UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

V. APPEAL NO. 14-4902

SHAQUILLE MONTEL ROBINSON,
Defendant-Appellant

RESPONSE TO THE GOVERNMENT'S PETITION FOR REHEARING EN BANC

Comes now the Defendant-Appellant, Shaquille Robinson, by and through counsel, and responds to the Government's Petition for Rehearing En Banc.

In order to succeed in its quest for *en banc* review, the Government must either demonstrate that the panel decision conflicts with a decision of the United States Supreme Court or of the Fourth Circuit Court of Appeals; or it must demonstrate that the proceeding involves one or more questions of exceptional importance. In short, the Government cannot succeed. The decision rendered by the panel of Judges Harris, Neimeyer and Senior Judge Davis exists in concert with well-settled Supreme Court and Fourth Circuit jurisprudence. The panel

announced no new points of law in reaching its decision in Mr. Robinson's favor. The panel reiterated existing rules formulated by the Supreme Court and the Fourth Circuit that remain intact; no prior decisions were overruled by the panel's decision. Thus, the Fourth Circuit should decline the Government's request for Rehearing *en banc*.

RESTATEMENT OF THE ISSUE

Whether the Terry frisk of Mr. Robinson was based upon a reasonable, articulable suspicion that he was both "armed and dangerous"?

DISCUSSION

Mr. Robinson does not dispute the facts of this case as first described by the Magistrate Court in its Report and Recommendation, a rendering that the District Court accepted in its Opinion accepting in part and rejecting in part the Magistrate Court's recommendation to deny Mr. Robinson's Motion to Suppress. Further, Mr. Robinson has no dispute with the facts as portrayed by the Fourth Circuit panel in its decision in this case, even when those facts have been viewed in light of the Government's success in a conviction against Mr. Robinson at the District Court below, to wit, most favorable to the Government as the prevailing party. See United States v. Black, 707 F.3d 531, 534 (4th Cir. 2013). Moreover, at oral argument, the parties and the panel, in particular Senior Judge Davis, discussed

how the appeal was not a factual, but a purely legal dispute.

The Fourth Circuit panel applied the appropriate standard of review for its analysis of the denial of a pre-trial motion to suppress, examining the facts for clear error and legal conclusions de novo. See United States v. Elston, 479 F.3d 314, 317 (4th Cir. 2007).

In its Petition, the Government takes up Judge Neimeyer's position that "armed and dangerous" are not "separate and independent conditions of a lawful Terry frisk," contravening the position it has maintained thus far in the case. The Government argues in its Petition that "the police who have made a valid traffic stop may frisk a [*sic*] armed suspect because that suspect is also dangerous."

As the majority states in its decision, "[t]he Supreme Court for decades has adhered to its conjunctive 'armed and dangerous' formulation, giving no indication that 'dangerous' may be read out of the equation as an expendable redundancy." United States v. Robinson, 814 F.3d 201, 206 n. 2 (4th Cir. 2016). The majority then cites additional support against the Government's position here in Supreme Court jurisprudence and from its sister circuits, namely the Sixth and Seventh Circuits, in published cases from 2015. Id.

Mr. Robinson respectfully concurs with the legal findings of the Fourth Circuit panel majority in this case, especially its holding that "reasonable

suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person is dangerous for Terry purposes." The panel's holding fits squarely in line with Terry and its progeny: police officers are limited in their right to frisk the occupants of a vehicle stop, even when the vehicle stop is proper, and in order to perform a patdown of a driver and/or passengers in a vehicle or conduct any further investigation, there must be reasonable suspicion that an individual may be armed and dangerous. See Maryland v. Wilson, 519 U.S. 408 (1997); Brendlin v. California, 551 U.S. 249 (2007); Knowles v. Iowa, 525 U.S. 113, 117-118 (1998) (holding, in dicta, that officers who conduct routine traffic stops may perform a patdown of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous); Arizona v. Johnson, 555 U.S. 323 (2009)(wherein the unanimous Supreme Court held that police may conduct a pat down search of a passenger in an automobile that has been lawfully stopped for a minor traffic violation, provided the police have reasonable suspicion that the passenger is armed and dangerous). (Emphasis added).

