No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAONTE HAIRSTON, PETITIONER
v.
THE STATE OF OHIO, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI
VOLUME I

Louis E. Grube, Esq.
Counsel of Record
Paul W. Flowers, Esq.
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower
50 Public Square
Suite 1910
Cleveland, Ohio 44113
(216) 344-9393
leg@pwfco.com

Yeura Venters, Esq.
FRANKLIN COUNTY PUBLIC DEFENDER

Timothy E. Pierce, Esq.
Zach D. Mayo, Esq.
Assistant Franklin
County Public Defenders

Attorneys for Petitioner

QUESTIONS PRESENTED

This dispute turns on the proper interpretation of the Fourth Amendment to the United States Constitution. In a jurisdiction where citizens are entitled by law to fire weapons on their property, a divided Ohio Supreme Court has held that law enforcement officers may act on a "hunch" and conduct a *Terry* stop of any individual found within the general vicinity of where a single gunshot was heard. The Ohio Supreme Court's opinion raises three questions for this Court's review:

1. Whether facts that do not individually show or permit an inference of a connection between a person and a crime that had been committed nearby may, in the aggregate, provide a police officer with reasonable suspicion justifying a limited stop and search of that person.
2. Whether at the time of the founding of our nation, it would have been considered reasonable to stop one among a number of persons present near the scene of a suspected crime and conduct even a limited search without any indication of who had committed the crime.
3. Whether the foundational requirement of reasonableness within the Fourth Amendment to the United States Constitution requires an assessment of whether society views as reasonable the manner in which a police officer conducts a limited stop and search.

PARTIES TO THE PROCEEDING

Petitioner is Jaonte Hairston, a citizen of the United States of America. Respondents are the State of Ohio, the Fraternal Order of Police, Capital City Lodge No. 9, the Ohio Public Defender, the Ohio Chapter of the National Lawyers Guild, the Ohio Justice and Policy Center, the Hamilton County Public Defender, the Montgomery County Public Defender, the Juvenile Justice Coalition, and Friedman & Gilbert, L.L.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Other Authorities

OPINIONS BELOW

The opinion of the Ohio Supreme Court in docket number 2017-1505 is published, and it was issued on May 2, 2019. *State v. Hairston*, __ Ohio St.3d __, 2019-Ohio-1622, __ N.E.3d __, 2019 WL 1940350. The opinion of the Ohio Court of Appeals for the Tenth Judicial District in docket number 16AP-294 is published, and it was issued on September 14, 2017. *State v. Hairston*, 2017-Ohio-7612, 97 N.E.3d 784, 2017 WL 4074578. The order of the Ohio Court of Common Pleas for Franklin County in docket number 15CR-07-3377 is not published, and it was issued from the bench on February 8, 2016.

STATEMENT OF JURISDICTION

This Court's jurisdiction is drawn from 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY AUTHORITY INVOLVED

The Fourth Amendment to the United States Constitution states:

> 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.

Ohio Revised Code § 2923.12(A) states:

> (A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:
>
> (1) A deadly weapon other than a handgun;
>
> (2) A handgun other than a dangerous ordnance;
>
> (3) A dangerous ordnance.

STATEMENT OF THE CASE

1. At approximately 9:00 p.m. on March 29, 2015, Officer Samuel Moore and his partner responded to a domestic dispute on Falcon Bridge Drive in the southeast region of Columbus, Ohio. *R. 59, Transcript of Proceedings, filed May 31, 2016 ("R. 59, Tr."), pp. 5-7; R. 58, State's Exhibits A1 and A2.* Officer Moore had worked the same patrol zone on that side of the city for the prior six years. *R. 59, Tr., pp. 4-5.* Two of the schools in his patrol zone, Independence High School and Liberty Middle School, were located directly to the west of Falcon Bridge Drive. *R. 59, Tr., pp. 6-7; R. 58, State's Exhibit A1.* Officer Moore relayed that the police department had received a "lot of complaints from the school" regarding drug activity and thefts from vehicles in the parking lot after hours. *R. 59, Tr., p. 8.* He also described his experience with "gun arrests," assaults, robberies, and calls for domestic violence in the area around Falcon Bridge Road. *Id., pp. 8-9, 30.* Officer Moore had been called on a prior occasion to respond to reports of discharged weapons in open fields one "quarter to a half mile" further away from Independence High School. *Id., pp. 17-18.* But Officer Moore had never arrested anyone in that area for discharging a weapon—just "other arrests of a violent nature." *Id., p. 32.* Officer Moore agreed that the area was densely residential with "a lot of houses" and "a lot of people that live there in all those houses." *Id., p. 23.*

