No. 17-6887

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IN THE SUPREME COURT OF THE UNITED STATES

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BENJIE EARL WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner's prior conviction for robbery, in violation of Fla. Stat. § 812.13 (1999), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

2. Whether police officers had reasonable suspicion to detain petitioner for further investigation when they found him in the store where the perpetrator of an armed robbery was supposed to be, observed that he closely matched the description of the perpetrator, and had grounds to believe he was lying about why he was in the store.

3. Whether the police officers conducted a permissible frisk for weapons under the Fourth Amendment when they lifted petitioner's shirt no higher than necessary to view his waistband and pat down his back pockets.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-9) is not published in the Federal Reporter but is available at 2017 WL 4679571. The order of the district court (Pet. App. A3) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on October 18, 2017. The petition for a writ of certiorari was filed on November 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Pet. App. A2, at 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1, at 1-9.

1. On June 20, 2015, a man walked into a Miami-Dade police station yelling that he had been robbed at gunpoint at the Yellow Meat Market. D. Ct. Doc. 57, at 5-6, 13 (June 28, 2016). After obtaining a description of the perpetrator, id. at 6, 8, the desk officer issued a be-on-the-lookout (BOLO) over police radio for a heavyset black male in his 30s, wearing black cargo shorts and a white shirt, with tattoos on his forearms and a "lowboy" (or short) haircut, id. at 8. The desk officer also reported that the perpetrator was supposedly still in the store and armed with a firearm. Id. at 8-9.

Two police officers on patrol heard the BOLO over the radio and were dispatched to the Yellow Meat Market. D. Ct. Doc. 57, at 11-13, 20-21. Upon entering, the officers observed petitioner -- a black male in his 30s, wearing dark-colored cargo shorts and a black shirt, with tattoos on his arms and a low haircut -- sitting inside. Id. at 21, 39, 56-57. Observing the similarities between petitioner and the perpetrator described in the BOLO, the officers

approached petitioner and requested his identification, but petitioner did not provide any. Id. at 21-22, 57-58. Instead, petitioner responded that he worked in the store. Id. at 22, 57. The officers found that response suspicious because they had become familiar with the store's employees (from responding to reports of criminal activity there at least once or twice a week) and they had never seen petitioner at the store before. Id. at 22-23, 57.

After noticing that petitioner kept moving his left hand toward or in his left pocket, the officers asked petitioner to stand up. D. Ct. Doc. 57, at 23-24, 47. With one officer on each side of petitioner, the officers put their hands on him and guided him to a standing position. Id. at 47, 49. The officers asked petitioner if he had any firearms, and petitioner responded in the negative. Id. at 24. One of the officers slightly lifted the back of petitioner's shirt and patted him down for weapons. Id. at 24, 34, 49-52. During the pat-down, the officer called out "55," which is code for the presence of a gun. Id. at 24, 34. At that point, the officers attempted to take petitioner into custody, but petitioner resisted. Gov't C.A. Br. 5-6. After a struggle, the officers recovered a firearm from petitioner's rear pocket and placed him in handcuffs. Id. at 6.

2. A federal grand jury in the Southern District of Florida indicted petitioner on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1.

Petitioner filed a pretrial motion to suppress the firearm. D. Ct. Doc. 20, at 5-8 (Jan. 14, 2016). Petitioner argued that the officers' actions were not permissible under Terry v. Ohio, 392 U.S. 1 (1968), because they lacked reasonable suspicion to detain him and conducted an impermissible frisk. D. Ct. Doc. 20, at 8.

Following an evidentiary hearing, the district court denied petitioner's motion. Pet. App. A3. The court determined that the "initial stop" of petitioner was "appropriate." D. Ct. Doc. 59, at 2 (June 29, 2016). The court also determined that the officers' conduct following that initial stop "comported with the strictures of Terry." Id. at 3 (underlining added). Petitioner pleaded guilty, reserving his right to appeal the Fourth Amendment ruling. D. Ct. Doc. 31, at 1-2 (Mar. 2, 2016); Gov't C.A. Br. 1 & n.1.

3. A conviction for violating Section 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Johnson v. United States, 559 U.S. 133 (2010), this Court defined "physical force" under the ACCA's elements clause to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140.

