No. _____

In The
Supreme Court of the United States

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

MARCUS MARTELL MCCLOUD
and BRUCE CLIFFIN EDWARDS,

Respondents.

On Petition For Writ Of Certiorari
To The Michigan Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Police preparing to enter a suspected unlicensed after-hours drinking establishment to make an undercover purchase removed the two respondents from just inside the premises who were security for the establishment and tasked with removing any firearms from those entering. For safety reasons, the officers entering to make an undercover purchase could not have their weapons removed from their persons. Respondents were patted down, and firearms found. The question presented is:

1. The determination of reasonable suspicion for a detention may be based on commonsense judgments, inferences about human behavior, and the experience of the officer(s). Were the respondents reasonably detained, and may a frisk for weapons of a person reasonably detained also be based on commonsense judgments, inferences about human behavior, and the experience of the officer(s)?

RELATED PROCEEDINGS

Michigan Court of Appeals: *People v. Marcus Martell McCloud and Bruce Cliffin Edwards*, Nos. 352158, 352280 (April 22, 2021) (opinion reversing convictions).

Michigan Supreme Court: *People v. Marcus Martell McCloud and Bruce Cliffin Edwards*, Nos. 163060, 163061 (August 12, 2022) (order denying leave to appeal).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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NOW COMES the State of Michigan, by KYM L. WORTHY, Prosecuting Attorney for the County of Wayne, JON P. WOJTALA, Chief of Research, Training, and Appeals, and TIMOTHY A. BAUGHMAN, Special Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on April 22, 2021, leave to appeal denied by the Michigan Supreme Court August 12, 2022.

OPINIONS BELOW

The order of the Michigan Supreme Court remanding to the trial court for an evidentiary hearing is presently unreported, and appears as Appendix A.

The opinion of the Michigan Court of Appeals denying leave to appeal is unreported, may be found at 2021 WL 1596498, and appears as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was rendered April 22, 2021; the order of the Michigan Supreme Court denying leave to appeal was rendered August 12, 2022. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution 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.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . . 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.

STATEMENT OF THE CASE

Respondent Marcus Martell McCloud was convicted of carrying a concealed weapon, and sentenced to 2 years probation. Respondent Bruce Cliffin Edwards was also convicted of carrying a concealed weapon, and sentenced as a fourth-offense habitual offender, MCL 769.12, to 2 years probation. Each moved to suppress the evidence—the firearms discovery—before trial, and that motion was denied. The salient evidence is that:

- The officers who worked with the Detroit Police vice squad said that the vice squad investigated "strip clubs, bars, do different operations for license, and different establishments that are a nuisance."[1]
- The squad went to the "establishment" here because there had been complaints about the place operating after hours.[2]
- The "establishment" was open to public entry. Officer Kelsey testified that the place was a private establishment, but

[1] T 8-13, 5.

[2] T 8-13, 6.

not a private club, in that members of the public could enter.[3]

- The purpose of the investigation was to enter to make an undercover buy of liquor from the unlicensed business.
- Before the planned undercover entry was attempted a check was made regarding whether the business was licensed to sell liquor, and it was not.[4]
- These illegal establishments routinely have security on the premises at the door. In order to make entry safely to operate undercover and make the buy, avoiding an alert to those running the bar,[5] and to gain entry without divesting themselves of their weapons, which would be required by security of the establishment, and unsafe for the officers,[6] the standard practice is to detain the bar's security

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[3] T 8-13, 30:

A. I mean, a private club, I think, it consists of—

Q. If you can't answer the question, that's fine. I'm just—

A. No, it wasn't.

Q. Well, it wasn't a public business, was it?

A. Yes.

Q. It was?

A. Yes.

[4] T 8-13, 16.

[5] T 8-13, 28.

[6] T 8-13, 21-22.

personnel as the entry is made,[7] and a patdown is made for the officers' safety.[8]

- Respondent McCloud identified himself as security as the officer entered[9] the bar (the officer said he "just asked" him), and was thus taken outside.[10] Respondent was patted down, a heavy object felt on the right side of his body, and a gun was retrieved.[11] Respondent was then arrested.[12] Respondent Edwards admits he was part of security at the club, and was thus taken outside, patted down, and a gun found.[13]

- A purchase of alcohol was made in the bar.[14]

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[7] T 8-13, 7-10.

[8] T 8-13, 10, 25.

