No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ADAM DOUGLAS SHERWOOD

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under *Terry* and its progeny, the police may stop and briefly detain a person driving in a motor vehicle for investigative purposes if the officer has a particularized and objective basis for suspecting that particular person of criminal activity, which must be more than an inchoate suspicion, or hunch. If the officer believes the person stopped is armed and dangerous, he may conduct a protective frisk of the suspect's outer clothing to discover guns, knives or other hidden instruments for an assault of the police officer. A thorough search of the car can be conducted if probable cause exists to believe the car contains contraband or evidence of a crime.

Where a dispatch alert indicates that a gunshots-fired incident involved a white Silverado pickup, the second most common vehicle on the road, driving away at a high rate of speed at 12:24 a.m. from a given location, does the officer have a particularized basis for stopping a white Silverado pickup truck 35 minutes later that happens to be driving in the same area, or is such a stop prohibited because it is nothing but a hunch?

If the passenger in the front seat of the white Silverado that the officer later stopped in a private parking lot has an open container of beer in his lap, does this give the officer the right to conduct a thorough search of the vehicle for contraband or evidence of a crime, including a search for other "intoxicants?"

If the person with the open can of beer, in response to questioning by the officer about whether he has any weapons on him, tells the officer he has a pocketknife in his left front pocket, but the officer frisks his outer clothing and feels nothing that resembles a weapon, may the officer still thrust his hand into the suspect's left front pocket and pull out items that the officer acknowledges did not feel like a weapon, such as a small amount of currency and a one-inch by one-inch plastic bag that contains only .35 grams of methamphetamine?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner, Adam Douglas Sherwood, was a defendant in the district court and was the appellant in the Tenth Circuit. Mr. Sherwood is an individual. Thus, there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

The Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Adam Douglas Sherwood respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's controlling decision is reported at *United States v. Sherwood*, No. 23-5122, 2025 WL 752342 (10th Cir. March 10, 2025).

JURISDICTION

The Tenth Circuit entered its order and judgment in an unpublished opinion that is not binding precedent on March 10, 2025. App., *infra,* 3-20. Mandate was issued in the case on April 1, 2025. This Court has jurisdiction under 28 U.S.C. Sect. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

"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."

STATEMENT OF THE CASE

Following a jury trial in the United States Court of the Northern District of Oklahoma, Petitioner was convicted of five counts in a fourteen count indictment that included conspiracy under 21 U.S.C. 846 and 21 U.S.C. 841(b)(1)(B) for 50 grams or more of methamphetamine; possession of methamphetamine with intent to distribute under 21 U.S.C. 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. 2, and three counts of unlawful use of a communication facility under 21 U.S.C. 843(b) and 843(d)(1). The charges arose from a traffic stop where Petitioner's cell phone was seized. A motion to suppress the stop, and subsequent frisk and seizure of property from Petitioner was denied. Petitioner was sentenced to 100 months in the Bureau of Prison, to be followed by five years of supervised release and a special monetary assessment of $100.

STATEMENT OF FACTS

The facts surrounding Petitioner's traffic stop presented to the Tenth Circuit Court in Petitioner's opening brief are undisputed.

Looking for a motel on May 23, 2020 just before 1:00 a.m. and having missed a turn, Petitioner Adam Sherwood found himself as a passenger in his father's white Chevrolet Silverado pickup driven by Kenny Rosenberg with Trinity St. Clair in the back seat. The pickup headed north on Mingo Road just beyond South 71 Street in Tulsa, Oklahoma. Rosenberg and St. Clair were from Miami, Oklahoma while Appellant was from Wyandotte, Oklahoma, both towns still about an hour and a half away. Petitioner had driven the car earlier that evening, but within the last 15 minutes had let Rosenberg drive. Rosenberg's leather jacket later was found lying on the back seat.

Tulsa Police Officer Andrew DeGeorge was on Mingo Road at about South 68th Street when his patrol car's audio-video recording device activated. Shortly afterward, as he conducted a stop of the truck, DeGeorge's body camera activated. DeGeorge later testified that these two recordings constituted the "entire footage" of the investigatory stop he conducted that night. The initial portion of the patrol car camera shows DeGeorge a block to two blocks south of a traffic light located at South 66th Street and

