No. 07-____

IN THE

Supreme Court of the United States

KEITH A. OWENS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

Petition for a Writ of Certiorari

SAMUEL ESTREICHER
NYU LAW SCHOOL
SUPREME COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

MEIR FEDER
DONALD B. AYER
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-7870

KAREN SHUFF MAURER
(Counsel of Record)
Assistant Public Advocate
Dep't of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort, KY 40601
(502) 564-8006

Counsel for Petitioner Keith Owens

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Terry v. Ohio, 392 U.S. 1 (1968), permits a warrantless frisk of an individual only upon reasonable suspicion that the individual is armed and dangerous, and *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979), emphasizes that this reasonable suspicion must be individualized, *i.e.*, "directed at the person to be frisked." A number of jurisdictions, including the Kentucky Supreme Court below, have nonetheless adopted the so-called "automatic companion" rule, under which the police may frisk an individual without individualized reasonable suspicion, based solely on the arrest of the individual's companion. Numerous other jurisdictions have disagreed.

The question presented is:

Does the so-called "automatic companion" rule, under which a police officer may frisk an individual based solely on the arrest of the individual's companion, comport with the Fourth Amendment?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Kentucky Supreme Court were Keith Owens and the Commonwealth of Kentucky.

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INTRODUCTION

OPINIONS BELOW

The opinion of the Kentucky Supreme Court [Pet. App. 1a-15a] is published at 244 S.W.3d 83 (Ky. 2008).

JURISDICTION

The opinion of the Kentucky Supreme Court was rendered on January 24, 2008, and entered as a final decision, pursuant to Kentucky Rule of Civil Procedure 76.30, on February 14, 2008. *See* Pet. App. 1a, 16a. *See also, e.g., Limtiaco v. Camacho*, 127 S. Ct. 1413, 1417-18 (2007). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

INTRODUCTION

The decision below merits this Court's review because it heightens a widespread and entrenched split in the lower courts on a critical Fourth Amendment issue confronted by police officers across the nation on a daily basis, and because it is inconsistent with several decisions of this Court.

This Court has long held that the Fourth Amendment permits *Terry* frisks upon particularized and individualized suspicion that a person is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

The lower circuit and state courts are deeply divided over whether a police officer may automatically conduct a *Terry* frisk of the companion of an arrestee—known generally as the "automatic companion" rule—or, alternatively, whether individualized reasonable suspicion is required. The Fifth, Sixth, and Eighth Circuits and a number of state courts have explicitly rejected the "automatic companion" rule and apply "traditional Fourth Amendment analysis" to ask "whether, in light of the 'totality of the circumstances' surrounding the seizure, it was reasonable for law enforcement personnel to proceed as they did." *United States v. Bell*, 762 F.2d 495, 499 (6th Cir. 1985) (citation omitted). Conversely, in this case the Kentucky Supreme Court joined the Seventh and Ninth Circuits and multiple state courts in adopting the "automatic companion" rule.

In addition to exacerbating this split, the decision below merits this Court's attention because it is inconsistent with this Court's prior decisions. In establishing the permissibility of a *Terry* frisk itself, the Court specifically required that, in order for such a frisk to be permissible under the Fourth Amendment, the officer must be "justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous." *Terry*, 392 U.S. at 24. This instruction has been reaffirmed in later cases explaining that *Terry* "does not permit a frisk for weapons on less than reasonable belief or suspicion *directed at the person to be frisked*," *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) (emphasis added).

This is inconsistent with the "automatic companion" rule's endorsement of frisks "even if there is no independent suspicion that the passenger is guilty of criminal conduct." Pet. App. 7a. In addition, contrary to the Kentucky Supreme Court's characterization of a *Terry* frisk as a "minimal" "additional intrusion," Pet. App. 11a, this Court has made clear that a *Terry* frisk is a "serious intrusion upon the sanctity of the person." *Terry*, 392 U.S. at 17.

Furthermore, the question presented is a bedrock Fourth Amendment issue as to which clear guidelines for police officers and a uniform constitutional rule are of the utmost importance, and the issue is squarely and cleanly presented by this case.

Accordingly, this Court's review is warranted.