Moreover, the Government states in its Petition that the panel's decision conflicts with the holdings of Terry v. Ohio, 392 U.S. 1 (1967), Pennsylvania v. Mimms, 434 U.S. 106(1977), and Adams v. Williams, 407 U.S. 143 (1972). It strains credulity that the holding of this case conflicts with Terry, as the holding of

that case controls the panel's decision here: police may do a limited search of a suspect's outer garments for weapons if they have a reasonable and articulable suspicion that the person detained may be armed and dangerous. 392 U.S. 1, 3.

In Adams v. Williams, the Supreme Court reiterated the holding of Terry, that a policeman making an investigatory stop may conduct a limited protective search for concealed weapons when he has reason to believe that the suspect is armed and dangerous. 407 U.S. 145-149. Further, in that case, the frisk that occurred was a search incident to arrest, after the police observed a bulge shaped like a firearm in the defendant's waist band, in a high-crime area, at 2:15am, and after the defendant had disobeyed commands from the officer to step out of the vehicle. Id. These are markedly different circumstances from the instant case, and the holding here does not contradict any part of the holding in Adams v. Williams, as that case requires that a suspect must be armed and dangerous for an official search to proceed.

In Pennsylvania v. Mimms, the Supreme Court makes it clear that an officer can order the driver of a vehicle out of the car pending completion of a lawful traffic stop. 434 U.S. at 11 n.6. In that case, the Supreme Court states,

> [i]n this case, unlike Terry v. Ohio, there is no question about the propriety of the initial restrictions on respondent's freedom of movement. Respondent was driving an automobile with expired tags in violation of Pennsylvania's Motor Vehicle Code. Deferring for a moment the legality of the

"frisk" once the bulge had been observed, we need presently deal only with the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable, and thus permissible under the Fourth Amendment. This inquiry must therefore focus not on the intrusion resulting from the request to stop the vehicle or from the later "pat down," but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped.

434 U.S. 109-110. In contrast, the inquiry in the case at hand is precisely the issue that Mimms does not address, that is, the propriety of the patdown. To the extent that Mimms deals with Terry, it upholds the notion that to frisk a suspect, the police must have reasonable suspicion that the suspect is armed and dangerous. The decision by the panel here does not conflict with Mimms.

Additionally, the Government states that the panel's decision conflicts with its own earlier decision in United States v. Baker, 78 F.3d 135, 137 (4th Cir. 1996), wherein a police officer observed a bulge in a suspect's clothing, warranting a belief that the suspect was potentially dangerous, even though the suspect had been stopped only for a minor violation. In Baker, the police officer was involved in a high speed chase in the middle of the night in a high-crime area in Maryland behind four vehicles traveling close together, and the officer succeeded in getting one of the vehicles to stop. Id. At 136. The officer spoke with the driver, and during the conversation about the other three cars, the officer noticed a bulge in the man's pants near his waistband. Id. In order to determine whether the man

was carrying a concealed weapon, the officer ordered the man to lift his shirt above the bulge. Id. The man hesitated initially, then lifted his shirt, allowing the officer to see the man's handgun tucked into his waist. Id. This intrusion into the defendant's privacy, unlike the laying on of hands in a more traditional Terry pat down, was a lesser intrusion of privacy than the Terry search conducted in Mr. Robinson's case. Id. at 139. The Fourth Circuit indicated that the act in Baker was less intrusive than the patdown sanctioned in Terry. Id. Clearly, the panel's holding here does not infringe upon the holding of Baker.

Taking the Government's position, armed and thus dangerous, to its logical conclusion, any person in a traffic stop poses a danger to police such that each and every person involved in any type of traffic stop must be immediately seized and frisked because in many states, anyone over 18 may legally carry a firearm without a permit, making everyone potentially armed and thus dangerous. Indeed, in West Virginia, anyone over 18 may legally conceal a weapon without a permit, and there is no coincidental duty to inform the police of one's concealed carry of a firearm. Surely, this cannot be how the Government expects its police forces to protect and serve its people. A law-abiding citizen, legally carrying a concealed firearm, should not be, and is not, considered armed and thus dangerous, under any legal framework.

The Fourth Circuit should reject the Government's request for a rehearing of this case, and issue its mandate affirming the majority opinion of its panel here.

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2016, I electronically filed the foregoing NOTICE OF APPEAL with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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