the white Chevrolet pickup that Petitioner sat in was north beyond the light in the distance. DeGeorge testified that the white pickup truck showed no sign of suspicious activity. According to DeGeorge's testimony at Petitioner's motion to suppress hearing, he had received, starting just before midnight on May 22, 2024 up until 12:24 a.m. on the morning of May 23, 2024 multiple dispatch calls about shots fired from a truck. "As those calls continued to come in," DeGeorge testified, "a vehicle description was generated, being a white Chevrolet pickup truck." The last call had come from an address at 6415 S. Mingo, DeGeorge said. This was where the Oilers Ice Skating Rink was located, a recreational area that catered to the public. A white Chevrolet pickup truck was "not an uncommon vehicle style or color," DeGeorge conceded. The trucks had the same body style for 6-8 years between 2007 and 2014 and they were hard to distinguish from General Motors' other "GMC" pickup. In 2014 alone, there were 404,251 Chevrolet Silverado pickup trucks sold, which made it the second best-selling vehicle that year behind the Ford F-150. The most popular car color in 2014 was white,

where 23% of all new vehicles sold in America were white. The total number of cars sold in the United States in 2014 was 16.5 million. These figures suggest that, at least in 2014, approximately 1 in 100 cars sold in the United States was a white Chevrolet Silverado. Based on DeGeorge's testimony, the brand had been equally strong in preceding years.

Officer DeGeorge's video showed the white Chevrolet pickup truck entering a concrete private driveway separating the Oilers Skating Rink from another business to the south, the Miller Swim School. The white pickup next entered the Oilers parking lot, which happened to be at 6415 South Mingo. Only after the truck entered the parking lot did DeGeorge turn on his overhead lights indicating his desire to stop the vehicle. DeGeorge, who had not previously been close to the white Chevrolet truck on the video, pulled up behind it. Although DeGeorge later claimed at some point he had been close to the white pickup and the license plate lights had not been functioning, the patrol car camera unmistakably showed the left license tag light operating and DeGeorge's body camera showed the right license plate light on.

Donald Sherwood, who was Petitioner's father and who owned the truck, testified he bought the truck new from the manufacturer and that, after he recovered the truck from impound following his son's arrest, the license plate lights were functional. The tag on the truck, which was an Eastern Shawnee tribal tag with the tribal emblem on the left and 4 numbers on the right, in this case "1621," was illuminated. DeGeorge later claimed that his stop was partially justified because the license plate lights were not lit properly. The Tenth Circuit Court declined to review this justification for the stop on that basis for good reason. During the jury deliberations, the jurors sent out a note to the judge which read: "In the initial stop for no license plate lights, is that a legal stop; since the license plate lights are obviously illuminated."

Officer DeGeorge stepped out of his car, walked up to the driver's side window and knocked on it. Kenny Rosenberg rolled down the window. DeGeorge asked for his driver's license, but Rosenberg said he did not have one. DeGeorge then asked whether any of the occupants had felony convictions. Both Rosenberg and St. Clair, sitting in the back seat, acknowledged

they both had previous felony gun possession charges. Petitioner, who had a driver's license, did not acknowledge prior felony convictions and the officer checking his record that night found none. DeGeorge looked through the vehicle and saw Petitioner holding an open can of beer in the car as it sat parked in the Oilers parking lot. He also saw what he said was a piece of linen fabric sitting in a cup holder on the center console. Although not evident on the video, DeGeorge claimed Rosenberg made furtive movements toward the center console.

DeGeorge asked for permission to search the truck, but Rosenberg denied consent to a search. DeGeorge did not even bother to ask Petitioner or St. Clair whether they would consent to a search. Instead, DeGeorge declared he was going to search regardless because the open beer in the car entitled him to search the truck for "intoxicants." When later asked at the suppression hearing what factors justified the search, DeGeorge cited four reasons: (1) multiple shots had been fired earlier that night from a vehicle that matched the description of the vehicle described in the shooting, the last shooting incident having occurred more than

30 minutes earlier called in from the same location, (2) there was piece of linen that could be used as a holster in the front seat cup holder, (3) the behavior of the occupants, and (4) two of the occupants had prior convictions for gun charges. DeGeorge described the behavior of the occupants as "squirrelly". At the suppression hearing, he said the occupants were nervous to a higher degree than normal for someone stopped in a traffic stop, they had "stiff posture," spoke in "hushed tones" and gave "non-committal answers" when asked about the presence of firearms or contraband in the car. Each of these descriptions would be open to dispute based on the video footage prior to DeGeorge's announcement that he would search the car regardless.

