No. 14-4902

In the United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
Petitioner-Appellee,

v.

SHAQUILLE M. ROBINSON,
Respondent- Appellant.

On Appeal from the United States District Court
for the Northern District of West Virginia

PETITION FOR REHEARING EN BANC

WILLIAM IHLENFELD, II
United States Attorney

JAROD J. DOUGLAS
Assistant U.S. Attorney
Northern District of West Virginia

LESLIE R. CALDWELL
Assistant Attorney General

SUNG-HEE SUH
Deputy Assistant Attorney General

THOMAS E. BOOTH
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W. Suite, 1511
Washington, DC 20530
(202) 514-5201
Thomas.booth@usdoj.gov

TABLE OF CONTENTS

STATEMENT OF REASONS FOR EN BANC CONSIDERATION 1

STATEMENT OF THE ISSUE 2

BACKGROUND AND PANEL DECISION 2

I. THE POLICE WHO HAVE MADE A VALID TRAFFIC STOP MAY ALSO FRISK AN ARMED SUSPECT BECAUSE THAT SUSPECT IS ALSO DANGEROUS 5

II. THE PANEL CONFLATED THE STOP STANDARD WITH THE FRISK STANDARD 10

III. IN ANY EVENT, ADDITIONAL EVIDENCE SUPPORTED THE DISTRICT COURT'S FINDING THAT ROBINSON WAS ARMED AND DANGEROUS 12

CONCLUSION 14

CERTIFICATE OF SERVICE 15

CERTIFICATE OF COMPLIANCE 16

TABLE OF AUTHORITIES

Cases

Adams v. Williams, 407 U.S. 143 (1972) ..... passim

Arizona v. Johnson, 555 U.S. 323 (2009) 8, 9

Illinois v. Wardlow, 524 U.S. 119 (2000) 13

Maryland v. Wilson, 519 U.S. 408 (1997) 9

Northup v. City of Toledo Police Department, 785 F.3d 1128 (6th Cir. 2015) 5, 11

Pennsylvania v. Mimms, 434 U.S. 106 (1977) ..... passim

Terry v. Ohio, 392 U.S. 1 (1967) 6, 7

United States v. Abdus-Price, 518 F.3d 926 (D.C. Cir. 2008) 8

United States v. Aitoro, 446 F.3d 246 (1st Cir. 2006).....13

United States v. Baker, 78 F.3d 135 (4th Cir. 1996).....1, 10

United States v. Barrett, 505 F.3d 637, 640 (7th Cir. 2007)..... 8

United States v. Black, 707 F.3d 531 (4th Cir. 2013) 5, 11, 12-13

United States v. Bullock, 510 F.3d 342 (D.C. Cir. 2007).....12

United States v. George, 732 F.3d 296 (4th Cir. 2013) 12

United States v. Holt, 264 F.3d 1215, 1223 (10th Cir.2001) (en banc) 8

United States v. Leo, 792 F.3d 742, 749 (7th Cir. 2015) 11-12

United States v. Payne, 534 F.3d 948, 952 (8th Cir. 2008)..... 10

United States v. Rodriguez, 135 S. Ct. 1609 (2015) 8

United States v. Sakyi, 160 F.3d 164 (4th Cir. 1998) 8

United States v. Sokolow, 490 U.S. 1 (1989)..... 13

United States v. Tinnie, 629 F.3d 749 (7th Cir. 2011)..... 13

United States v. Ubiles, 224 F.3d 213 (3d Cir. 2000).....5, 11

Whren v. United States, 517 U.S. 806 (1996).....14

Statutes and Rules

18 U.S.C. § 922(g)(1) 3

Fed. R. App. 35(b)..... 1

Misc

FBI, Uniform Crime Reports. 2014 Law Enforcement Agents Killed & Assaulted.....9

4 W. LaFave, Search and Seizure, § 9.6(a) (5th ed).....7-8, 11

STATEMENT OF REASONS FOR EN BANC CONSIDERATION

In a divided decision, the panel held that officers in a concealed-carry state may not, during a valid traffic stop, frisk a suspect reasonably believed to carry a loaded firearm without additional evidence of dangerousness. That decision conflicts with three binding Supreme Court decisions and should be vacated: Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) ("The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer [during a routine traffic stop]."); Adams v. Williams, 407 U.S. 143, 146 (1972) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law."); Terry v. Ohio, 392 U.S. 1, 28 (1967) ("a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety") (emphasis supplied in each). The panel decision also conflicts with this Court's decision in United States v. Baker, 78 F.3d 135, 137 (4th Cir. 1996) ("Based on the inordinate risk of danger to law enforcement officers during traffic stops, observing a bulge that could be made by a weapon in a suspect's clothing reasonably warrants a belief that the suspect is potentially dangerous, even if the suspect was stopped only for a minor violation."). See Fed. R. App. 35(b)(1)(A).