[9] The doors to the bar were open. T 8-13, 31-32.

[10] T 8-13, 9-10.

[11] T 8-13, 10-11.

[12] T 8-13, 18.

[13] Defendant's brief, p. 12-13. And see T 8-13, 28-33: "The testimony of the two officers make it clear that they were going to detain Mr. Edwards just because he was merely working security at the club. . . . The fact that Mr. Edwards was working security at a location in which the officers were conducting an undercover operation does not give grounds to just detain Mr. Edwards and then subsequently frisk him. . . . They just detained him because he was working security. . . . The fact that he was working security at a business that was allegedly selling liquor without a license. . . ."

[14] T 8-13, 15.

On April 22, 2020, the Michigan Court of Appeals in a 2-1 opinion reversed and ordered the evidence suppressed. Petitioner sought leave to appeal, which was denied on August 12, 2022, over the dissent of Justice Viviano.

REASONS FOR GRANTING THE WRIT

A. The critical facts

Here,

- The officers who worked with the Detroit Police vice squad said that the vice squad investigated "strip clubs, bars, do different operations for license, and different establishments that are a nuisance."[15]
- The squad went to the "establishment" here because there had been complaints about the place operating after hours.[16]
- The "establishment" was open to public entry. Officer Kelsey testified that the place was a private establishment, but not a private club, in that members of the public could enter.[17]

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[15] T 8-13, 5.

[16] T 8-13, 6.

[17] T 8-13, 30:

A. I mean, a private club, I think, it consists of—

Q. If you can't answer the question, that's fine. I'm just—

- The purpose of the investigation was to enter to make an undercover buy of liquor from the unlicensed business.
- Before the planned undercover entry was attempted a check was made regarding whether the business was licensed to sell liquor, and it was not.[18]
- These illegal establishments routinely have security on the premises at the door. In order to make entry safely to operate undercover and make the buy, avoiding an alert to those running the bar,[19] and to gain entry without divesting themselves of their weapons, which would be required by security of the establishment, and unsafe for the officers,[20] the standard practice is to detain the bar's security personnel as the entry is made,[21] and a patdown is made for the officers' safety.[22]
- Respondent McCloud identified himself as security as the officer entered[23] the bar

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A. No, it wasn't.

Q. Well, it wasn't a public business, was it?

A. Yes.

Q. It was?

A. Yes.

[18] T 8-13, 16.

[19] T 8-13, 28.

[20] T 8-13, 21-22.

[21] T 8-13, 7-10.

[22] T 8-13, 10, 25.

[23] The doors to the bar were open. T 8-13, 31-32.

(the officer said he "just asked" him), and was thus taken outside.[24] Respondent was patted down, a heavy object felt on the right side of his body, and a gun was retrieved.[25] Respondent was then arrested.[26] Respondent Edwards admitted he was part of security at the club, and was thus taken outside, patted down, and a gun found.[27]

- A purchase of alcohol was made in the bar.[28]

B. The holding of the Michigan Court of Appeals majority relies on inapposite cases, and ignores the most relevant decisions: this Court should apply the logic of *Kansas v. Glover* regarding detentions to frisk

The Michigan Court of Appeals majority opinion relies on two inapposite decisions from this Court,

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[24] T 8-13, 9-10.

[25] T 8-13, 10-11.

[26] T 8-13, 18.

[27] "The testimony of the two officers make it clear that they were going to detain Mr. Edwards just because he was merely working security at the club. . . . The fact that Mr. Edwards was working security at a location in which the officers were conducting an undercover operation does not give grounds to just detain Mr. Edwards and then subsequently frisk him. . . . They just detained him because he was working security. . . . The fact that he was working security at a business that was allegedly selling liquor without a license. . . ." Defendant's brief, p. 12-13. And see T 8-13, 28-33.

[28] T 8-13, 15.

Sibron v. New York[29] and *Ybarra v. Illinois*,[30] and this Court should not allow these misapplications to stand. *Sibron* is wholly dissimilar. An officer simply observed Sibron over a period of over eight hours talk to six or eight persons whom the officer knew from past experience to be narcotics addicts, and did not overhear anything said in the conversations, nor see anything pass between these individuals and Sibron. After Sibron spoke to several individuals known to the officer to be addicts in a restaurant, and then sat down and ordered pie and coffee, the officer approached him, ordered him outside, told him "You know what I am after," and when Sibron mumbled something and reached into his pocket, the officer reached into that pocket and found several glassine envelopes of heroin.