As other backup officers arrived on the scene, DeGeorge told Rosenberg to get out of the car. DeGeorge then first displayed his method for how he conducted a frisk search. First, he handcuffed Rosenberg with his hands behind his back. DeGeorge briefly patted Rosenberg's front right jeans pocket, appeared to put his thumb and forefinger around a small object deep in the pocket, then thrust his hand into the pocket and pulled out whatever was

inside, which turned out to be a wad of United States money totaling $1300. Rosenberg later told DeGeorge the money was from his stimulus check he had received like many others during the pandemic. DeGeorge also claimed Rosenberg had a fabric holster on his belt that matched the fabric in the cup holder in the truck's center console. DeGeorge stuffed the currency back into Rosenberg's pocket and directed him to one of the other officer's vehicles at the scene.

DeGeorge then went around the vehicle to where Petitioner was seated. By then, at least two other police officers had arrived on the scene. One was Officer G. K. Smith, who was told by DeGeorge to start searching the interior of the vehicle. The other was a female officer. Petitioner had sat patiently as DeGeorge searched Rosenberg. Smith, in fact, admitted Petitioner had made no threatening moves. The officers all acknowledged Petitioner's record had been searched, but he had no convictions. Petitioner did not even have a belt, so, unlike Rosenberg who had one of the linen 'holsters' attached to his belt, Petitioner would have had nothing that such a holster could have attached to.

As Petitioner got out of the front passenger seat, DeGeorge handcuffed him "for protection." DeGeorge conceded nothing about Petitioner indicated impairment. In fact, Petitioner asked DeGeorge why the truck had been stopped. DeGeorge answered, "You don't have a tag light and we're looking for a vehicle that matches the exact description of this truck for some shooting incident." DeGeorge claimed, because Petitioner had held an open beer can, he had the right to search for "additional intoxicants." When asked whether he had any weapons on him, Petitioner said he had a pocketknife in his left front jeans pocket. DeGeorge told Petitioner he was not under arrest. DeGeorge on the video then, after a momentary frisk, appears to simply thrust his hand into Petitioner's left front jeans pocket. DeGeorge testified he never felt anything in examining the left front jeans pocket, whether he frisked it first or not, that felt like a weapon.

After DeGeorge thrust his hand into Petitioner's left front jeans pocket, he simply pulled out its contents. Nothing he pulled out resembled a weapon. DeGeorge found a small amount of United States currency that totaled $226. The video also showed

DeGeorge found a very small clear plastic packet rolled up. "He's got a little bit of dope there in his pocket," DeGeorge said. He unrolled the item to discover it contained a very small quantity of what the Government laboratory later reported as 0.35 grams of methamphetamine. DeGeorge directed Petitioner toward one of the parked police vehicles, while DeGeorge continued to examine various plastic bags and containers on or near the passenger floorboard.

The video at that moment, with DeGeorge standing near or inside the opened front passenger door, showed a chartreuse colored item that had been tucked under the front passenger seat earlier that Petitioner would not have seen as he changed seats from driving the car fifteen minutes before the stop. Only a tip of a corner of the item was visible, which was well under the outer edge of the cushion of the front passenger seat. DeGeorge, after searching other items on the floorboard in front of Petitioner's seat or up against the passenger side of the console, then pulled the chartreuse colored item out from underneath the seat. The item turned out to be a four-inch by ten-inch zip lock bag about an inch

and a half thick. DeGeorge testified he found nothing to indicate the green zip lock bag had ever belonged to Petitioner or was otherwise connected to him. Petitioner himself later denied any knowledge of the green zipped lock bag or its contents. When DeGeorge unzipped the bag, he found several clear plastic baggies, one that contained non-weighable residue and a small digital scale. The small baggies inside the zip lock bag, though small, were not the same configuration as the small packet found earlier in Petitioner's left front jeans pocket.

While DeGeorge searched the floorboard area, Officer Smith searched the center console. Smith opened the closed center console door and uncovered a magazine and a loaded Lorcin firearm with the serial number defaced on it. It was possible to lift up the entire console storage area to make a middle seat in the front next to where the driver sat. When Smith did this, he found a second firearm, a Ruger LCR cylinder-loaded. Neither the Lorcin nor the Ruger had been fired that night. In the back seat, officers found the black leather jacket that Rosenberg said belonged to him. Inside the jacket's pockets was live .38 caliber

ammunition that matched the Ruger firearm. Petitioner's father, Don Sherwood, testified neither gun was his, nor had he ever seen his son in possession of either gun. Petitioner at trial testified neither the holster nor the guns in or under the console were his and that he had no gun that night. Other officers searched the backseat passenger, St. Clair. They found LSD in her purse and slightly more than $300 United States currency, either in her purse or on her person.