The Probation Office classified petitioner as an armed career criminal under the ACCA based on two prior drug-trafficking convictions; a 2002 conviction for robbery, in violation of Fla. Stat. § 812.13(2)(c) (1999); and a 2002 conviction for felony battery, in violation of Fla. Stat. § 784.041 (1999). Presentence Investigation Report (PSR) ¶¶ 24, 31, 37, 39; Supp. C.A. App. 37. The latter two offenses were committed on the same occasion. PSR ¶ 31.

Petitioner objected to his classification as an armed career criminal. D. Ct. Doc. 37, at 3-8 (Apr. 15, 2016). He argued, inter alia, that his Florida robbery conviction did not qualify as a "violent felony" under the ACCA's elements clause because Section 812.13 "does not require 'violent force' against a person." Id.

at 8; see D. Ct. Doc. 41, at 2-5 (May 15, 2016). The district court overruled petitioner's objections and imposed a sentence of 180 months of imprisonment. Sent. Tr. 9-10.

4. The court of appeals affirmed. Pet. App. A1, at 1-9.

Relying on circuit precedent, the court of appeals determined that petitioner's Florida robbery conviction qualified as a violent felony under the ACCA's elements clause. Pet. App. A1, at 8 (citing United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017)). The court also noted that petitioner did "not dispute [that] he has two previous convictions for a serious drug offense that qualify as predicate offenses under the ACCA." Id. at 8 n.4. The court reasoned that because petitioner's Florida robbery conviction qualified as a third predicate offense, it had no need to address whether his conviction for felony battery qualified as a violent felony as well. Id. at 9 n.5. The court thus upheld petitioner's classification as an armed career criminal under the ACCA. Id. at 9.

The court of appeals also upheld the denial of petitioner's motion to suppress. Pet. App. A1, at 2-6. The court determined that the officers had reasonable suspicion to detain petitioner. Id. at 3-5. The court explained that the officers reasonably believed that petitioner matched the description of the armed robber because he "was black, appeared to be in his 30s, had on dark colored cargo shorts, had tattoos, had a lowboy haircut, and

was in the Yellow Meat Market." Id. at 4. The court acknowledged that there were "[o]ther facts" -- such as that petitioner "was wearing a black shirt and not a white shirt" -- that "indicated he might not be the suspect." Id. at 4 n.2. But the court noted that one of the officers had testified that, "based on his experience, he knew descriptions of suspects can be incorrect because suspects change or discard clothing." Id. at 4. The court also noted the officer's belief, based on "frequent visits to the Yellow Meat Market," that petitioner "lied" when he said that he worked there. Ibid. "Based on the totality of the circumstances, including the suspect's description and the officers' familiarity with the Yellow Meat Market," the court determined that "the officers had enough articulable facts amounting to reasonable suspicion and were justified in conducting a brief, investigatory stop." Id. at 5.

The court of appeals also determined that the officers conducted a permissible frisk for weapons under Terry. Pet. App. A1, at 5. The court reasoned that "because the officers had reasonable suspicion to believe [petitioner] matched the description of the armed robber, the officers had reasonable suspicion to believe he was armed and dangerous." Ibid. Thus, the court explained, "the officers were entitled, for their protection, to conduct a carefully limited search of the outer clothing of [petitioner] in an attempt to discover weapons." Ibid. The court determined that the search the officers conducted --

namely, "rais[ing] the back of [petitioner]'s long, baggy shirt no higher than necessary to view his waistband and pat down his back pockets" -- fell "within the boundary of Terry because the intrusion was designed to discover a gun when the officers reasonably believed that [petitioner] had a gun." Ibid.

ARGUMENT

Petitioner contends (Pet. 9-14) that his prior conviction for Florida robbery, in violation of Fla. Stat. § 812.13 (1999), does not qualify as a "violent felony" under the ACCA's elements clause. He also contends (Pet. 14-22) that the police officers violated his Fourth Amendment rights when they detained and frisked him. Those contentions do not warrant further review. The court of appeals correctly determined that Florida robbery is a violent felony. Although a shallow circuit conflict exists on the issue, that conflict does not warrant this Court's review because the issue is fundamentally premised on the interpretation of a specific state law and lacks broad legal importance. In any event, this case would be a poor vehicle for further review because petitioner would have three predicate ACCA convictions even if his Florida robbery conviction does not qualify as a violent felony. The court of appeals' determination that petitioner was lawfully detained and frisked is also correct, and it does not conflict with any

decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.[1]

