NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

MICHAEL JAMES BOSMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Tenth Circuit misapply this Court's precedent, and wrongly reject Mr. Bosman's Fourth Amendment claim, when it dismissed the availability of an obvious and readily available alternative to the gunpoint seizure, without considering whether the police acted unreasonably in failing to recognize or pursue that alternative?

## STATEMENT OF RELATED CASES

United States v. Bosman, No. 19-cr-00213-RM (D. Colo.)
Judgment entered March 2, 2021

United States v. Bosman, No. 21-1076 (10th Cir.)
Judgment entered February 18, 2022

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## PRAYER

Petitioner, Michael James Bosman, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on February 18, 2022.

## OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Bosman, 2022 WL 500550 (10th Cir. Feb. 18, 2022), is found in the Appendix at A1. The decision of the United States District Court for the District of Colorado is found in the Appendix at A5.

## JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Gorsuch has extended the time in which to file a petition for writ of certiorari until June 20, 2022, see A18, so this petition is timely.

## CONSTITUTIONAL PROVISION INVOLVED

This petition implicates the Fourth Amendment to the United States Constitution, which provides as follows:

> 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

Around nine o'clock on a March morning in 2019, police in Colorado Springs, Colorado received information that Albert Stuart, who had an outstanding felony arrest warrant for identity-theft and property offenses, was asleep in a car in a motel parking lot. Three officers responded. They found Mr. Stuart asleep in the front, passenger seat of a Chevrolet Impala. Michael Bosman was asleep in the rear seat on the driver's side.

Officers Hallas and Gilman approached the passenger-side of the Impala. Officer Gilman had his gun drawn, and held in the "low ready" position, that is, pointing downward at a roughly forty-five-degree angle. As the officer explained, this enabled him to use the gun "in the fraction of a second," should force be needed. Officer Hallas knocked on the window next to Mr. Stuart, waking him up, and ordered him out of the car. Mr. Stuart obeyed.

When the car door was opened, it caused an alarm to blare. Officer Hallas asked Mr. Stuart over the din whether there were any guns in the car. When he did not get a clear answer, he asked again. Mr. Stuart

answered in the negative. The officer arrested and handcuffed Mr. Stuart, and took Mr. Stuart back to his patrol car.

Even before Mr. Stuart was arrested, Officer Gilman had shouted into the car for Mr. Bosman to put his hands on top of his head. Mr. Bosman complied, as he would with every instruction the police gave him that morning.

After Mr. Stuart was led away from the Impala, the third policeman on the scene, Officer Sandoval, moved to the rear, driver's side of the car, next to the window adjacent to Mr. Bosman. Officer Gilman explained to Mr. Bosman that they had to identify him and needed him to get out of the car with his hands on his head. The officer instructed Mr. Bosman to open the door lock with his left hand, and not to move his hands near his waist or legs. Before Mr. Bosman could act on these commands, Officer Hallas yelled out gun, as Mr. Stuart had told him back at the patrol car that he was armed. Officer Gilman went to assist. He told Mr. Bosman to "hold tight," and Mr. Bosman did.

When he was sure that Officer Hallas, who had removed the gun from the handcuffed Mr. Stuart, had the situation under control, Officer

Gilman returned to the Impala. He instructed Mr. Bosman to open the lock to the car door with his left hand. This proved awkward, as it required Mr. Bosman to pull up a button that was near his left shoulder. Officer Gilman then had Mr. Bosman turn his body towards the door and use his right hand to open the lock, which he easily did. At the same time, Officer Sandoval tapped on the window with a pair of handcuffs.

In the meantime, Mr. Stuart had told Officer Hallas that Mr. Bosman also had a gun. Before Mr. Bosman could open the door, Officer Hallas shouted out, "he's got a gun too, supposedly." Officer Gilman moved his gun from the low-ready position and pointed it at Mr. Bosman. Officer Gilman warned Mr. Bosman that if he moved his arm in a way that the officer perceived as frightening, he would probably be shot.