Petitioner started recording the stop on his cell phone. Officer DeGeorge found the phone and seized it. He later filled out a search warrant affidavit to search the phone, where he claimed his search of the vehicle and its occupants had "yielded methamphetamine in Sherwood's pants pocket" and insinuated that Petitioner had been involved in drug deals that night, stating, "cell phones are often carried by drug dealers to facilitate drug sales." The search warrant was granted and Petitioner's phone was searched. The Tenth Circuit did not address the validity of the search warrant because trial counsel had not properly preserved the issue. Nevertheless, it was the officer's

ability to search the Petitioner's phone, after what Petitioner believes were several unjustified searches, that made possible Petitioner's prosecution and convictions.

REASON FOR GRANTING THE WRIT

THE TENTH CIRCUIT OPINION SANCTIONS THREE VIOLATIONS OF THE FOURTH AMENDMENT: (1) THE STOP OF A COMMON VEHICLE NEAR A CRIME SCENE LONG AFTER THE CRIME HAS PASSED, (2) AN OFFICER THRUSTING HIS HAND INTO A DETAINEE'S POCKET FEELING NOTHING THAT RESEMBLES A WEAPON BUT TAKING OUT A SMALL CELLOPHANE PACKET OF ILLEGAL DRUGS, AND (3) BASING A SEARCH OF A VEHICLE PARKED IN A PRIVATE PARKING LOT BECAUSE OF THE PRESENCE OF AN OPEN BEER CAN HELD BY A FRONT SEAT PASSENGER, ALL OF WHICH EXPAND THE AUTHORITY OF POLICE OFFICERS TO STOP VEHICLES AND CONDUCT WARRANTLESS SEARCHES OF BOTH OCCUPANTS INSIDE THOSE VEHICLES AND OF THE VEHICLE ITSELF BEYOND WHAT THIS COURT HAS AUTHORIZED AND BEYOND WHAT OTHER CIRCUIT COURTS HAVE ALLOWED

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." U.S. Const. amend IV. Searches 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 established and well-defined exceptions. *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S. Ct. 2022 (1971). The exceptions are jealously

and carefully drawn, and there must be a showing by those who seek exemption to the exigencies of the situation that made the course imperative. *Id.*

This case involves a belated stop of the second most common vehicle on the American road, a white Chevrolet Silverado pickup. The officer conducting the stop, after dealing with the driver, came to Petitioner, who sat in the front passenger seat. The officer momentarily frisked Petitioner, but he quickly thrust his hand into Petitioner's left front jeans pocket. He later acknowledged he felt nothing that resembled a weapon in the pocket, but nevertheless pulled out a few bills of currency and a small plastic packet containing only .35 grams of illegal drugs. The officer already had commenced a search of the vehicle. He told Petitioner, who held an open can of beer in his hand, he had the right to conduct a full search of the vehicle for other "intoxicants." The Tenth Circuit opinion approved each of the officer's actions, buttressed by the holding that the totality of the circumstances permitted each search or seizure. This Court should accept certiorari on any one of these three warrantless

searches and seizures, or on all three. The Tenth Circuit opinion as to these three actions by the officer appears to be in conflict with the holdings of this Court or holdings of many Circuit Courts.

The Traffic Stop of the White Chevrolet Silverado Pickup Truck

It should come as no surprise that Officer DeGeorge picked the wrong white Chevrolet Silverado pickup truck when he conducted the traffic stop on the white Silverado Petitioner occupied at 12:58 a.m. on the morning of March 25, 2025. Not long after the stop and the discovery of the guns in or under the center console, and after Petitioner's pat-down and search of his front pocket that found the small plastic packet containing a tiny amount of methamphetamine, other police officers investigating the scene where the initial shots-fired 911 call had been made discovered that the gun used had 9 mm bullets rather than the .32 and .380 caliber bullets required by the guns found in the Silverado where Petitioner sat.

The Court has held in *Terry v. Ohio,* 367 U.S. 643 (1968), that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by

articulable facts that criminal activity may be afoot, even if the officer lacks probable cause." *Id.* The justification for a *Terry* stop "requires considerably less than proof of wrongdoing by a preponderance of the evidence," but "something more than an inchoate and unparticularized suspicion or 'hunch.'" *Alabama v. White,* 496 U.S. 325, 329-330 (1990).