STATEMENT

On Sept. 10, 2004, Petitioner Keith A. Owens was a passenger in a car driven by Chris Thornton. Pet. App. 2a. A police officer arrested Mr. Thornton for driving with a suspended license, and, in the course of a search incident to arrest, found a suspected crack pipe. *Id.* A second officer arrived while Mr. Thornton was being processed.

Following the arrest, the officer decided to search the car. Petitioner stepped out of the car at the officer's request, and indicated, in response to questioning, that he was not carrying any weapons. *Id.* Although there is no indication "that Owens was acting nervous or was fidgeting...; [that the officer] feared for his safety; [or] that the stop of the vehicle occurred in a high crime area," the officer chose to

conduct a full *Terry* frisk of petitioner. Pet. App. 7a n.14. During the course of this frisk, a small baggie containing marijuana and several pills (two pills were later found to include methamphetamine and three to include ecstasy) was found. Pet. App. 3a.

As a result of this discovery, petitioner was arrested and charged with possession of marijuana, first-degree possession of a controlled substance, and being a first-degree persistent felony offender. Pet. App. 3a-4a. Petitioner moved to suppress the drug evidence on the ground that the officer who frisked lacked reasonable suspicion to justify the frisk, but the trial court, after a hearing, denied the motion. A jury subsequently found Mr. Owens guilty of all charges, and he was sentenced to twenty years' imprisonment.

On direct appeal to the Kentucky Supreme Court, that court affirmed. The court candidly recognized the absence of individualized suspicion concerning petitioner, observing that "nothing of substance appears in the record to justify the frisk of Owens, except . . . that he was a passenger in a vehicle driven by someone who possessed a crack pipe." Pet. App. 7a n.14. Accordingly, the court noted, it was faced with the question whether petitioner's status as the companion of an arrestee could justify the frisk under the Fourth Amendment.

The court noted that this issue has been addressed by numerous jurisdictions and produced "two schools of thought." One view, "known as the automatic companion rule, holds that '[a]ll companions of the arrestee within the immediate

vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory "pat-down" reasonably necessary to give assurance that they are unarmed.'" Pet. App. 7a (quoting *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971)). The other view rejects the automatic companion rule, reasoning, among other things, that the rule "improperly creates a guilt-by-association scenario and obliterates the requirement that an officer have a particularized, reasonable, articulable suspicion that a person is engaging in criminal activity or is dangerous before subjecting that person to a frisk." Pet. App. 8a-9a. In this view, a frisk is permissible only if the officer has reasonable, individualized suspicion under the totality of the circumstances. Pet. App. 9a.

The Kentucky Supreme Court sided with the jurisdictions adopting the automatic companion rule, observing that it seemed "illogical that . . . an officer could search a vehicle incident to an arrest of the driver, which necessitates removing any passengers from the vehicle, but could not take the additional protective step of conducting a *Terry* pat-down" of the passengers. Pet App. 9a-10a. The court termed the "additional intrusion" of such a frisk "minimal—since the passengers presumably have already been ordered to exit the vehicle," and further asserted that excluding evidence in such circumstances would have "no practical deterrent effect." Pet. App. 11a-12a. In addition, the court justified the automatic companion rule as "provid[ing] needed bright line guidance to the bench, bar, law enforcement community, and citizens across the Commonwealth as to what is

constitutionally permissible in cases such as the one at hand." Pet. App. 13a.

REASONS FOR GRANTING THE WRIT

I. THE LOWER FEDERAL AND STATE COURTS ARE DIVIDED OVER WHETHER AN OFFICER MAY AUTOMATICALLY FRISK AN ARRESTEE'S COMPANION WITHOUT INDIVIDUALIZED REASONABLE SUSPICION.

The lower courts are deeply divided over whether a police officer may *automatically* conduct a pat-down search of the companion of an arrestee. Indeed, the decision below explicitly acknowledged that "[t]wo schools of thought have emerged around this subject" and adopted the so-called "automatic companion" rule, joining the minority side of the split. Pet. App. 7a, 9a-13a.

