No. 18-9399

IN THE SUPREME COURT OF THE UNITED STATES

PAUL JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment prohibited law-enforcement officers from seizing a round of ammunition identified during a lawful frisk of petitioner that was performed pursuant to Terry v. Ohio, 392 U.S. 1 (1968).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Johnson, No. 15-cr-20838 (May 20, 2016)

United States Court of Appeals (11th Cir.):

United States v. Johnson, No. 16-15690 (Apr. 16, 2019)

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-88a) is reported at 921 F.3d 991. The order vacating the panel opinion and ordering rehearing en banc is reported at 892 F.3d 1155. The vacated panel opinion is reported at 885 F.3d 1313 (Pet. App. 89a-108a). The order of the district court (Pet. App. 109a-122a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 16, 2019. The petition for a writ of certiorari was filed

on May 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced him to 37 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The en banc court of appeals affirmed. Pet. App. 1a-88a.

1. Shortly after 4 a.m. one morning in June 2015, police officers in Opa-Locka, Florida responded to a complaint that a suspected burglar was trying to break into a home through a window at a multi-family duplex. Pet. App. 3a, 111a. The caller described the suspect as a black male wearing a white shirt. Ibid. Upon arriving at the scene, an officer saw petitioner, a black male wearing a white shirt, standing near a fence in a dark alley at the rear of the complex. Id. at 3a, 112a. The officer asked petitioner to come toward him and lie on the ground, which petitioner did. Ibid.

After placing petitioner in handcuffs, the officer began frisking petitioner. Pet. App. 3a, 112a. While patting down petitioner's right pocket, he felt "a nylon piece of material; and then, underneath it, a round, hard-like, oval-shaped object." 4/8/16 Supp. Suppression Hr'g Tr. 6 (Supp. Tr.); Pet. App. 4a,

112a. Based on his previous training and experience, the officer "immediately thought it was ammunition." Supp. Tr. 7; Pet. App. 4a, 112a. And based on his experience that burglaries often involve more than one person, the officer also thought that "maybe there's a weapon somewhere nearby, maybe there's another person in an apartment that may come out with something." Supp. Tr. 7; Pet. App. 4a. The officer reached into petitioner's pocket and removed a .380 caliber round of ammunition and an empty nylon holster, later testifying that he had done so in order "to make the scene secure as much as possible for the other officers." Supp. Tr. 7; Pet. App. 4a, 112a.

The officer then searched the area for a gun while his colleagues spoke with petitioner. Pet. App. 4a, 113a. He discovered two firearms -- a .380 caliber pistol and a .40 caliber pistol -- by a hole in the fence near the place where he first saw petitioner. Id. at 4a, 113a. After running a check on the firearms' serial numbers, the officer learned that both firearms had been reported as stolen. Id. at 5a, 113a. Petitioner was placed under arrest and later confessed that he had been holding the firearms. Id. at 5a, 113a-114a.

2. A grand jury in the Southern District of Florida returned an indictment charging petitioner with possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a. Petitioner moved to suppress the ammunition, holster, and firearms. Id. at 5a. A magistrate judge held two evidentiary

hearings and issued a report and recommendation that the motion be denied, determining that the stop and frisk of petitioner was reasonable under the Fourth Amendment. Id. at 5a-6a, 109a-110a. The district court adopted the magistrate's report and recommendation and denied petitioner's motion. Id. at 114a-122a.

The district court first found that the "investigatory stop was reasonable," noting that petitioner did not challenge the magistrate's determination that the stop was permissible under the Fourth Amendment. Pet. App. 117a. The district court next found that a pat-down of petitioner was justified because "(1) the [o]fficers were dispatched to a suspected burglary; (2) during pre-dawn hours; (3) to a high-crime area where burglaries are typically armed burglaries; (4) and, when they encountered [petitioner] he was in a dark-alley and matched the description of the suspect provided in the 911 call." Id. at 117a-118a.

Finally, the district court determined that the officer's "decision to search the interior of [petitioner]'s pocket" and to retrieve the ammunition and holster "was a justified continuation of the initial frisk." Pet. App. 118a. The court explained that an "officer's seizure of ammunition following a lawful frisk when investigating a possible violent crime, particularly when confronted with an unsecure scene, is sufficiently connected to officer safety not to run afoul of the Fourth Amendment." Id. at 120a.

Petitioner pleaded guilty, reserving his right to appeal the denial of his motion to suppress. Pet. App. 7a.