The situation Officer DeGeorge faced on the early morning of March 25, 2020 made his action stopping the white Silverado pickup nothing more than a "hunch" that the occupants had been involved in the shots-fired incidents that had preceded DeGeorge's sighting of the truck by more than 30 minutes. The dispatch, in facts set out in Petitioner's reply brief, reported the first shots fired incident that night at 23:51:22 coming from 2921 S. 94th E. Ave. The address was two blocks north of South 31st Street and two blocks west of Mingo Road, which runs parallel a few blocks west of Highway 169, known as the Mingo Valley Expressway. Dispatch reported that one caller "heard 5-6 gunshots in the area and saw a whi pk driving around." No further description was provided about the vehicle – not the license tag, nor the direction

the vehicle was traveling, nor any other special characteristic about the car. The address at 2921 S. 94th E. Ave. was approximately 3 ½ *miles* from where Petitioner's Silverado pickup truck was stopped at 6415 S. Mingo Road by Officer DeGeorge at 12:58 a.m. One officer was assigned to the scene on 94th E. Ave and arrived within 9 minutes of the last report of shots-fired in the area, but by 00:36:41 he gave up searching for the white pickup in the area.

After midnight, a second "shots-fired" incident was reported by a passerby who left his phone number. The address the passerby gave was 6415 S. Mingo Road, which was an ice skating rink that catered to the public. The trial court record did not disclose when the skating rink commonly closed for business on the day of the week when the shooting occurred. The ice skating rink, however, was the only active business on Mingo Road between South 61st Street and South 71st Street. On one side of the street were the grounds for the Asbury Methodist Church and on the other side was Union High School. The first place a car might turn around, the patrol camera showed, would be the ice skating rink. The

dispatch notes written at 00:24:26 after the second shooting incident read: "1 MTL** WHI CHEVY SILVERADO OCC BY UNK SUBJ WHO FIRED 5 SHOTS AND LEFT SB FROM LOC AT HIGH RATE OF SPEED." Again, no additional information was given to describe the truck – in particular no license plate or other distinguishing characteristic that would identify it from any of the other large number of white Chevrolet Silverado pickup trucks driving on the roads, which DeGeorge himself conceded was "not an uncommon vehicle style or color." Once again, officers were sent to investigate the scene. This time two squad cars arrived, the first at 00:31:19, less than seven minutes after the shots were first reported fired. Someone else called dispatch to report the same shots-fired incident belatedly at 00:37:04. Neither officer who went to investigate the scene found a white Chevrolet Silverado near the location. Both officers terminated their investigations at 00:41:44 and 00:43:26, respectively, at least 15 minutes before DeGeorge stopped Petitioner.

Justification for making a *Terry* stop of a vehicle requires a prompt response to the alleged crime itself. There is a stronger

governmental interest in stopping an individual in the process of violating the law or suspect fleeing from the scene of a crime and a "suspect in a particular crime who now appears to be going about his lawful business." *United States v. Hensley,* 469 U.S. 221, 228 (1985). This Court has at least on one occasion approved the stop of a vehicle whose occupants were suspected to have engaged in criminal activity based on a 911 call. In *Navarette v. California,* 572 U.S. 393 (2014), a 911 caller reported a man had tried to run her car off the road. Police responded within five minutes and found the car in another twelve minutes. The woman described the vehicle as a silver Ford F150 pickup with a license plate of 8D94925. The stop by police was justified because the woman had described "a specific vehicle," this Court held. *Id.,* at 1328, citing *Illinois v. Gates,* 462 U.S. 213, 234 (1983) ("an informant's *explicit and detailed description* of alleged wrongdoing…entitles his tip to greater weight than might otherwise be the case"). "The Fourth Amendment permits brief investigative stops – such as a traffic stop in this case," this Court held, "when a law enforcement officer has a particularized and objective basis to support the particular

person stopped of criminal activity." *Id.,* at 396. The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of the information possessed by police and the degree of reliability." *Id.*

Other Circuit Courts have addressed the propriety of an investigative vehicle stop passed on *less specific* information about the car fleeing the scene. In no instance in cases cited by the Government where a generalized description of a car by color or model had been involved was a time lapse longer than seven minutes between flight from the crime scene and the traffic stop ever sanctioned. *United States v. Burgess,* 759 F.3d 708, 711 (7th Cir. 2014)(after a 911 call for shots fired from a "black car," police hurried to the scene and found the car within two minutes); *United States v. Roberts,* 787 F.3d 1204 (8th Cir. 2015) (police responded to a shooting involving a black Chrysler, which police found "moments after" seven blocks away); *United States v. Madrid,* 713 F.3d 1251 (10th Cir. 2013) (police called to a fight scene stopped the suspect in his white 4-door Pontiac two minutes later leaving the scene); *United States v. Mosley,* 743 F.3d 1317,

1328 (10th Cir. 2014) (police respond to call of suspicious activity in a Denny's parking lot where they find the black Ford Focus described); *United States v. Sanchez,* 519 F.3d 1208 (10th Cir. 2008) (man wearing gray shirt driving white van found a block away after victim flagged down police); *United States v. Bold,* 19 F.3d 99, 103 (2nd Cir. 1994) (4-door Cadillac in White Castle parking lot, where police responded immediately).