At least three federal courts of appeals—the Fifth, Sixth, and Eighth—have concluded that the Fourth Amendment and this Court's holding in *Terry v. Ohio*, 392 U.S. 1 (1968), bar the automatic pat-down search of an arrestee's companion without individualized reasonable suspicion. The Sixth Circuit, for example, has held that "[a]s to the propriety of the 'automatic companion' rule, we do not believe that the *Terry* requirement of reasonable suspicion under the circumstances has been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates." *United States v. Bell*, 762 F.2d 495, 499 (6th Cir. 1985) (internal citation omitted). Instead, these courts apply "traditional Fourth Amendment analysis," asking "whether, in light of the 'totality of

the circumstances' surrounding the seizure, it was reasonable for law enforcement personnel to proceed as they did." *Id.* (citation omitted).

In contrast, the Seventh and Ninth Circuits have adopted the automatic companion rule, dispensing with the need for individualized suspicion. In *United States v. Berryhill*, 445 F.2d 1189, 1193 (1971), which has become the paradigmatic statement of the automatic companion rule, the Ninth Circuit held that "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed."

A. Cases Rejecting the "Automatic Companion" Rule

The Sixth Circuit has consistently rejected *Berryhill*'s automatic companion rule in favor of a totality of the circumstances analysis of the legality of the search at issue. In *United States v. Wilson*, 506 F.3d 488, 496 (6th Cir. 2007), the court granted a motion to suppress brought by the companion of an arrestee because "the government can point to no specific and articulable facts to justify the pat-down of [the companion] on the basis of a reasonable suspicion that he was armed and dangerous." Noting that it rejected the automatic companion rule, the Sixth Circuit concluded that the defendant's "proximity to [the arrestee] was relevant, but not dispositive, to the analysis. . . . [T]his court has held that the government must indeed show additional

factors in order for the search to be constitutional." *Id.* at 494.

Similarly, the Fifth and Eighth Circuits have expressly declined to adopt the automatic companion rule. *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986) ("We decline to adopt the 'automatic companion' rule."); *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (en banc) (rejecting rule "conferring categorical reasonableness upon searches of all companions of the arrestee as being incident to the arrest of the other"), *overruled on other grounds by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987). Like the Sixth Circuit, these circuits apply a totality of the circumstances analysis, finding that "[i]t is relevant that one member of a group has been arrested, but that does not automatically give rise to a reasonable suspicion that the others may be armed and dangerous." *United States v. Menard*, 95 F.3d 9, 11 (8th Cir. 1996).[1]

A number of state courts have likewise rejected the automatic companion rule, contrary to the Kentucky Supreme Court's decision here. As the

[1] District courts in the Eighth Circuit have continued to adhere to this rejection of the automatic companion rule. *See, e.g., United States v. Bowers*, No. 8:05CR294, 2006 WL 277094, at *5 (D. Neb. Feb. 3, 2006) (requiring reasonable suspicion to search the companion of an arrestee); *United States v. Easley*, No. CR05-4107-MWB, 2006 WL 42149, at *5 (N.D. Iowa Jan. 9, 2006) ("The Eighth Circuit 'expressly rejected the 'automatic companion' rule, requiring instead that the search of a companion of an arrestee be reasonable in the 'totality of the circumstances,' including companionship with the arrestee[.]'") (citation and emphasis omitted).

Supreme Judicial Court of Massachusetts explained, "such a bright-line rule [is] not consistent with the Fourth Amendment principles of *Terry v. Ohio*, under which the frisk of a person is constitutionally permissible if the arresting officer can point to specific, articulable facts that warrant a reasonable suspicion." *Commonwealth v. Ng*, 649 N.E.2d 157, 157 (Mass. 1995) (internal citation omitted). *See also Commonwealth v. Jackson*, 907 A.2d 540, 544 (Pa. Super. Ct. 2006) (rejecting *per se* automatic companion rule); *El-Amin v. Commonwealth*, 607 S.E.2d 115, 118 (Va. 2005) (declining to adopt a *per se* automatic companion rule); *Way v. State*, 101 P.3d 203, 211 (Alaska Ct. App. 2004) ("[T]he police can not frisk a person based simply on that person's 'unfortunate choice of associates.' Rather, 'the predicate to a patdown of a person for weapons is a reasonable belief that [the person] [is] armed and presently dangerous.'" (citations and footnote omitted)); *State v. Jason L.*, 2 P.3d 856, 864 (N.M. 2000) (suppressing the evidence because the police lacked "[i]ndividualized, particularized suspicion[, which] is a prerequisite to a finding of reasonable suspicion"); *Commonwealth v. Graham*, 685 A.2d 132, 136 (Pa. Super. Ct. 1996) ("[A] *per se* rule that a companion to an arrestee is subject to a 'pat-down' search regardless of justification . . . effectively warrants 'unreasonable searches' and is, thus, contrary to the Fourth Amendment . . . ."), *rev'd on other grounds by* 721 A.2d 1075 (Pa. 1998); *State v. Eggersgluess*, 483 N.W.2d 94, 98 (Minn. Ct. App. 1992) ("We believe that the prevailing trend, which rejects the 'automatic companion rule' of *Berryhill* as

