No. 13-1521

In the Supreme Court of the United States

CHUNON L. BAILEY, AKA POLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Terry* v. *Ohio*, 392 U.S. 1 (1968), officers had reasonable suspicion to stop, question, frisk, and briefly detain petitioner during a warrant-authorized search of his apparent apartment for a handgun and evidence of drug dealing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 743 F.3d 322. An earlier opinion of the court of appeals (Pet. App. 86a-105a) is reported at 652 F.3d 197, rev'd and remanded, 133 S. Ct. 1031 (Pet. App. 57a-85a). The order of the district court denying petitioner's motion to suppress (Pet. App. 106a-141a) is reported at 468 F. Supp. 2d 373.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2014. On April 28, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including June 20, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possessing five grams or more of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii) (2000); possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); and possessing a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). Pet. App. 1a. He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. *Id.* at 9a. After the court of appeals affirmed, *id.* at 86a-105a, this Court reversed and remanded, *id.* at 57a-85a. On remand, the court of appeals again affirmed. *Id.* at 1a-56a.

1. At 8:45 p.m. on July 28, 2005, local police secured a warrant to search for a .380-caliber handgun in the basement apartment located at 103 Lake Drive in Wyandanch, New York. Pet. App. 3a, 58a. A reliable confidential informant provided a sworn statement in support of the warrant application stating that, days earlier, he had seen the gun when he was in the apartment buying drugs from a "dark skinned, heavyset, black male with short hair" who went by the name "Polo." *Id.* at 3a; see also *id.* at 58a. The statement further relayed that, on several occasions in the preceding two months, the informant had purchased drugs from Polo at the basement apartment or at Polo's former residence in nearby Bay Shore, New York, and that the informant had seen the gun on at least some of those occasions. *Id.* at 3a.

As the search team prepared to execute the warrant, Detectives Richard Sneider and Richard Gorbecki conducted surveillance from an unmarked car outside

the apartment. Pet. App. 58a. At 9:56 p.m., they saw two men—later identified as petitioner and Bryant Middleton—who fit the informant's description of "Polo." *Ibid.*; see also *id.* at 4a (each man was black and "approximately six-feet tall, with a stocky build and short hair"). The men emerged from the gated area at the top of the stairs leading from the basement apartment, got into a car, and drove away. *Ibid.* They showed no indication that they were aware of the impending search. *Id.* at 58a. After waiting for a few seconds, the detectives followed the car and informed the search team that they would detain both men. *Ibid.* The search team, meanwhile, executed the warrant at the basement apartment. *Ibid.*

The detectives followed the car for approximately five minutes before stopping it to "identify the two men and to see what their purpose was for being at the residence." Pet. App. 4a (internal quotation marks omitted), 58a. They ordered petitioner and Middleton out of the car, patted them down for weapons, and found in petitioner's pockets a set of keys and his wallet. *Id.* at 4a. The detectives returned the wallet and placed the keys on the car's trunk. *Ibid.*

The detectives asked petitioner and Middleton for their names and where they had been. Pet. App. 4a. Petitioner identified himself by name and said he was coming from "my house," which he said was located at 103 Lake Drive. *Id.* at 4a, 58a-59a. Upon request, petitioner produced his driver's license, which bore an address in Bay Shore. *Id.* at 4a-5a, 59a. In response to questions, Middleton confirmed that petitioner lived at 103 Lake Drive. *Id.* at 5a, 59a.

The detectives handcuffed both men. Pet. App. 5a, 59a. Detective Gorbecki said they were not being ar-

rested but they were being detained while a search warrant was executed at 103 Lake Drive. *Ibid.* Petitioner then said: "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation." *Ibid.* All four men then went back to 103 Lake Drive: other officers arrived to transport petitioner and Middleton in a patrol car; Detective Sneider drove the unmarked police car; and Detective Gorbecki drove petitioner's car. *Ibid.*

When they arrived at the basement apartment, the detectives learned that the search team had found a gun and drugs. Pet. App. 5a, 59a. They placed petitioner and Middleton under arrest. *Ibid.* The total time between the initial stop of petitioner's car and his arrest was less than ten minutes. *Id.* at 5a. The police later learned that one of the keys seized from petitioner opened the door to the basement apartment. *Id.* at 5a-6a, 59a.

