No. _____

IN THE

Supreme Court of the United States

MICHAEL D. JOHNSON,

Petitioner,

vs.

INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Indiana

PETITION FOR A WRIT OF CERTIORARI

Paul J. Podlejski
LAW OFFICE OF PAUL J. PODLEJSKI
22 W. 8th Street
Anderson, IN 46016
765-644-5376
attorneypaulp@gmail.com

Daniel S. Harawa
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
Appellate Clinic
One Brookings Dr.
Campus Box 1120
St. Louis, MO 63130
314-935-4689
dharawa@wustl.edu

QUESTION PRESENTED

To uphold a *Terry* frisk as constitutional, the First and Ninth Circuits require the frisking officer to have actually suspected that the detainee may be armed and dangerous. Here, the Indiana Supreme Court joined the Seventh and Tenth Circuits by applying a purely objective standard that regards an officer's actual suspicion as irrelevant to a *Terry* frisk analysis. And other courts, including the Eighth Circuit and the Supreme Court of Utah, have adopted a hybrid approach wherein an officer's actual suspicion is a relevant—but not dispositive—factor to weigh in an ultimately objective analysis.

The question presented is: May a court uphold a *Terry* frisk where the frisking officer did not actually suspect that the detainee was armed and dangerous?

RELATED PROCEEDINGS

State v. Johnson, No. 48C01-1602-F5-402 (Ind. Cir. Ct. Oct. 4, 2017) (motion to suppress)

State v. Johnson, No. 48C01-1602-F5-402 (Ind. Cir. Ct. April 1, 2018) (sentencing order)

Johnson v. State, No. 19A-CR-975 (Ind. Ct. App. Dec. 19, 2019) (appeal from sentencing order)

Johnson v. State, No. 20S-CR-655 (Ind. Dec. 1, 2020) (transfer from Indiana Court of Appeals)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

CASES

OTHER AUTHORITIES

INTRODUCTION

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. "Time and again, this Court has observed that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (cleaned up). In *Terry v. Ohio*, this Court established one such exception: "a police officer [who] observes unusual conduct which leads him reasonably to conclude . . . that the persons with whom he is dealing may be armed and presently dangerous" may conduct "a carefully limited search" to ensure his own safety. 392 U.S. 1, 30 (1968). *Terry* was clear that protective frisks have to be objectively reasonable—"inarticulate hunches" and "simple 'good faith on the part of the arresting officer [are] not enough.'" *Id.* at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 96–97 (1964)). Though *Terry* explained the need to evaluate the facts justifying a frisk "against an objective standard," the Court also noted that "in justifying the particular intrusion[,] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

In the aftermath of *Terry*, lower courts across the country have splintered in their approaches to justifying protective frisks. Specifically, courts disagree over whether an officer's actual suspicion that a detainee may be armed and dangerous is relevant to a *Terry* frisk analysis. Both federal and state courts acknowledge this

split. *See, e.g.*, *United States v. Wald*, 216 F.3d 1222, 1227 (10th Cir. 2000); *State v. Bannon*, 398 P.3d 846, 852–54 (Kan. 2017). The First and Ninth Circuits require that an officer actually suspect an individual is armed and dangerous and that the suspicion be objectively reasonable. *United States v. Lott*, 870 F.2d 778, 784 (1st Cir. 1989); *United States v. Prim*, 698 F.2d 972, 975 (9th Cir. 1983). The Seventh and Tenth Circuits hold that an officer's actual suspicion is irrelevant and ask only whether a reasonable officer would have suspected the individual was armed and dangerous. *United States v. Adamson*, 441 F.3d 513, 521–22 (7th Cir. 2006); *United States v. Johns*, 120 F. App'x 254, 257 n.2 (10th Cir. 2005) (unpublished). Other courts, including the Eighth Circuit and the Supreme Court of Utah, follow a hybrid approach, wherein an officer's actual suspicion is a relevant—but not dispositive—factor to weigh in an ultimately objective analysis. *United States v. Roggeman*, 279 F.3d 573, 582–84 (8th Cir. 2002); *State v. Warren*, 78 P.3d 590, 595 (Utah 2003).

Here, the Indiana Supreme Court sided with the Seventh and Tenth Circuits' view that actual suspicion is irrelevant. The court ignored the fact that no evidence indicated the officer actually suspected Mr. Johnson was armed and dangerous before frisking him and that the officer testified he frisked suspected criminals as a matter of course. *See* Pet. App. 7a–10a. Instead, the court looked only to the facts surrounding the frisk to determine whether "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Pet. App. 7a (quoting *Terry*, 392 U.S. at 27). Applying this purely objective standard, the court held that a reasonable officer could have suspected that Mr.

Johnson was armed and dangerous because Mr. Johnson was suspected of a drug crime, it was 7:00 AM, and the room where the officer frisked Mr. Johnson was small. Pet. App. 10a. And the Indiana Supreme Court reached this conclusion despite the State's expressly disclaiming that the frisk was justified under *Terry*. Pet. App. 31a.

The Indiana Supreme Court's decision misapplies *Terry*. While *Terry* certainly held that protective frisks must be objectively reasonable, it did not intimate that a frisk could be justified where the officer has no actual suspicion that an individual is armed or dangerous. Indeed, *Terry*'s companion case, *Sibron v. New York*, clarified that for a frisk to be lawful, an officer "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." 392 U.S. 40, 64 (1968). Thus, *Sibron* interpreted *Terry* as announcing a two-pronged approach requiring (1) an actual belief or suspicion on the part of the officer that (2) is objectively reasonable. The Court's later opinions applying *Terry* have been consistent with this approach and have "invariably held" that an officer must have a "reasonable belief or suspicion" that an individual is armed or dangerous before conducting a frisk. *Ybarra v. Illinois*, 444 U.S. 85, 93–94 (1979); *see also Michigan v. Long*, 463 U.S. 1032, 1047 (1983).

