No. 23-_____

IN THE SUPREME COURT OF THE UNITED STATES

JACE EMERSON FESLER,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a citizen's noncompliance with an unlawful order from law enforcement create reasonable suspicion to conduct a *Terry* frisk?

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Petitioner Jace Emerson Fesler respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 1, 2023.

JURISDICTION

The District Court for the District of Alaska had original jurisdiction over the criminal offense against the United States under 18 U.S.C. § 3231. Reviewing the judgment under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's conviction in an unpublished disposition on March 1, 2023. *See United States v. Fesler*, __ F. App'x ___, 2023 WL 2301435 (9th Cir. 2023) (App. A). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

U.S. Const. amend. I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IV: 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.

DIRECTLY RELATED PROCEEDINGS

There are no directly related proceedings under Rule 14(b)(iii).

STATEMENT OF THE CASE

A. Background.

In Wasilla, Alaska, a police offer responded to a report of shoplifting at a supermarket. The store had reported that a man stole donuts and then walked to a black Mercedes sedan parked in front of the door. When the officer arrived at the supermarket parking lot, he parked his police cruiser facing a parked black Mercedes.

As he walked toward the car, the officer saw a man standing next to the open passenger-side door eating a donut. Petitioner was sitting in the driver's seat. The

officer said hello to Petitioner using his first name, indicating the officer already knew him. A third man was sitting in the back seat.

As the officer waited for information from dispatch, a supermarket employee walked up. The employee pointed at the passenger and said, "I didn't see this guy do anything." He then pointed toward the driver's side of the car and said, "He stole the donuts." The employee proclaimed they were "trespassed for life" and walked away.

Four minutes after the encounter began, the officer called in the Mercedes' license plate to dispatch. The car was not registered, and the title was under a name not matching Petitioner. A second officer arrived, and the first officer asked him to "keep an eye" on Petitioner while he investigated the passenger. When the first officer returned to the car to talk to Petitioner, he noticed a knife in the car. He took it and placed it on the roof of the car. Petitioner stayed seated in the driver's seat.

The officer addressed Petitioner with a number of accusations. He told Petitioner he was trespassing, he had transported somebody to steal for him, the car had the wrong license plates, the car was not insured, and Petitioner did not have a driver's license. Petitioner claimed to have proper registration and title, but the officers were not convinced. The second officer remarked, "I've had the pleasure of arresting [Petitioner] in the past."

About 17 minutes after the first officer had arrived, the police informed Petitioner they were going to impound the car. They told him to gather his things

and go. The officer repeated, "You gotta go. You gotta gather your things and go." Petitioner calmly agreed and began to gather his belongings inside the car. The two officers stood next to the car as Petitioner collected his possessions. A third officer arrived on the scene and asked if he could help. The second officer then left. The first officer observed Petitioner handle a knife and told the third officer, "Just make sure he puts it away before he gets out of the car."

The two officers walked to the back of the car and opened the trunk. With the trunk up, they had no view of Petitioner. The first officer took Petitioner's backpack from the trunk and brought it back to him. Petitioner said, "I'll just come out and go around." The officer told him to put any knives away in the backpack. The officer said, "I'll let you take care of that, but just make sure, like, it stays wrapped up in the coat, alright?"

Before Petitioner could get out of the car, the officer said, "I'll take the key." Petitioner responded, "No, you can't have the keys to my car." The officer said, "No, that key goes to this car; this car's gettin' impounded." Petitioner answered, "That doesn't mean I have to give you the keys, do it?" Petitioner opened the door and got out of the car. The first officer was still standing next to the trunk and the other officer was standing on the side of the car, a few feet away. The other officer asked, "You're not leaving the key to the car?" Petitioner again refused. Neither officer approached or frisked him as he got out of the car. Outside of the car, Petitioner raised his voice and expressed his displeasure with the officers and the seizure of his car.

About 30 seconds after Petitioner got out, he walked past the first officer toward the rear of the Mercedes. The first officer said, "I want to make sure there are no knives on you, alright?" He grabbed Petitioner by the elbow. Petitioner stated, "I have a firearm on me." The officers took the gun from him and placed him under arrest.

B. District Court Proceedings.

The government charged Petitioner with one count of being a felon in possession of a firearm and ammunition. The district court had jurisdiction over the case under 18 U.S.C. § 3231.

Petitioner moved to suppress the gun and ammunition, arguing that the officers did not have reasonable suspicion to conduct a *Terry* frisk. The district court denied the motion without an evidentiary hearing, adopting the magistrate judge's finding that Petitioner's "understandable" reaction to the seizure of his car and his handling of two knives created reasonable suspicion for the search.

Petitioner waived his right to a jury and the district court convicted him after a stipulated-facts bench trial. Petitioner timely appealed.