Officer Gilman had Mr. Bosman open the door, directed him to comply with Officer Sandoval's orders, and went quickly to the driver's side of the car. As soon as Mr. Bosman opened the door, Officer Sandoval had a gun pointed at him. Officer Gilman, now on the driver's side, also pointed his gun at Mr. Bosman. Officer Sandoval warned Mr. Bosman he would be shot if his hands went below his shoulders.

The officers commanded Mr. Bosman to come straight out of the car with his hands up, and Mr. Bosman started to do so with his hands clasped on his head. Officer Sandoval, who had holstered his gun, took one of Mr. Bosman's wrists and guided him to the ground. As Mr. Bosman fell out of the car and onto the ground, a gun fell to the ground.

Colorado law allows a person to possess a concealed gun in a car, without a permit, to protect himself or another, or to protect property. Colo. Rev. Stat. § 18-12-105(2)(b). But 18 U.S.C. § 922(g)(1) prohibited Mr. Bosman from carrying a gun with knowledge that he had previously been convicted of a felony. He was charged in the United States District Court for the District of Colorado with that offense.

Mr. Bosman moved to suppress the gun, arguing that the police had used unreasonable force in removing him from the car at gunpoint, effectively making an arrest without probable cause. The district court denied the motion. Mr. Bosman then conditionally pleaded guilty to the § 922(g) charge, reserving the right to appeal the denial of his suppression motion. See Fed. R. Crim. P. 11(a)(2).

The Tenth Circuit affirmed the judgment of the district court, holding that the police action in having Mr. Bosman crawl out of the car at gunpoint was justified to ensure their safety. A4. In doing so, the court of appeals recited that, under this Court's decision in United States v. Sharpe, 470 U.S. 675 (1985), the unreasonable failure to recognize or pursue less-intrusive alternatives bore on whether the gunpoint seizure was unreasonable. A3.

But the Tenth Circuit ultimately turned away from that standard and dismissed the relevance of alternatives, whether reasonable or not. It ignored the fact that Mr. Bosman had complied with every instruction the police had given. And it did not consider that not only were the officers dealing with a compliant Mr. Bosman, but Officer Gilman had his gun drawn and in the low-ready position. Instead, the court of appeals merely announced that ordering Mr. Bosman out of the car, with a gun out and ready to be used, might pose some further risk. A4. All the Tenth Circuit said was that this obvious alternative to a gunpoint seizure, and to having Mr. Bosman crawl out of the car, "*may* have put th[e police] at greater risk given the circumstances." Id. (emphasis added).

The Tenth Circuit continued that the availability of alternatives was not the sole determinative of the reasonableness of the police action. Id. It gave no consideration to whether the police reasonably ignored the obvious alternative, or the weight this might play in the analysis. Rather, the court simply declared that "we cannot base our determination of reasonableness solely on "whether some other alternative was available." Id. (quoting Sharpe, 470 U.S. at 687). The whole of the Tenth Circuit's discussion was a paragraph of four sentences, with the first one being its summary of Mr. Bosman's position.

## REASONS FOR GRANTING THE WRIT

**This Court should grant review to correct the Tenth Circuit's serious misinterpretation of a basic precept of Fourth Amendment analysis, a misinterpretation that may well not be an anomaly even though the precept has been the law for decades.**

The Tenth Circuit's decision in this case rests on a a basic misreading of a principle of Fourth Amendment analysis that has been the law for at least thirty-seven years. To be sure, the Tenth Circuit articulated the principle correctly in reciting how the reasonableness of the seizure here was to be assessed. But when it turned to apply the principle in assessing the propriety of the gunpoint seizure of a compliant Mr. Bosman, it used a truncated version of the standard. It converted a standard that requires consideration of the reasonableness of police failure to recognize or pursue an alternative course of action into a basis for making such an alternative an irrelevancy.