2. Petitioner was indicted on one count of possession with the intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii) (2000); one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); and one count of possession of a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). Pet. App. 59a. He moved to suppress his apartment key and statements to the detectives on the ground that they derived from an unreasonable seizure. *Ibid.*

After conducting an evidentiary hearing, the district court denied the motion on two independent grounds. Pet. App. 59a-61a, 119a-141a. First, the court held that the detention was lawful under *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981), which held that officers executing a search warrant can, without individualized

suspicion of wrongdoing, "detain the occupants of the premises while a proper search is conducted." See Pet. App. 60a, 111a-119a. Second, and alternatively, the court held that the detention was a lawful investigative stop under *Terry* v. *Ohio*, 392 U.S. 1 (1968). See Pet. App. 60a, 120a-141a. The court found that the detectives had reasonable suspicion for such a stop because petitioner had "exited the search location and matched the general description provided by the confidential informant." *Id.* at 120a. That initial information, the court found, "was bolstered by" petitioner's statement that 103 Lake Drive was his residence, by Middleton's confirmation, and by "the information on [petitioner's] driver's license." *Ibid.* Collectively, the court concluded, those facts "provided more than a sufficient factual basis under *Terry* to transport [petitioner] a short distance back to his residence and briefly detain him during the search." *Ibid.*

At trial, petitioner argued that he did not live in the basement apartment and therefore did not possess the gun and drugs that had been found there. Pet. App. 7a-9a. The government presented evidence linking petitioner to the apartment that was unrelated to petitioner's statements and the key (both of which were the fruits of the detention). Among other things, the confidential informant identified petitioner as "Polo," and Middleton testified that he knew petitioner by that name and that the two of them had been in the apartment before police arrived to conduct the search. *Id.* at 6a-7a.

The jury found petitioner guilty on all three counts, and the court sentenced him to 360 months of imprisonment, to be followed by five years of supervised release. Pet. App. 9a.

3. The court of appeals affirmed. Pet. App. 86a-105a. It held that petitioner's detention during the search of the apartment was reasonable under *Summers*, which the court construed as extending to circumstances "when, for officer safety reasons, police do not detain the occupant on the curbside, but rather wait for him to leave the immediate area and detain him as soon as practicable." *Id.* at 99a (quoting *id.* at 117a n.4). In light of that holding, the court found it unnecessary to address whether the detention was also permissible under *Terry*. *Id.* at 101a n.7.

4. This Court reversed and remanded. Pet. App. 57a-85a. The Court held that the categorical rule in *Summers* applies only to persons located in "the immediate vicinity of the premises to be searched." *Id.* at 68a. It concluded that the stop at issue here, which took place nearly one mile from 103 Lake Drive, was not supported by *Summers*. *Id.* at 70a. The Court, however, recognized that, even when *Summers* does not support the detention of a suspect or occupant who is allowed to "leave[] the immediate vicinity, the lawfulness of detention [will be] controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under *Terry*." *Id.* at 71a. Noting that the court of appeals had not addressed the district court's holding that *Terry* justified the stop, the Court "expresse[d] no view on that issue" and noted that it would "be open, on remand, for the Court of Appeals to address the matter and to determine whether, assuming the *Terry* stop was valid, it yielded information that justified the detention the officers then imposed." *Ibid.*

