NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

JOSHUA BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A vehicle might appear to be a certain color, but its registration says that it should be a different color. This might happen if a motorist decided to repaint the vehicle. This might also occur if a vehicle has a paint job that cannot be described as one color or another, because it looks like one color in a certain light and a different color in another light. Or it might even happen if the department of motor vehicles makes a clerical error when recording the information for the registration. In sum, it is not a big deal—and it is not a crime—if there is such a discrepancy.

Many such vehicles pass through so-called "high-crime areas," generally in urban areas.

The question presented is whether an officer patrolling in a "high-crime area" has reasonable suspicion to stop *any vehicle* that does not appear to be the color listed in its registration. The Eighth Circuit said yes; the correct answer is no.

PARTIES TO THE PROCEEDINGS

The caption lists all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Iowa and the United States Court of Appeals for the Eighth Circuit:

United States v. Brown, No. 1:21-cr-14-CJW-MAR (N.D. Iowa) (criminal proceedings), judgment entered May 16, 2022.

United States v. Brown, No. 22-2133 (8th Cir.) (direct criminal appeal), judgment and opinion entered February 27, 2023.

There are no other proceedings in state or federal trial or appellate courts or in this Court directly related to this case.

TABLE OF CONTENTS

INDEX TO APPENDICES

[1] The Report and Recommendation was originally filed under seal. It was later unsealed by order of the court dated August 9, 2022.

TABLE OF AUTHORITIES

Constitutional Amendment

Federal Cases

Supreme Court

Courts of Appeals

District Court

State Cases

PETITION FOR WRIT OF CERTIORARI

Petitioner Joshua Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's published opinion in Mr. Brown's case is available at 60 F.4th 1179 and appears in the appendix to this petition at page 1.

The U.S. Magistrate Judge's report and recommendation on Mr. Brown's motion to suppress and the U.S. District Judge's two orders regarding the same are unpublished and appear in the appendix at pages 16, 36, and 50, respectively.

JURISDICTION

The Eighth Circuit entered judgment in Mr. Brown's case on February 27, 2023. Mr. Brown did not file a petition for rehearing by the panel or by the *en banc* court.

This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

An indictment filed in the United States District Court for the Northern District of Iowa charged Joshua Brown with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court denied his motion to suppress (Apps. C-E), and he pled guilty conditioned on preserving his right to appeal that ruling. The Eighth Circuit affirmed the district court's order denying the motion to suppress. (App. A.)

Mr. Brown's federal charge stemmed from a traffic stop that occurred in the early morning hours of July 18, 2020, in Cedar Rapids, Iowa. The police officer who made the stop observed Mr. Brown driving an orange motorcycle. The motorcycle caught the officer's eye simply because it was the only vehicle on the road at that early hour, and it was traveling in a neighborhood where vehicle-related crimes had occurred in the past. Mr. Brown did not commit any traffic violations, nor was it illegal under Iowa law to change the color of a vehicle without updating its registration. (*See* App. A, p. 2.)

Despite factors suggesting that no criminal activity was afoot, merely two considerations led the officer to stop the motorcycle. *One*, when the officer ran the license plate, he learned that the plate was registered to a blue (not orange) motorcycle. (*Id.*) *Two*, as the officer closely followed the motorcycle, Mr. Brown pulled into a residence where, in the officer's view, "narcotics, stolen property, and stolen vehicles were frequently found." (*Id.*)

During the traffic stop, a pat-down search led to the discovery of a handgun with an obliterated serial number (and other items) on Mr. Brown's person. That handgun seized from Mr. Brown led directly to the federal case against him. As noted, the circumstances of the traffic stop prompted a motion to suppress. (*See id.*)

After an evidentiary hearing, a U.S. Magistrate Judge recommended that Mr. Brown's motion to suppress be denied. (App. C.) The U.S. District Judge accepted that recommendation. (Apps. D, E; *see also* App. A, p. 3.)

The Eighth Circuit affirmed. (App. A.) The Eighth Circuit held that despite the many innocuous reasons why the actual color of a vehicle might not match its registration, the officer's "partial reliance on the color discrepancy" was reasonable under the circumstances. (*Id.*, p. 6.) According to the court, the officer's "personal knowledge and experience with license-plate anomalies and vehicular crimes both at the specific location of the stop and in the surrounding neighborhood" provided reasonable suspicion. (*Id.*)

REASONS FOR GRANTING THE WRIT

This Court should grant Mr. Brown's petition because (1) the Eighth Circuit's decision was incorrect, and (2) there is a split of authority on this issue.