unconstitutional and unsound, is a better approach and is consistent with . . . federal constitutional law.").[2]

B. Cases Adopting the "Automatic Companion" Rule

Like the Kentucky Supreme Court below, the Seventh and Ninth Circuits have adopted the automatic companion rule for pat-down searches of an arrestee's companion, reasoning, in essence, that "[i]t is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate. . . ." *Berryhill*, 445 F.2d at 1193. *See also United States v. Prieto-Villa*, No. 91-50505, 1993 WL 222610, at *3 (9th Cir. June 24, 1993) ("[I]n certain circumstances indicating a close personal connection, police officers are justified in briefly detaining and patting-down for weapons someone who is associated with a person or place as to which probable cause exists."). The Seventh Circuit, citing *Berryhill*, has approved the pat-down search of an arrestee's companion, but refused to extend the rule to cover a search of all items with the companion's area of immediate control. *United States v. Simmons*, 567

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[2] One other state appellate court has rejected the automatic companion rule as violating its state constitution. *See State v. Henderson*, 906 A.2d 232, 237-38 (Del. Super. Ct. 2005) ("[T]he Delaware Constitution would not allow for [the automatic companion rule]."). While the Delaware court ultimately rested its conclusions on state law, it was influenced by federal law and suggested that the same result was appropriate under federal law. *See id.* at 237.

F.2d 314, 319 (7th Cir. 1977); *see also, e.g.*, Pet. App. 8a n.16 (placing Seventh Circuit on *Berryhill*'s side of the split).[3]

In addition, in a case decided shortly after *Berryhill*, the Fourth Circuit expressly agreed with *Berryhill* and extended the automatic companion rule to "a limited search for weapons of a known companion of an arrestee, especially one reported to be armed at all times, who walks in on the original arrest." *United States v. Poms*, 484 F.2d 919, 922 (4th Cir. 1973). But in a more recent case involving the search of the companion of a driver placed under arrest, the Fourth Circuit failed to cite *Poms* and instead required an "appropriate level of suspicion of criminal activity and apprehension of danger." *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998). Unlike in *Berryhill*, the court concluded that it could "not rely on a generalized risk to officer safety to justify a routine 'pat-down' of all passengers as a matter of course." *Id.* However, the court nonetheless dispensed with the requirement of individualized suspicion, ruling that "when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out

[3] Scholarly articles likewise understand *Simmons* as adopting the automatic companion rule. *See* Jeanne C. Serocke, Note, *The Automatic Companion Rule: An Appropriate Standard to Justify the* Terry *Frisk of an Arrestee's Companion?*, 56 FORDHAM L. REV. 917, 918 n.16 (1988); John J. O'Shea, *The Automatic Companion Rule: A Bright-Line Standard for the* Terry *Frisk of an Arrestee's Companion*, 62 NOTRE DAME L. REV. 751, 755 (1987).

of the vehicle and pat them down briefly for weapons to ensure the officer's safety . . . ." *Id.* Ultimately, the meaning of *Sakyi* with respect to the vitality of the automatic companion rule in the Fourth Circuit remains unclear. *See United States v. Williams*, Nos. 99-4279, 99-4280, 2000 WL 718395, at *7 (4th Cir. June 5, 2000) (case decided after *Sakyi* that cites *Poms* to justify the frisk of an arrestee's companion).