Despite this precedent, two federal courts of appeals and now the Indiana Supreme Court treat an officer's actual suspicion as irrelevant to a *Terry* analysis. This purely objective approach invites courts to conjure ex post facto justifications for frisks—like the Indiana Supreme Court did here—stretching *Terry*'s judge-made carveout to the probable cause requirement far beyond the "narrow scope" this Court

"has been careful to maintain." *Ybarra*, 444 U.S. at 93 (quoting *Dunaway v. New York*, 442 U.S. 200, 210 (1979)). This approach is particularly problematic given that, as Justice Scalia recognized, it is doubtful whether the Framers would have recognized a frisk exception to the Fourth Amendment's probable-cause requirement. *Dickerson*, 508 U.S. at 381 (Scalia, J., concurring).

The question presented is important. The Fourth Amendment right to be free from unreasonable searches is sacrosanct and must be uniform across jurisdictions. And despite *Terry*'s deliberately narrow scope, lower courts have crafted categorical rules that have substantially broadened what was intended to be a limited exception. These categorical rules, together with *Dickerson*'s approval of police reaching into citizens' pockets during a frisk for nonthreatening contraband, make it pivotal that the Court maintain the actual suspicion prong of *Terry*, requiring police to actually suspect a person is armed and dangerous before conducting a frisk. Requiring officers to justify frisks instead of allowing courts to rationalize them post hoc both holds the government to its burden and protects citizens' Fourth Amendment rights, especially citizens of color, who are stopped and frisked at disproportionate rates. Mr. Johnson's case demonstrates the dangers of ignoring *Terry*'s actual suspicion requirement.

This Court should grant certiorari and resolve the deep and acknowledged spilt on the relevance of actual suspicion to a *Terry* frisk analysis.

OPINIONS AND ORDERS BELOW

The Indiana Circuit Court's Order, Pet. App. 26a, is unreported. The opinion of the Indiana Court of Appeals, Pet. App. 16a, is reported at 137 N.E.3d 1038. The opinion of the Supreme Court of Indiana, Pet. App. 1a, is reported at 157 N.E.3d 1199.

JURISDICTION

The Indiana Supreme Court rendered its decision in this case on December 1, 2020. Pet. App. 1a. On March 19, 2020, this Court entered a standing order extending the time to file a petition for a writ of certiorari to April 30, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides in relevant part: "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." U.S. Const. amend. IV.

STATEMENT OF THE CASE

Michael Johnson, a single parent who worked seventy hours a week as a machinist to support his two-year-old, (Tr. at I:11–12), was enjoying a slow morning at Anderson, Indiana's Hoosier Park Casino in 2015. Just after 7:00 AM, two Indiana Gaming Commission (IGC) agents approached Mr. Johnson, identified themselves as law enforcement officers, and asked to speak with him "in the IGC interview room." Pet. App. 43a.

Another casino patron had told casino security that "a black male with . . . a white hat," Pet. App. 38a, had allegedly offered to sell him "white girl," Pet. App. 35a. IGC Agent Zach Wilkinson concluded that "white girl" meant cocaine after speaking with the patron and after his partner, Agent David Jenkins, "Google[d] ["white girl"] to confirm the slang term." Pet. App. 35a. Agents Wilkinson and Jenkins had reviewed casino surveillance video and confirmed that the complaining patron had interacted with a Black male in a white hat. Pet. App. 42a. The agents then identified Mr. Johnson as the alleged suspect and asked him to accompany them to the IGC office to get "his side of the story." Pet. App. 43a–44a.

After the trio entered the IGC office, the agents directed Mr. Johnson to their interview room: a "pretty small," windowless room with one door, furnished with a table and two chairs. Pet. App. 52a. After taking Mr. Johnson into the interview room, Agent Wilkinson informed Mr. Johnson that he "needed to pat him down." (Tr. at II:111). At no point during the suppression hearing or at trial did Agent Wilkinson testify that he believed, feared, or suspected that Mr. Johnson was armed. *See* Pet. App. at 32a–54a; (Tr. at II:102–31). Rather, Wilkinson testified that it was "common"

to pat down people in the interview room "for criminal incidents in particular." (Tr. at II:112). Mr. Johnson informed Agent Wilkinson that he had no weapons or drugs on him, but Wilkinson proceeded with the search anyway. (Appellant's App. at II:26). In Mr. Johnson's front pocket, Wilkinson felt what seemed to be a "giant ball," which he "took . . . to be drugs or contraband[]." Pet. App. 46a. Wilkinson removed the object. It was baking soda. (Tr. at II:142). Mr. Johnson was arrested and charged with possessing with intent to distribute a drug look-a-like substance in violation of Ind. Code § 35-48-4-4.6. (Appellant's App. at II:23–24).

Before trial, Mr. Johnson filed a motion to suppress the baking soda, arguing that the "pat down" was an unlawful "*Terry* search" because "Agent Wilkinson knew of no articulable facts indicating that Mr. Johnson was armed or dangerous," (Appellant's App. at II:84–85). The State, on the other hand, argued that Mr. Johnson had been searched incident to arrest. (Appellee Br. at 10). And at the suppression hearing, the prosecutor directly repudiated *Terry* as the justification for Wilkinson's warrantless search of Mr. Johnson: "although I believe the officer[] . . . may have put in his report that it was a *Terry* stop . . . the Court can find . . . [an] exception for the [warrant] requirement for a different reason. In fact, in this case that's not [the] reason." Pet. App. 30a–31a. The trial court denied Mr. Johnson's suppression motion, Pet. App. 26a, and later denied a motion for a mistrial on the grounds that the baking soda was improperly admitted. (Tr. at II:145–48). Mr. Johnson was convicted and sentenced to four years' imprisonment for possession with intent to distribute baking soda. (Appellant's App. at II:129).