After the officers exited their vehicle on Falcon Bridge Drive, they heard four or five gunshots coming from the west in the direction of the elementary

school. *R. 59, Tr., pp. 7, 20.* The officers believed the shots were "close by" because they did not sound "faint," and Officer Moore made a "guesstimate" that the shots were fired near the school. *Id., pp. 16, 31.* They immediately re-entered the vehicle. *Id., p. 20.* Moore reported the gun shots over the radio while his partner drove them south on Falcon Bridge Drive. *Id., p. 20.* They took a slight right and continued southward on Paladim Road, which wound to the west and eventually came to a dead end at Whitlow Road. *Id., pp. 20-21.* Their route took them four tenths of one mile to the southwest from where they began on Falcon Bridge Drive. *Id., p. 29; R. 58, State's Exhibit A1.* Officer Moore believed that this drive took "no more than 30, 60 seconds." *R. 59, Tr., p. 16.*

As the officers approached the intersection of Paladim and Whitlow in their cruiser, they saw a young man walking eastward away from the school in a cross-walk while having a conversation on his cellular telephone. *R. 59, Tr., pp. 9-10, 22-24.* Officer Moore agreed that he "just had a hunch" that the four or five gunshots had been discharged by this young man because they had found him, and only him, "in the general vicinity where these gunshots were fired." *Id., p. 19.*

The uniformed officers stopped their marked cruiser before they entered the intersection, they leapt out, and both immediately drew their weapons. *R. 59, Tr., pp. 18, 22-24.* The young man was ordered to stop and show his hands. *Id., p. 24; R. 58, Police Report, p. A14.* He was "compliant" with the orders given by the officer. *R. 59, Tr., p. 17.* After Officer Moore was sure that his partner had the young man covered with his weapon, he felt that he was able to

approach. *Id., pp. 17, 24.* This individual was the first and only person the officers found in the area. *Id., pp. 9, 11, 15, 30-31.* Officer Moore did not recall seeing any other people or vehicles in the area. *Id.* But he admitted that it was dark out. *Id., pp. 15, 30.*

Petitioner Jaonte Hairston was the young man that the officers found in the cross-walk having a conversation on his telephone. *R. 59, Tr., p. 10.* He appeared to be a little nervous after he was stopped, which Officer Moore agreed was likely the result of having two weapons pointed at him. *Id., pp. 17, 32-33.* "I don't blame him if he is nervous for that," stated Officer Moore. *Id., p. 33.*

Officer Moore asked Petitioner Hairston whether he had heard the gunshots. *R. 59, Tr., p. 9.* The young man replied that he had and that the sound of gunfire had come from further to the west. *Id., pp. 9, 11.* Officer Moore instructed the Petitioner to place his hands behind his back so that the officer could pat him down. *Id., pp. 9-11, 25; R. 58, Police Report, p. A14.* The young man was asked if he had any weapons on him, he stated that he did, and he nodded toward his jacket pocket. *Id.* Officer Moore first placed the Petitioner in handcuffs and then recovered from his pocket an operable Browning model 1955, .380 caliber, semiautomatic pistol loaded with two live rounds. *R. 59, Tr., pp. 11-13; R. 58, State's Exhibits B1-4 and C, pp. A5-A10.* The firearm was not warm in the way it would have been had it been fired very recently. *R. 59, Tr., p. 26.* Officer Moore wrote in his police report that Petitioner Hairston was arrested at approximately 9:20 p.m. *Id., p. 28; R. 58, Police Report, p. A12-A14.*

2. Petitioner Hairston was charged by indictment filed in the Ohio Court of Common Pleas for Franklin County with a single count of carrying a concealed weapon in violation of Ohio Revised Code § 2923.12(A), a fourth-degree felony. *R. 3, Indictment, filed July 10, 2015.* He initially entered a plea of not guilty. *R. 7, Plea of Not Guilty, filed July 24, 2015.* Thereafter he filed a motion to suppress statements and physical evidence acquired from him and his person on the evening of March 29, 2015. *R. 30, Motion to Suppress Evidence and Statements, filed December 22, 2015 ("Motion").* The motion generally alleged that the Petitioner had been illegally stopped and searched and his property had been illegally seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections Ten and Fourteen of the Ohio Constitution. *R. 30, Motion, p. 1.* Respondent, the State of Ohio, opposed the Motion on the theory that Officer Moore and his partner had developed reasonable suspicion sufficient to justify the stop and seizure consistent with this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), and other related decisions. *R. 31, State's Memorandum Contra Defendant's Motion to Suppress Evidence, p. 4-5.* The Franklin County Court of Common Pleas held a hearing on the Motion on February 8, 2016. *R. 59, Tr., pp. 1-45.*

Petitioner Hairston's Motion was denied from the bench at the end of the motion hearing. *R. 59, Tr., p. 43-44.* The trial court explained its ruling:

> [H]ere they personally heard [the gunshots] and went in that direction, and the officer said it only took them a minute or so to get there.

> And you asked him if he had a hunch, and he said yeah. Well, he did have a hunch, but that doesn't necessarily mean that he didn't have a little more than a hunch when he only saw one person in the area and didn't see any other cars. All he has to have is a reasonable suspicion to question the suspect, and that's what he did, and that led to the discovery of the firearm.
>
> So I think it's a close call because, you know, what's a reasonable suspicion probably varies from one individual to the next. But with all the facts that were testified to by the officer, I think they had enough to do a Terry stop. So I'll deny the motion. And I guess we need to set a date.