3. A panel of the court of appeals reversed the district court's denial of petitioner's suppression motion. Pet. App. 7a, 108a. The panel concluded that "the presence of a single round of ammunition -- without facts supporting the presence, or reasonable expectation of the presence, of a firearm -- was insufficient to justify the seizure of the bullet and the holster from [petitioner]'s pocket." Id. at 107a.

Acting sua sponte, the court of appeals vacated the panel's opinion and ordered rehearing en banc. 892 F.3d 1155.

4. The en banc court of appeals affirmed the district court's denial of petitioner's suppression motion. Pet. App. 1a-24a. The court determined that the officer "acted reasonably when he seized the ammunition and holster in [petitioner]'s pocket." Id. at 16a. Emphasizing that Terry v. Ohio, 392 U.S. 1 (1968) authorizes a pat-down during a seizure based on reasonable suspicion for "the protection of the police officer and others nearby," Pet. App. 15a (quoting Terry, 392 U.S. at 29), the court explained that, "during a Terry frisk, an officer may remove ammunition from a suspect when the removal is reasonably related to the protection of the officers and others nearby," ibid. The court found that, on the facts of this case, the officer conducting the frisk acted reasonably because, when he felt the ammunition and holster in petitioner's pocket, "he had every reason to expect that a matching

gun was nearby" and therefore "was entitled to 'take steps to assure' himself that the ammunition in [petitioner]'s pocket would not be loaded into 'a weapon that could fatally be used against him.'" Id. at 16a (brackets, citation, and ellipsis omitted). "As an essential part of a lethal weapon," the court observed, "[petitioner]'s ammunition threatened the safety of [the officer] and others in this circumstance." Id. at 10a; see id. at 16a ("When [the officer] found only a single round of ammunition in [petitioner]'s pocket, he was left to fear where other ammunition may be, especially a round already loaded into a gun's chamber.").

The court of appeals stressed that its decision turned on the "concrete factual circumstances" encountered by the officer who conducted the frisk. Pet. App. 10a. It emphasized that the officer was responding to a suspected burglary at 4 a.m., that "he was patrolling a 'high-crime area' that receives a 'high volume of calls' involving 'bodily harm done to others' by guns," that the officer found petitioner "standing in a dark alley," that "the scene was not yet secure," and that "burglars in Opa-Locka were often armed" and "often worked with other perpetrators." Ibid. "[I]n this circumstance," the court determined, the seizure of the ammunition was permissible. Ibid.

The court of appeals also stated that the ability of a police officer to "seize ammunition when it threatens the safety of officers and others has long been the settled precedent in several jurisdictions." Pet. App. 12a; see id. at 12a-13a (citing United

States v. Ward, 23 F.3d 1303 (8th Cir. 1994); State v. Smith, 665 P.2d 995 (Ariz. 1983) (en banc); People v. Colyar, 996 N.E.2d 575 (Ill. 2013); State v. Moton, 733 S.W.2d 449 (Mo. Ct. App. 1986); Scott v. State, 877 P.2d 503 (Nev. 1994) (per curiam); People v. Lewis, 507 N.Y.S.2d 80 (N.Y. App. Div. 1986)). The court was "aware of no precedential opinion to the contrary in any jurisdiction." Id. at 13a.

The court of appeals acknowledged petitioner's argument "that Terry is inconsistent with the original meaning of the Fourth Amendment," but stated that it had no authority to disregard that "binding precedent." Pet. App. 17a, 19a. The court also observed that, under "the law during the Founding period," the evidence against petitioner would have been admissible even if it had been seized unlawfully. Id. at 19a. The court declined to "use a halfway theory of judicial precedent to cut back on Terry while faithfully adhering to the exclusionary rule." Ibid.

Five judges wrote separate opinions. Judge Newsom acknowledged in a concurrence that the court's ruling was limited "to the particular situation faced by the particular officer in this particular case," but explained that he would have gone further and would have held, as a categorical matter, "that if a policeman discovers a bullet during the course of an otherwise-lawful Terry stop, he can seize it." Pet. App. 25a; see id. at 25a-30a. Judge Branch, joined by Judge Grant, likewise explained in a concurrence that she would have held that "anytime an officer