In breaking new ground, the panel majority recognized that denying officers the ability to frisk an armed suspect for weapons raises "genuine safety concerns," but treated those concerns as the price of concealed-carry laws. United States v. Robinson, 814 F.3d 201, 213 (4th Cir. 2016). They are not. Especially in light of the high volume of traffic stops, the panel

majority's incorrect ruling is of significant and recurring importance to officer safety, and it therefore merits en banc review.

STATEMENT OF THE ISSUE

Whether a police officer violated the Fourth Amendment by frisking Robinson during a valid traffic stop based on a reasonable belief that Robinson was carrying a loaded firearm.

BACKGROUND AND PANEL DECISION

1. On March 24, 2014, at approximately 4:00 p.m., the Ranson, West Virginia, police Department received an anonymous call indicating that a black male loaded a firearm while standing in the 7-Eleven parking lot on North Mildred, concealed the gun in his pocket, and entered a bluish-green Toyota Camry driven by a white female. The caller also advised that the Camry had just left the lot and headed south on North Mildred. The North Mildred 7-Eleven is located next to the Apple Tree Gardens apartment complex, the highest drug and violent crime area in Ranson. J.A. 31-34, 40-48, 70-71.

Officers Kendall Hudson and Captain Robbie Roberts responded to the call in separate vehicles. Within two or three minutes of the call, Hudson spotted the Camry less than a mile from the 7-Eleven, noticed that neither driver nor passenger was wearing a seatbelt, and pulled the car over for the seatbelt violations. J.A. 63-65. While asking the driver for identification, Officer Hudson, fearing that Robinson, the passenger, had a gun in his pocket, ordered Robinson out of the car. J.A. 65-66. At this point, Captain Roberts pulled up, opened the passenger door, and asked Robinson if he had any weapons. Without answering, Robinson gave the Captain a "weird look", at which point the Captain ordered Robinson to put his hands on top of the car. Captain Roberts then frisked Robinson, finding a firearm in his pants

pocket. J.A. 62-72, 88-89. After the frisk, Captain Roberts recognized Robinson as a convicted felon, and arrested him. J.A. 82-93.

2. Following his indictment on a felon-in-possession charge (18 U.S.C. 922(g)(1)), Robinson moved to suppress the gun on the ground that it was seized in violation of the Fourth Amendment. The district court denied the motion after an evidentiary hearing, finding that the stop was supported by probable cause to believe that the driver and passenger were violating the seatbelt law, that the anonymous tip was reliable, and that "[v]iewing the totality of the circumstances, there are objective and particularized facts giving rise to reasonable suspicion that [Robinson] was armed and dangerous." 2014 WL 4064035, at * 4 (N.D.W.V. 2014). The district court concluded, "following the valid traffic stop for an observable seatbelt violation, Officer Roberts lawfully frisked [Robinson] for weapons to protect himself and others because reasonable suspicion that [Robinson] was armed and dangerous existed based upon [Robinson's] reaction at the scene and the reliable tip, either of which would justify the pat down search." Id. Robinson preserved his suppression claim by entering a conditional guilty plea. He was sentenced to 37 months in prison.