5. On remand, the court of appeals received supplemental briefing and argument on the *Terry* issue. Pet. App. 2a.

a. The court of appeals explained that the justification for a *Terry* stop differs from a detention under *Summers* because *Terry* depends on more than "spatial proximity to the premises to be searched" and requires a showing of "reasonable suspicion of criminal conduct beyond proximity to a location of suspected crime." Pet. App. 18a (footnoted omitted). Considering the facts here, the court held that petitioner's "initial stop and patdown were supported by multiple articulable facts giving rise to a reasonable suspicion that he had been and was then engaged in criminal activity and might be armed." *Id.* at 15a. The court explained that its analysis depended on the presence of several factors, including the following: (1) when the stop began, the detectives had probable cause to believe that the apartment was the site of recent drug-trafficking activities and that it contained a .380-caliber gun, *ibid.*; (2) petitioner was seen leaving 103 Lake Drive through a gate that the detectives believed was accessible only from the basement apartment, *id.* at 15a-16a; (3) petitioner and Middleton fit the informant's description of Polo, *id.* at 16a-17a; and (4) any handgun in the apartment "was an easily transportable item of a sort frequently carried by drug dealers," *id.* at 17a. "[T]he combination of these circumstances," the court concluded, "provided the reasonable suspicion of ongoing criminal activity and weapon possession necessary for a *Terry* stop and patdown." *Id.* at 20a.

b. The court of appeals then considered whether the "scope and duration of the detention" were reasonable. Pet. App. 21a. It concluded that the initial questioning

of petitioner and Middleton and the patdown for potential weapons were "certainly within the reasonable scope of the initial stop" and had produced the evidence of petitioner's former address in Bay Shore and statements about his current residence at 103 Lake Drive. *Id.* at 21a-22a. Those discoveries, in turn, "made it entirely reasonable for police to detain [petitioner] for the few additional minutes it took to use a readily available investigative means—execution of an already-procured search warrant at the suspected crime scene—to confirm or dispel suspicion of his ongoing criminal activity." *Id.* at 23a-24a. The court also found it reasonable for the police to retain petitioner's keys to keep him from leaving the scene and held that, even if the keys had been returned to him, they would inevitably have been seized again when he was formally arrested a few minutes later. *Id.* at 22a-27a.

c. The court of appeals further held, however, that the detectives "exceeded the reasonable bounds of a *Terry* stop when they handcuffed [petitioner]" at a time when he was known to be unarmed (and unable to get to any weapon inside the car). Pet. App. 30a. As a result, the court concluded that petitioner's statements that he did not live at 103 Lake Drive and would not cooperate should have been suppressed. *Id.* at 32a-33a. Nevertheless, it concluded that the admission of those statements had been harmless beyond a reasonable doubt. *Id.* at 33a-39a. Accordingly, the court affirmed petitioner's convictions. *Id.* at 40a-41a.

d. Judge Pooler concurred in part and dissented in part. Pet. App. 41a-56a. In her view, reasonable suspicion to support a *Terry* stop did not exist at the time of the initial detention. *Id.* at 43a-51a. Furthermore, she agreed with the majority that "the police exceeded the

bounds of *Terry* upon handcuffing [petitioner]," but would have held that the erroneous admission into evidence of petitioner's post-arrest statements had not been harmless. *Id.* at 54a-56a. Finding that "all of the evidence as a result of the stop and the unlawful detention should have been suppressed," she would have remanded the case for a new trial. *Id.* at 56a.

ARGUMENT

Petitioner contends (Pet. 18) that the court of appeals' decision conflicts "with this Court's *Terry* [v. *Ohio*, 392 U.S. 1 (1968),] jurisprudence" and with its "earlier decision in this case." Both of those contentions lack merit. The court of appeals correctly concluded that, under the totality of the circumstances, officers had reasonable suspicion to stop, question, and frisk petitioner, as well as to detain him for a few minutes while his apparent apartment was being searched, pursuant to a warrant, for a handgun and evidence of drug-dealing. It also correctly held that petitioner was not prejudiced by any evidence derived from aspects of his detention that exceeded the permissible scope of a *Terry* stop. The court of appeals' fact-bound decision does not conflict with the decisions of this Court or of any other court of appeals and does not warrant further review.