The fact that the Tenth Circuit misinterpreted such a basic and clear standard of very long standing is as telling as it is surprising. It shows that there is a need for this Court to act in an area that it may rightly have believed was settled long ago. Indeed, if the Tenth Circuit can get the point so wrong even when it initially quotes the standard correctly, there

are no doubt many other courts that do not even acknowledge the principle at issue here. This Court should accept this case for review to ensure that the mistaken view of the Tenth Circuit does not further take hold, and to ensure that other courts are not *sub silencio* operating on such a misconception, in a very important, and frequently litigated, area of constitutional law.

In United States v. Sharpe, 470 U.S. 675 (1985), this Court explained that the availability of alternatives to the action the police took are relevant to whether a detention was unreasonably long. This Court "considered it appropriate to examine" what the police could have done that might have dispelled their suspicions more promptly, and so would have resulted in a briefer detention. Id. at 686. Of course, this is not a least-intrusive means approach. This Court was clear in Sharpe that the mere fact that one might imagine a way in which police could have accomplished their objective quicker, and so with less intrusion on Fourth Amendment interests, will not make the length of the detention unreasonable. Id. at 687 (citing Cady v. Dombrowski, 413 U.S. 433, 447 (1973)). But what the police could readily have done does bear on the reasonableness of what they in fact did.

That is, "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it." Id.

The principle articulated in Sharpe regarding the relevance of readily available alternatives applies not just to the reasonableness of the length of a seizure, as in Sharpe, but also as to the reasonableness of the manner of the seizure, which is at issue here. The generality of the Sharpe principle is reflected in this Court's statement there of how one evaluating "police conduct" can almost always think of other means by which "the objectives of the police" might have been achieved. Id. at 687. And it is reflected too in this Court's support of the principle with a quotation from Cady v. Dombrowski, a case involving the constitutionality of a search, about the "'protection of the public.'" Sharpe, 470 U.S. at 687 (quoting Dombrowski 413 U.S. at 447).

The Tenth Circuit was thus right to recognize the relevance of the Sharpe principle in Mr. Bosman's challenge to the manner of the police seizure. Other federal appellate courts have done the same. E.g., United

States v. Casado, 303 F.3d 440, 448 (2d Cir. 2002); Seekamp v. Michaud, 109 F.3d 802, 807-08 (1st Cir. 1997).

But this case shows how, in practice, the Tenth Circuit has actually given the Sharpe principle little effect. The brevity of the Tenth Circuit's analysis is alone suggestive of this. The entirety of its discussion in this regard was limited to four sentences, one of which was its summary of what Mr. Bosman's argument was. A4.

The terse discussion also failed to mention, much less consider, facts that would plainly bear on the reasonableness of the obvious alternative of simply ordering Mr. Bosman out of the car. There was no recognition there that Mr. Bosman had been cooperative throughout the encounter. This included his obeying the police direction to put his hands on his head. The opinion also did not consider in the Sharpe context that Officer Gilman had his gun out and in the low-ready position from the beginning. He did so to ensure he would have adequate time to use it should anything go wrong.

There was thus a compliant Mr. Bosman, with his hand on his head, and an officer on either side of him, one with his gun drawn and in the low-ready position. All indications were that the situation was well under

control, even once the officer learned that Mr. Bosman had a gun with him in the car, something generally legal in Colorado. Indeed, the very reason Officer Gilman had his gun out and in the low-ready position was that, as he explained at the suppression hearing, it both served as a deterrent and allowed him to use it, should the need arise, before a gun could be used against him. In fact, the officer stated that, with his gun in the low-ready position, he would have been able to use it against Mr. Bosman in a fraction of a second.

These circumstances at least call for consideration of whether there was a readily available alternative to the aggressive action that the police instead used. But rather than doing that, the Tenth Circuit reduced the Sharpe principle to near-irrelevance. Although the court of appeals had earlier recounted that the principle called for inquiry into whether the police unreasonably failed to recognize or pursue an available alternative, when it addressed the issue of the propriety of the police conduct it put the Sharpe principle in very different terms. At the time when it mattered, the Tenth Circuit declared, "And we cannot base our determination of reasonableness solely on 'whether some other alternative was available.'"