Id., p. 44. Petitioner Hairston entered a plea of no contest in the wake of this ruling, thereby preserving his right to appeal the order denying his Motion. *R. 44, Entry of No Contest Plea, filed March 17, 2016; R. 59, Tr., p. 46-49.* He was sentenced to a suspended term of six months in prison with credit for three days spent in jail, and he was ordered to serve "probation for one year" with conditions requiring "that [he] maintain employment and have no new offenses." *R. 59, Tr., p. 51-52; R. 51, Judgement Entry, filed March 22, 2016.*

3. Petitioner Hairston timely filed a notice of appeal from his conviction and sentence. *R. 54, Notice of Appeal, filed April 18, 2016.* He asked the Ohio Court of Appeals for the Tenth Judicial District to reverse the order denying his Motion solely on the

basis that his stop, search, and seizure of his property had violated the Fourth Amendment to the United States Constitution. *Appeal R. 15, Brief of Appellant, filed June 30, 2016, pp. 4-34.* Respondent, the State of Ohio, opposed the Petitioner's request for reversal, arguing again that Officer Moore and his partner had developed reasonable suspicion sufficient to justify the stop and seizure of Petition Hairston consistent with this Court's decision in *Terry*, and other related decisions. *Appeal R. 16, Brief of Plaintiff-Appellee, filed July 11, 2016, pp. 2-22.* The Tenth District Court of Appeals reversed, ruling that no reasonable suspicion existed, as "required under *Terry*," to justify the stop and search of Petitioner Hairston or the seizure of his property. *State v. Hairston*, 2017-Ohio-7612, 97 N.E.3d 784, ¶ 13 (10th Dist.). The Tenth District's decision explained that the "general fact" that "someone, somewhere, had shot a gun" together with the other facts known by Officer Moore and his partner did not provide a "particularized connection" between the gunshots and Petitioner Hairston. *Id.* at ¶ 13.

4. Respondent, the State of Ohio, sought discretionary review, and the Ohio Supreme Court accepted jurisdiction in order to consider a single proposition of law:

> When officers are responding to very recent gunfire in an area known for criminal activity, it is reasonable for the officers to have their weapons drawn and to briefly detain the only individual seen in the area.

Memorandum of Plaintiff-Appellant in Support of Jurisdiction, filed October 26, 2017, p. 4; Entry, filed March 14, 2018, Ohio Supreme Court No. 2017-1505. After briefing and argument, the Ohio Supreme Court found "no violation of the Fourth Amendment" and reversed the decision of the Tenth District Court of Appeals. *State v. Hairston*, __ Ohio St.3d __, 2019-Ohio-1622, __ N.E.3d __, ¶ 1; *Judgment Entry, filed May 2, 2019, Ohio Supreme Court No. 2017-1505.*

In its opinion, the Ohio Supreme Court ruled that "cumulative facts support the conclusion that the officers had a reasonable suspicion to stop Hairston." *Hairston*, __ Ohio St.3d __, 2019-Ohio-1622, __ N.E.3d __, at ¶ 11. This ruling was premised upon Officer Moore and his partner having personally heard the gunshots, Officer Moore's experience with crime and conducting arrests in the area during his six years patrolling the same part of the city of Columbus, the fact that the events occurred after dark, the short time between the officers hearing gunshots and coming across the Petitioner, and the fact that "Hairston was the only person in the area from which the shots emanated." *Id.* at ¶ 11-13. Only when these facts were "taken together and viewed in relation to each other," did they "rise to the level of reasonable suspicion." *Id.* at ¶ 14, 16.

Dissenting, Chief Justice Maureen O'Connor explained that the court's decision set "the unwise precedent that a police officer may conduct an investigative stop of any person present in a so-called 'high crime' area as long as the officer has recently heard gunshots, without any specific and articulable facts pointing more directly to that *particular* person's being engaged in criminal activity." *Hairston*, __ Ohio

St.3d __, 2019-Ohio-1622, __ N.E.3d __, at ¶ 32. The Chief Justice highlighted that Petitioner Hairston had "appeared to be lawfully, casually walking in a crosswalk at 9:20 p.m. in a residential area crowded with homes" when he was stopped and searched by police. *Id.* at ¶ 50. Associate Justice Melody J. Stewart dissented in her own opinion, and highlighted the narrowness of the issue before the Ohio Supreme Court: "whether a person's presence near a location police thought gunshots had recently been fired from amounts to particularized suspicion sufficient to conduct an investigatory stop[.]" *Id.* at ¶ 51. And echoing the Chief Justice, Justice Stewart explained that "what is missing" from the record "is some fact or reasonable factual *inference* that would connect Hairston to a potential crime." *Id.* at ¶ 62.

REASONS FOR GRANTING THE PETITION

Petitioner Hairston now seeks further review in this Court and offers the following reasons why a writ of certiorari is warranted.