I. THE EIGHTH CIRCUIT'S DECISION WAS INCORRECT BECAUSE A DISCREPANCY BETWEEN THE COLOR THAT A VEHICLE APPEARS TO BE AND THE COLOR LISTED IN ITS REGISTRATION DOES NOT AMOUNT TO REASONABLE SUSPICION FOR A TRAFFIC STOP, EVEN IN A SUPPOSEDLY HIGH-CRIME AREA.

The Fourth Amendment protects persons from unreasonable seizure. U.S. Const. amend. IV. Accordingly, an officer conducting an investigative traffic stop must have "reasonable suspicion that criminal activity may be afoot." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quotation marks omitted). This requires "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). A mere hunch of criminal activity is insufficient. *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *see also Terry v. Ohio*, 392 U.S. 1, 27 (1968).

In this case, Mr. Brown produced credible evidence at the suppression hearing that changing the color of a vehicle is commonplace. Moreover, there is no Iowa law requiring a motorist to report to authorities when she or he changes the color of a vehicle. Additionally, such "discrepancies" might be the result of a clerical error by the department of motor vehicles. Or they might not be discrepancies at all if a vehicle has a paint job that gives the appearance of different colors depending on the light. And the government produced no evidence establishing how frequently color discrepancies are associated with criminal behavior versus innocent behavior (even

in a supposedly high-crime area). Despite that, the Eighth Circuit concluded that a discrepancy between a vehicle's actual color and the color listed on its registration contributes to reasonable suspicion for a traffic stop.

The Eighth Circuit's decision contravenes this Court's precedent. For instance, in *Reid v. Georgia*, 448 U.S. 438 (1980) (*per curiam*), this Court held a DEA agent unlawfully seized the petitioner while investigating drug activity at the Atlanta airport. The government attempted to justify the seizure by arguing that the petitioner had flown from Fort Lauderdale (supposedly then the hub of cocaine distribution in the country) early in the morning and without luggage. *Id.* at 441. This Court rejected this argument, reasoning (without empirical data) that more innocent people than drug couriers fly from Fort Lauderdale in the morning without luggage. As the Court wrote, these 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." *Id.*

United States v. Brignoni-Ponce, 422 U.S. 873 (1975), is also apposite. In that case, the Court held that the Fourth Amendment prohibits law enforcement from stopping a vehicle to investigate a potential immigration crime based solely on the "apparent Mexican ancestry" of its occupants. *Id.* at 885-87. Again, the Court focused the inquiry on proportionality: "Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even

in the border area a relatively small proportion of them are aliens." *Id.* at 886. In other words, the illegal activity of a "small proportion" of people fitting certain characteristics does not give police license to stop all people fitting those characteristics.

If the Eighth Circuit's decision stands, it gives officers license to stop motorists whenever they believe that a vehicle's color does not match its registration, simply because they are driving through an allegedly high-crime area. Yes, the explanation for a color discrepancy *could* be that a vehicle is stolen or that its registration is fraudulent. But the explanation could also be *completely benign*, and traffic stops of such vehicles would often ensnare innocent motorists. The Fourth Amendment, as interpreted by this Court in *Reid* and *Brignoni-Ponce*, requires more.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A SPLIT AMONG THE STATE AND FEDERAL COURTS ON A RECURRING ISSUE.

Whether a color discrepancy provides a lawful basis for a traffic stop has divided state and federal courts.