1. Petitioner errs in contending (Pet. 3, 14-20) that the court of appeals created a new categorical rule for *Terry* stops and that no *Terry* stop was justified in this case because the police had no "valid, case-specific basis for individualized suspicion," Pet. 20.

a. The Fourth Amendment allows police officers to conduct a brief investigative stop when they have reasonable suspicion to believe that the individual is involved in criminal activity. See, *e.g.*, *Navarette* v. *Cali-*

fornia, 134 S. Ct. 1683, 1687 (2014); *Hiibel* v. *Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004); *Terry*, 392 U.S. at 21-22. The Court has explained that the showing required for reasonable suspicion is "not high." *Richards* v. *Wisconsin*, 520 U.S. 385, 394 (1997). It requires more than "a mere 'hunch'" but "'considerably less than proof of wrongdoing by a preponderance of the evidence' and 'obviously less' than is necessary for probable cause." *Navarette*, 134 S. Ct. at 1687 (quoting *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989)).

Whether reasonable suspicion exists to support a particular stop and frisk turns on "the totality of the circumstances—the whole picture." *Navarette*, 134 S. Ct. at 1687 (quoting *United States* v. *Cortez*, 449 U.S. 411, 417 (1981)). The Court has, accordingly, warned against "divide-and-conquer analysis," *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002), and has explained that a combination of discrete facts may provide reasonable suspicion even if, considered independently, those facts could have innocent explanations, see, *e.g.*, *ibid.*; *Sokolow*, 490 U.S. at 9-10.

b. Petitioner contends (Pet. 20) that the decision below conflicts with this Court's earlier decision in this case because petitioner says the court of appeals "effectively created a categorical entitlement to detain individuals with an observed connection to premises subject to a search warrant." That contention misreads both this Court's earlier decision and the decision below, and it lacks merit.

This Court's earlier decision did not preclude a determination that the stop of petitioner and Middleton was permissible under *Terry*. The Court held only that the categorical rule from *Michigan* v. *Summers*, 452

U.S. 692 (1981), did not authorize the stop of a departing occupant so far away from the premises that were being searched. It remanded the case for the court of appeals to address whether the same stop was justified "based on reasonable suspicion under *Terry*." Pet. App. 71a. As the Court explained, the police would "not need *Summers*," and could "rely instead on *Terry*," if they had "grounds to believe the departing occupant [was] dangerous, or involved in criminal activity." *Id.* at 65a. The court of appeals applied the case-specific analysis of *Terry* and upheld the stop based on the particular facts of this case—not based on a categorical rule that *Terry* is satisfied whenever an individual is seen leaving premises that are about to be searched under warrant.

Petitioner's contention (Pet. 18) that the court of appeals' decision "created an entitlement to detain individuals with an observed connection to premises subject to a search warrant" cannot be reconciled with the court of appeals' opinion. Although the court took into account petitioner's apparent connection to the premises that were being searched, it expressly recognized that *Terry* and *Summers* "provide distinct standards for reasonable stops" and that a *Terry* stop "requir[es] reasonable suspicion of criminal conduct *beyond proximity to a location* of suspected crime." Pet. App. 18a (emphasis added; footnote omitted).[1] Petitioner therefore errs in suggesting (Pet. 3) that the

[1] Petitioner does not dispute that, as part of the reasonable-suspicion calculus, officers may take into account (without making dispositive) an individual's observed connection to a residence that is the subject of a search warrant. See Pet. App. 18a n.9 (noting that petitioner abandoned the contrary position at oral argument in the court of appeals).

court of appeals used *Terry* to grant the government "the same categorical authority" that it "unsuccessfully sought from this Court under *Summers*."

