No. 98-1036

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF ILLINOIS,
Petitioner,

v.

WILLIAM WARDLOW,
aka SAM WARDLOW,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, COLORADO, DELAWARE, HAWAII, IDAHO, KANSAS, LOUISIANA, MINNESOTA, MISSISSIPPI, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
ROBERT C. MAIER*
ALEJANDRO ALMAGUER
Assistant Solicitors
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980
Counsel for *Amici* States

BILL PRYOR
Attorney General
State of Alabama

KEN SALAZAR
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

THOMAS R. KELLER
Acting Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

MIKE HATCH
Attorney General
State of Minnesota

MICHAEL C. MOORE
Attorney General
State of Mississippi

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

MICHAEL P. EASLEY
Attorney General
State of North Carolina

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK L. BARNETT
Attorney General
State of South Dakota

MARK L. EARLEY
Attorney General
Commonwealth of Virginia

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Other Authorities

STATEMENT OF *AMICI* INTEREST

Ohio and the 16 other States joining in this brief, as guardians of public order within their respective jurisdictions, possess a profound and obvious interest in the question presented in this case: namely, whether police officers who patrol a high crime area may infer suspicion from a person's taking flight upon seeing the officers, so that a stop and frisk are justified pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). The States submit this brief to protect their authority, pursuant to their democratically accountable legislation, to adopt reasonable law enforcement practices that legitimately balance the interest in crime prevention against the privacy rights of individuals. The Illinois Supreme Court misinterpreted the Fourth Amendment to deny the states this reasonable democratic discretion, and that erroneous interpretation now needs to be corrected.

SUMMARY OF ARGUMENT

It is essential to note at the outset that this case presents neither the situation of someone merely present in a high crime area, *see Brown v. Texas*, 443 U.S. 47, 52 (1979) (fact of presence "in a neighborhood frequented by drug users, standing alone" was no "basis for concluding that appellant himself was engaged in criminal conduct"), nor the scenario of such a person merely running through the neighborhood.

Nor does this case even involve a genuine refusal to listen or answer an officer's inquiry, because Wardlow took flight upon realizing police presence in the vicinity long before any actual officer contact with him. Rather, this case presents officers patrolling an area where it is reasonable to suspect crime to occur, and where protecting the populace calls not only for stopping crime that is actually afoot, but also forestalling crime aborning.

Seeing someone flee upon recognizing police presence in such a neighborhood forms the basis for the officer's pursuit and *Terry* stop. The States urge that, under the *Terry* reasonable suspicion standard and the "totality of the circumstances" test, such pursuit and a brief stop are justified unless the defendant shows circumstances making it somehow unreasonable for an officer to find flight suspicious. In the last analysis, the Illinois Supreme Court did not appear to deny that flight could raise suspicion, but instead believed that flight is part of a "right of law-abiding citizens to eschew interactions with the police." J.A. 22, 701 N.E. 2d at 487. But no such right to flee emanates from the Fourth Amendment, as there is nothing unreasonable about stopping a person who runs from the police, especially in a neighborhood known for its criminal activities. Moreover, creating such a right to flee would extend too far the citizen's right to avoid interacting with police to the complete exclusion of the officer's duty to inquire into inherently suspicious circumstances.

In short, the *Terry* standard adequately protects Fourth Amendment values, and any further protection of citizens' rights during police encounters can safely and properly be left to State and local law.

ARGUMENT

I. In A High Crime Area, A Person's Flight Upon Sight Of A Police Officer Arouses Reasonable Suspicion And Justifies A *Terry* Stop.

A. In attempting to apply the *Terry* requirement of reasonable suspicion, the Illinois Supreme Court cited this Court's decision in *Florida v. Royer*, 460 U.S. 491 (1983), for the proposition that a citizen "may decline to listen to the

[officer's] questions and simply go on his or her way" and that "refusal to listen or answer does not, without more, furnish [reasonable, objective] grounds" for detention. J.A. 21, 701 N.E.2d at 487. In the lower court's view, "*Terry* and *Royer* stand for the proposition that exercise of this constitutional right [*i.e.*, the freedom to 'move on'] may not itself provide the basis for more intrusive police activity." *Id.* That proposition, in turn, ostensibly underpins the Illinois Supreme Court's holding.

The *amici* States do not disagree that, in the context of encounters between citizens and police officers, the officers in the street have a general power to inquire of citizens, and citizens in turn have a general prerogative to decline to converse or cooperate with such inquiry. Those concommitant privileges have been repeatedly acknowledged and endorsed by this Court at the latest from *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). In urging that police be permitted to regard flight as a suspicious circumstance, the States ask only that the ordinary *Terry* doctrine of reasonable suspicion be applied in a straightforward manner. The States do not ask anything beyond what *Terry* provides; namely, a balance that permits, in a high crime area, officers to stop and inquire when a person flees upon sight of the police.