The ruling by the Tenth Circuit justifies an overly expansive period of time that police may stop a vehicle as common as a white Chevrolet Silverado – the second most common vehicle driven in America – with no further information such as a license plate number, such as in *Navarette,* or other distinguishing feature about the car or its occupants. Petitioner's car, in fact, was occupied by three persons, which was different from the "UNK SUBJ" described in the police dispatch. To justify the stop, the court wrote, "The short time intervals between calls and the close geographic proximity, combined with two matching vehicle descriptions, provided more specificity than courts often require to establish reasonable suspicion. See, e.g. *United States v. Juvenile*

T. K., 134 F.3d 899, 904 (8th Cir. 1998) (finding reasonable suspicion based on calls made 'forty minutes apart in the very early morning hours, identifying a male with a gun in a gray vehicle while engaging in clearly criminal activity and, more importantly, the vehicle's temporal and geographic proximity to the crime scenes)." But the Tenth Circuit opinion is incorrect about the "temporal proximity" in *Juvenile T. K.* Dispatch first received a call about a suspect in a gray car in a small town in North Dakota breaking out a window of a car in a parking lot who had possession of a gun at 3:10 p.m. But a second call was made about the occupant of the same gray car in the same general location at a convenience store where the same person had brandished a gun at 3:49 a.m. The police stopped the gray car *seven minutes* later making a U-turn 1½-2 blocks away from the same store. The Tenth Circuit decision suggests a temporal difference of as much as forty minutes between the crime and the stop of a vehicle with a highly generic description. Nothing this Court said in *Navarette* nor any of the prompt responses described in the other Circuit Court cases listed above, many of which were

cited by the Tenth Circuit, can be applied to support such a ruling. The Tenth Circuit opinion greatly broadens the possibility that an ordinary citizen "going about his business," just like Petitioner in this case, can be stopped by police if he is unfortunate enough to occupy such a common vehicle previously linked to criminal activity after more than a half hour has passed. While the geographic similarity of where the car was driving or the time of day may carry some wight, the passage of time of more than a half hour between the crime and the traffic stop reduces the likelihood that the stop was justified by anything but a hunch that the three occupants in Petitioner's car were connected to the single subject in the car involved in the shots-fired incidents. The Fourth Amendment protects a person from such a random seizure.

Emptying a Suspect's Pockets Knowing a Weapon is Not There

In *Terry,* this Court crafted a "stop-and-frisk" exception to the general rule that seizures and subsequent searches of an individual be supported by probable cause. In describing limits of a protective frisk for weapons, *Terry* held, "The sole justification of the search is the protection of the police officer and others nearby,

and it must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instrument for the assault of the police officer." *Terry,* 392 U.S. at 29. *Terry* was decided at the same time as *Sibron v. New York,* 392 U.S. 40 (1968), where a law enforcement officer sat next to a suspected drug dealer, thrust his hand into his pockets and removed illegal drugs. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Id.,* at 65-66. "With no attempt at an initial limited exploration for arms," *Sibron* held, "Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin," *Id.,* at 65. "His testimony shows that he was looking for narcotics and found them." *Id.* "The search was not reasonably limited in scope to the accomplishment of the only goal which might reasonably have justified its inception – the protection of the officer – by disarming a reasonably dangerous man." *Id. Sibron* established the procedure required for protective searches that has now been in place for more than 50 years. "If a reasonably-tailored pat-down

reveals an object that appears to meet that description …of concealed objects which might be used as instruments of assault…the officer must then (but only then) reach inside the suspect's clothing and remove it without offending the Fourth Amendment." *Id.*

This Court visited the scope of a protective frisk once again in *Minnesota v. Dickerson,* 508 U.S. 366 (1993). The officer conducting a protective frisk for weapons felt a small lump of cellophane in the suspect's pocket, reached in, and pulled out a small bag containing 1/5 of a gram of crack cocaine. This Court reversed Dickerson's drug conviction. "A protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer and others nearby." *Id.,* at 373. "Where, as here, 'an officer who is exercising a valid search for one item seizes a different item,' this Court rightly 'has been sensitive to the danger…that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a

general warrant to rummage and seize at will.'" *Id.,* at 378, citing *Texas v. Brown,* 460 U.S. 730, 748 (1983).