In applying *Terry*, the court of appeals found reasonable suspicion based on more than just petitioner's having recently left the basement apartment that was about to be searched. Instead, the court combined that fact with the detectives' further observation that petitioner and Middleton "fit the informant's general description of 'Polo,' the individual from whom the informant had bought drugs in the basement apartment only days earlier." Pet. App. 16a. Petitioner's resemblance to a suspected drug dealer was a critical part of the court's analysis. See *ibid.* ("[I]t is the fact that [both men] fit that description *and* had just left the very premises where 'Polo' dealt drugs that provided an articulable basis[.]"); *id.* at 16a-17a ("[W]hen detectives observed two men who fit the description of the tenant 'Polo' leaving the basement apartment, they had an articulable basis to conduct an investigatory *Terry* stop[.]"); *id.* at 19a n.10 ("[T]o the extent that there was reasonable suspicion to think that [petitioner] was 'Polo,' there was reasonable suspicion to think that he was then in unlawful possession of the sought firearm[.]"); *id.* at 20a ("[P]olice here stopped the two persons whose race, sex, build, and hair were consistent with an informant's description of the man who had sold him drugs, and who were seen leaving the very premises where the reported drug sale took place and where police had probable cause to think that an easily transportable firearm used in the drug trafficking was then located.").

Petitioner concedes that the court of appeals relied on more than just petitioner's connections to the prem-

ises at 103 Lake Drive. He notes (Pet. 18-19) that "the court of appeals identified four facts" in support of its holding and that "three of those four facts" were about petitioner's relationship to the premises. Petitioner contends (Pet. 19) that this Court's earlier decision "would be rendered irrelevant" if *those three facts alone* were "sufficient to give rise to reasonable suspicion." The court of appeals, however, never indicated that it would have found reasonable suspicion if petitioner and Middleton had been seen leaving the gated area leading to the basement apartment but had not matched the informant's description of Polo. As a result, no basis exists for petitioner's assertion (Pet. 18) that the decision below "stands for the proposition that there will always, or almost always, be reasonable suspicion where an individual is seen leaving premises where a search warrant for contraband is about to be executed." For the same reason, the decision below does not "effectively gut the Court's earlier decision in this case." Pet. 3, 22.

c. Petitioner contends (Pet. 19-20) that the court of appeals' decision conflicts with this Court's *Terry* jurisprudence because, in his view, the resemblance between petitioner and Middleton and the description of the drug dealer was "insufficient to give rise to reasonable suspicion, either standing alone or together with petitioner's connection with the premises."

Petitioner claims (Pet. 20) that the description of Polo was so "generic" that allowing it to be the basis of a *Terry* stop "would come perilously close to sanctioning racial profiling." But the informant's tip was not as generic as petitioner suggests. It addressed not just the drug dealer's race ("black"), but also his sex ("male"), his skin tone ("dark skinned"), his build

("heavyset"), and his hair length ("short"). Pet. App. 3a. Furthermore, the court of appeals never suggested that petitioner's match with that description would alone have been sufficient to establish reasonable suspicion. Instead, as explained above, the court repeatedly relied on the combination of that match with petitioner's observed connection with the basement apartment (where police had probable cause to believe was located an easily transportable handgun). *Id.* at 16a-17a, 19a n.10, 20a. Petitioner's attempts to identify each individual observation as insufficient when considered in isolation reflect exactly the kind of "divide-and-conquer analysis" that this Court has rejected in the context of reasonable-suspicion analysis. *Arvizu*, 534 U.S. at 274.

For similar reasons, petitioner errs in suggesting that reasonable suspicion cannot be established if officers do not personally witness their target "engage[] in any suspicious behavior" such as "appear[ing] to be armed or fleeing with the evidence sought." Pet. 20 (citations omitted). It is well established that actions that are entirely innocent in themselves might create reasonable suspicion when combined with other information. For instance, in *Alabama* v. *White*, 496 U.S. 325 (1990), officers watched a woman, who was carrying nothing in her hands, exit an apartment building, get into a brown Plymouth station wagon with a broken right taillight, and drive four miles to a motel. *Id.* at 326-327. Those actions were not themselves suspicious, but there was reasonable suspicion for an investigative stop because police had received an anonymous tip that the woman would, in addition to doing those things, be carrying cocaine. *Id.* at 331-332. Similarly, the fact that petitioner and his companion were not seen doing

anything inherently suspicious is not dispositive. The court of appeals correctly found that reasonable suspicion arose from the combination of what petitioner and Middleton looked like, the things that they were seen doing, and other information about what had recently happened in the basement apartment. Pet. App. 15a-21a. That factbound conclusion creates no legal rule and does not warrant further review.