I. THE OPINION OF THE OHIO SUPREME COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF A UNITED STATES COURT OF APPEALS

The Ohio Supreme Court decided the federal question raised in this matter in a way that conflicts with decisions issued by the United States Courts of Appeals. For that reason, review by this Court is warranted. *Sup.Ct.R. 10(b).* This Court should

recognize that a sharp discord has developed over whether factors that do not individually show or permit an inference of a connection between a person and a crime that had been committed nearby may, in the aggregate, provide a police officer with reasonable suspicion justifying a limited stop and search of that person.

The United States Court of Appeals for the Seventh Circuit has issued two opinions illustrating the conflict that has arisen between the strictures of the Fourth Amendment as applied by Ohio's High Court and as applied by the Federal Circuit Courts. *United States v. Bohman*, 683 F.3d 861 (7th Cir. 2012); *United States v. Brewer*, 561 F.3d 676 (7th Cir. 2009).

In *Bohman*, a "veteran meth investigator" received a report from an individual under arrest that meth was being cooked on "a rural forty-acre parcel" of land. *Id.* at 862-63. The report detailed that "an anhydrous ammonia tank" had been seen there "within the last week or so," that the arrested individual had seen a "known meth cook . . . brew meth" there "three times in the past two months," and that the cook "drove a green Mercury Grand Marquis." *Id.* The veteran officer knew from "his experience" that "meth cooks do not tend to store anhydrous ammonia for more than a week or so[.]" *Id.* at 863. He therefore concluded that the alleged meth cook would either be preparing to cook methamphetamine, actively cooking it, or the materials he had used would still be at the property. *Id.*

The veteran investigator traveled to the property that night around 11:00 p.m. *Bohman* at 863. He inadvertently beeped his horn while parked

on the road, which caused someone to get into a vehicle near a cabin, travel to the end of the driveway, stop for 20 to 30 seconds, and then return to the cabin. *Id.* The officer was surprised and this seemed unusual—"he thought that if someone were checking on a car honk they would have come onto the road and possibly a little farther rather than just stopping at the gate." *Id.* Not long after that, the vehicle returned to and entered the road. *Id.* As the car approached the officer, he "flipped on his police lights and pulled in front of the approaching car, which stopped immediately." *Id.* The officer had not observed any traffic violations, nor had he been able to see any aspect of the vehicle's appearance beyond its lit headlights. *Id.* When he approached the car, the officer saw that it was a "reddish-maroon Chevrolet Beretta coupe." *Id.* He smelled anhydrous ammonia on the defendant, who sat in the passenger seat, and he was told by the driver that the passenger had been cooking meth. *Id.* at 863-64. This information led to the issuance of a warrant to search the cabin, which confirmed the officer's suspicion that the place was a meth lab. *Id.* at 864.

The defendant sought to suppress the evidence resulting from the stop, but his motion was denied by the United States District Court for the Northern District of Indiana. *Bohman* at 862. On appeal, the dispute initially turned on whether the veteran investigator had reasonable suspicion sufficient to justify the stop of the vehicle. *Id.* at 864. A panel of the Seventh Circuit began by explaining that the officer had not developed probable cause to search the cabin because he had not confirmed the facts provided by his tipster and a warrant had not yet issued. *Id.* at

864-65. As a result, the officer needed some additional factor beyond mere presence at the cabin to raise his hunch regarding the vehicle to a reasonable suspicion. *Id.* at 865. The horn honk was not a fact that indicated meth was being cooked on the property, and it did not "lend a suspicion of something illegal or wrong as to the Beretta." *Id.* The Court noted the "lack of *particular* suspicion about the car actually stopped" before distinguishing other cases in which stopping every person exiting a home was permissible because a warrant had been issued to search the premises. *Id.*

The Seventh Circuit distinguished the *Bohman* case from another appeal it had decided, *Brewer*, 561 F.3d 676, in which a police officer had heard gunfire coming from within a "notorious apartment complex." *Bohman* at 866. The officer drove "toward the complex via its only access point" and "a car passed him going the other direction." *Id.* Noting the "unusual circumstances—*the single access point*, the timing of the car's departure from the complex related to the shots fired, the lateness of the hour and lack of traffic, and importantly, the situation's dangerous nature" the Court had held that there was reasonable suspicion sufficient to justify that stop. *Id.* (emphasis added). Understandably, the Seventh Circuit called the circumstances in *Brewer* "very different" from the ones in *Bohman*, noting that *Brewer* fell directly "on the line between reasonable suspicion and pure hunch." *Bohman* at 866 (quoting *Brewer* at 678).

The important threshold difference between cases like *Bohman* and Petitioner Hairston's on the one hand and those such as *Brewer* on the other hand, is the existence of some fact—any fact—tying a

specific individual to a specific crime that an officer believes has been committed. In *Bohman*, there was some degree of suspicion regarding the existence and location of a meth lab. In the circumstances underlying the instant matter, Officer Moore and his partner had knowledge that shots had been fired almost half of a mile away to the west. But no fact connected the defendant in *Bohman* or Petitioner Hairston *in particular* to the crimes that police had good reason to believe had been committed.