A number of state courts, in addition to the court below, have also adopted the automatic companion rule. *See, e.g., Trice v. United States*, 849 A.2d 1002, 1007 (D.C. 2004) ("[I]mmediate safety concerns . . . will justify the police in stopping, or stopping and frisking, the companion of a person whom the police have reason to seize, even if the police have no particularized suspicion that the companion is armed, dangerous, or engaged in criminal activity."); *Perry v. State*, 927 P.2d 1158, 1163 (Wyo. 1996) ("[The] frisk . . . was lawful under the 'automatic companion' rule."); *People v. Myers*, 616 N.E.2d 633, 636 (Ill. App. Ct. 1993) ("While a police officer may not search a person merely because he is with someone who has been arrested, the officer may conduct a pat-down of the arrested person's companions to protect himself or others."); *State v. Clevidence*, 736 P.2d 379, 382 (Ariz. Ct. App. 1987) ("The right to a limited search for weapons extends to a suspected criminal's companions at the time of arrest."); *State v. Moncrief*, 431 N.E.2d 336, 342 (Ohio Ct. App. 1980) ("The right to frisk for the limited purpose of searching for weapons has been extended to the other occupants of a stopped automobile."); *see also State v. Dougherty*, 493 P.2d

1383, 1385 (Or. 1972) (citing *Berryhill* to justify asking the companion of an arrestee to open her purse for a weapons check).

In short, the split in the lower federal and state courts over the automatic companion rule is deep, acknowledged, and enduring. *See, e.g.*, *Graham*, 685 A.2d at 135 (noting that *Berryhill's* automatic companion rule has "drawn a large amount of criticism"); *Easley*, 2006 WL 42149, at *5 ("[T]he court is mindful of the Eighth Circuit's rejection of the 'automatic companion' rule, by which some courts have held 'all companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed.'"); *Commonwealth v. Riggins*, No. 2001-03-4, 2004 WL 192053, at *3 n.2 (Va. App. Jan. 30, 2004) ("To the extent the Commonwealth invokes an 'automatic companion rule' to justify the search, we note that, although some courts have adopted such a rule, others make clear that the 'totality of circumstances' test does not support it." (internal citations omitted)); *People v. Samples*, 56 Cal. Rptr. 2d 245, 254 & 254 nn. 5, 6 (Cal. Ct. App. 1996); *United States v. McKie*, 951 F.2d 399, 401-02 (D.C. Cir. 1991). The decision below endorsing the automatic companion rule exacerbates this clear conflict.

II. THE KENTUCKY SUPREME COURT'S DECISION IS INCONSISTENT WITH THIS COURT'S CASES.

This Court should also grant review because the Kentucky Supreme Court's decision is inconsistent with this Court's cases narrowly circumscribing the Fourth Amendment exception embodied by *Terry*. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway v. New York*, 442 U.S. 200, 210 (1979).

The lower court's adoption of a bright line automatic companion rule subjecting a passenger to a *Terry* frisk incident to the arrest of the driver—"regardless of whether those passengers' actions or appearance evidenced any independent indicia of dangerousness or suspicion," Pet. App. 15a—is inconsistent with this Court's repeated instruction that the Fourth Amendment requires particularized and individualized suspicion that a person is armed and dangerous as a condition to a *Terry* search. The Fourth Amendment "does not permit a frisk for weapons on less than reasonable belief or suspicion *directed at the person to be frisked*." *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) (emphasis added). It is only "[w]hen an officer is justified in believing that the *individual whose suspicious behavior he is investigating* . . . is armed and presently dangerous" that a protective frisk is constitutionally permissible. *Terry*, 392 U.S. at 24 (emphasis added).

Nevertheless, the Kentucky court held that a police officer may pat-down a vehicle passenger "even

if the officer has no independent suspicion that the passenger is guilty of criminal conduct," and even while acknowledging that individualized suspicion against petitioner was entirely absent. Pet. App. 1a; *see also* Pet. App. 7a n.14. ("[N]othing of substance appears in the record to justify the frisk of Owens, except for the inarguable fact that he was a passenger in a vehicle driven by someone who possessed a crack pipe.")

Terry further made clear that an officer conducting a *Terry* search must be able to point to "specific and articulable facts" justifying the intrusion. 392 U.S. at 21. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 22 n.18. The automatic nature of the Kentucky court's rule is flatly to the contrary—rather than specific facts, the frisk of the passenger is based on the generalization that the companions of arrested drivers always pose a safety threat to arresting officers. "Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons.'" *Ybarra*, 444 U.S. at 93-94.