2. Petitioner further contends (Pet. 20) that, even apart from the alleged invalidity of the "initial stop," his "subsequent detention exceeded the scope of a permissible *Terry* stop." That contention also lacks merit.

a. The actions associated with an investigative stop must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Hiibel*, 542 U.S. at 185 (quoting *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985) (quoting *Terry*, 392 U.S. at 20)). Thus, a "seizure cannot continue for an excessive period of time or resemble a traditional arrest." *Id.* at 185-186 (citations omitted). But "questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops." *Id.* at 186. And a stop may include a frisk if police have a reasonable basis for suspecting "that the person stopped is armed and dangerous." *Arizona* v. *Johnson*, 555 U.S. 323, 326-327 (2009).

b. Petitioner does not contest the court of appeals' conclusion that "it was certainly within the reasonable scope of the initial stop and patdown for detectives (1) to remove hard objects from [petitioner's] pockets to ensure that they were not weapons, and (2) to ask him to identify himself and his residence." Pet. App. 21a; see *id.* at 21a-22a (noting that petitioner "effectively

conceded" these points at oral argument if there was an articulable basis for the initial stop); see also, *e.g.*, *Maryland* v. *Wilson*, 519 U.S. 408, 410 (1997) (police may "as a matter of course order the driver" and the passenger "of a lawfully stopped car to exit [the] vehicle"). As the court explained, the validity of those actions was sufficient to support the admission at trial of the evidence that was acquired during the initial "phase of the stop"—which included petitioner's admission that he resided at 103 Lake Drive, the production of a driver's license indicating that he had also lived in Bay Shore, and the production of the keys in his pocket. Pet. App. 22a.

That additional, validly acquired evidence connected petitioner to both the basement apartment and Bay Shore and "strongly enhanced the likelihood that [petitioner] was 'Polo,' the person who was dealing drugs from the subject premises and who had recently done so at a prior Bay Shore residence." Pet. App. 23a. At that point, the court of appeals correctly concluded, it was "entirely reasonable for police to detain [petitioner] for the few additional minutes it took to use a readily available investigative means—execution of an already-procured search warrant at the suspected crime scene—to confirm or dispel suspicion of his ongoing criminal activity." *Id.* at 23a-24a. That conclusion is consistent with this Court's recognition that the investigative purpose of a *Terry* stop may justify "detain[ing] the individual for longer than the brief time period" required for a frisk—and in particular that it may include the time it takes the police to "determine[] if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect,

or talking with other people." *Summers*, 452 U.S. at 700-701 n.12 (quoting 3 Wayne R. LaFave, *Search and Seizure* § 9.2, at 36-37 (1st ed. 1978)).

c. Rather than contest the questioning, the frisk, and the decision to detain him for the few minutes it would take for the apartment search to be completed, petitioner simply contends (Pet. 22) that "the overall intrusiveness of [his] detention took it outside the scope of a permissible *Terry* stop." In his view (Pet. 21), the court of appeals "erred by failing to recognize that the *entire* detention was a *de facto* arrest." In particular, petitioner emphasizes that his detention resembled an arrest because he was "handcuffed" and then "'transported in a marked patrol car.'" Pet. 21 (quoting Pet. App. 69a). That factbound contention lacks merit.

Legally, petitioner's argument rests entirely (Pet. 21, 26) on this Court's previous decision, which described petitioner's detention as "more intrusive" than the kind of detentions that typically occur at the scene of a search pursuant to *Summers*. Pet. App. 69a. But it is unsurprising that a *Terry* stop—which is based on individualized suspicion—might be more intrusive than a detention pursuant to *Summers*, which applies categorically to all persons in the vicinity of the premises being searched.