No aspect of the conduct of the individuals stopped in *Bohman* indicated they had been engaged in cooking meth prior to the stop. The officer in *Bohman* had "simply stopped a car he knew nothing about other than its emergence from a suspected meth cook site." *Id.* at 866 n.1. Nothing in the Petitioner's case indicated he was fleeing from shots he had fired—he was walking casually during a phone call near where gunshots had been fired. Indeed, there were many routes for flight away from the shots fired, and there was no reason to believe the shooter had traveled eastward like Petitioner Hairston rather than in any other direction or into one of the countless homes nearby in the densely populated neighborhood. Rather, a cloud of generally suspicious facts pointed to these individuals just as they would have pointed to anyone else Officer Moore may have come across acting normally had he chosen to knock on a door or to keep looking for individuals on the street.

Bohman and Petitioner Hairston's case are unlike *Brewer*, where a single avenue for flight from a crime, and the reasonable inference that a person would flee from a shooting at the notorious apartment complex, permitted officers a further inference that a

particular car they saw on that road was related to the crime. *Brewer* at 678. And yet in Ohio state courts, unlike the federal courts in the Seventh Circuit, generally suspicious circumstances, lacking some fact connecting a particular suspect to a crime, may be "taken together and viewed in relation to each other" and may "rise to the level of reasonable suspicion." *Hairston*, __ Ohio St.3d __, 2019-Ohio-1622, __ N.E.3d __, at ¶ 14, 16.

Much like in *Bohman*, the United States Court of Appeals for the Eleventh Circuit ruled not long ago in a factually similar case that a limited stop and search violated the protections of the Fourth Amendment. *United States v. Heard*, 725 F.App'x 743 (11th Cir. 2018). In *Heard*, a security guard at an apartment complex saw a group of men walking toward a wooded area after dark, and not long after, "he heard gunshots coming from the woods." *Id.*, 725 F.App'x at 745, 747. He called 911. *Id.* at 745. The officer who was dispatched to the scene was not provided with a description of a suspect. *Id.* This officer "was familiar with the apartment complex as a high crime area." *Id.* Upon arriving, the officer made contact with the security guard, who "pointed toward the woods to indicate where the gunshots had originated." *Id.*

The officer drove around the apartment complex for a few minutes without "seeing anyone or any additional evidence of criminal activity" until he "saw [the defendant] standing in the grass walking a small dog . . . by the woods[.]" *Heard*, 725 F.App'x at 745. The officer approached the defendant and asked whether he had heard the gunshots. *Id.* The defendant "said that he had and indicated that the

gunshots came from the woods behind him." *Id.* The officer asked for identification, which was provided. *Id.* A second officer soon arrived, who observed that the interactions with the defendant were " 'low-key' and 'amicable[.]' " *Id.* at 746. But the first officer believed that the defendant answered questions in a defensive manner that indicated he "wasn't supposed to be there." *Id.* at 745-46. The first officer decided to ask the defendant "for permission to search him because he wanted to make sure [the defendant] was not carrying a weapon." *Id.* at 746. The defendant "responded that 'he had not done anything wrong.' " *Id.* The defendant's demeanor changed, indicating to officers that he was "opposed to answering any more questions" and did not agree with how the interaction was proceeding. *Id.*

At that time, the second officer "instructed [the defendant] to keep his hands by his side." *Heard*, 725 F.App'x at 746. He was then instructed to raise his hands so that "the officers could pat him down for weapons." *Id.* The second officer found a gun on the defendant's person. *Id.*

The defendant was charged with "possession of a firearm as a convicted felon." *Heard*, 725 F.App'x at 746. He filed a motion to "suppress the gun, arguing that the officers lacked sufficient cause to *Terry* stop and search him." *Id.* at 747. The United States District Court for the Northern District of Georgia denied the motion to suppress, ruling that "the officers reasonably suspected that [the defendant] was involved in the reported gunfire." *Id.* at 748. The District Court relied upon factual circumstances that are remarkably similar to those under which Petitioner Hairston was stopped and searched:

> [T]he officers knew the apartment complex was a high crime area; it was dark outside; [the first officer] encountered [the defendant] near the location of reported gunfire "shortly after the shots were reported," . . . ; the officers had no description of any suspect and saw no one else in the immediate area; [the defendant] was standing in "probably the most remote" part of the complex . . . ; [the defendant's] ID did not verify that he lived in the complex; [the defendant] pointed to rather than verbally identifying his mother's apartment, which [the first officer] understood to be "defensive"; [the defendant] failed to provide an apartment number when asked; and [the defendant] was swaying.

Id. at 747-48.

On appeal, a panel of the Eleventh Circuit reversed the District Court's decision, ruling that "the officers lacked reasonable suspicion" that the defendant was involved in a crime when they stopped him by ordering him to "keep his hands at his side or raise them." *Heard*, 725 F.App'x at 749. Viewing "the totality of the circumstances of the encounter," the Court determined that the defendant's presence "in a high crime area, at night, near where gunshots had been reported . . . only very generally linked [the defendant] to the gunshots: he was the only person present around the time and near the place where the shots were heard." *Id.* at 751-52. As well, the Court ruled that the lower court had failed to consider factors that cut against the defendant's involvement in the crime, including that he "behaved like a

cooperative witness" by answering questions and providing identification. *Id.* at 752. And the Court held that his nervousness and refusal to cooperate did not "tip the balance to reasonable suspicion." *Id.* at 752-53.