1. The court of appeals determined that Florida robbery, in violation of Fla. Stat. § 812.13 (1999), qualifies as a "violent felony" under the ACCA's elements clause, which encompasses "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). That determination was correct and does not warrant further review.

a. Florida's robbery statute provides in relevant part that robbery is "the taking of money or other property * * * from the person or custody of another" through "the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1999). Under the putting-in-fear prong, "the fear contemplated by the statute is the fear of death or great bodily harm." United States

[1] Other pending petitions for writs of certiorari also present the question whether Florida robbery is a violent felony under the ACCA's elements clause. See, e.g., Stokeling v. United States, No. 17-5554 (filed Aug. 4, 2017); Conde v. United States, No. 17-5772 (filed Aug. 24, 2017); Williams v. United States, No. 17-6026 (filed Sept. 14, 2017); Everette v. United States, No. 17-6054 (filed Sept. 18, 2017); Jones v. United States, No. 17-6140 (filed Sept. 25, 2017); James v. United States, No. 17-6271 (filed Oct. 3, 2017); Middleton v. United States, No. 17-6276 (filed Oct. 3, 2017); Reeves v. United States, No. 17-6357 (filed Oct. 3, 2017); Rivera v. United States, No. 17-6374 (filed Oct. 12, 2017); Orr v. United States, No. 17-6577 (filed Oct. 26, 2017); Mays v. United States, No. 17-6664 (filed Nov. 2, 2017); Hardy v. United States, No. 17-6829 (filed Nov. 9, 2017).

v. Lockley, 632 F.3d 1238, 1242 (11th Cir.) (brackets omitted) (quoting Magnotti v. State, 842 So. 2d 963, 965 (Fla. Dist. Ct. App. 2003)), cert. denied, 565 U.S. 885 (2011). Thus, "robbery under th[e] statute requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm." Id. at 1245.

In Robinson v. State, 692 So. 2d 883 (1997), the Florida Supreme Court addressed "whether the snatching of property by no more force than is necessary to remove the property from a person who does not resist" satisfies the "force or violence element required by Florida's robbery statute." Id. at 884-885. The court surveyed Florida cases -- including McCloud v. State, 335 So. 2d 257 (Fla. 1976), Montsdoca v. State, 93 So. 157 (Fla. 1922), and various other appellate decisions dating back to 1903, see, e.g., Colby v. State, 35 So. 189 (Fla. 1903) -- and confirmed that "the perpetrator must employ more than the force necessary to remove the property from the person." Robinson, 692 So. 2d at 886. Rather, there must be both "resistance by the victim" and "physical force [by] the offender" that overcomes that resistance. Ibid.; see also id. at 887 ("Florida courts have consistently recognized that in snatching situations, the element of force as defined herein distinguishes the offenses of theft and robbery.").

Under Johnson v. United States, 559 U.S. 133 (2010), "physical force" for purposes of the ACCA's elements clause requires "violent

force -- that is, force capable of causing physical pain or injury to another person." Id. at 140. Such force might "consist * * * of only that degree of force necessary to inflict pain," such as "a slap in the face." Id. at 143. The degree of force required under Florida's robbery statute -- "physical force" necessary to "overcome" "resistance by the victim," Robinson, 692 So. 2d at 886 -- satisfies that standard. Force sufficient to prevail in a physical contest for possession of the stolen item is necessarily force "capable" of "inflict[ing] pain" equivalent to "a slap in the face," Johnson, 559 U.S. at 140, 143; Florida robbery could not occur through "mere unwanted touching," id. at 142. The court of appeals thus correctly determined that Florida robbery is a violent felony under the ACCA's elements clause. Pet. App. A1, at 8.

b. Petitioner argues (Pet. 11, 13-14) that Montsdoca, supra, and Mims v. State, 342 So. 2d 116 (Fla. Dist. Ct. App. 1977) (per curiam), demonstrate that Florida robbery may involve no more than de minimis force. But those cases do not establish that Florida robbery may involve a degree of force less than the "physical force" required by the ACCA's elements clause.

In Montsdoca, the Florida Supreme Court stated that "[t]he degree of force used is immaterial," but only if "such force * * * is actually sufficient to overcome the victim's resistance." 93 So. at 159. Montsdoca involved the "violent or forceful taking" of an automobile, whereby the defendants, under a false pretense

of official authority, "grabbed" the victim "by both shoulders," "shook him," "ordered him to get out of the car," and demanded his money "under the fear of bodily injury if he refused." Ibid. Montsdoca thus involved a degree of force greater than de minimis.