Factually, petitioner asserts that the conduct here went beyond what is permitted by *Terry* and constituted a *de facto* arrest. The court of appeals agreed in part. It determined that, while handcuffs may be an appropriate part of a *Terry* stop in certain circumstances, the "police here exceeded the reasonable bounds" of such a stop "when they handcuffed [petitioner]." Pet. App. 30a. The court therefore concluded

that the evidence that the police subsequently acquired from petitioner—statements in which petitioner denied that he lived in the basement apartment—should have been suppressed. *Id.* at 30a-33a. Nevertheless, in a portion of the opinion that petitioner does not question, the court held that the error in admitting those statements had been harmless in light of the "totality" of the evidence providing "compelling proof of [petitioner's] residency in, and control over, the basement apartment at 103 Lake Drive" and the prosecution's care in recognizing that the statements were not inculpatory unless the jury had already independently concluded that petitioner was guilty. *Id.* at 33a-39a.

The court of appeals also noted that it did not need to address whether transporting petitioner from the scene of the stop back to the apartment exceeded the permissible scope of a Terry stop, because "no challenged evidence was obtained as a result." Pet. App. 28a n.13. And petitioner does not contest the portions of the court of appeals' opinion explaining that it was reasonable for the police to keep petitioner's keys while the detention continued and that, even if they had returned the keys to petitioner once they determined that he was unarmed, the keys would inevitably have been seized a few minutes later, when the officers searching the basement apartment discovered evidence there that was sufficient to support petitioner's arrest. *Id.* at 22a-27a.

Because the court of appeals agreed that petitioner's detention in part exceeded the permissible bounds of a *Terry* stop and yet correctly concluded that petitioner had not been prejudiced by the admission of any evidence derived from the impermissible aspects of the

detention, petitioner's *de-facto*-arrest contention does not warrant further review.

3. Petitioner contends (Pet. 22-26) that the decision below conflicts with decisions from other courts of appeals. But no conflict exists.

a. With respect to the existence of reasonable suspicion, petitioner's alleged conflicts rest almost entirely on two lines of cases. The first line stands for the proposition that, in petitioner's words (Pet. 22), "the mere fact that an individual has a connection with premises subject to a search warrant does not establish reasonable suspicion to stop, or a reasonable basis to frisk, the individual."[2] The second line purportedly supports the proposition that "the mere fact that an individual matches an extremely generic description of a suspect * * * is insufficient to give rise to reasonable suspicion." Pet. 23-24.[3] Both of those lines of cases are inapposite here. The court of appeals' holding did not depend on either the mere fact of physical proximity or the mere fact of physical description. Instead, as described above, the court relied on the simultaneous presence of both of those considerations (as well as

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[2] See *United States* v. *Black*, 707 F.3d 531, 542 (4th Cir. 2013); *United States* v. *Ritter*, 416 F.3d 256, 268-269 (3d Cir. 2005); *Leveto* v. *Lapina*, 258 F.3d 156, 164-165 (3d Cir. 2001); *United States* v. *Clay*, 640 F.2d 157, 160 (8th Cir. 1981); *United States* v. *Cole*, 628 F.2d 897, 899 (5th Cir. 1980), cert. denied, 450 U.S. 1043 (1981).

[3] See *United States* v. *Brown*, 448 F.3d 239, 247-248 (3d Cir. 2006); *Goodson* v. *City of Corpus Christi*, 202 F.3d 730, 733, 737 (5th Cir. 2000); *Washington* v. *Lambert*, 98 F.3d 1181, 1190-1191 (9th Cir. 1996); *United States* v. *Jones*, 998 F.2d 883, 884-885 (10th Cir. 1993); *United States* v. *Jones*, 619 F.2d 494, 497-498 (5th Cir. 1980).

evidence about the probable presence of a handgun). Pet. App. 16a-21a.