On appeal, Mr. Johnson again argued that the frisk was impermissible under *Terry* as "there was no evidence in the record that would have led officers to believe that [he] was either armed or dangerous to justify the search." (Appellant's Br. at 10, 12). The Court of Appeals of Indiana vacated Mr. Johnson's conviction, holding that Agent Wilkinson had conducted a search incident to arrest, yet the State had not met its burden of proving probable cause existed at the time of the search. Pet. App. 24a–25a. The Court of Appeals reasoned that the State failed to dispel the possibility that "Wilkinson, having received information of an attempted sale of contraband, may have reached into Johnson's pocket and examined the item before concluding it was likely contraband." Pet. App. 24a–25a.

The Indiana Supreme Court granted the State's motion to transfer the case and affirmed the trial court's suppression ruling. Pet. App 4a, 12a. In so doing, the Indiana Supreme Court relied purely on the briefing provided by the parties to the Court of Appeals. *See* Pet. App. 4a (granting transfer from the Court of Appeals but not requesting briefing). Moreover, the Indiana Supreme Court decided to resolve the case on *Terry* grounds despite that not being the basis for either of the rulings below, and despite the fact that the State did not raise *Terry* as a justification for the search. Pet. App. 5a. In the words of the Indiana Supreme Court, "although the parties and the courts below largely focused on whether there was probable cause to arrest Johnson at the time of the search . . . , [*Terry*] is a clearer path to sustaining the evidence's admission." Pet. App. 5a.

The court first found reasonable suspicion to justify the stop based on the tip and corresponding surveillance video. Pet. App. 6a–7a. Then, in its analysis of the frisk, the court did not consider whether Agent Wilkinson actually suspected that Mr. Johnson was armed and dangerous. *See* Pet. App. 7a–10a. Instead, the court looked exclusively to whether "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Pet. App. 7a (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Applying this objective test, the Indiana Supreme Court found that a reasonable officer could have suspected Mr. Johnson may have been armed based on three facts (despite these facts not being argued by the State). *See* Pet. App. 10a. First, Agent Wilkinson thought that Mr. Johnson might have been selling drugs—"a crime for which [Mr.] Johnson could possibly be armed." Pet. App. 8a. Second, Agent Wilkinson had brought Mr. Johnson into "a confined space"—the interview room. Pet. App. 8a–9a. And third, the search was at an "early morning hour"—a little after 7:15 AM. Pet. App. 10a. The court cited no facts indicating Agent Wilkinson *actually* believed Mr. Johnson was armed and dangerous and ignored Wilkinson's testimony that he searched Mr. Johnson as a matter of course. *See* Pet. App. 7a–10a.

Justice Slaughter dissented, concluding that the facts cited by the majority "do not suggest that Johnson was armed and dangerous." Pet. App. 14a. He explained that *Terry* drew "an intentionally fine line" that he did "not wish to see eroded," given that "a frisk is not a petty indignity but a serious intrusion upon the sanctity of the person." Pet. App. 15a (quoting *Terry*, 392 U.S. at 17) (cleaned up). Justice Slaughter

warned that "to protect rights guaranteed under the Fourth Amendment, we must respect *Terry*'s limitations." Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

The Indiana Supreme Court's decision stretches *Terry*'s narrow exception to the Fourth Amendment's warrant requirement beyond recognition. Agent Wilkinson testified that it was "common" for him to frisk detainees and never testified that he suspected Mr. Johnson was armed or otherwise dangerous. (Tr. at II:112). If Mr. Johnson had been visiting a casino in one of the thirteen states in the First or Ninth Circuits, a federal court would have found the search illegal because Wilkinson did not actually suspect Mr. Johnson was armed. And if Mr. Johnson's had been tried in the Eighth Circuit—or a state court in Illinois, Utah, Wisconsin, or Maryland—Wilkinson's lack of suspicion would have counted against the reasonableness of the search. As it happened, the Indiana Supreme Court did not consider whether Agent Wilkinson actually suspected Mr. Johnson was armed before frisking him, *see* Pet. App. 7a–10a, an approach shared by the Seventh and Tenth Circuits. This inconsistency in analyzing the constitutionality of *Terry* frisks is entrenched and acknowledged, resulting in the unequal protection of citizens' Fourth Amendment rights.

The Indiana Supreme Court failed to follow *Terry* and its progeny because it did not require Agent Wilkinson to have actual suspicion that Mr. Johnson was armed before frisking him. This mistaken application of *Terry*—an error shared by other state and federal courts—has contorted Fourth Amendment doctrine beyond what *Terry* and the Framers could have imagined. Because lower courts are split over the relevance of an officer's actual suspicion to a *Terry* frisk analysis, this Court should grant certiorari.

I. Lower Courts Are Splintered on How to Weigh an Officer's Actual Suspicion When Considering the Constitutionality of a Terry Frisk.

Lower courts are intractably divided over the relevance of an officer's actual beliefs to the legality of a *Terry* frisk. Federal and state courts have acknowledged this disagreement. *See, e.g.*, *United States v. Wald*, 216 F.3d 1222, 1227 (10th Cir. 2000) (observing that "circuits are split on the issue" of the relevance of officer's beliefs and motivations); *State v. Bannon*, 398 P.3d 846, 852–54 (Kan. 2017) ("Courts addressing the subjective/objective distinction are split."); *State v. Warren*, 78 P.3d 590, 595–96 (Utah 2003) (opining there is a "majority" and "minority" view on whether an officer's actual suspicion is relevant to reviewing *Terry* frisks).

Some courts require the officer to actually suspect a detainee may be armed and dangerous before conducting a frisk and further require that the suspicion be reasonable. Other courts only require that a reasonable officer would have suspected a detainee may be armed and dangerous based on the surrounding facts. Still other courts split the difference, weighing the presence or absence of actual suspicion as one factor in determining whether a reasonable officer could have suspected a detainee may be armed and dangerous. Thus, whether a frisk is deemed constitutional depends entirely on which court reviews it.