3. By a divided vote, this Court reversed. The panel majority (Harris, J. & Davis, S.J.). upheld the district court's findings that the stop was lawful and that the officers had reason to believe Robinson was carrying a loaded firearm, neither of which Robinson contested. 814 F.3d at 206-207. But, the majority held, although reasonable suspicion that a suspect is armed might be sufficient to establish "a strong indicia of criminal activity" in a jurisdiction "where local law tightly regulates the concealed carry of firearms," Id. at 207, it does not establish dangerousness in West Virginia where "it is legal to carry a gun in public" and "it is legal to carry a concealed firearm with a permit." Ibid. In other words, the majority

explained, "in West Virginia * * * there is no reason to think public gun possession is unusual, or that a person carrying or concealing a weapon during a traffic stop is anything but a law-abiding citizen who poses no danger to the authorities." Id. at 208. Relying on caselaw holding that possession of a firearm in a State like West Virginia no longer provides a justification for an investigatory stop because it does not provide "reasonable suspicion of criminal activity," Id. at 207-208, the majority held that courts in states with concealed-carry laws may not assume that "firearms inherently pose a danger justifying their seizure by law enforcement officers without consent." Id. at 208. A rule to the contrary, the majority held, would authorize "a personally intrusive frisk whenever a citizen stopped by the police is exercising the constitutional right to bear arms." Id. at 209. Moreover, the majority observed, the officers had no reason to suspect that Robinson had a prior felony conviction, and thus, that his possession of a firearm was illegal. Ibid. The majority acknowledged that "recent legal developments regarding gun possession have made the work of the police more dangerous as well as more difficult," Id. at 210, but "the fact that an individual is armed, in and of itself, is not an objective indication of danger." Ibid.

Turning to the factual context of this case, the majority held that neither Robinson's refusal to answer the Captain's question nor Robinson's presence in a high-crime area "is probative of dangerousness." 814 F.3d at 210-211. The majority pointed out that Robinson was not required to disclose that he was armed, Id. at 211-212, and where "public gun possession is legal," law-abiding citizens can be expected to carry guns in high-crime areas. Id. at 212. Again acknowledging the "genuine safety concerns" of officers, the majority held that a court cannot find dangerousness where "a sovereign state has made the judgment that its citizens may safely arm themselves in public." Id. at 213.

Judge Niemeyer dissented. He pointed out that the majority mistakenly used the reasonable suspicion standard for a stop to assess the lawfulness of the frisk of Robinson. Judge Niemeyer explained that in evaluating the legality of a frisk, Terry and Mimms established that the term "armed and dangerous" is a "unitary concept." 814 F.3d at 217. Moreover, West Virginia's concealed-carry law was irrelevant to the frisk inquiry under the holding of Adams v. Williams, 407 U.S. at 146. Id. at 214. Accordingly, if the police have lawfully stopped a suspect who is known to be armed, Judge Niemeyer reasoned, the police may frisk the suspect "with or without any additional signs indicating that the individual may be dangerous." Id. at 218.

Judge Niemeyer also noted that the panel majority mistakenly relied on United States v. Black, 707 F.3d 531 (4th Cir. 2013); Northrup v. City of Toledo Police Department, 785 F.3d 1128 (6th Cir. 2015); and United States v. Ubiles, 224 F.3d 213 (3d Cir. 2000), because each held only that reasonable suspicion to stop an individual may not be based solely on firearm possession in a concealed-carry state. In sum, Judge Niemeyer concluded, the evidence, viewed under the totality of the circumstances, demonstrated that Captain Roberts had ample grounds to frisk Robinson because Robinson was armed and dangerous. 814 F.3d at 218-220.