Upon similar facts, the United States Court of Appeals for the Sixth Circuit also ruled that a limited stop and search violated the protections of the Fourth Amendment. *United States v. Beauchamp*, 659 F.3d 560 (6th Cir. 2011). In *Beauchamp*, "the police were saturating the area" near a "housing project in Covington, Kentucky" on account of having received "a 'ton' of narcotics complaints." *Id.*, 659 F.3d at 564. One officer came across the defendant with another person around 2:30 a.m. *Id.* After the officer began to approach him, the defendant "hurriedly walked away without making eye contact with the officer." *Id.* The first officer's partner, who was driving in a patrol car, later spotted the defendant two blocks away and was instructed to stop him. *Id.* The defendant complied with the second officer's orders, first to stop and then to come closer. *Id.* The defendant acted in a nervous manner and answered questions vaguely. *Id.* at 564-65. The officer frisked the defendant for weapons, finding nothing. *Id.* at 565. Then, after asking for and receiving the defendant's consent for a search, the officers found cash, a cell phone, and "18 individually-wrapped rocks of crack cocaine" between the defendant's butt cheeks. *Id.*

After being indicted for several drug crimes, the defendant moved to suppress the evidence that was seized from him. *Beauchamp*, 659 F.3d at 565. A magistrate judge "issued a report and

recommendation that the district court deny the motion," which was adopted by the United States District Court for the Eastern District of Kentucky over the defendant's written objection. *Id.*

On appeal, a panel of the Sixth Circuit reversed the order denying the motion to suppress. *Beauchamp*, 659 F.3d at 564, 575. The Court held that the defendant had been stopped "when, after walking away from the police two times, an officer targeted Beauchamp by driving up to him, instructed him to stop, and then instructed him to turn around and walk toward the officer." *Id.* at 566. The defendant had complied with these orders. *Id.* at 567-68.

The panel then described the facts from the record that the District Court had considered in its analysis of the totality of the circumstances, including the late hour, the defendant's location near "a housing project that was the source of many drug complaints," that he was seen near another individual, and that he walked hurriedly away from police. *Beauchamp*, 659 F.3d at 570-71. With regard to the defendant's proximity to a location that had generated complaints of drug activity at an odd hour, the Court explained that "[t]hese factors would apply to anyone who was in the housing project early that morning, and so they 'should not be given undue weight.' " *Id.* at 570 (quoting *United States v. See*, 574 F.3d 309, 314 (6th Cir.2009)). As to all of these factors, each either described "innocent activity" or behavior that was not specifically indicative of drug activity. *Id.* at 570. And with regard to the defendant walking away from the officers, the Court explained that in the cases in which it had "found that walking away from police does

contribute to reasonable suspicion, specific facts have shown that the defendant's behavior was otherwise suspicious." *Id.* Without "objective and particularized indicia of criminal activity" the defendant's evasion was ambiguous and "susceptible to many different interpretations." *Id.* at 571.

The Sixth Circuit summarized by noting:

> [T]he totality of the circumstances consists of contextual factors that apply to everyone in the housing project and [one officer's] testimony that [another officer] observed [the defendant] walk hurriedly away from him without making eye contact. Certainly there are situations in which innocent acts, taken together, can amount to reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 9-10, 109 S. Ct. 1581, 104 L.Ed.2d 1 (1989). But the facts here are insufficient: [the defendant's] exercise of his right to walk away—even if the walk was made hurriedly, briskly, or snappily—does not turn his otherwise innocuous behavior into the conduct of a "suspicious suspect."

Beauchamp, 659 F.3d at 571. Thereafter, the Court determined that the defendant's consent to a search was tainted by the illegal stop and reversed the District Court's order denying the defendant's motion to suppress. *Id.* at 571-75.

Each of these decisions of a Federal Court of Appeals conflicts with the decision of the Ohio Supreme Court in the present dispute. In each case, a court considered a series of contextual factors that did not individually point to a particular suspect or

permit an inference of suspicion unique to the individual who had been stopped by police. In each decision, these factors were viewed in their totality. But only in the Ohio Supreme Court did these facts add up to a finding of reasonable suspicion. *Hairston*, __ Ohio St.3d __, 2019-Ohio-1622, __ N.E.3d __, at ¶ 11-16.

This Court should take up this appeal to settle the conflict by determining whether the totality of the circumstances must include at least one fact specifically connecting an individual to a specific crime in order to add up to more than a generalized suspicion of wrongdoing that would be true of any individual in close proximity to a crime.