A. Several Courts Find Frisks Unconstitutional Where the Officer Frisking the Defendant Did Not Suspect the Defendant Was Armed and Dangerous.

The logic of courts that require actual suspicion is clear: it is impossible for an officer to possess reasonable suspicion that someone is armed and dangerous when the officer does not actually suspect the person to be armed and dangerous. *United*

States v. Lott, 870 F.2d 778, 784 (1st Cir. 1989). Such logic is consistent with this Court's holding in *Terry*.

For example, the First Circuit in *Lott* held that "[a]n officer cannot have a *reasonable* suspicion that a person is armed and dangerous when he in fact has *no* such suspicion." *Id.* at 784. In *Lott*, the police had searched the defendant's car at a traffic stop, *id.* at 779, even though the officers did not "fear[] that the [occupants] were armed and dangerous," *id.* at 785. The First Circuit held that suppression of firearms recovered during the search was appropriate because an officer must have an actual suspicion to make suspicion reasonable under *Terry*. *Id.* at 783–85. The court found an actual suspicion requirement to be implicit in this Court's opinions in *Ybarra v. Illinois*, 444 U.S. 85 (1979), and *Michigan v. Long*, 462 U.S. 1032 (1983). *See Lott*, 870 F.2d at 783–85. The First Circuit further reasoned that justifying a frisk through an "ex post facto reconstruction based upon . . . objective reasonableness" was inappropriate, because the court was evaluating the real-world actions of the officers who searched Lott's car, not hypothecating how "other officers might have viewed the situation." *Id.* at 784.

Similarly, in *United States v. Prim*, the Ninth Circuit held that the reasonable suspicion standard is "applied to the actual . . . belief of the law enforcement officer." 698 F.2d 972, 975 (9th Cir. 1983). In *Prim*, an officer frisked the defendant, removing an envelope from the defendant's person and placing it in the defendant's briefcase. *Id.* at 974–75. After a narcotics dog alerted police to the defendant and the briefcase, the officers obtained a warrant and found cocaine in the envelope. *Id.* at 975. The

Ninth Circuit found the frisk unlawful, affirming the use of an objective standard to assess reasonable suspicion but holding that the "standard [is] applied to the actual and/or perceived belief of the law enforcement officer." *Id.* The court emphasized that the officers lacked actual suspicion that the defendant was armed or dangerous. *Id.* at 977 ("Both [officers] testified that nothing about defendant's behavior indicated that he was armed or dangerous."); *see also United States v. Newberry*, 8 F.3d 32 (9th Cir. 1993) (unpublished) (explicitly construing *Prim* to require actual suspicion).

Finally, although the Eleventh Circuit has not expressly ruled on the question, it has suggested that it may require actual suspicion in the appropriate case. *See United States v. Thompson*, 712 F.2d 1356, 1361 (11th Cir. 1983) ("Although a subjective suspicion of criminality is arguably indispensable in justifying a warrantless search, we do not decide whether an actual suspicion is required." (citations omitted)).

B. Several Jurisdictions Do Not Require Actual Suspicion but Still Consider the Officer's Suspicion Relevant to Determining Reasonableness.

A number of jurisdictions take what one court has called a "hybrid approach," under which an officer's actual suspicion that a suspect may be armed and dangerous is a relevant but not dispositive factor in determining whether a frisk is objectively reasonable. *See Bannon*, 398 P.3d at 853 (labeling this the "hybrid approach").

When the Eighth Circuit evaluates the reasonableness of a *Terry* frisk, it considers actual suspicion as one factor to weigh in an objective assessment. *United States v. Roggeman*, 279 F.3d 573, 580 n.5 (8th Cir. 2002). In *Roggeman*, the officer frisked the defendant after he noticed a bulge in the defendant's pants and found

marijuana. *Id.* at 575–76. The defendant sought to suppress the marijuana, but the Eighth Circuit found the frisk supported by reasonable suspicion. *Id.* at 576–77. The Eighth Circuit first interpreted *Terry* to require an objective inquiry in deciding whether a frisk is reasonable, *id.* at 578, but held that an officer's lack of suspicion "would militate against a conclusion that a search was supported by an objectively reasonable, articulable suspicion," *id.* at 580 n.5. The court reasoned that "an objective inquiry does not . . . require us to ignore all evidence of [the officer's] thought processes at the time he patted down [the defendant]." *Id.* That is because an officer's "conclusions during the initial moments of his stop of [a suspect] are at least some evidence of what a reasonable officer . . . would have inferred from the facts and circumstances of the encounter." *Id.* (relying in part on this Court's instructions in *Ornelas v. United States*, 517 U.S. 690, 699 (1996), to grant "due weight" to the inferences drawn by officers).

After noting the split of authority on whether an officer must possess actual suspicion, the Supreme Court of Utah likewise held that an officer's suspicion is helpful in evaluating the objective reasonableness of a frisk but not required for a frisk to be permissible. *Warren*, 78 P.3d at 595–96. There, the defendant was frisked at a traffic stop by an officer who testified "he had no reason to believe [the defendant] was armed and dangerous." *Id.* at 592. Although finding that "an officer's lack of subjective belief alone does not invalidate an otherwise objectively reasonable *Terry* frisk," it held that "completely disregard[ing] an officer's subjective belief excludes a potentially important element of the analysis." *Id.* at 596. Like the Eighth Circuit in

Roggeman, the Supreme Court of Utah justified its hybrid position by referencing this Court's instructions to give "due weight" to "an officer's subjective factual determination based on experience and specialized training." *Id.* (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)).