I. THE POLICE WHO HAVE MADE A VALID TRAFFIC STOP MAY FRISK A ARMED SUSPECT BECAUSE THAT SUSPECT IS ALSO DANGEROUS

As Terry v. Ohio established, the Fourth Amendment permits the police to stop an individual on reasonable suspicion that criminal activity is afoot. A lawful stop, in turn, gives the police the authority to do a patdown search ("frisk") of the suspect's outer clothing for "weapons for the protection of the police officer, where he has reason to believe that he is

dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27. In Terry, because the officer reasonably believed that suspects were about to commit a crime that likely would involve the use of weapons, a "reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety." 392 U.S. at 28 (emphasis supplied). No additional indicia of a threat was needed.

Likewise, in Adams v. Williams, a police officer received a tip that an individual was carrying drugs and had a gun at his waist, sitting in a car in a high crime area at night. State law allowed its citizens to carry concealed firearms with a permit. 407 U.S. at 149 (dissenting opinion). The officer approached the suspect and seized the firearm from his waist. The Court upheld the stop and the frisk. As to the frisk, the Court stated that the purpose of a frisk is not to discover evidence of a crime, but to allow "the officer to pursue his investigation without fear of violence * * * whether or not carrying a concealed weapon violate[s] any applicable state law." Id. at 146. Further, the tip that the suspect was carrying drugs and a firearm in a high-crime area gave the officer "ample reason to fear for his safety." Id. at 147-148. Finally, the Court noted that approximately 30% of police shootings occur when an officer approaches a suspect seated in an automobile. Id. at 148 n. 3.

The Court reaffirmed this principle in the context of a traffic stop in Pennsylvania v. Mimms, where a police officer stopped a vehicle because it was displaying an expired license plate. When the driver got out of the car, the officer noticed a bulge in his coat pocket. Fearing that the bulge might be a weapon, the officer frisked the driver and seized a firearm

from the coat pocket. After upholding the stop, the Court concluded that the officer was justified in frisking the driver for weapons under Terry because the "bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer." 434 U.S. at 112 (emphasis supplied).

Taken together, Terry, Adams, and Mimms demonstrate that the standard for stopping a suspect on reasonable suspicion that a crime has or is being committed is different from the standard for conducting a frisk of a suspect lawfully stopped. The standard for a stop focuses on the quantum of proof necessary to establish that the suspect is, or has committed a crime. In a state permitting public possession or concealed carry of a firearm, a police officer's knowledge that a suspect is armed does not, standing alone, demonstrate that the suspect is, or has committed, a crime. The frisk standard, in contrast, focuses on officer safety. It asks whether the suspect who has been lawfully stopped for a crime is armed and dangerous. In a case in which the suspect has been lawfully stopped for a crime that likely involves a gun, as in Terry, or a traffic stop, as in Mimms, knowledge by the police that the suspect is armed also demonstrates that the suspect is dangerous. No further evidence of dangerousness is required. See 4 W. LaFave, Search and Seizure, § 9.6(a), 848 n.35 (5th ed.) ("It must be emphasized that Terry requires that there is reason to believe that the suspect may be armed *and* dangerous. In most stop-and-frisk situations, it would seem that if there is the requisite suspicion that the person is armed, then it will follow that there is the requisite suspicion that he is dangerous because he is confronting an officer who is investigating the possibility that

he is engaged in criminal conduct").[1] And under Adams, it is irrelevant that the suspect is permitted to carry a concealed firearm under state law.

Mimms' holding that, during a traffic stop, knowledge by the police that a motorist or passenger is armed is sufficient to show that he is also dangerous rests on the premise that a traffic stop is "especially fraught with danger to police officers," and police officers, when confronting an armed motorist, may therefore take reasonable steps to protect their safety. United States v. Rodriguez, 135 S. Ct. 1609, 1616 (2015) (citing Arizona v. Johnson, 555 U.S. 323, 330 (2009) (internal quotations omitted); Mimms, 434 U.S. at 110. See also United States v. Holt, 264 F.3d 1215, 1223 (10th Cir.2001) (en banc) ("The terrifying truth is that officers face a very real risk of being assaulted with a dangerous weapon each time they stop a vehicle"), overruled on other grounds in United States v. Stewart, 473 F.3d 1265, 1269 (10th Cir.2007). The "officer safety interest stems from the mission of the stop itself." Rodriguez, 135 S. Ct. at 1616. The risk of a violent encounter between a police officer and an occupant of a car during a traffic stop stems not from the ordinary reaction from the miffed motorist stopped for a traffic infraction but from the fact that "evidence of a more serious crime might be uncovered" during the stop, thereby raising the chances that the motorist or his passenger