Specifically *not* requested in this case is that flight in a high crime neighborhood be somehow deemed to constitute probable cause sufficient to justify arrest and a full search. Nor do the States maintain that furtive movements such as flight could authorize police to intrude upon protected privacy zones such as the home—a person who manages to flee from the street into his house or apartment, for example, is ordinarily free of police following him inside, and he cannot be rousted out merely to answer questions without more—*i.e.*, without other circumstances amounting to probable

cause, *see Wong Sun v. United States*, 371 U.S. 471, 483 (1963).

That said, however, we note that the Illinois Supreme Court's citation to the reciprocal prerogatives of the police and the citizen during a street encounter forms no sufficient basis for the lower court's holding. That is so, because this case simply does not present a "refusal to listen or answer." Instead, it presents the very different circumstance of an affirmative act of fleeing upon the mere recognition that police officers are in the vicinity. No words were, in this case, initially directed by Officer Nolan at Wardlow to which Wardlow could have "listened" or furnished an "answer." Nothing said or done by police created a choice for Wardlow whether to voluntarily cooperate or voluntarily "move on" instead. As a result, the issue of when the citizen chooses to act voluntarily "in a spirit of apparent cooperation" and when the citizen is surrendering to a show of authority, *Mendenhall*, 446 U.S. at 553, simply does not arise on this record.

Accordingly, there is no need on the particular facts presented here to extend any special judicial protection to the freedom to move away, because the freedom to move away from an inquiring officer is not directly implicated here. What this record presents is flight upon learning police are present in the vicinity, which is known to be a high crime area. That is a suspicious circumstance that merits inquiry by police.

B. This Court in *Royer* said that "refusal to listen or answer does not, *without more*, furnish [objective, reasonable] grounds" for detention, 460 U.S. at 498 (emphasis added). Quite simply: flight is "more" than mere refusal to listen or answer. Where, as here, flight appears to result from a potential suspect's becoming aware of police presence in the vicinity, suspicion is particularly well founded in reason. For

fleeing on the street can reasonably be inferred to constitute an affirmative act to conceal one's person—and anything on one's person—from ordinary scrutiny in a public place. A potential suspect with a guilty conscience may or may not know the police have independent information tying her to particular crimes; but when the officer shows up, the citizen does not want to stay to find out—she runs. On the other hand, the citizen without the guilty conscience may desire to avoid interacting with police, so she declines to listen to, or to answer, police questions and walks on—but typically she does not undertake the additional exertion of running, because in her understanding there is no illegal conduct to which the officer could tie her.

Accordingly, flight in the context of police encounters in the street legitimately raises suspicion as a general proposition. *Accord* 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.4(f) (1996), at 176 ("It is not to be doubted that [flight and other furtive reactions to police presence] may be taken into account by the police and that together with other suspicious circumstances these reactions may well justify a stopping for investigation.").

Moreover, flight has historically been recognized as supplying an increment of evidence of guilt to the extent it shows consciousness of guilt. *See Allen v. United States*, 164 U.S. 492, 498-99 (1896) (noting "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt"); *Alberty v. United States*, 162 U.S. 499, 508-10 (1896); *Hickory v. United States*, 160 U.S. 408, 422 (1896). *See also California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991) (dicta); C. Hobson, *Flight and* Terry*: Providing the Necessary Bright Line*, 3 Md. J. Contemp. Legal Issues 119, 123-26 (1992); 2 J. Wigmore, *Evidence* §276 (Chadbourne rev. 1979), at 122 *et seq.* Historically, the main objection

against such evidence has been the possibility of innocent alternative explanation (or, in some cases, the guilty alternative of fleeing because of some crime other than the one charged). *Cf. Alberty*, 162 U.S. at 510 (noting that "there are so many reasons for such conduct consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give such weight as it deserves"). But the general admissibility of flight evidence in conjunction with other evidence of guilt shows that courts have regarded fleeing as manifesting a guilty mind, an inference that police could also reasonably draw during a street encounter in concluding flight was suspicious. Indeed, as Illinois argues more fully, so strong was the inference of guilt from flight at the time the Fourth Amendment was promulgated, that a powerful historical basis exists for concluding the Fourth Amendment inherently incorporates the Framers' judgment that flight from officers forms a reasonable basis for search and seizure, *see Wyoming v. Houghton*, 119 S.Ct. 1297, 1300 (1999) (first Fourth Amendment inquiry is "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed"); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (looking to "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing").

This Court's decision in *Wong Sun v. United States*, 371 U.S. 471, 483 (1963) is not to the contrary, because the Court there considered whether *probable cause* could be inferred primarily or solely from the accused's flight from an officer at the door to his business and residence. Because of its inherent ambiguities, flight alone could not be deemed sufficient to support probable cause. By contrast, this case involves the lesser standard of reasonable suspicion, not probable cause.