In Mims, the defendant "forced" the victim "into a car" and drove her "to a deserted area" where the defendant "grabbed" the victim's pocketbook. 342 So. 2d at 117. When the victim "resist[ed]," the defendant "beat[]" her and "pushed [her] out of the car." Ibid. The force employed by the defendant in Mims was plainly "capable of causing physical pain or injury to another person" and would thus qualify as "physical force" under the ACCA's elements clause. Johnson, 559 U.S. at 140.

c. Petitioner does not suggest that the decision below implicates any broad or methodological conflict in the court of appeals. Although a shallow conflict exists between the Ninth and Eleventh Circuits on the specific question whether Florida robbery in violation of Section 812.13 qualifies as a "violent felony" under the ACCA's elements clause, that conflict does not warrant this Court's review.

In United States v. Geozos, 870 F.3d 890 (2017), the Ninth Circuit determined that Florida robbery is not a "violent felony." Id. at 901. The Ninth Circuit acknowledged that under Robinson, "there must be resistance by the victim that is overcome by the physical force of the offender." Id. at 900 (quoting Robinson, 692 So. 2d at 886). But the Ninth Circuit read the Florida cases

to mean that "the Florida robbery statute proscribes the taking of property even when the force used to take that property is minimal." Id. at 901. The Ninth Circuit recognized that its decision "put[] [it] at odds with the Eleventh Circuit," but it believed that the Eleventh Circuit had "overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." Ibid.

The shallow conflict does not warrant this Court's review. This Court has repeatedly denied petitions for writs of certiorari that raised the same issue of whether Florida robbery is a "violent felony." See United States v. Bostick, 675 Fed. Appx. 948 (11th Cir.) (per curiam), cert. denied, 137 S. Ct. 2272 (2017); United States v. McCloud, No. 16-15855 (11th Cir. Dec. 22, 2016), cert. denied, 137 S. Ct. 2296 (2017); United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017); United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017); United States v. Durham, 659 Fed. Appx. 990 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2264 (2017). Notwithstanding the narrow conflict created by the Ninth Circuit's recent decision in Geozos, supra, the same result is warranted here.

Although the issue of whether Florida robbery is a "violent felony" arises under the ACCA, it is fundamentally premised on the interpretation of a specific state law. The Ninth and the Eleventh Circuits may disagree about the degree of force required to support

a robbery conviction under Florida law, but as petitioner's discussion of state-court decisions demonstrates (Pet. 12-14), that state-law issue turns on "Florida caselaw" (Pet. 12). As such, the issue does not warrant this Court's review. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) ("Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located."), abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

The question whether Florida robbery is a "violent felony" also does not present an issue of broad legal importance. The issue arises only with respect to defendants with prior convictions for Florida robbery. Accordingly, the issue is unlikely to recur with great frequency in the Ninth Circuit, which sits on the other side of the country. Should that prove to be incorrect, there will be ample opportunity for the government to seek further review in that circuit or in this Court. At this time, however, the issue is not of sufficient recurring importance in the Ninth Circuit to warrant this Court's review.

d. In any event, this case would be a poor vehicle for further review because this Court's resolution of the question presented would not affect petitioner's classification as an armed career criminal. Even if his prior conviction for Florida robbery were not a conviction for a violent felony under the ACCA's elements clause, petitioner would still have three predicate ACCA

convictions. Petitioner "does not dispute [that] he has two previous convictions for a serious drug offense that qualify as predicate offenses under the ACCA." Pet. App. A1, at 8 n.4; see PSR ¶¶ 24, 37, 39. And under circuit precedent -- which petitioner does not challenge -- his prior conviction for felony battery, in violation of Fla. Stat. § 784.041 (1999), qualifies as a violent felony under the ACCA's elements clause. See United States v. Vail-Bailon, 868 F.3d 1293, 1298 n.8, 1308 (11th Cir. 2017) (en banc) (holding that a conviction for felony battery in violation of Section 784.041 "qualifies as a crime of violence under the elements clause" of Sentencing Guidelines § 2L1.2 and noting that "[t]he elements clause of the ACCA is identical" to that of Section 2L1.2), petition for cert. pending, No. 17-7151 (filed Dec. 20, 2017); PSR ¶¶ 24, 31; Supp. C.A. App. 37.[2] Thus, regardless of this Court's resolution of the question presented, petitioner would still have three predicate ACCA convictions and be subject to sentencing under the ACCA.