II. THIS DISPUTE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. AT THE TIME OF THE FOUNDING OF OUR NATION, IT WOULD NOT HAVE BEEN CONSIDERED REASONABLE TO STOP AND SEARCH ONE AMONG A NUMBER OF PERSONS PRESENT NEAR THE SCENE OF A SUSPECTED CRIME WITHOUT ANY INDICATION WHO HAD COMMITTED THE VIOLATION

This Court should accept this opportunity to consider whether at the time of the founding of our nation, it would have been considered reasonable to stop one among a number of persons present near the scene of a suspected crime and conduct even a limited

search without any indication who had committed the violation. Without some fact connecting a particular individual to a crime to a greater degree than all of the other persons present in a densely populated area, a limited stop and search of that person is indistinguishable in its *generality* from the conduct of a peace officer armed with a general warrant, an instrument of colonial oppression that was widely decried in the nascent United States. *Boyd v. United States*, 116 U.S. 616, 625-29 (1886); *Stanford v. Texas*, 379 U.S. 476, 481 (1965). Justice Miller explained the sentiment in the simplest terms:

> While the framers of the constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only unreasonable searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, *which were called general warrants, because they authorized searches in any place, for any thing.*
>
> This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, *the person* and place to be searched, are still permitted.

Boyd at 641 (Miller, J., concurring).

Yet it was not just general warrants for the search of a person's papers that drew the ire of the founding generation. *E.g., Marcus v. Search Warrants of Property*, 367 U.S. 717, 724-729 (1961). The early state constitutions prohibited a broader category of general warrants including those providing the general authority to stop or seize the person. The Declaration of Rights adopted by Maryland in 1776 declared that " 'all general warrants—to search suspected places, or *to apprehend suspected persons*, without naming or describing the place, *or the person in special*—are illegal, and ought not to be granted.' " *Frank v. Maryland*, 359 U.S. 360, 368 (1959) (quoting 3 Thorpe, Federal and State Constitutions 1688 (1909)) (emphasis added). Similarly, the Constitution adopted by the Commonwealth of Massachusetts in 1780 declared that "[e]very subject has a right to be secure from all unreasonable searches and seizures of his person," which therefore required any warrant to include "a special designation *of the persons* or objects of search, arrest, or seizure[.]" Mass. Const. Part I, Art. XIV (emphasis added). When Virginia and North Carolina gave notice of ratification of the United States Constitution, there was an additional request not simply for a bill of rights to be enacted, but for a specific prohibition against general warrants permitting a seizure of a person without specifically identifying the person to be seized. Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part Two*, 4 U. Rich. L. Rev. 60, 70-71 (1969). And when New York and Rhode Island gave notice of ratification, the states each included an identical statement explaining how

the Constitution had been construed; that "every freeman has a right to be secure from all unreasonable searches and seizures of his person . . . and that all general warrants, (or such in which the place or *person suspected are not particularly designated*) are dangerous and ought not to be granted. *Id.* (quoting 13 Journal of Congress 178-84 (1801).). Plainly those who cobbled together the structure of our government after the revolution intended that a person would not be seized by a government authority upon suspicion of a crime when there was no ascertainable reason to believe any particular person had committed the wrongdoing.

In addition to modifying the warrant clause, the particularity concept—understood by the framers to be necessary to a free republic—must have been meant to help answer which searches and seizures are unreasonable. As the Fourth Amendment was first introduced, "the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures." *Payton v. New York*, 445 U.S. 573, 584 (1980). Rather than introducing another Amendment, the proposed Amendment was modified to collect together "the basic right to be free from unreasonable searches and seizures" with the requirement "that warrants be particular and supported by probable cause." *Id.; accord* Stengel, 4 U. Rich. L. Rev. at 72-73. It would therefore be remarkable if the founding generation had understood the two clauses of the Fourth Amendment to operate independently such that arrest warrants were required to identify a particular suspect but seizures of just anyone nearby the

commission a crime might still be considered reasonable. It is precisely because of this overlap between the particularity requirement in the warrant clause and the prohibition on unreasonable searches and seizures that this Court held that "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant" in the context of the limited stop and search. *Terry*, 392 U.S. at 20-21.

Set against this historical backdrop, it was not enough for the Ohio Supreme Court to say that the facts known to Officer Moore and his partner could be "taken together and viewed in relation to each other" in order to create a reasonable suspicion that Petitioner Hairston had fired the shots that were heard. *Hairston*, __ Ohio St.3d __, 2019-Ohio-1622, __ N.E.3d __, at ¶ 14. The facts that Officer Moore and his partner were aware of—the gunshots, experience with crime and conducting arrests in the area, the fact that the events occurred after dark, the short time between the gunshots and coming across the Petitioner, and the fact that they had not come across anyone else yet—would have been true of anyone else walking around the neighborhood. These facts would have been true of any person who had come out of their home to investigate the sound of gunfire. And there was no testimony suggesting that the shots sounded as if they had come from outside. There was no reason offered by the state to suspect the Petitioner rather than the numerous individuals in their homes. These circumstances are roughly analogous to the intrusions against individuals based upon general suspicion of the colonists that helped sow the seeds of revolution. Due to the generality of the suspicion

possessed by the officers, this Court should consider whether the stop of Petitioner Hairston would have comported with founding era notions of reasonableness.