conducts a lawful Terry frisk, the officer may seize any bullet located during the frisk." Id. at 37a; see id. at 31a-37a. Judge Jordan's dissent criticized the court for "choosing to avoid [petitioner]'s originalist argument," characterizing it as "giv[ing] credence to those who have noted that originalism * * * can be just as subjective (and just as subject to manipulation) as other competing theories." Id. at 44a; see id. at 38a-44a. Judge Rosenbaum's dissent objected to the court's decision on procedural grounds, asserting that the court had adopted a theory, which she viewed to be broader than the court described, "that neither party briefed." Id. at 46a; see id. at 46a-73a. Finally, Judge Jill Pryor, joined by Judges Wilson, Martin, and Jordan, dissented on the view that the court's rule was inappropriately broad and that "no officer reasonably could have believed that a single bullet -- without any accompanying indication or reasonable expectation of the presence of a firearm [petitioner] could access -- posed a present safety threat." Id. at 79a; see id. at 74a-88a.

ARGUMENT

Petitioner contends (Pet. 10-23) that the Fourth Amendment prohibited the seizure of a round of ammunition identified during a Terry frisk whose lawfulness he accepts. The court of appeals correctly rejected that contention, and its decision affirming the lawfulness of the seizure in this case does not conflict with any decision of this Court or of another court of appeals or state court of last resort. Further review is not warranted.

1. In Terry v. Ohio, 392 U.S. 1 (1968), this Court explained that, once the police lawfully stop a person, the police may, for "the protection of the police officer and others nearby," frisk the suspect for "weapons," so long as the officer "has reason to believe that he is dealing with an armed and dangerous individual." Id. at 27, 29. "The purpose of this limited search" is "to allow the officer to pursue his investigation without fear of violence." Adams v. Williams, 407 U.S. 143, 146 (1972). As a result, the frisk must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." Terry, 392 U.S. at 29.

The en banc court of appeals correctly determined that, under the circumstances at issue here, the officer acted reasonably when he seized a round of ammunition from petitioner's pocket. "When [petitioner] was stopped and frisked, the officers had not found a gun on the scene, did not know how many or what kind of guns might be on the scene, and did not know whether others, who were not handcuffed, participated in the burglary and were still lurking in the area." Pet. App. 17a. Thus, when the officer "recognized the ammunition in [petitioner]'s pocket during the frisk," he reasonably "'neutralized the threat of physical harm' by removing the ammunition from [petitioner]'s pocket." Id. at 10a (quoting Terry, 392 U.S. at 24 (brackets omitted)); see, e.g., United States v. Ward, 23 F.3d 1303, 1306 (8th Cir. 1994) (determining that an

officer conducting a Terry frisk who "felt * * * cylindrical objects in [the defendant's] pocket" and believed "that the objects were shotgun shells * * * was justified in reaching into the pocket to retrieve them"); State v. Smith, 665 P.2d 995, 998 (Ariz. 1983) (en banc) (determining that "the police reasonably decided to inspect the contents of [the defendant's] pockets which were bulging with shotgun ammunition").

Petitioner errs in contending (Pet. 15) that the seizure of a .380-caliber round of ammunition exceeded the scope of a permissible Terry frisk because that "item is not a weapon." As the court of appeals observed, petitioner "fails to appreciate the grave injury that could have been caused by his ammunition if it had been loaded into a gun." Pet. App. 10a. "Ammunition is not a gun, but it is an integral part of what makes a gun lethal." Id. at 11a. And the seizure of ammunition is entirely consistent with the purpose of the limited protective search authorized by Terry -- "the protection of the police officer and others nearby," 392 U.S. at 29. The officer "was entitled to take steps to assure himself that the ammunition in [petitioner]'s pocket would not be loaded into a weapon that could fatally be used against him." Pet. App. 16a (brackets, citation, ellipsis, and internal quotation marks omitted). Petitioner does not appear to dispute that officers may seize ammunition when it is found in conjunction with a firearm during a lawful Terry frisk. It makes little sense to require an officer who has not yet determined whether a firearm is

present to leave a suspect in possession of ammunition as he continues his search.