A4 (quoting Sharpe, 470 U.S. at 687). This bespeaks no recognition of the proposition that there had to be inquiry into whether the police here were unreasonable in not recognizing or pursuing the obvious alternative that was right in front of them. The invocation of Sharpe became not a way to be faithful to it, but a way to avoid the inquiry that this Court in Sharpe demanded.

The Tenth Circuit's statement that simply ordering Mr. Bosman out of the car "may have put th[e officers] at greater risk given the circumstances," A4, does not show it to be otherwise. The court did not explain why this might be so. And its stress elsewhere in the decision that the police did not know where the gun might be, A3, A4, is unconvincing that this did (or even might) make ordering Mr. Bosman out of the car a more dangerous option. Officer Gilman, by having his gun in the low-ready position, protected against Mr. Bosman reaching for a gun in the usual places where he might have it, such as in his waistband, or somewhere else on (or next to) his body. The officer's drawn gun afforded even more protection if the reported gun were somewhere else in the cluttered back seat. Any reach by Mr. Bosman to such a place, much less

his rooting around in the clutter, would give the officer even more time to use his gun on Mr. Bosman.

The mere statement that ordering Mr. Bosman out of the car "may" have been riskier is no substitute for the analysis that Sharpe requires. Such a statement of mere possibility could almost always be made. And it was made here without any evident consideration of facts that pointed very much in the opposite direction. Sharpe requires real engagement on the reasonableness of the police failure to recognize or pursue a viable and obvious option. The Tenth Circuit did not do this.

The last sentence of the court of appeals' three-sentence discussion, as a coda to its rejection of his claim, also shows that the Tenth Circuit elided the instruction of Sharpe. The Tenth Circuit followed up on what it said about Sharpe by stating, "We thus decline Mr. Bosman's request that we engage in the 'unrealistic second-guessing' that the Supreme Court has warned against." A4 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985)). By its very terms, the Sharpe principle has a built-in check that prevents anything of the kind (which, needless to say, Mr. Bosman did not request) from happening. This Court was at pains to

stress in Sharpe that it is only the unreasonable failure to recognize or pursue an alternative that matters, Sharpe, 470 U.S. at 687, and unrealistic second-guessing would certainly not show that.

So, although Sharpe itself contains a similar caution to Montoya de Hernandez, namely that in making the assessment of police conduct in the context of a "swiftly developing situation," a reviewing should be careful not to "indulge" in unrealistic second-guessing, id. at 686; see also A3 (characterizing this case as involving an "escalating situation" when the police learned Mr. Bosman was armed), that does not justify the refusal to consider at all the obvious alternative here. A reminder not to be unrealistic in applying the Sharpe principle is not an excuse to forego applying the principle it at all. To the contrary, this Court was speaking there of how a reviewing court should proceed in making "th[e] assessment" it described. Sharpe, 470 U.S. at 686. As one court of appeals has explained, the caution does not change the fact that Sharpe "requires an analysis of counterfactuals which will inform the court on the reasonableness" of the challenged police action. Short v. West, 662 F.3d 320, 327 (5th Cir. 2011).

The Sharpe principle is an important one. Although Sharpe was issued in 1985, the decision in this case shows that its faithful application cannot be taken for granted. The Tenth Circuit re-purposed the principle in a way that so distorted it that it became a basis for easily denying relief, contrary to its intended role in Fourth Amendment analysis.

With the Sharpe principle relevant to the reasonableness of police action across the Fourth Amendment spectrum, its proper application has implications for a very large number of cases. That a federal appellate court at this late date got the simple instruction of Sharpe so wrong is troubling. It is suggestive of a much bigger problem in approach, both by courts that invoke the principle and by those that do not. It also shows that the oft-cited caution about unrealistic second-guessing, in both Sharpe and other cases, may have overtaken the Sharpe principle itself.

Accordingly, this Court should grant review in this case, which squarely presents the question of the faithful application of Sharpe. Reviewing this case will allow this Court to ensure that the Sharpe principle does not become only a platitude, and that it is not merely honored in the breach.

## CONCLUSION

This Court should grant Mr. Bosman a writ of certiorari.

Respectfully submitted,

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