The Eighth Circuit and Supreme Court of Utah have been joined by at least three state courts of last resort and an intermediate state court. *See State v. Bannon*, 398 P.3d at 854 (Kan. 2017) ("In short, an officer's subjective fear or belief that a stopped person is armed and presently dangerous is not individually controlling on the question of reasonableness of a frisk. It is not indispensable, but it is not to be ignored."); *State v. Kyles*, 675 N.W.2d 449, 456 n.22 (Wis. 2004) ("[W]e agree[] that the officer's belief that his or her safety or that of others was in danger is one factor that a circuit court may consider in evaluating the totality of the circumstances in examining the validity of a frisk."); *People v. Galvin*, 535 N.E.2d 837, 843 (Ill. 1989) ("[While] an officer's subjective feelings may not dictate whether a frisk is valid, the testimony of an officer as to his subjective feelings is one of the factors which may be considered in the totality of the circumstances known to the officer at the time of the frisk."); *Lockard v. State*, 233 A.3d 228, 241 (Md. Ct. Spec. App. 2020) ("[W]e . . . hold that an officer's subjective belief [about] whether the suspect is armed and dangerous is a relevant consideration in the 'totality of circumstances' calculus.).[1]

---

[1] The Fifth Circuit also implicitly considered an officer's suspicion in determining a frisk's reasonableness when the court, although upholding the search, noted that the officer's testimony that "before the patdown, he had no specific reason to believe [the defendant] was armed . . . somewhat detracts from our position." *United States v. Michelletti*, 13 F.3d 838, 842 (5th Cir. 1994).

C. Some Jurisdictions Hold that Whether an Officer Actually Suspected a Detainee Was Armed and Dangerous Is Irrelevant to the Constitutionality of a *Terry* Frisk.

The Indiana Supreme Court neither required actual suspicion nor considered whether Agent Wilkinson suspected Mr. Johnson was armed. Pet. App. 7a–10a. Such indifference places the Indiana Supreme Court alongside the Seventh and Tenth Circuits, which view as wholly irrelevant the presence or absence of an officer's actual suspicion before a *Terry* frisk.

The Seventh Circuit requires only that a reasonable officer would have suspected a person was armed and dangerous and does not weigh the officer's actual beliefs in making this determination. *United States v. Adamson*, 441 F.3d 513 (7th Cir. 2006). In *Adamson*, officers stopped the defendant, who was holding a white bag and some clothing in front of his chest and whom the officer knew was reputed to carry a firearm. *Id.* at 516. Roughly twenty minutes after the officers initiated the stop, they frisked the defendant and found a firearm. *Id.* at 516–17. The defendant moved to suppress the firearm, arguing that the officers' delay in frisking him meant they did not "subjectively believe[] that he was armed." *Id.* at 521. The court rejected this argument, holding that the test for reasonable suspicion is exclusively objective. *Id.* The court upheld the search and did not weigh the officers' lack of actual suspicion in evaluating the reasonableness of the search. *Id.* at 521–22.

The Tenth Circuit likewise does not weigh an officer's actual suspicion—or lack thereof—when determining whether a frisk violated the Fourth Amendment. In *United States v. Johns*, an officer frisked the defendant after she exited the car he had stopped. 120 F. App'x 254, 255–56 (10th Cir. 2005) (unpublished). The defendant

argued the frisk was unreasonable because the officer "harbored no *actual* suspicion" she was armed and dangerous. *Id.* at 257. Although the court rejected the defendant's factual argument and found that the officer "*did* believe [the defendant] might be dangerous," *id.*, it cautioned that this factual assessment "should not be taken as an implicit endorsement . . . that an officer must harbor an actual belief that the suspect may be armed in order to conduct a pat-down under *Terry*. . . . [T]he subjective beliefs of the officer are irrelevant," *id.* at 257 n.2.

This Court should grant certiorari to resolve this entrenched divide amongst the lower courts.

II. The Indiana Supreme Court's Decision is Wrong.

This Court's precedent indicates that an officer must actually suspect an individual may be armed and dangerous and that his suspicion must be objectively reasonable before he may conduct a *Terry* frisk. But the decision below upheld a frisk conducted without actual suspicion that Mr. Johnson was armed and dangerous. *See* Pet. App. 7a–10a. Agent Wilkinson testified it was his "common" practice to frisk suspects "for criminal incidents in particular," (Tr. at II:112), and never indicated that he suspected Mr. Johnson was armed, *see* Pet. App. at 32a–54a; (Tr. at II:102–31). The Indiana Supreme Court disregarded this testimony and sifted through the record for facts that would have justified a hypothetical, reasonable officer's suspicion that Mr. Johnson was armed. *See* Pet. App. 7a–10a. This ex post facto justification disregarded consistent language in this Court's precedent, thereby infringing upon Mr. Johnson's Fourth Amendment rights.

A. This Court's Precedent Requires that an Officer Have Actual Suspicion that Must be Objectively Reasonable Before a Frisk Is Permissible.

While an "objective evidentiary justification" is necessary to conduct a search, *see Terry*, 392 U.S. at 15, this Court has never upheld a protective frisk based on solely objective factors or indicated that an officer does not need to actually suspect the detainee was armed and dangerous. In fact, *Terry* suggested just the opposite, holding that "where a police officer observes unusual conduct which *leads him reasonably to conclude* . . . that the persons with whom he is dealing may be armed and presently dangerous," he may conduct "a carefully limited search" to ensure his own safety. *Id.* at 30 (emphasis added). The Court required objective justification for a frisk because "inarticulate hunches" and "subjective good faith alone" are "not enough." *Id.* at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 96–97 (1964)). But *Terry* never suggested that simply because subjective suspicion is not enough to justify a protective frisk, such suspicion is therefore not required to justify a frisk.

In *Terry*'s companion case *Sibron v. New York*, the Court made plain that for a protective frisk to be lawful, an officer "must be able to point to particular facts *from which he reasonably inferred* that the individual was armed and dangerous." 392 U.S. 40, 64 (1968) (emphasis added). Thus, in its very first application of the *Terry* standard, this Court understood *Terry* to require (1) an officer's actual inference or suspicion that a detainee may be armed and dangerous (2) that is objectively reasonable in light of the circumstances. This dual requirement was problematic for the frisking officer in *Sibron*, who "did not ever seriously suggest that he was in fear of bodily harm." *Id.* at 46. The same is true of Agent Wilkinson, who made it clear in

his testimony that frisks were a "common" tactic he used to investigate "criminal incidents in particular." (Tr. at II:112).