Petitioner identifies (Pet. 24-25) only two decisions that dealt with both physical proximity and physical description, but neither of them conflicts with the decision below. In *Buffkins* v. *City of Omaha*, 922 F.2d 465 (8th Cir. 1990), cert. denied, 502 U.S. 898 (1991), officers received a tip that, before 5 p.m. on a particular date, "a black person or persons arriving on a flight from Denver" to Omaha would be carrying cocaine. *Id.* at 467. Officers met a Denver-to-Omaha flight that afternoon and saw only one black person deplane. *Ibid.* They noticed that she was carrying a teddy bear with seams that looked like they had been re-sewn; they also noticed that she met two of her sisters at the airport, one of whom appeared nervous. *Ibid.* The Eighth Circuit held that the officers lacked reasonable suspicion for a stop. *Id.* at 470. The court explained that "[t]he officers stopped Buffkins solely because her race fit the racial description of the person described in the tip" and that they "could not have narrowed their suspicion to a particular individual based on the tip alone." *Ibid.* The court also explained that the physical description was "very indefinite"; it did not indicate whether there would be one or more drug couriers, and it did not give any "physical description of the sex, height, weight, clothing, or other characteristics" of the person or persons at issue. *Ibid.* Here, by contrast, the description of Polo was about a particular person, who had repeatedly been seen in the basement apartment, and who had a known sex, skin tone, build, and hair length. There is no reason to conclude that the more detailed description would have been insufficient for the *Buffkins* court, when taken in combination with

petitioner's observed connection with the basement apartment where drug dealing had occurred.[4]

Petitioner also cites without elaboration (Pet. 25) the decision in *Romero* v. *Story*, 672 F.3d 880 (10th Cir. 2012). In *Romero*, an individual heard a loud noise coming from outside his apartment; he went outside and saw that his car had been vandalized and that a "Hispanic male" was in the same parking lot as the car. *Id.* at 883. He later saw the man enter Apartment 17 in his building. *Ibid.* On the basis of that information, officers went to Apartment 17 and had a brief encounter with Steven Romero, culminating in his arrest. *Ibid.* The Tenth Circuit held that "[a] person of a particular race standing in a parking lot where a crime occurred is not enough to create reasonable suspicion." *Id.* at 888. Here, however, the police had much more: they had been told by a reliable confidential informant that Polo—who was described with more specificity than the "Hispanic male" in the parking lot—was not simply seen near the location where a crime had recently occurred, but was actually involved in drug trafficking on the premises; and the police had a reasonable basis for suspecting that petitioner (or Middleton), who had almost certainly emerged from the basement apartment and who matched the description of Polo, was engaged in criminal activity. *Romero* is therefore distinguishable.

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[4] *Buffkins* also discounted the importance of the teddy bear with apparently re-sewn seams and the apparently nervous state of one of the sisters meeting the passenger. 922 F.2d at 470 & n.13. But those observations differ considerably from the observation that petitioner had just left an apartment for which a magistrate had issued a warrant to search for evidence of drug trafficking and a handgun.

b. With respect to the scope of the *Terry* stop, petitioner contends (Pet. 25-27) that the court of appeals' holding conflicts with the decisions of other courts of appeals. Petitioner, however, invokes (Pet. 25-26) cases supporting the proposition that "where a detention crosses the line from a temporary investigative detention to a *de facto* arrest, it must be supported not just by reasonable suspicion but by probable cause." The decision below—and the Second Circuit more generally—already recognizes that conduct rising to the level of an arrest must be supported by probable cause. See Pet. App. 29a; *United States* v. *Alexander*, 907 F.2d 269, 272 (2d Cir. 1990) ("There are, of course, occasions when law enforcement officers do exceed the bounds of permissible safeguards and thereby convert an otherwise legitimate investigative stop into a *de facto* arrest requiring probable cause."), cert. denied, 498 U.S. 1095 (1991). Petitioner identifies no decision that conflicts with the court of appeals' conclusion that the evidence acquired during the permissible portions of the stop could be admitted while evidence acquired once petitioner was handcuffed could not be. In the absence of any conflict, the inherently factbound question of when the line between investigative stop and *de facto* arrest was crossed does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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