Several state courts have held that a color discrepancy does not provide a basis for reasonable suspicion. For instance, in *State v. Teamer*, 151 So. 3d 421 (Fla. 2014), the Florida Supreme Court held that a color discrepancy does not lead to reasonable suspicion of criminal activity. The court concluded that a color discrepancy "is not inherently suspicious or unusual enough or so out of the ordinary as to provide an officer with . . . reasonable suspicion." *Id.* at 427-28 (quotation marks omitted). The Arkansas and Montana Supreme Courts (and lower courts in other states) have made

similar decisions. *See Schneider v. State*, 459 S.W.3d 296, 299 (Ark. 2015) (adopting *Teamer*); *City of Billings v. Rodriguez*, 456 P.3d 570, 573 (Mont. 2020); *Commonwealth v. Mason*, No. 1956-09-2, 2010 WL 768721, at *3 (Va. Ct. App. Mar. 9, 2010) (unpublished); *State v. O'Neill*, Nos. 06-S-3456, 06-S-3457, 2007 WL 2227131 (N.H. Super. Ct. Apr. 17, 2007) (unpublished) ("This court will not sanction traffic stops for those citizens who simply decide to paint their cars without some particularized suspicion of criminal wrongdoing such as, for example, the theft and subsequent repainting of a vehicle.").

Other state courts have reached the contrary conclusion, thus showing that a split exists at the state level. *See, e.g.*, *State v. Hawkins*, 140 N.E.3d 577, 582 (Ohio 2019) (concluding, over a dissent, that "when an officer encounters a vehicle the whole of which is painted a different color from the color listed in the vehicle-registration records and the officer believes, based on his experience, that the vehicle or its displayed license plates may be stolen, the officer has a reasonable, articulable suspicion of criminal activity and is authorized to perform an investigative traffic stop"); *Andrews v. State*, 658 S.E.2d 126, 128 (Ga. Ct. App. 2008); *Smith v. State*, 713 N.E.2d 338, 342 (Ind. Ct. App. 1999).

A split also exists at the federal level. On the one hand, *United States v. Uribe*, 709 F.3d 646 (7th Cir. 2013), held that "driving a car of one color with a registration number attached to a car of a different color" does not give rise to reasonable suspicion for a traffic stop. *Id.* at 648. Police had stopped the defendant in Indiana while he

was driving a Utah-registered vehicle. *Id.* In so holding, the court observed that, as in Iowa, "the color discrepancy itself was lawful, because neither Indiana nor Utah requires a driver to update his vehicle registration when he changes the color of his car." *Id.* at 650. The court also rejected the government's argument that the discrepancy provided reasonable suspicion to investigate a violation of an Indiana provision forbidding registration-swapping because the government failed to prove its applicability to a nonresident vehicle. *Id.* at 652-53. Thus, the court held that a registration-related infraction "could not be the criminal activity at the heart of the objective reasonable suspicion analysis." *Id.* at 654.[2]

United States v. Rodgers, 656 F.3d 1023 (9th Cir. 2011), is in line with *Uribe*. In *Rodgers*, law enforcement stopped the defendant's car based on a color discrepancy. The court ultimately reversed the denial of the motion to suppress on another ground, but not before commenting on the issue at hand. The court noted that "color discrepancy and high-crime location, even when considered cumulatively, at best provide a thin basis for reasonable suspicion that the car was stolen." *Id.* at 1027 (calling it an "exceedingly close question").

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[2] The Eighth Circuit attempted to distinguish *Uribe* on the basis that the "color discrepancy was not the sole basis for [the officer's] suspicion." (App. A, p. 5.) But *Uribe* did not suggest that a color discrepancy plus driving through a high-crime area (which are ubiquitous in cities) would suffice for reasonable suspicion. Rather, *Uribe* noted that "[w]here our sister circuits have considered color discrepancies, they have relied on the discrepancy as only one of *several* factors establishing reasonable suspicion." 709 F.3d at 651 (emphasis added).

On the other hand, as the Eighth Circuit noted, "*United States v. Cooper*, 431 F. App'x 399, 402 (6th Cir. 2011) [(unpublished)], upheld a finding of reasonable suspicion based on an officer's testimony about his knowledge and experience with vehicle-related crime and the fact that the vehicle [with a color discrepancy] was spotted in a high-crime area." (App. A, p. 5.) *See also United States v. Caro*, 248 F.3d 1240, 1246-47 (10th Cir. 2001); *United States v. Clarke*, 881 F. Supp. 115, 117 (D. Del. 1995).

Thus, there is a split for this Court to address. This issue is recurring because, as Mr. Brown established, changing the color of a vehicle is commonplace, not all vehicles can be described as being one particular color or another, and sometimes a department of motor vehicles will make a mistake. This Court should grant the writ to weigh in.

CONCLUSION

For these reasons, Mr. Brown respectfully requests that his petition for writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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