In subsequent cases applying *Terry* and *Sibron* to protective searches, this Court has continued to require officers to have actual suspicion before conducting a frisk. In *Ybarra v. Illinois*, the Court explained that *Terry* "does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked." 444 U.S. 85, 94 (1979). The Court found the frisk in *Ybarra* impermissible because it was "simply not supported by a reasonable belief that [the defendant] was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons." *Id.* at 92–93. Likewise, the Court held in *Michigan v. Long* that a police officer may not conduct a protective search of a vehicle during a traffic stop unless he "has a reasonable belief 'that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous.'" 463 U.S. 1032, 1047 (1983) (quoting *Terry*, 392 U.S. at 4). The officer must "possess[] a reasonable belief based on specific and articulable facts." *Id.* at 1049 (cleaned up). Put differently by the Court in *Arizona v. Johnson*, "to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." 555 U.S. 323, 326–27 (2009). Finally, in *Minnesota v. Dickerson*, the Court found that an "officer's continued exploration of the respondent's pocket after having concluded that it contained no weapon . . . amounted to the sort of evidentiary search that *Terry* expressly refused to authorize." 508 U.S. 366, 378 (1993). And if *Dickerson* requires an officer to maintain an actual belief that

a detainee is armed for a protective frisk to continue, it follows that an officer must actually believe a suspect is armed for a frisk to be "justified at its inception" *Terry*, 392 U.S. at 20.

Courts that deny the need for actual suspicion have ignored the clear dictates of *Terry* and its progeny.[2] Courts that adopt a hybrid approach fare little better. Recognizing this Court's repeated references to officers' beliefs, hybrid jurisdictions attempt to split the difference by treating officers' subjective suspicion as one part of an objective whole. *See, e.g.*, *State v. Bannon*, 398 P.3d 846, 854 (Kan. 2017). But this approach is also inconsistent with *Terry*. Where hybrid jurisdictions see subjective belief as one component of an ultimately objective standard, the *Terry* cases view actual suspicion as a distinct and indispensable component of a two-pronged test.[3] Because hybrid jurisdictions do not keep the suspicion and reasonableness inquiries distinct, these courts run the risk of allowing the biased or ill-founded suspicions of police officers to prop up the legitimacy of a frisk—undermining the objectivity of the

---

[2] Even where the Court has not explicitly described reasonable suspicion as including an officer's subjective mental state, it has nevertheless drawn attention to the officer's actual suspicion that a detainee was armed. *Compare Adams v. Williams*, 407 U.S. 143, 146 (1972) ("So long as [an] officer . . . has reason to believe that the subject is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose."), *with id.* at 148 ("Under these circumstances the policeman's action in reaching to the spot where the gun was *thought to be hidden* constituted a limited intrusion designed to insure his safety, and . . . it was reasonable.") (emphasis added).

[3] Outside the frisk context, this Court still distinguishes "reasonable suspicion" from the objective basis undergirding that suspicion. *See Brown v. Texas*, 443 U.S. 47, 51 (1979) ("[W]e have required the officers to have a reasonable suspicion, based on objective facts, that the individual is engaged in criminal activity [to justify an investigatory stop]." (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–83 (1975))).

analysis. Additionally, hybrid jurisdictions, like jurisdictions that use a purely objective analysis, can uphold a frisk despite a lack of evidence that the officer actually suspected the detainee was armed and dangerous.[4]

Many jurisdictions that reject the necessity of actual suspicion have done do by erroneously relying on *Whren v. United States*,[5] which held that probable cause to pull over a driver for a traffic violation is not invalidated by an officer's desire to catch the driver with evidence of a more serious crime. 517 U.S. 806 (1996). *Whren* held that "an officer's motive" does not "invalidate[] objectively justifiable behavior," *id.* at 812, and that "[s]ubjective *intentions* play no role in ordinary, probable-cause Fourth Amendment analysis," *id.* at 813 (emphasis added). But *Whren* has no bearing here; to marshal *Whren* in support of a purely objective test is to confuse motives and intentions with beliefs and suspicions. In *Whren*, the police officers' alleged motive was to search for contraband in Whren's car. *Id.* at 809. But the officers nonetheless had actually witnessed—and therefore believed—that Whren had violated a traffic law before they pulled him over. *Id.* at 808.

Consistent with *Whren*, an officer's hope or expectation that a *Terry* frisk will uncover incriminating contraband does not render the frisk unlawful—so long as the

---

[4] *See, e.g.*, *State v. Bannon*, 411 P.3d 1236, 1247 (Kan. Ct. App. 2018) (applying the hybrid approach and upholding frisk in the absence of officer testimony that the defendant was armed and dangerous); *see also United States v. Michelletti*, 13 F.3d 838, 842 (5th Cir. 1994) (justifying frisk despite officer's explicit testimony that he had no reason to believe the suspect was armed).

[5] *See, e.g.*, *United States v. Roggeman*, 279 F.3d 573, 580 n.5 (8th Cir. 2002) (citing *Whren* in support of a hybrid view); *United States v. Rochin*, 662 F.3d 1272, 1274 (10th Cir. 2011) (same); *State v. Bannon*, 398 P.3d 846, 853 (Kan. 2017) (same) (citing *United States v. McGregor*, 650 F.3d 813, 821–22 (1st Cir. 2011)).

officer actually and reasonably suspects that the detainee is armed and dangerous. Similarly, even if an officer is motivated by something other than justice when he applies for a warrant, he must actually believe the target of that warrant application committed a crime. *See* U.S. Const. amend. IV (warrants must be supported by "Oath or Affirmation"). So while this Court has typically declined to "entertain Fourth Amendment challenges based on the motivations of individual officers," *United States v. Knights*, 534 U.S. 112, 122 (2001), it has never entertained the position that officers' beliefs are irrelevant to a Fourth Amendment analysis.[6]

B. An Actual Suspicion Standard Is Necessary to Prevent the Erosion of Fourth Amendment Rights.

An actual suspicion requirement protects Fourth Amendment rights as they existed at the Nation's founding. It also maintains harmony among investigative criminal procedure doctrines that require articulated reasons to justify a search, and it keeps courts' reasonableness analyses grounded in the beliefs and inferences of actual police officers.