[1] Following Terry, this Court and other courts of appeals have held that where the individual is suspected of a violent crime, he is necessarily suspect as being armed and dangerous. E.g., United States v. Sakyi, 160 F.3d 164, 169 (4th Cir. 1998) (drug offense; "the indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to the officer"); United States v. Abdus-Price, 518 F.3d 926, 932 (D.C. Cir. 2008) ("[a]rmed with reasonable suspicion of danger by the very nature of the suspected crime of armed robbery, the officers initiated protective frisks of both men"). See also United States v. Barrett, 505 F.3d 637, 640 (7th Cir. 2007) (burglary offense; "[t]hough not every Terry stop justifies a frisk, some crimes by their very nature are so suggestive of the presence and use of weapons that a frisk is always reasonable when officers have reasonable suspicion that an individual might be involved in such a crime").

will use violence to prevent his arrest for the more serious crime. Johnson, 555 U.S. at 331 (quoting Maryland v. Wilson, 519 U.S. 408, 414 (1997)). The danger to an officer is likely to be greater when, like here, there are multiple people in the car. See Wilson, 519 U.S. at 414. That risk of violence is minimized if the officer takes complete control of the situation by frisking the motorist or his passenger for a weapon. Johnson, 555 U.S. at 330-331.

Both Mimms and Adams relied in part on studies showing that a significant number of police shootings had occurred when a police officer approached a suspect in an automobile. Mimms, 434 U.S. at 110; Adams, 407 U.S. at 148 n.3. That pattern continues. A recent FBI Report found that between 2005 and 2014, 505 law enforcement officers were feloniously killed in the line of duty, including 93 (18%) officers killed during a felony vehicle stop or a traffic violation stop. See FBI, Uniform Crime Reports, 2014 Law Enforcement Officers Killed and Assaulted, Table 21. Of the 505 police fatalities, 466 were killed by a firearm, including 343 by a handgun. Id. at Table 29.

Concealed-carry laws do not eliminate the threat of violence faced by officers. When the officer first stops the car, he knows little about the car's occupants, including whether anyone is impaired, mentally ill, short-tempered, or transporting contraband. There is always the risk that the traffic stop will escalate into a violent confrontation between the officer and the suspect, and as long as the officer reasonably believes that the suspect is armed, the Fourth Amendment permits him to minimize the risk to his safety and the safety of others with a patdown for weapons.

Applying Mimms, this Court and the Eighth Circuit have stated that when the police conduct a lawful traffic stop and then develop reasonable suspicion that the suspect is armed, the officer has sufficient evidence of danger to frisk the suspect. E.g., United States v. Baker,

78 F.3d 135, 137 (4th Cir. 1996) ("[b]ased on the inordinate risk of danger to law enforcement officers during traffic stops, observing a bulge that could be made by a weapon in a suspect's clothing reasonably warrants a belief that the suspect is potentially dangerous, even if the suspect was stopped only for a minor violation"); United States v. Payne, 534 F.3d 948, 952 (8th Cir. 2008) (observation of weapons in car "gave Lewis reasonable justification to suspect that Payne was armed and that he posed a serious and present danger to Lewis's safety"). No circuit, to our knowledge, requires additional proof of dangerousness. The panel decision stands alone.