C. The foregoing analysis does not suggest that fleeing from police always and everywhere justifies a *Terry* stop. The *Terry* reasonableness standard turns upon examination of "the totality of the circumstances—the whole picture." *United States v. Sokolow*, 490 U.S. 1, 8 (1989), citing *United States v. Cortez*, 449 U.S. 411, 417 (1981). Relevant circumstances in the present case certainly include the context of investigatory activity of officers in a high crime area. Additionally, were it so, it would also be relevant if the officer had reason to know beforehand of an innocent reason underlying the respondent's flight.

Surely in most instances fleeing upon learning of police presence in the vicinity legitimately raises suspicion, and therefore a presumption of reasonable suspicion is warranted—subject to rebuttal by showing the officer knew about an innocent explanation for flight. If specific information at the time of flight and pursuit negates suspicion, and if the officer knows or should know such information, the criminal defendant can still prove those circumstances and invoke his or her Fourth Amendment rights.

In this regard, it is crucial to observe that reasonableness must be judged from the standpoint of the officer, and what the officer knows or ought to know. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether, *viewed from the standpoint of an objectively reasonable police officer*, they amount to reasonable suspicion or to probable cause"); *Terry*, 392 U.S. at 21-22 (standard of reasonableness: "would the *facts available to the officer* at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was

appropriate"). Accordingly, unless the officer is aware of the innocent explanation ahead of time, the innocent explanation itself does not remove justification for the stop—indeed, seeking that very explanation ordinarily constitutes the main legitimate reason for stopping the person in flight to inquire.

II. Police Inquiry Into Suspicious Circumstances, Which Include Fleeing Upon Seeing The Police, Is Fully Consistent With 'The Concept Of Ordered Liberty,' And Accordingly A Person Who Takes Flight Has No Fundamental Right To Flee.

A. In urging the Court to uphold the constitutionality of the police practice in this factual context, the States in no way disparage the right to be free of unreasonable searches and seizures. This right, explicit in the Fourth Amendment, applies to the States through Section 1 of the Fourteenth Amendment: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

Twelve years after *Wolf* acknowledged incorporation of the Fourth Amendment, the Court took the additional step of importing the exclusionary rule as a means to redress violations of this right. *Mapp v. Ohio*, 367 U.S. 643 (1961). At no time in the subsequent history of Fourth Amendment incorporation into the Fourteenth Amendment has the Court retreated from the basic rationale that unreasonable searches and seizures upset the balance between order and liberty, and thereby violate the most fundamental norms of a free society. The question in the subsequent cases concerns the precise requirements of Fourth Amendment reasonableness. But underlying that inquiry is the more basic issue of how much

the Fourteenth Amendment limits the democratic discretion of State governments. While the States undeniably should be bound to respect the basic right of all Americans to be free from unjustified police intrusion into their private affairs, the Constitution should not be interpreted to prevent State and local officers from reasonable law enforcement practices pursuant to their authority under democratically approved state laws.

B. The Illinois Supreme Court's decision in this case departs from the fundamental balance between order and liberty. Far from imposing the basic nationwide norm of reasonable suspicion, the Illinois Supreme Court decided to regard fleeing at the sight of police as part of "the right of law-abiding citizens to eschew interactions with the police," J.A. 22, 701 N.E.2d at 487. This determination, like any proposed Fourth Amendment principle said to be incorporated into the Fourteenth Amendment, should be measured against the standard of whether such principle constitutes a necessary part of, or corollary to, that degree of freedom from police intrusion which is 'implicit in the concept of ordered liberty.'

In other words, the question here should be: Does the very concept of ordered liberty demand that a citizen be free to flee upon recognizing that police are present, without being subject to a brief stop and interview concerning the grounds for her flight? The *amici* States maintain that it does ***not***—that in fact the concept of ordered liberty is far more consistent with an officer's reasonable action in inquiring into genuinely suspicious circumstances (which, as previously discussed, include flight from the police) rather than in recognizing a blanket privilege to flee with no official consequence.

Indeed, it is difficult to see how liberty that is 'ordered'—as opposed to the empty, illusory 'liberty' of the state of anarchy—can be reconciled with requiring officers to ignore inherently suspicious acts. As this Court has trenchantly observed, "[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses," *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (maintaining public order protects liberty itself from being "lost in the excesses of anarchy"). Maintaining public order is what policing ought to be about, because that order forms the very basis for liberty in the meaningful sense. Inquiring into suspicious conduct, in turn, constitutes an important aspect of maintaining order.

