

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

**JAMES CALVIN MASSEY,
Petitioner,**

v.

**STATE OF TEXAS ,
Respondent,**

**PETITIONER’S APPLICATION FOR EXTENSION
OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

To: The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court and Circuit Justice for the Fifth Circuit.

Pursuant to Title 28, United States Code, Section 2101(c) and Supreme Court Rule 13.5, Petitioner James Calvin Massey respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for 21 days, to and including Tuesday, August 15, 2023.

Basis for Jurisdiction

This Court has the power to grant or deny this motion under 28 U.S.C. § 2101(c). This Court has jurisdiction to review the Texas Court of Criminal Appeals’ judgment for two reasons: (1) the Texas Court of Criminal Appeals is the highest criminal court in the State of Texas; and (2) this case involves a right claimed under the Fourth Amendment to the United States Constitution. 28 U.S.C. § 1257.

Judgment to be Reviewed and Opinion Below

The Texas Court of Criminal Appeals' opinion is published at *Massey v. State*, 667 S.W.3d 784 (Tex. Crim. App. 2023), reprinted on pages 1a-8a of the appendix. The intermediate court of appeals opinion is published at *Massey v. State*, 649 S.W.3d 500 (Tex. App.—Fort Worth 2022), reprinted on pages 9a-19a of the appendix. The judgment of the district court is reprinted on pages 20a-23a of the appendix.

Reasons for Granting an Extension

The Texas Court of Criminal Appeals delivered its opinion in *Massey v. State* on April 26, 2023. *Massey v. State*, 667 S.W.3d 784 (Tex. Crim. App. 2023). Three years earlier, in February 2020, James Calvin Massey parked his pickup truck in the parking lot of a Fort Worth area convenience store and was about to enter the store when a police officer requested to speak with him. The officer told Mr. Massey that his truck registration was expired and asked to see his driver's license. Mr. Massey complied fully. The officer—purportedly because Mr. Massey was alone, appeared nervous, and was in a high-crime area—then asked Mr. Massey to turn around for a *Terry* frisk. *Id.* at 787. When the officer began to pat down the pocket of Mr. Massey's cargo shorts, Mr. Massey resisted: he withdrew his hand, turned to face the officer, backed away, and moved behind an air pump machine. The officer then tased Mr. Massey and placed him in handcuffs. That's when the officer noticed a small bag of methamphetamine on the ground next to the air pump.

State prosecutors charged Mr. Massey with simple possession of methamphetamine. *Id.* at 786. Mr. Massey entered into a conditional plea agreement, pleading guilty while preserving his right to challenge (and appeal) both the constitutionality of the officer’s *Terry* frisk and the admissibility of the methamphetamine as fruit of the poisonous tree. After holding an evidentiary hearing, the trial court held that while the officer’s initial encounter with Mr. Massey was justified by the expired registration sticker, the officer’s subsequent *Terry* frisk was unlawful because it was not supported by reasonable suspicion. But the court held that the drugs were nonetheless admissible because Mr. Massey’s twin, uncharged offenses of resisting a search and evading arrest purged the taint of the unlawful *Terry* frisk. Accordingly, the court denied Mr. Massey’s motion to suppress the drugs and sentenced him to five years in the state penitentiary. *Id.* at 786-87.

The Fort Worth Court of Appeals reversed. *Massey v. State*, 649 S.W.3d 500, 507-08 (Tex. App.—Fort Worth 2022) (opinion on rehearing). The court applied the *Brown* factors, recently reaffirmed by this Court in *Utah v. Strieff*: temporal proximity; the presence of intervening circumstances; and the purpose and flagrancy of police misconduct. *Id.* at 517. Under the Fort Worth Court of Appeals’ analysis, not all criminal acts—even ones of the suspect’s own free will—qualify as intervening circumstances for purposes of the attenuation doctrine. *Id.* at 517-18. An “extreme act,” such as brandishing a firearm and pointing it at an officer, is certainly intervening. *Id.* at 517. By contrast, a “petty” and “predictable” crime is

not intervening; instead, it is “better viewed as an extended derivation of the illegal police action.” *Id.* at 517-18.

After weighing the degree of Mr. Massey’s uncharged criminal acts—resistance and evasion—and comparing them to prior cases, the Fort Worth Court of Appeals concluded that Mr. Massey’s acts, while criminal, did not constitute intervening circumstances because they were petty and predictable: “neither offense marked a severe departure from the common, if regrettable, range of responses to an unlawful frisk.” *Id.* at 518. Thus, because there were no intervening circumstances, the temporal-proximity factor tipped the outcome toward suppression. *Id.*

The Texas Court of Criminal Appeals granted discretionary review and reversed. *Massey v. State*, 667 S.W.3d 784 (Tex. Crim. App. 2023). The Court sharply rejected the court of appeals’ distinction between intervening “extreme” criminal acts and non-intervening “petty” and “predictable” criminal acts. *Id.* at 792. To the Court of Criminal Appeals, any criminal act—no matter how petty, predictable, or perhaps even provoked—constitutes an intervening circumstance for purposes of the attenuation doctrine. *See id.* Thus, if the purpose or flagrancy of police misconduct were low, as the Court found in *Massey*, then the criminal act will attenuate the connection between an officer’s unconstitutional act (the unjustified *Terry* frisk) and the discovery of new evidence (the methamphetamine) even when temporal proximity weighs heavily in favor of suppression.

In short, this case involves a significant question about the application of the attenuation doctrine. This Court's opinion in *Utah v. Strieff* repeatedly emphasized the importance of the fact that the outstanding warrant was independent of any unconstitutional police activity. *E.g.* 579 U.S. 232, 240-41 (2016). The Texas Court of Criminal Appeals, by contrast, has created a per se rule that any criminal act, no matter how petty or elicited by unconstitutional police activity, is an intervening circumstance. On this matter, *Massey* and *Strieff* are in conflict.

In addition to the importance and complexity of this case, I have just agreed to represent Mr. Massey (pro bono) today: July 18, 2023. That gives me seven days to write and mail his cert petition to this Court by the July 25, 2023 deadline. While I would not normally seek an extension solely on these grounds, I am still awaiting his form demonstrating *in forma pauperis* status, which will likely take around two weeks to arrive given the speed at which mail enters and leaves his facility in Huntsville, Texas.

Thus, based on the importance and complexity of this case, and a logistical need for additional time, Petitioner, by and through counsel, requests a new deadline of August 15, 2023.

Respectfully submitted,

/s/ Brandon Beck
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