Moreover, this Court has "generally eschewed bright-line rules in the Fourth Amendment context," *Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997), and has expressly noted the inappropriateness of an automatic rule in performing the *Terry* analysis. *Michigan v. Long*, 463 U.S. 1032 (1983), held that even when the driver is not arrested, a limited *Terry* search of the passenger compartment of an automobile is permissible if the officer possesses a reasonable belief based on specific and articulable

facts that the suspect is dangerous and may gain immediate control of weapons. In emphasizing that the decision did not establish a bright line rule allowing police to conduct automobile searches whenever they conduct an investigative stop, the court distinguished the automatic rule of *New York v. Belton,* 453 U.S. 454 (1981): "An additional interest exists in the arrest context, *i.e.*, preservation of evidence, and this justifies an 'automatic' search. However, that additional interest does not exist in the *Terry* context." *Long*, 463 U.S. at 1049 n.14. Likewise, there is no additional interest beyond the *Terry* context that can justify an "automatic" search of a passenger in a car whose driver is being arrested.[4]

Furthermore, the view that a pat-down is anything other than a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment" has been clearly rejected by this Court. *Terry*, 392 U.S. at 17. In fact, *Terry* noted it was "simply fantastic" to describe a pat-down as a "petty indignity." *Id.* at 16-17. Thus, a key premise of the Kentucky court's decision, that "[a]lthough a *Terry* pat-down may be considered an additional intrusion into the privacy of a passenger, any additional intrusion is minimal—since the passengers presumably have already been

[4] Needless to add, any argument that a passenger can automatically be subjected to a full search incident to a driver's arrest is foreclosed by *United States v. Di Re*, 332 U.S. 581, 587 (1948) (rejecting an evidentiary search of a passenger's person based merely on presence in vehicle when driver is arrested).

ordered to exit the vehicle," Pet. App. 11a, conflicts with *Terry*'s statement that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry*, 392 U.S. at 24-25.

In short, the Kentucky Supreme Court's adoption of the automatic companion rule conflicts with this Court's cases establishing that the Fourth Amendment requires individualized suspicion before an individual may be subjected to the significant intrusion of *Terry* search.

III. THE ISSUE IN CONFLICT IS WELL PRESENTED BY THIS CASE

This case presents the automatic companion rule on which the lower courts are divided in an ideal posture, following a Kentucky Supreme Court opinion that "[gave] careful analysis to the well-reasoned thoughts expressed by both proponents and opponents of the automatic companion rule." Pet. App. 9a.

Most importantly, the court below made clear that the automatic companion rule was the *only* basis on which the frisk of petitioner (and, consequently, petitioner's conviction) could be upheld. Pet. App. 7a n.14 ("nothing of substance appears in the record to justify the frisk of Owens, *except* for the inarguable fact that he was a passenger in a vehicle driven by someone who possessed a crack pipe") (emphasis added). As the court noted, there was no "independent suspicion that [Owens was] guilty of

criminal conduct," and the arresting officer had no "articulable and independent suspicions that Owens was armed or dangerous." *Id.* Furthermore, the permissibility of the arresting officers' actions prior to the frisk are unchallenged—as the court explicitly notes—"every important action taken up to the point where Owens was frisked was constitutionally permissible," Pet. App. 6a—thereby placing the permissibility of the frisk squarely in issue.

Moreover, whether officers may automatically frisk an individual based solely on the arrest of the individual's companion is a critical Fourth Amendment issue that police repeatedly confront. Until this Court provides a clear rule, persons cannot be guaranteed the full protections of the Fourth Amendment nor can police officers be sure their actions fully comport with the Fourth Amendment. *See, e.g.*, *New York v. Belton*, 453 U.S. 454, 459-60 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."); *see also* Wayne LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. REV. 127, 142 ("the protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.").

Finally, it is clear that this issue will not benefit from further percolation. As the lower court's opinion makes clear, the automatic companion rule is the subject of an entrenched split in the Circuits and states that has not been ameliorated over time. It cannot be settled without this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

KAREN SHUFF MAURER
(Counsel of Record)
Assistant Public Advocate
Dep't of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort, KY 40601
(502) 564-8006

SAMUEL ESTREICHER
NYU LAW SCHOOL
SUPREME COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

MEIR FEDER
DONALD B. AYER
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-7870

Counsel for Petitioner Keith Owens

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