, three years prior to this traffic stop, Petitioner had been found delinquent as a juvenile for a firearm-related offense and, purportedly, was a member of a gang. Tr3/18, 25-26. But, in contrast to the circumstances in *Johnson*, *supra*, there was nothing about *Petitioner's* behavior or the circumstances of this traffic stop that interacted with his three-year old firearm offense or his purported gang membership. The police flatly admitted that Petitioner did nothing to arouse their suspicion. Tr1/18; Tr3/27-28. The police admitted they had received no report of anyone potentially in possession of a firearm. Tr1/35. And, as the dissent below noted, the government "introduced no evidence concerning recent gang violence in the vicinity of the stop, police were not

investigating gang-related crime when they initiated the traffic stop, [nor did the government] link any efforts by Paris to distract the officers from the vehicle and its contents to any gang activity." *Commonwealth* v. *Sweeting-Bailey*, 488 Mass. at 777, 178 N.E.3d at 386 (Budd, C.J., dissenting).

The state court also relied in part on an assertion that this stop – at 7 p.m. in a restaurant parking lot – occurred in a 'high crime area.' *Id.* at 745. This was clearly erroneous as a matter of fact and law. Other than DaCunha's affirmative response when asked whether the area where the stop occurred was "considered" a high crime area, there was no evidence of the level of crime in that area. Tr3/8. No officer testified that the crime level in the area of the stop affected his level of suspicion. And, finally, even if there were evidence of an elevated level of crime in the immediate area of the traffic stop, there was no evidence that supported the requisite *individualized* suspicion of the Petitioner. See *Maryland* v. *Buie*, 494 U.S. 325, 334, n. 2 (1990) ("Even in high crime areas, … *Terry* requires reasonable, *individualized suspicion* before a frisk for weapons can be conducted.") (Emphasis added).

E. The state court upheld a search based upon Petitioner's mere presence with another whose behavior aroused an "inchoate and unparticularized suspicion or 'hunch'" – precisely what this Court held the Fourth Amendment prohibits

Here, the officers all frankly admitted that they decided to pat-frisk the Petitioner based on Paris's reaction to being stopped, again. Tr1/38; Tr2/16; Tr3/27-28. Despite the obvious explanation for Paris's frustration – that he was reacting to

a pattern of harassment from these same officers – the officers claimed that they had a "hunch" that he might be trying to distract them from some kind of criminal behavior. Tr1/35. These undisputed facts are precisely what this Court warned should never be allowed: a search based upon an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 382 U.S. at 27. Accordingly, the state court decision upholding the pat-frisk of Petitioner directly contravenes this Court's holding in *Ybarra* that "[t]he 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked …." 444 U.S. at 94.

When this Court sanctioned pat-frisks based on reasonable suspicion that the suspect is armed and presently dangerous it took pains to stress that this authority must be "narrowly drawn." *Terry*, 382 U.S. at 27. It further declared: "Under our decision, courts still retain their traditional responsibility to guard against police conduct which …. trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Id.* at 15. Five years after *Terry*, referring to the protections of the Fourth Amendment, this Court wrote:

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Almeida-Sanchez v. *United States*, 413 U.S. 266, 273 (1973).

Terry laid down basic requirements for the authority it sanctioned: the police must have an objectively reasonable suspicion, based on "specific and articulable

facts" "that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others…." 382 U.S. at 21, 24. The evidence in this case did not meet these criteria. Rather, the state court allowed suspicion of another person, based on an inarticulate admitted "hunch" to serve as a justification for pat-frisking the Petitioner, clearly contravening this Court's requirement of individualized suspicion under the Fourth Amendment. Moreover, the so-called suspicious behavior of a third party was "provoked" by a pattern of police behavior, and thus boot-strapping prohibited by this Court in *Wong Sun* v. *United States*, 371 U.S. at 484.

The circumstance that led to the pat-frisk in this case, a motor vehicle stop for a minor traffic infraction, is a frequent occurrence that led to two narrowly decided state court rulings, which contradicted at least three precedents of this Court's Fourth Amendment jurisprudence. This Court should grant certiorari to clarify basic individual rights in these common circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: May 16, 2022

Respectfully submitted,

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