B. THE FOUNDATIONAL REQUIREMENT OF REASONABLENESS WITHIN THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES AN ASSESSMENT OF WHETHER SOCIETY VIEWS AS REASONABLE THE MANNER IN WHICH A POLICE OFFICER CONDUCTS A LIMITED STOP AND SEARCH

This Court has consistently observed that "reasonableness is always the touchstone of Fourth Amendment analysis." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016); *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530, 536 (2014). This principle has been offered as one of the reasons why the Fourth Amendment's "warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *see Katz v. United States*, 389 U.S. 347, 362-62 (1967) (White, J., concurring). But it has also been recognized that unreasonable conduct by police officers engaged in a search may establish a violation of the Fourth Amendment even when a search is otherwise lawful. *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

Assuming *arguendo* that officers had some particular reason to suspect that Petitioner Hairston had fired a weapon on the night of March 29, 2015, he was by no means the only person with a weapon in the surrounding neighborhood. Indeed, the people of the

State of Ohio share a legal culture in which possession of weapons is common and should be expected. *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶ 5-11. Ohio is an open carry state—state law only limits possession of concealed handguns to licensed individuals. *Ohio Revised Code §§ 9.68 and 2923.12(C)(2).* The state provides for the affirmative defense of self-defense without any specific *limitation* upon the use of firearms. *Ohio Revised Code § 2901.05(A) and (B).* Similarly, the municipal code section prohibiting discharge of a firearm in the City of Columbus, Ohio, includes an exception for self-defense. *Columbus Codified Ordinances § 2323.30(B)(3).* And the state specifically permits the discharge of a weapon by a person upon his or her own land—even nearby a school, a church, a neighbor's home, or a charitable institution. *Ohio Revised Code § 2923.162(B)(2).*

In light of these circumstances, there are a number of lawful reasons why a person within the neighborhood on the southeast side of Columbus, Ohio at 9:00 p.m. may possess or fire a weapon. Officer Moore and his partner failed to even *ask* Petitioner Hairston whether he was licensed to carry a concealed handgun. *R. 59, Tr., pp. 1-44.* Insofar as the Ohio General Assembly has adopted a liberal view on the legality of firearms, it is objectively unreasonable for police officers suspecting a weapon had been fired to immediately draw their weapons upon coming across another individual. Officer safety would be adequately protected by less forceful conduct and drawing a weapon on another person is understood by the general public to be extreme conduct and objectively unreasonable.

Reasonableness, as a standard by which we judge the conduct of others, and as the textual standard provided by the Fourth Amendment to the United States Constitution, must be understood to be the broadest possible litmus test. This Court should consider whether the touchstone of reasonableness requires consideration of the manner in which a police officer engages in a limited stop and search even when the stop meets the mechanical requirements placed upon such conduct by this Court's decision in *Terry* and other related decisions. To the extent that society would generally view the conduct of the officers who stopped Petitioner Hairston to be intolerable, and therefore objectively unreasonable, such conduct must be understood to have violated the Fourth Amendment to the United States Constitution.

III. THIS DISPUTE PRESENTS A LIVE CASE AND CONTROVERSY

The present dispute remains a live one. "Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.' " *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). Generally, "those who invoke the power of a federal court" must "demonstrate standing—a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Id.*, quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

Although Petitioner Hairston has served his sentence, an exception to the mootness doctrine will presumptively permit review of a criminal conviction after a criminal defendant has completed the sentence imposed. *E.g.*, *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011). This Court once recognized that "[m]any deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process—in the context of prosecutions for 'minor' offenses which carry only short sentences." *Sibron v. New York*, 392 U.S. 40, 52 (1968). In *Sibron*, a criminal defendant had been sentenced to six months in jail, and his appeal progressed through the state courts of New York to an appeal in this Court. *Id.* at 44 n.1. It was recognized that there is no way for some individuals to bring their case to this Court before completion of a short sentence. *Id.* at 51-53. As well, "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences" sufficiently justifies this Court's presuming such consequences and reviewing the merits of an appeal after completion of a sentence. *Id.* at 55.

This criminal dispute is one of the many "in which the sentence had been fully served or *the probationary period during which a suspended sentence could be reimposed had terminated*." *Sibron* at 55 (emphasis added). Petitioner Hairston nonetheless challenges admission of facts and evidence that form the basis of his conviction, and pursuant to this Court's authorities his conviction will presumptively cause him collateral consequences. *E.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106, 108 n.3 (1977). In addition, numerous detrimental

consequences of his felony conviction demonstrate an actual ongoing injury. *Ohio Revised Code § 2961.01* ("a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned, unless the plea, verdict, or finding is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit"); *Ohio Revised Code § 2923.125(D)(1)(e)* (denying a license to carry a concealed weapon to a person who has "been convicted of or pleaded guilty to a felony"); *Ohio Revised Code § 4973.171* (disqualifying a convicted felon from employment as a police officer in certain circumstances).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Louis E. Grube, Esq.
Counsel of Record
Paul W. Flowers, Esq
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, Suite 1910
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
leg@pwfco.com

Yeura Venters, Esq.
FRANKLIN COUNTY PUBLIC DEFENDER

Timothy E. Pierce, Esq.
Zach D. Mayo, Esq.
Assistant Franklin County Public Defenders