On these facts, this Court found the seizure of Sibron and the search of his pocket impermissible under the Fourth Amendment. The officer knew nothing of Sibron, and all he knew was that this individual talked to a number of known narcotics addicts over a period of eight hours, having no knowledge of the content of those conversations, and seeing no object pass between him and any of them. The Court said that the "inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's

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[29] *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

[30] *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

personal security."[31] Further, no frisk was permissible (and the search of the pocket was not a frisk for possible weapons in any event, said the Court), as that which the officer observed "no more g[ave] rise to reasonable fear of life or limb on the part of the police officer" than it justified the seizure of the person.[32]

In *Ybarra* the police executed a search warrant for a bar, a place of public accommodation—where those with no relationship to the premises might be expected to be found—as well as the bartender, for narcotics. A state statute allowed the detention and search of all persons on the premises when a warrant was executed so as to avoid the destruction or concealment of the object(s) of the warrant, and for the safety of the executing officers. All of the customers were patted down, and in the pocket of one, Ybarra, an officer felt a cigarette pack with hard objects in it, which he eventually removed, and the pack contained heroin. The Court held that under the particular facts the search of Ybarra was improper. The agents knew nothing about Ybarra other than that he was present in a public bar at a time when a search warrant directed to the premises and the bartender was executed; "a person's mere propinquity to others independently suspected of criminal activity," said the Court, "does not, without more, give rise to probable cause to search that person."[33] As to reasonable suspicion for the frisk of Ybarra, the Court

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[31] *Sibron*, 88 S. Ct. at 1902.

[32] *Id.*, 88 S. Ct. at 1903.

[33] *Id.*, 100 S. Ct. at 342.

said that the frisk "was simply not supported by a reasonable belief that he was armed and presently dangerous. . . . When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them."[34]

From these cases the Michigan Court of Appeals majority concluded that:

> Considering the evidence admitted at the motion to suppress hearing in light of *Sibron* and *Ybarra*, we conclude that the trial court erred by denying McCloud's and Edwards's motions to suppress. Here, as in *Sibron*, the mere act of working security at an afterhours club being investigated for the possibility that it was selling liquor without a license did not provide reasonable suspicion for a Terry stop at the time of defendants' seizure and pat down search. . . . Further, as in *Ybarra*, there was no testimony that either defendant gave any indication that they possessed a weapon or intended to commit an assault.[35]

The question, then, is whether reasonable suspicion existed to detain the respondents and whether that suspicion also supported a patdown for weapons. *Sibron* and *Ybarra* present fact situations wholly disparate from the facts in the present case, and were

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[34] *Id.*, 100 S. Ct. at 343.

[35] *People v. McCloud*, 2021 WL 1596498, at *4 (2021).

improperly relied upon by the Michigan Court of Appeals.

Reasonable suspicion is not concerned with "hard certainties, but with probabilities" and law enforcement officers may rely on "common sense conclusions."[36] The Michigan Court of Appeals did not confront the recent decision of this Court in *Kansas v. Glover*,[37] though cited to the court, and directly pertinent. There a stop was made of a vehicle because the police knew that the registered owner had a revoked license, and nothing suggested that someone other than the registered owner was driving. The Court held that reasonable suspicion for the stop—a standard less than certainty or probable cause—existed on these facts. This was so because common sense may justify a stop—and, petitioner submits, a frisk also—depending on the circumstances, without regard to specific training materials or field experiences; "removing common sense as a source of evidence . . . would considerably narrow the daylight between the showing required for probable cause and the 'less stringent' showing required for reasonable suspicion."[38] And so, "the determination of reasonable suspicion must be based on *commonsense judgments and inferences about human behavior*."[39]

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[36] *United States v. Bishop*, 940 F.3d 1242, 1250 (CA 11, 2019).

[37] *Kansas v. Glover*, ___ U.S. ___, 140 S. Ct. 1183, 206 L. Ed. 2d 412 (2020).

[38] *Id.*, 140 S. Ct. at 1190.