II. THE PANEL MAJORITY CONFLATED THE STOP STANDARD WITH THE FRISK STANDARD

The panel did not follow the controlling precedents on frisks in Mimms and Baker. For example, the panel ignored Mimms' holding that the police officer properly frisked the passenger in a car that had been properly stopped for a traffic infraction because the officer's suspicion that the passenger was armed also ("thus") made him dangerous. 434 U.S. at 111-112. Instead, the majority cited Mimms for the unrelated rule that the officer may order the passenger out of the car, see 814 F.3d at 209-210 (citing Mimms at 434 U.S. at 110-111), and for the proposition that the arrest in Mimms occurred when local law limited the public possession of firearms. Id. at 207 n.3. But Mimms' analysis did not turn at all on how easy it was to obtain a concealed-carry permit under state law. Rather, the Court simply equated being armed with being dangerous.

Rather than looking to the caselaw on frisks, the panel relied on "stop cases" to hold that, under Black, Northrup, and Ubiles, in a concealed-carry state, police knowledge that a suspect is armed does not automatically make him dangerous because a person's lawful possession of a gun in public is not criminal and therefore does not imply that that person presents a danger

to the police. 814 F.3d at 208-209. To the contrary, those cases held only that such knowledge did not establish reasonable suspicion to stop the suspect for a crime; none addressed the legality of a frisk of an armed suspect in a concealed carry state after a valid stop. See Black, 707 F.3d at 542 ("all the factors recited by the Government fail to amount to a reasonable suspicion justifying Black's seizure"); Northrup, 785 F.3d at 1132 ("[t]o allow stops in this setting 'would effectively eliminate Fourth Amendment protections for lawfully armed persons'") (internal citation omitted); Ubiles, 224 F.3d at 217 ("Ubiles contends that the stop in this case was not supported by the type of reasonable suspicion required by Terry. * * * * We agree"). To be sure, if an officer has information that an individual is armed in a concealed-carry state, that information, standing alone, does not amount to reasonable suspicion that the suspect is committing, or has committed, a crime. The officer can avoid any threat to his safety by not confronting the individual. See LaFave, Search and Seizure, § 9.6(a), pp. 841-842. But the calculus changes once the suspect has been stopped for criminal activity because any confrontation between an officer and a suspect raises a risk of violence. Under Mimms, when the police have made a traffic stop and believe that the motorist or a passenger is armed, the police also have reasonable suspicion to believe that he is dangerous.

The panel also stated that United States v. Leo, 792 F.3d 742, 749 (7th Cir. 2015) had held that in a concealed-carry state, "the police could neither Terry "frisk" nor search a backpack in a preschool parking lot on the suspicion that it contained a gun." 814 F.3d at 208. The panel misread Leo. The defendant in Leo conceded that the police could frisk his backpack for weapons, and argued only that a full search of the backpack violated the Fourth Amendment. See 792 F.3d at 749 ("Leo concedes that, under Terry, the officers lawfully could have patted down the backpack to search for weapons. But he maintains that safety

concerns did not justify opening and emptying the backpack because he was handcuffed and out of reach of the backpack").

III. IN ANY EVENT, ADDITIONAL EVIDENCE SUPPORTED THE DISTRICT COURT'S FINDING THAT ROBINSON WAS BOTH ARMED AND DANGEROUS

The panel also erred in rejecting the other evidence of dangerousness in this case. First, the panel's rejection of the high-crime-area factor on the ground that it sheds no light on the likelihood that a suspect's gun possession poses a danger to the police when the state permits its citizens to carry firearms in public is inconsistent with Adams. Adams, like this case, involved the frisk of an armed suspect in a high-crime area in a state that allowed its citizens to carry a concealed gun with a permit. 407 U.S at 147-148 ("[w]hile properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly had ample reason to fear for his safety") (emphasis supplied). This Court and other courts of appeals have relied on the high-crime area factor to support a frisk. See United States v. George, 732 F.3d 296, 300 (4th Cir. 2013) (frisk justified in part because the stop occurred "in a high-crime area"); United States v. Tinnie, 629 F.3d 749, 751 (7th Cir. 2011) (frisk justified in part because the stop occurred "in a high-crime neighborhood"); United States v. Bullock, 510 F.3d 342, 348 (D.C. Cir. 2007) (frisk justified in part because "the stop occurred in a medium- to high-crime area"), cert. denied, 553 U.S. 1024 (2008); United States v. Aitoro, 446 F.3d 246, 253 (1st Cir. 2006) (frisk justified in part because "the neighborhood was known for a high incidence of crime"). The panel's reliance on Black was misplaced because Black held only that the high crime area and other factors did not constitute reasonable suspicion to

detain the suspect. Black did not address the legality of a frisk of a suspect in a high crime area in a state that allows its citizens to carry a gun.