The concept of the *Terry* frisk would have been foreign to the Framers. *Terry* frisks are a judicially created "exception to the requirement of probable cause" not

---

[6] Aside from *Whren*, some courts have rejected an actual suspicion requirement based on dicta from *Scott v. United States*, 436 U.S. 128, 130 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."). *See, e.g.*, *State v. Schlechty*, 926 N.E.2d 1, 7 (Ind. 2010) (citing *Scott* when adopting a purely objective test); *United States v. Barnett*, 505 F.3d 637 (7th Cir. 2007) (same); *State v. Warren*, 78 P.3d 590, 595 n.3 (Utah 2003) (citing *Scott* approvingly when adopting a hybrid test). But like *Whren*, *Scott* framed its discussion of objectivity against the concepts of "intent" and "motivation." 436 U.S. at 138. Thus, lower courts have misread *Scott* in rejecting an actual suspicion requirement for *Terry* frisks.

found in the text of the Fourth Amendment. *Ybarra*, 444 U.S. at 93. While the common law might have permitted a temporary detention of a person, *see Dickerson*, 508 U.S. at 380 (Scalia, J., concurring), "the historical record gives no indication that an officer had the authority to search before an actual arrest occurred," Heather Winter, *Resurrecting the "Dead Hand" of the Common Law Rule of 1789: Why* Terry v. Ohio *Is in Jeopardy*, 42 Crim. L. Bull. 564, 584–85 (2006); *see also United States v. Johnson*, 921 F.3d 991, 1009–11 (11th Cir.) (Jordan, J., dissenting) (arguing that *Terry* "rests on a shaky originalist foundation"), *cert. denied*, 140 S. Ct. 376 (2019). In Justice Scalia's words, it is "frankly doubt[ful] . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity [of a frisk]." *Dickerson*, 508 U.S. at 381 (Scalia, J., concurring). Relaxing the actual suspicion requirement would further unmoor *Terry* from the text of the Fourth Amendment and the common law at the time at which it was adopted.

Removing an actual suspicion requirement for a *Terry* frisk also creates tension among criminal-procedure doctrines. In the warrant context, an officer with writer's block receives no constitutional leeway: "mere conclusory statements" in a warrant application cannot provide an adequate basis "for making a judgment regarding probable cause." *Illinois v. Gates*, 462 U.S. 213, 239 (1983). To obtain a warrant, the Constitution demands that a police officer articulate the facts justifying the intrusion. *Id.* Likewise, courts should not be permitted to comb through a trial record and lend a hand to an officer who failed to articulate a suspicion that the

subject of his *Terry* frisk was armed. "Our constitutional guarantees would mean little if any search or seizure which produced evidence of criminal conduct was justified post hoc." *Wilson v. State*, 874 P.2d 215, 225 (Wyo. 1994). And like the warrant requirement, an actual suspicion standard is simple for courts and law enforcement officials to understand and administer in practice.

Failing to require actual suspicion is also inconsistent with this Court's warnings that lower courts should not substitute their judgment for that of a "trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979).[7] And while some judges may be tempted to ignore suspicions informed by officers' on-the-ground experience, an equal and opposite danger is that judges may conjure hidden threats in truly innocuous circumstances. Where a trained and experienced police officer was not actually suspicious—or worse, admits on the record that he searches suspects out of habit—a judge should not readily conclude that a reasonable officer would have harbored such suspicion.

The Indiana Supreme Court's decision is wrong because it ignores this Court's precedents, impinging Indianans' constitutional rights in the process. Only an actual suspicion requirement can make sense out of *Terry* and its progeny. Actual suspicion

---

[7] *Accord United States v. Cortez*, 449 U.S. 411, 419 (1981) ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and action on that suspicion."); *Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("[A] police officer views the facts through the lens of his police experience and expertise," from which he draws "inferences that deserve deference.").

also prevents courts from holding that an officer had reasonable suspicion a detainee was armed and dangerous when the officer on the ground did not have any such suspicion. An actual suspicion standard "protect[s] the citizen without overburdening the police," and "preserves and protects the guarantees of the Fourth Amendment." *Coolidge v. New Hampshire*, 403 U.S. 443, 483 (1971).

This Court should grant certiorari and reject the approach taken by the Indiana Supreme Court in this case.

III. The Question Presented Is Important.

The question presented is important for three reasons. First, the right to be free from unreasonable searches is a sacred Fourth Amendment right that must be uniform across jurisdictions for the sake of both citizens *and* law enforcement. Second, despite *Terry*'s explicitly narrow scope, lower courts have created categorical rules that have weakened the objective standard. Such categorical rules, combined with the power afforded to police to stop suspects and then reach into their pockets during a frisk for nonthreatening contraband under *Dickerson*, make it pivotal that the Court maintain an actual suspicion requirement. Third, requiring officers to justify frisks better protects citizens' Fourth Amendment rights, particularly citizens of color who are stopped and frisked at disproportionate rates.

As this Court made clear in *Terry*: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 392 U.S. at 9 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). Frisks are no "petty

indignity"; they are "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and [they are] not to be undertaken lightly." *Id.* at 16–17. During a frisk, "[t]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." *Id.* at 17 n.13 (quoting L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. Crim. L.C. & P.S. 481 (1954)). Justice Scalia was troubled by the invasiveness of this description of a frisk from a police manual:

> "Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked. []A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject."