C. Appeal to the Ninth Circuit.

On appeal, Petitioner argued that the district court had erred in denying his motion to suppress. Reviewing the judgment under 28 U.S.C. § 1291, the Ninth Circuit affirmed the conviction in an unpublished memorandum. *See* App. A. The panel agreed with Petitioner that he was "calm, compliant, and seated in his vehicle for much of the investigatory stop." *Id*. But they ultimately concluded that

reasonable suspicion existed because the officers knew Petitioner had knives and he "raised his voice and refused to give the officers his keys as they approached him." *Id*. The Court held, "Considering the officers' knowledge of Fesler's knife possession, together with Fesler's demeanor after he exited the vehicle, we hold that the frisk was supported by a reasonable suspicion that he was armed and dangerous." *Id*.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to correct the Ninth Circuit's error in concluding that officers had reasonable suspicion to conduct a *Terry* frisk. *Terry* provides a limited exception to the warrant requirement, requiring reasonable suspicion that a person is armed and dangerous to justify a search for weapons. *See Terry v. Ohio*, 392 U.S. 1 (1968). Here, the Ninth Circuit concluded that Petitioner's failure to obey an unlawful order—that he surrender the keys to his car—created a reasonable suspicion that he posed a danger to police. This conclusion was error. Non-violent refusal to comply with an unlawful order from law enforcement cannot form the basis of reasonable suspicion for a *Terry* frisk

A. Verbal protest against an unlawful police order cannot justify a *Terry* frisk.

The Fourth Amendment requires that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry*, 392 U.S. at 20. In *Terry v. Ohio*, however, the Court announced a "narrowly drawn authority to permit a reasonable [warrantless] search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." 392 U.S. 1, 27 (1968). Under this

rule, an officer may perform a limited frisk when he has reasonable suspicion that the person he is investigating is "armed and presently dangerous to the officer or to others[.]" *Id.* at 24. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

Against this backdrop is the notion that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987). This "reflects the constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint." *Id.* at 471. Together, the First and Fourth Amendments thus protect against a particular, egregious form of police misconduct: a suspicionless search in retaliation against protected speech.

The police, then, may not justify a warrantless search by pointing to a person's angry or even profane reaction to an unlawful order. A person who does not use 'fighting words' or engage in any conduct is not a danger. A contrary rule would pile one harm on top of another; the police would be permitted to unlawfully provoke a citizen with an unlawful order and then search the citizen without a warrant in the face of a reasonable refusal.

B. The Ninth Circuit Erroneously Concluded that Petitioner's Demeanor in Refusing to Comply with an Unlawful Order Gave Rise to Reasonable Suspicion that He Was Dangerous.

The Ninth Circuit's reasoning in affirming the denial of Petitioner's motion to suppress cannot be squared with the First or Fourth Amendment. None of the facts

identified by the court gives rise to a reasonable suspicion of dangerousness. Importantly, the police expressly told Petitioner to handle the knives and get out of the car, so his compliance with those orders hardly showed him to be dangerous. In addition, the police unlawfully ordered him to surrender the keys to his car, so his reasonable refusal did not make him dangerous either. The Ninth Circuit erred in concluding that these circumstances justified a *Terry* frisk.

As the Ninth Circuit conceded, Petitioner was "calm, compliant, and seated in his vehicle for much of the investigatory stop." App. A. The officers were so unconcerned about any danger during those first twenty or so minutes that they specifically told Petitioner to gather his knives and put them away. Certainly, no suspicion of dangerousness arose during this initial period, and the police, accordingly, did not frisk Petitioner. They had ordered him to collect his things and go after deciding not to detain him.

The Ninth Circuit ruled, however, that Petitioner's dangerousness became apparent when he got out of the car. This danger arose from three facts: 1) Petitioner was armed with two knives; 2) he had "enhanced freedom of motion" once outside the car; and 3) he had become "emotional and noncompliant" in response to the request that he surrender his keys. App. A. None of these facts, however, justifies a warrantless search for weapons.

First, Petitioner can't be faulted for holding knives or getting out of the car. The police ordered him to do *both*. They easily could have asked Petitioner to leave the knives in the car and get out, but they did not. Alternatively, they could have

taken the knives and told Petitioner to remain inside the car, but they did not. Instead, they ordered him to collect his knives and exit the car. He calmly complied with those orders. Up to that point, Petitioner was only guilty of doing exactly what he was asked to do.

The supposed danger arose from Petitioner's "demeanor after he exited the vehicle." App. A. The Ninth Circuit panel reasoned that the frisk "ensure[d] officer safety" because Petitioner "raised his voice and refused to give the officers his keys as he approached them." *Id.* But the panel never explains how that conduct translates into dangerousness.

Notably, the panel never asserts that the police had any right to the keys. Not at any point during the litigation in front of the magistrate judge, district judge, or appellate court did the government ever state that the police had the right to seize the keys. Accordingly, Petitioner had every right to get upset, raise his voice, and say "No!" Petitioner was not noncompliant in general; he only refused to comply with that lone, unlawful order. Petitioner did not take off running when told to sit, refuse to show his hands, or refuse to lower a weapon. He simply protested with non-threatening words, "No, you can't have the keys to my car." In fact, the magistrate judge called his reaction "understandable." The response to this sort of protected speech should be "restraint," not a warrantless search. *Hill*, 482 U.S. at 471. The Ninth Circuit erred in ruling otherwise.

This is the rare case in which this Court should grant certiorari based on "misapplication of a properly stated rule of law." S. Ct. R. 10. "[T]he rule excluding

evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry*, 392 U.S. 1, 12 (1968). Were this Court to leave the Ninth Circuit's decision in place, it would go further than condoning Petitioner's conviction based on illegally discovered evidence. It would broadcast to law enforcement that they may frisk people based solely on their exercise of a constitutionally protected right to refuse cooperation with unlawful orders. This Court should not send that message.

CONCLUSION

The Ninth Circuit erred in affirming the denial of Petitioner's motion to suppress. This Court should grant this Petition for a Writ of Certiorari and correct the Ninth Circuit's error.

Respectfully submitted,

Dated: May 30, 2023

s/ Michael Marks

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