Contrary to petitioner's contentions (Pet. 16), therefore, the decision below represents a straightforward application of Terry to the particular facts at issue. The court of appeals left open the possibility that it could reach a different result on different facts, stressing that it had not "jettisoned Terry's totality-of-the-circumstances approach in favor of a categorical rule." Pet. App. 23a. It emphasized that the officer was responding to a suspected burglary at 4 a.m., that "he was patrolling a 'high-crime area' that receives a 'high volume of calls' involving 'bodily harm done to others' by guns," that the officer found petitioner "standing in a dark alley," that "the scene was not yet secure," and that "the burglars in Opa-Locka were often armed" and "often worked with other perpetrators." Id. at 10a. To the extent that petitioner objects to the court's analysis of the facts, that objection does not warrant this Court's review. See Sup. Ct. R. 10; United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Petitioner errs in contending (Pet. 2) that "courts must narrowly apply" Terry because that case is "contrary to the original meaning of the Fourth Amendment." First, Terry is consistent with the text and original meaning of the Fourth Amendment. See, e.g., Akhil Reed Amar, Terry and Fourth Amendment

First Principles, 72 St. John's L. Rev. 1097 (1998). Second, Terry -- which petitioner has not asked this Court to overrule -- has been the law for over 50 years. This Court has treated that decision as "settled" law, Minnesota v. Dickerson, 508 U.S. 366, 373 (1993), not as a suspect precedent that a defendant may seek to avoid by questioning its underpinnings and urging a narrow interpretation. Third, if the original meaning of the Fourth Amendment were controlling here, petitioner's motion to suppress the ammunition would fail even if he were correct about Terry, because the Fourth Amendment did not originally require the exclusion of unlawfully seized evidence. See Collins v. Virginia, 138 S. Ct. 1663, 1675-1680 (2018) (Thomas, J., concurring); see also Pet. App. 18a-19a. The Court should reject petitioner's invitations to "engage in this halfway originalism." Janus v. American Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2470 (2018).

2. Petitioner contends (Pet. 19-20) that the decision below conflicts with United States v. Miles, 247 F.3d 1009 (9th Cir. 2001), and United States v. Lemons, 153 F. Supp. 2d 948 (E.D. Wis. 2001). As the court below pointed out, no such conflict exists. Pet. App. 13a.

In both Miles and Lemon, officers found ammunition, not in the course of the Terry frisk itself, but in the course of an additional search that the courts in those cases concluded was unlawful. In Miles, a police officer conducting a Terry frisk

felt a small box in a suspect's pocket. 247 F.3d at 1011. Because the contents of the box were "not immediately apparent," the officer moved and shook the box, at which point he heard the sound of bullets clanking together. Id. at 1014; see id. at 1011. Reasoning that the officer "determined that [the defendant possessed] contraband only after conducting a further search, one not authorized by Terry," the Ninth Circuit concluded that the seizure of the bullets inside the box was impermissible. Id. at 1014 (citation and internal quotation marks omitted); see id. at 1014-1015. Similarly, in Lemon, the officer "did not immediately recognize the items as bullets." 153 F. Supp. 2d at 957. Instead, the bullets were located in a sock in the suspect's pocket, and the officer determined that they were bullets only after squeezing them during the pat-down. Id. at 958. The district court in that case concluded that the officer's continued manipulation of the sock went "beyond the scope of Terry," and that the resulting seizure of the bullets in the sock was accordingly unlawful. Ibid.

As the court below pointed out, this case differs from both Miles and Lemon because the officer here "testified that, when he felt the object in [petitioner]'s pocket, he 'immediately thought it was ammunition.'" Pet. App. 13a. The officer did not further shake or manipulate any item in petitioner's pocket. See ibid. In other words, the officer here found the ammunition in the course of the initial Terry pat-down itself, not, as in Miles or Lemon, in the course of a further search that has been found to be

unlawful. That critical distinction -- between the lawfulness of the search that revealed the presence of ammunition (at issue in Miles and Lemon) and the lawfulness of the seizure of ammunition once it is revealed (at issue here) -- also highlights the relative unimportance of the question presented. Although the government did not press the point below, it is far from clear what bearing the seizure of the ammunition here had on the arrest or charges. See Pet. App. 79a n.3 (J. Pryor, J., dissenting). And particularly in light of the circumstance-specific nature of the court of appeals' decision, the set of circumstances in which the seizure of lawfully detected ammunition would be outcome-determinative is not readily apparent. Any review of the question presented would thus be premature and unwarranted.

3. Petitioner (Pet. 21) and amici (Br. 21-25) suggest that the seizure of ammunition also violates the Second Amendment. This Court, however, is a "court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and its ordinary practice "precludes a grant of certiorari" to review contentions that were "'not pressed or passed upon below,'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner did not raise a Second Amendment challenge below, and the court of appeals did not address the question. No sound basis exists for this Court to address any Second Amendment argument in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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