In spite of these passages from *Terry, Sibron* and *Minnesota v. Dickerson* each being presented to the Tenth Circuit Court, the law in them appears to have been largely ignored. Officer DeGeorge asked Petitioner whether he had any weapons on him. According to DeGeorge, Petitioner responded he had a pocketknife in his front left pocket. While this statement might have made DeGeorge believe Petitioner was armed, he did not thereafter conduct a search "limited to that which is necessary for the discovery of weapons." In fact, DeGeorge admitted as much during his cross-examination. The body camera footage showed his hand ever-so-briefly frisk the outer layer of Petitioner's left front jeans pocket before DeGeorge thrust his hand into the pocket. DeGeorge was asked during cross-examination whether he felt a weapon at that time and he answered that he did not. Instead of taking his hand out of the pocket and looking elsewhere, he took everything in the pocket out – a small amount of currency and a small one-inch by one-inch plastic bag that

contained .35 grams of methamphetamine. DeGeorge's actions were identical to the officer's actions in *Sibron* and *Dickerson.* The weight of the drug found was almost identical to that in *Dickerson.* The officer extracted nothing from the pocket remotely resembling a weapon. As *Sibron* said, "He was looking for narcotics, and he found them."

None of this made any difference to the Tenth Circuit Court. "Once a suspect tells an officer he possesses a weapon, the officer is not restricted to a mere pat-down," the Tenth Circuit held. "The rationale for *Terry* frisks is to ensure officer safety, because these sorts of "close-range" searches leave officers 'particularly vulnerable.' *(Michigan v.) Long,* 463 U.S. (1032) at 1052 (1983)." The court continued, "When an officer has an 'objective basis to believe that the person being lawfully detained is armed and dangerous,' the government's interest in the safety of police officers outweighs the individual's Fourth Amendment interest." *United States v. King,* 990 F.2d 1552, 1561 (10th Cir. 1993) (citing *Long,* 463 U.S. at 1051)." The court concluded, "Here Defendant told Officer DeGeorge he had a pocketknife, and in which pocket it

could be found. Such a situation justifies an officer reaching into Defendant's pocket to pull out the weapon expressly identified by the suspect" (citing *Adams v. Williams,* 407 U. S. 143, 146 (1972)).

The Tenth Circuit went further. "Additionally, Officer DeGeorge's removal of the items from Defendant's pockets did not exceed *Terry's* bounds, even if he could not tell if he felt a knife. After all, 'the Fourth Amendment is not a game of blind man's bluff. It doesn't require an officer to risk his safety or the safety of those nearby while he fishes around a suspect's pockets until he can guess the identity of a risk associated with an unknown object,'" the court held, citing *United States v. Rochin,* 662 F.3d 1277, 1275 (10th Cir. 2011). The court made one last observation: "We also generally strive to avoid 'unrealistic second-guessing of police officer's decisions' regarding officer safety, and are 'guided by common sense and ordinary human experience' when determining 'whether the scope of police conduct was reasonably related to the goals of the stop.' (*United States v.) Albert,* 579 F.3d (1188) at 1193 ((10th Cir. 2009))." Finally, the Tenth Circuit concluded, "Because officers 'should not be required to take

unnecessary risks,' the Fourth Amendment authorizes them to take 'reasonably necessary' steps to protect their personal safety and to maintain the same status-quo during the course of a *Terry* stop." *Id.*

The ruling by the Tenth Circuit takes the rulings in *Terry, Sibron* and *Dickerson* and literally turns them on their head. Even if Petitioner told Officer DeGeorge he had a pocketknife in his pocket, which was not any threat to DeGeorge who carried a gun at the time, DeGeorge still had an obligation to locate the pocketknife before he began pulling out pieces of paper currency and small plastic packets he acknowledged he knew were not weapons. In *Adams,* the officer had cause to find a gun in the suspect's waistband. He felt and pulled out a gun. Like the officers in *Sibron* and *Dickerson,* DeGeorge's ruse was to find illegal drugs, not to find a weapon that might be used to assault him or others. The protective frisk authorized by *Terry* in this situation did not permit the expanded search authorized by the Tenth Circuit Court in this case. *Minnesota v. Dickerson* was precisely on point with Petitioner's case and should have been

applied. That the Tenth Circuit Court has expanded the scope of a protective frisk by its ruling in this case undermines the protections addressed by the Fourth Amendment.

Does An Open Can of Beer in the Lap of a Front Seat Passenger Justify a Search of the Entire Car for 'Intoxicants?'