The panel further erred in holding that Robinson's "weird look" was irrelevant. Captain Roberts had been a law enforcement officer for 28 years, including 26 years in Ranson (J.A. 83-84), and he had made thousands of traffic stops (J.A. 93), so he was amply qualified to interpret words and gestures from suspects. Given his experience, the Captain properly concluded that Robinson's "weird look" and failure to answer his question whether he was armed was non-cooperative, evasive, behavior that was designed to prevent him from finding Robinson's gun. E.g., Illinois v. Wardlow, 524 U.S. 119, 124 (2000) (nervous, evasive behavior contributes to reasonable suspicion). See Tinnie, 629 F.3d at 753 ("[c]oupled with the earlier suspicious circumstances, Tinnie's silence when twice asked if he had any weapons, but his immediate denial of possessing drugs, provided Kaiser with reasonable suspicion that Tinnie was armed and thus justified the frisk") (emphasis supplied).

The panel was concerned that a rule permitting Terry frisks in high-crime areas would disproportionately affect racial minorities and poor people who are most likely to live in such areas. 814 F.3d at 209. But a Terry frisk can only be conducted after the police have lawfully stopped a suspect on reasonable suspicion that the suspect is or has been involved in criminal activity. That objective standard prevents police stops on hunches alone. See United States v. Sokolow, 490 U.S. 1, 7 (1989). Further, "[A]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." Wardlow, 528 U.S. at 124. It follows that a frisk, which requires a lawful stop, may not be made on an individual merely because he is present in a high-crime area. Moreover, intentionally racially discriminatory police searches

and seizures may be challenged on equal protection principles. See Whren v. United States, 517 U.S. 806, 813 (1996).

In this case, Captain Roberts properly frisked Robinson because he had reasonable suspicion under Terry to believe that Robinson was armed and dangerous based on a reliable tip that Robinson had just loaded a firearm and placed it in his pocket while standing in an area known for drug and violent crimes. Following Robinson's "weird look" and refusal to answer when asked whether he had a gun, the Captain reasonably took the minimally invasive step of patting down Robinson's outer clothing to locate the gun and neutralize the threat it posed as he and Officer Hudson completed the traffic stop. The West Virginia concealed-carry law did not remove the officers' ability to take this prudent measure.

CONCLUSION

The decision should be vacated, the case should be reheard, and the judgment should be affirmed.

Respectfully submitted.

WILLIAM IHLENFELD, II
United States Attorney

JAROD J. DOUGLAS
Assistant U.S. Attorney
Northern District of West Virginia

LESLIE R. CALDWELL
Assistant Attorney General

SUNG-HEE SUH
Deputy Assistant Attorney General

s/ Thomas E. Booth
THOMAS E. BOOTH
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Suite 1511
Washington, DC 20530
(202) 514-5201
Thomas.Booth@usdoj.gov

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that this Rehearing En Banc Petition for the United States was this day served upon Nicholas J. Compton, counsel for Robinson, by notice of electronic filing with the Fourth Circuit's CM/ECF system.

Dated: April 7, 2016

/s/ Thomas E. Booth
Thomas E. Booth

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4540 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Calisto MT 12-point font in text and in footnotes.

DATED: April 7, 2016

/s/ Thomas E. Booth

THOMAS E. BOOTH
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Suite 1511
Washington, DC 20530
(202) 514-5201
Thomas.Booth@usdoj.gov