Minnesota v. Dickerson, 508 U.S. 366, 381–82 (1993) (Scalia, J., concurring) (quoting J. McCauslin Moynahan, Jr., *Police Searching Procedures* 7 (1963)). The Court must resolve the question presented to clarify the legal justification necessary for police to perform this invasive procedure on individuals on the street.

Furthermore, the deep division among the lower courts on this question means that the liberty of citizens varies from jurisdiction to jurisdiction. Yet the Constitution demands uniform enforcement. This Court has recognized the "necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution," and should grant certiorari to end the "deplorable"

"public mischief" of the inconsistent vindication of Fourth Amendment rights. *Martin v. Hunter's Lessee*, 14 U.S. 304, 347–48 (1816). Moreover, law enforcement agents across the country deserve clarity on the procedures that they are required to follow in order to conduct a frisk. The different standards complicate "already complex Fourth Amendment law," "hinder[ing] the administrative guidance (with its potential for control of unreasonable police practices) that a less complicated jurisprudence might provide." *Bond v. United States*, 529 U.S. 334, 342 (2000) (Breyer, J., dissenting).

There is also an urgent need for the Court to enforce the actual suspicion requirement given lower court rulings that have weakened the objective standard through the use of categorical rules. For example, nearly every federal circuit has upheld a frisk based solely on an officer's belief that the person was engaged in drug trafficking.[8] And while this categorical rule began with courts permitting frisks for "wholesale-level drug-traffickers," "courts gradually widened the category . . . to any sellers of narcotics" and finally to "anyone involved with drugs—including persons merely in possession of small amounts." David A. Harris, *Particularized Suspicion,*

---

[8] *See United States v. Sanchez*, 398 F. App'x 840, 843 (3d Cir. 2010) (unpublished); *United States v. Jackson*, 390 F.3d 393, 399 n.7 (5th Cir. 2004), *cert. granted, judgment vacated*, 544 U.S. 917 (2005) (remanding in light of *United States v. Booker*, 543 U.S. 220 (2005)); *United States v. Young*, 277 F. App'x 587, 589 (6th Cir. 2008) (unpublished); *United States v. Thompson*, 842 F.3d 1002, 1007 (7th Cir. 2016); *United States v. Crippen*, 627 F.3d 1056, 1063 (8th Cir. 2010); *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1086 (9th Cir. 2000); *United States v. Hishaw*, 235 F.3d 565, 570–71 (10th Cir. 2000); *United States v. Cruz*, 909 F.2d 422, 424 (11th Cir. 1989) (per curiam); *United States v. Smart*, 98 F.3d 1379, 1385 (D.C. Cir. 1996). *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998) (going a step further in finding the mere presence of illegal drugs sufficient for a frisk).

Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio, 72 St. John's L. Rev. 975, 1002–05 (1998). This dilution of the reasonable suspicion standard is alarming given the power bestowed to police by *Dickerson*, which expanded what may be seized in a frisk to include not only weapons but also nonthreatening contraband based on only "probable cause to believe that the item is contraband." 508 U.S. at 376. Thus, in jurisdictions like Indiana that both consider actual suspicion irrelevant and apply a categorical drug-crime rule, an officer who harbors mere reasonable suspicion that an individual is committing a drug crime may frisk that person and reach into the individual's pockets for what the officer incorrectly believes is nonthreatening contraband. And the officer can do all this without ever suspecting that the defendant may be armed and dangerous. Such a scenario is incompatible with the text and original understanding of the Fourth Amendment, rendering the question presented worthy of the Court's attention.

Finally, the gradual widening of *Terry*'s scope has been particularly harmful for people of color. As Justice Sotomayor explained, "it is no secret that people of color are disproportionate victims of [frisks]." *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing Michelle Alexander, *The New Jim Crow* 95–136 (2010)). In some jurisdictions, Black and Hispanic drivers stopped by police officers are "searched about twice as often as stopped white drivers," despite finding less contraband in searches of Hispanic drivers and "comparable hit rates" among Black and white drivers. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736, 739 (2020). And

some police departments have adopted dragnet stop-and-frisk policies targeting communities of color without any particularized suspicion whatsoever. *See, e.g.*, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013). Thus, what *Terry* imagined to be a narrow exception has led to large-scale indignities for people of color.

This case demonstrates that without an actual suspicion requirement, an overzealous court can justify a frisk on grounds unarticulated, *and even disclaimed*, by the government, wholly excusing the government from its burden of proving the constitutionality of a search. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (noting that the burden for proving an exception to the Fourth Amendment warrant requirement is "on those seeking the exemption"—i.e., the government (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)). Agent Wilkinson admitted that he searched Mr. Johnson as a matter of course, not because he suspected that Mr. Johnson was armed, (Tr. at Vol II:112), and the Indiana Supreme Court did not consider this at all relevant to its purely objective analysis, *see* Pet. App. 7a–10a. Thus, this case provides a clean factual vehicle for considering whether an officer's actual suspicion should have any relevance to a *Terry* frisk analysis.

The Fourth Amendment should not tolerate what happened here. This Court should grant certiorari to resolve the deep and acknowledged split among both state and federal courts over whether an officer's actual suspicion is relevant to a *Terry* frisk analysis. And ultimately, the Court should hold that a warrantless frisk must be justified by an officer's actual and objectively reasonable suspicion that a suspect is armed and dangerous.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Paul J. Podlejski
LAW OFFICE OF PAUL J. PODLEJSKI
22 W. 8th Street
Anderson, IN 46016
765-644-5376
attorneypaulp@gmail.com

Daniel S. Harawa
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
Appellate Clinic
One Brookings Dr.
Campus Box 1120
St. Louis, MO 63130
314-935-4689
dharawa@wustl.edu

March 23, 2021