2. Petitioner's contention (Pet. 14-18) that the officers lacked reasonable suspicion to detain him does not warrant further review.

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[2] Although petitioner asserts (Pet. 9) in a section heading that Florida felony battery is not a violent felony under the ACCA, that assertion is outside the questions presented (Pet. i); he presents no argument in support of it; and it does not warrant this Court's review.

The Fourth Amendment allows police officers to stop and briefly detain a suspect for investigation if they have reasonable suspicion that criminal activity is afoot. See, e.g., Navarette v. California, 134 S. Ct. 1683, 1687 (2014); Terry v. Ohio, 392 U.S. 1, 21-22, 30 (1968). Reasonable suspicion requires more than a hunch, but it does not require proof by a preponderance of the evidence or even probable cause, and it does not require ruling out the possibility of innocent conduct. See Navarette, 134 S. Ct. at 1687; United States v. Arvizu, 534 U.S. 266, 273-274 (2002); United States v. Sokolow, 490 U.S. 1, 10 (1989). The reasonable-suspicion standard "takes into account 'the totality of the circumstances -- the whole picture.'" Navarette, 134 S. Ct. at 1687 (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

Applying those principles, the court of appeals correctly determined that the officers had reasonable suspicion to detain petitioner for further inquiry. Pet. App. A1, at 5. The victim of the armed robbery had described the perpetrator as a heavyset black male in his 30s, wearing black cargo shorts and a white shirt, with tattoos on his forearms and a short haircut. D. Ct. Doc. 57, at 8. The victim also believed that the perpetrator was still inside the Yellow Meat Market. Ibid. When the officers entered the store, they were permitted to rely on the victim's description of the perpetrator. See United States v. Hensley, 469 U.S. 221, 232 (1985) ("[I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion

that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification."). And when the officers observed that petitioner closely matched that description, see D. Ct. Doc. 57, at 21, 39, 56-57, they had a "particularized and objective basis" for suspecting that petitioner had committed the robbery, Arvizu, 534 U.S. at 273 (citation omitted). The officers had additional reason to be suspicious when, in response to a request for identification, petitioner told them that he worked at the store; the officers -- who were familiar with the people who worked there -- did not recognize him as an employee. D. Ct. Doc. 57, at 22-23, 57. Given the "totality of the circumstances, including the suspect's description and the officers' familiarity with the Yellow Meat Market," the court correctly determined that the officers had "reasonable suspicion" to justify a "brief, investigatory stop." Pet. App. A1, at 5.

While acknowledging (Pet. 18) that he matched the BOLO's description of a black male in his 30s with a low haircut and tattoos on his forearms, petitioner contends (Pet. 16-17) that he was wearing "camouflage" (rather than black) cargo shorts and a black (rather than white) shirt. But the cargo shorts that he was wearing had black markings on the side. D. Ct. Doc. 57, at 86. And as the court of appeals noted, the officer who had initially approached petitioner in the store testified, "based on his experience," that suspects may "change or discard clothing." Pet.

App. A1, at 4. Given that petitioner matched the BOLO description in nearly all other respects, it was reasonable for the officers to suspect that petitioner could be the perpetrator.

Petitioner also contends (Pet. 18) that there were "other black males present in the store" who matched the BOLO description. But whether the officers would have had grounds to detain other people is not relevant to whether they had a sufficient basis to detain petitioner. See Arvizu, 534 U.S. at 273. In any event, the other people in the store did not match the BOLO description as well as petitioner did. Petitioner points (Pet. 15), for example, to "a black male playing video games" with "a white T-Shirt." But that person appeared to be in his "[h]igh 40s, 50s," D. Ct. Doc. 57, at 42; was not wearing cargo shorts, see D. Ct. Doc. 63, at 0:15-2:18 (Oct. 4, 2016); and was wearing a cap, see ibid. Moreover, the officer who had initially approached petitioner testified that he had recognized some of the other males in the store to be employees. D. Ct. Doc. 57, at 22-23, 43, 56-57. That same officer testified, however, that he had never before seen petitioner in the store, even though petitioner had stated that he worked there. Id. at 23, 57. The court of appeals' fact-bound determination, based on the totality of the circumstances, that the officers had reasonable suspicion to detain petitioner for further investigation does not conflict with any decision of

this Court or another court of appeals. Further review is not warranted.[3]

3. Petitioner's contention (Pet. 19) that the officers conducted an impermissible frisk under the Fourth Amendment likewise does not warrant further review.