Under the automobile exception to the Fourth Amendment's warrant requirement, police officers who have probable cause to believe there is contraband or evidence of a crime not related to the stop inside an automobile that has been stopped may search it without obtaining a warrant. *Carroll v United States,* 267 U. S. 132 (1925); *Arkansas v. Sullivan,* 532 U.S. 769 (2001) (per curium). The rule originates with the decision in *Carroll*, where law enforcement agents seized bootleg liquor found stuffed inside a passenger seat. But *Carroll* held that there was a distinction between legal and illegal seizures of liquor transported in vehicles. Only probable cause to believe the car contained suspected contraband goods justified the exception to search the vehicle. *Id.*, at 156.

In this case, Petitioner held an open can of beer in his lap after Officer DeGeorge stopped the vehicle in the parking lot of the

Oilers Ice Skating Rink. When the driver of the car declined to give consent to search the car, the officer declared he could conduct a full search of the vehicle for "intoxicants," because Petitioner held the open can of beer. Remarkably, the Tenth Circuit Court's opinion, rather than follow the almost century-old ruling in *Carroll,* appears to have agreed with the officer. "Probable cause to search a vehicle is established if, under the totality of circumstances, there is a fair probability that the car contains contraband or evidence," the court held, citing *United States v. Saulsberry,* 878 F.3d 946, 951 (10th Cir. 2017). Once an officer concludes he has probable cause, he is "empowered to search the entire vehicle, including the trunk and all containers therein that might contain contraband," the court continued, citing *United States v. Chavez,* 534 F.3d 1338, 1345 (10th Cir. 2008).

The court then stated, "Longstanding precedent demonstrates the sort of factual scenarios that support probable cause to search a vehicle." This language then was followed by three cases where officers had probable cause to believe illegal drugs were in the

stopped car, which justified searches of those vehicles. But in this group of cases, the opinion included a fourth citation: "*Michigan v. United States,* 458 U.S. 259, 259-60 (1982) (*upholding probable cause where officers saw an open bottle of liquor in the car).*" The inclusion of this italicized language appears to expand full vehicle searches in the Tenth Circuit if a passenger, like Petitioner, sitting in a private parking lot has done nothing more than open a can of beer. *Michigan v. United States,* moreover, was not a vehicle search based on the presence of an open bottle of liquor in the car. Rather, the search of the car arose from an inventory search that became necessary when the lone occupant driver of the vehicle did not have a valid driver's license and the inventory search preceded towing of the vehicle.

To be sure, the search of Petitioner's car was justified by the Tenth Circuit for three other reasons: (1) Officer DeGeorge claimed the occupants of the car were "squirrely," had stiff posture, spoke in hushed tones and committed other subjectively-evaluated acts, (2) both the driver and the back seat passenger had been convicted of possession of firearms after former

conviction of a felony (although DeGeorge found no prior convictions in Petitioner's background check); and (3) the linen cloth's presence on the console that DeGeorge claimed could have been used as a holster, even though the trial record never included an actual demonstration of how that might have been possible. Petitioner argued Tenth Circuit cases to contest the search of the car based on the officer's opinion its occupants had acted "squirrely" by citing *United States v. Lopez,* 849 F.3d 921, 925-926 (10th Cir. 2017) ("we have consistently assigned this factor limited significance because the measure is so subjective") and with regard to the two other occupants of the car having felony gun convictions, by citing *United States v. Davis,* 94 F.3d 1465, 1469 (10th Cir. 1996) ("any persons with a criminal record could be subjected to a *Terry* stop at any time without the need for any justification at all"). The search of the car commenced *before* DeGeorge thrust his hand into Petitioner's pocket and pulled out the small plastic packet containing .35 grams of methamphetamine, which if it was a proper search, might have justified a search of the vehicle for contraband. But if the seizure

of the drug packet was unconstitutional, the Tenth Circuit Court's reliance on petitioner holding a can of beer to justify a full car search for other legal "intoxicants" takes on a far more important consideration as an improper basis for probable cause to search the entire vehicle. Like the belated stop of the common white Silverado and allowing the officer to thrust his hand in Petitioner's pocket so that he could pull out an item he knew was not a weapon, the search of the car for "intoxicants" represents an expansion of law enforcement authority that is not sanctioned by the Fourth Amendment.

CONCLUSION

For the reasons set forth above, Petitioner requests this Court to grant certiorari on any one or all of these three issues, which may be all too common in vehicle stops conducted throughout the country.

Respectfully submitted,

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