[39] *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570 (2000) (emphasis supplied). See also *United*

The question is not whether it is reasonable to detain and frisk someone who had simply talked to known narcotic addicts, as in *Sibron*,[40] nor is it whether it is reasonable to detain and frisk the patrons in a public bar because a search warrant for premises for narcotics is being executed, nothing whatever being known regarding the patrons, or seen suggesting possible armed violence. The question is whether it is reasonable on a standard of reasonable suspicion, not certainty or probable cause, using commonsense judgment and inferences regarding human behavior, and the experience of the officers, to believe that those admittedly functioning as security—including barring from entry those who are armed—in a suspected unlicensed and thus illegal bar are armed. In their meritless arguments concerning the exception to the Michigan statutory prohibition on concealed weapons regarding places of business that was made below, *defense counsel certainly thought so*.

States v. Mitchell, 963 F.3d 385, 390 (CA 4, 2020) ("while we require more than an inchoate and unparticularized suspicion or hunch . . . we also credit the practical experience of officers who observe on a daily basis what transpires on the street" (cleaned up).

[40] The Michigan Court of Appeals' statement that "*Here, as in Sibron* (emphasis supplied), the mere act of working security at an afterhours club being investigated for the possibility that it was selling liquor without a license did not provide reasonable suspicion" is puzzling, for in *Sibron* the facts were *not* that an individual involved was working security at an afterhours club suspected of selling liquor without a license; rather, the facts were, as explained previously, completely different, so there can be no "Here, as in *Sibron*" reference to the facts that makes sense.

> [W]e now are, are asserting that, as a matter of law, which we can raise, at the directed verdict standard, that, uhm, the, both the defendants here were working in their capacity as security personnel, uhm, *and as part of their, uhm, obviously, responsibilities, they, uh, had guns*.[41]

The officers could reasonably suspect—to a standard of reasonable suspicion—that those working security at a suspected unlicensed and after-hours bar, whose job would include keeping order and barring those attempting entry in possession of weapons, would be armed, so that their detention and frisk was permissible. *Unlike Sibron*, the officers knew something about the respondents—that they were security for a suspected illegal establishment, part of whose duties was to disarm people who entered. *Unlike Ybarra*, the respondents were not mere customers, with no connection to the premises, but security personnel for the illegal establishment.

C. Conclusion

The Michigan Court of Appeals found a Fourth Amendment violation on the ground that there was no evidence that the detaining officers "had a reasonable suspicion that [respondents] had committed or w[ere] committing any crimes"[42] and there was no testimony that either respondent "gave any indication that they

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[41] T 10-4, 96 (argument of co-counsel, joined by respondent's counsel. T 10-4, 99). "[H]e had [a gun] in his possession, because that was part of what security does." T 10-4, 128 (co-counsel).

[42] *People v. McCloud*, 2021 WL 1596498, at *3.

possessed a weapon or intended to commit an assault."[43] Instead the two "were simply working at a place being investigated for selling liquor without a license."[44]

But the respondents were "simply working" *as security* for an illegal after-hours establishment, and a part of their duties was to disarm those entering if necessary. Under the circumstances here, the notion that the officers did not have reasonable suspicion—based on commonsense judgments, inferences about human behavior, and their experience—that the respondents were involved in criminal activity in their "employment" in an illegal establishment, *and* that they were armed, is fantastic. Even defense counsel recognized the obviousness of the point ("both the defendants here were working in their capacity as security personnel, uhm, *and as part of their, uhm, obviously, responsibilities, they, uh, had guns*"). This Court should grant certiorari and hold that *Kansas v. Glover* applies to frisks as well as detentions,[45] and that reasonable suspicion

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[43] *Id*., *4.

[44] *Id*.

[45] Petitioner can find no case as yet applying *Kansas v. Glover* to the frisk or patdown.

While petitioner appreciates the statement of Justice Viviano, dissenting from the denial of leave to appeal, that this case may present "the question of whether police officers conducting an undercover operation may briefly detain and pat down third parties without individualized suspicion," Appendix A., p. 22, Justice Viviano also noted that a "strong argument could be made that the police here did have a reasonable suspicion that criminal activity was afoot." Appendix A., p. 23. Petitioner submits that, as argued above, the commonsense judgments, inferences about

existed for both here based on commonsense judgments, inferences about human behavior, and the experience of the officers, so as to reverse the Michigan Court of Appeals, the Michigan Supreme Court having failed to do so.

REQUEST FOR RELIEF

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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human behavior, and the officers' experience provided reasonable suspicion under *Kansas v. Glover* both for detention and for a frisk.