In Terry, the Court held that, once a lawful stop has occurred, the police may "for the protection of the police officer" frisk the suspect for "weapons," when the officer "has reason to believe that he is dealing with an armed and dangerous individual." 392 U.S. at 27. "The officer need not be absolutely certain that the individual is armed; the 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." Ibid.

The court of appeals correctly determined that the officers had reason to believe that petitioner was "armed and dangerous." Pet. App. A1, at 5. As explained above, the officers had reasonable suspicion that petitioner had committed an armed robbery. See pp. 16-19, supra. And the BOLO -- on which the officers were permitted to rely -- stated that the perpetrator

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[3] To the extent that petitioner contends (Pet. 16) that he was seized immediately when the officers approached him in the store, that contention is mistaken. The initial questioning and request for identification were not a seizure. See United States v. Drayton, 536 U.S. 194, 201 (2002). Petitioner was not seized until the officers physically guided him to a standing position. D. Ct. Doc. 57, at 47, 49. The seizure thus occurred after petitioner told the officers that he worked in the store, which they regarded as additionally suspicious. Id. at 22-23, 57.

supposedly still had "a small black 40 caliber semiautomatic on him." D. Ct. Doc. 57, at 9. Under Terry, the officers were thus entitled, for their own protection, to frisk petitioner for weapons. 392 U.S. at 27.

Contrary to petitioner's contention (Pet. 19), the officers' actions did not exceed the scope of a permissible frisk. Petitioner contends (Pet. 21) that the officers "lifted his shirt and went through his pockets." But the officers did not go into petitioner's pockets; rather, they patted down the outer surface of his pockets, D. Ct. Doc. 57, at 24, 51-52, 59, which Terry permitted them to do, 392 U.S. at 30. Moreover, as the court of appeals found, the officers "raised the back of [petitioner]'s long, baggy shirt no higher than necessary to view his waistband and pat down his back pockets." Pet. App. A1, at 5. Because that search was "confined in scope to an intrusion reasonably designed to discover guns" or other weapons, it fell within the bounds established by Terry. 392 U.S. at 29.

Petitioner's reliance (Pet. 20-21) on Florida v. Royer, 460 U.S. 491 (1983), and United States v. Hanson, No. 5-cr-106, 2005 WL 2716506 (W.D. Wis. Oct. 20, 2005), is misplaced. The question presented in Royer was whether the defendant was being illegally detained when he consented to a search of his luggage, 460 U.S. at 493, 501 (plurality opinion); the Court did not address the permissible bounds of a frisk for weapons under Terry. A frisk for weapons was likewise not at issue in Hanson. Rather, the

officers in that case lifted the defendant's shirt to look for identifying tattoos, exposing his bare chest to view. Hanson, 2005 WL 2716506, at *7, *9. The magistrate judge -- whose report and recommendation the district court adopted, Order at 1, Hanson, supra (Nov. 1, 2005) -- determined that there were "less intrusive" ways of verifying the defendant's identity. Hanson, 2005 WL 2716506, at *9. This case, by contrast, involves an intrusion limited to checking for weapons, and the officers lifted petitioner's shirt "no higher than necessary to view his waistband and pat down his back pockets." Pet. App. A1, at 5. The court of appeals' fact-bound determination that the scope of the frisk was permissible under the Fourth Amendment does not conflict with any decision of this Court or another court of appeals.

In any event, this case would be a poor vehicle for addressing the permissible scope of a frisk under Terry. The officers discovered petitioner's firearm when they patted down the outside of his pockets, not when they lifted his shirt. D. Ct. Doc. 57, at 24; Gov't C.A. Br. 17. And it is uncontested that such a pat-down is permissible under Terry when officers have reason to believe that a suspect they have lawfully detained is armed and dangerous. See Pet. 21; Terry, 392 U.S. at 29-30. Thus, even if the officers exceeded the scope of a permissible frisk when they lifted petitioner's shirt, that intrusion had no causal connection to the discovery of the firearm. Regardless of the resolution of the question presented, there would be no grounds for suppressing

the firearm as fruit of a poisonous tree. See Hudson v. Michigan, 547 U.S. 586, 592 (2006) (explaining that "but-for causality" is a "necessary * * * condition for suppression").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2018