The Court in *Terry* explicitly tied the reasonable suspicion standard to the need for "effective crime prevention and detection," 392 U.S. at 22, and the recent emphasis on community policing and order maintenance has only served to make *Terry's* logic more compelling than ever. *See* D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 582-82 (1997) (citing empirical research supporting the 'broken windows' thesis that unremediated disorder leads to greater disorder and crime). As one leading commentator has noted, "the argument the police must have some additional power to make seizures beyond that conferred by the pre-*Terry* law of arrests is most compelling when stated in terms of the crime-prevention function." 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §9.2(a) (1996).

C. Finally, the lower court's citation to *Chicago v. Morales*, 687 N.E.2d 53 (1997), *aff'd*, 67 U.S.L.W. 4415, 119 S.Ct. 1849 (June 10, 1999), is not availing. This Court's

decision in *Morales* upheld the Illinois Supreme Court's finding that Chicago's ordinance authorizing police to issue gang dispersal orders was unconstitutionally vague. A majority of this Court found that the substantive prohibition of gang loitering reached so broadly that police were granted an excessively wide and uncontrolled discretion, while citizens were too little apprised by the law of their obligations. As a result, police orders under the Chicago ordinance were invalid.

The issue here has nothing to do with a vague ordinance, or with police discretion to participate in defining a crime or determining what constitutes criminal activity. Instead, this case concerns the suspiciousness of flight as a basis for investigatory stop, which is subject to judicial review in determining whether the exclusionary rule applies. Because *Morales* does not address the latter question, that case simply does not control here.

III. The Fourth Amendment Should Not Be Read To Create A Special Privilege To Engage In Suspicious Conduct Such As Flight, Because No Such Privileges Are Necessary To Protect Fourth Amendment Privacy And Security Interests.

In essence, the lower court converted this Court's observation that a citizen may refuse to listen to and answer police questions and may simply "move on" into a new species of fundamental right, and further hypothesized that permitting police to infer suspicion from flight would infringe that asserted right. But the lower court was wrong for two main reasons.

First, no privilege to flee is necessary to preserve the liberties of the citizen, because the *Terry* standard adequately does that all by itself. Fourth Amendment reasonableness is

not an all-or-nothing proposition. Officers must carefully tailor the degree of intrusion against protected security and privacy interests to the degree of suspicion, *see Royer*, 460 U.S. at 500 (scope of both a search or a seizure on less than probable cause must be "strictly tied to and justified by the circumstances which rendered its initiation permissible").

Terry's companion case, *Sibron v. New York*, 392 U.S. 40 (1968), well illustrates the point: the intrusive pocket-search of Sibron was wholly unjustified by the quantum of reasonable suspicion the officer could have harbored under the total circumstances, 392 U.S. at 65 (search "not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man"). By contrast, the search of the suspect Peters was justified as being incident to an arrest that itself was supported by probable cause that arose from Peters' presence as a stranger on the residential premises, his furtive movements, and his flight upon hearing the officer's apartment door slam, 392 U.S. at 66.

Flight alone typically will not justify a general search of the person or the person's house or effects, but only a brief investigatory stop and where appropriate, a pat down. Additional search activity must ordinarily await a warrant issued upon probable cause, *see Sokolow*, 490 U.S. at 7 (after drug-sniffing dog alerted on luggage, passenger was properly detained while warrant was obtained for search of luggage). This proportionality principle adequately safeguards security and privacy interests by assuring a low level of suspicion can never authorize broad intrusion into one's person, house, papers or effects. It also decisively distinguishes *Wong Sun v. United States*, 371 U.S. 471, 483 (1963): in that case, police attempted to use the accused's flight into his own family residence to justify unconsented entry into the residence, a

search, and an arrest. Mere flight could not suffice to support probable cause to so invade the accused's security and privacy interests; but here, suspicion based on flight can justify a *Terry* stop on the public streets.

By limiting the degree of intrusion authorized by suspicious flight, the *Terry* doctrine cabins police abuses and sufficiently maintains security and privacy interests. Accordingly, no prophylactic privilege to flee is necessary.

Second, the lower court's analysis excessively favors one side of the citizen/police encounter to the exclusion of the legitimate prerogatives of the other. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets," *United States v. Mendenhall*, 446 U.S. 544, 553 (1980), because "[p]olice officers enjoy 'the liberty ... to address questions to other persons," *id.* Corollary to this general prerogative to inquire, which calls for no Fourth Amendment scrutiny, is the prerogative of the "person addressed ... to ignore his interrogator and walk away." *Id.* But when a person excites legitimate suspicion by taking flight at the mere presence of police, the officer is typically deprived of any opportunity to seek an explanation of that suspicious activity without a stop. By positing a privilege to flee, the lower court overprotects the "right to move on" and destroys any meaningful power of the police to exercise their reasonable prerogative to ask for an explanation of the circumstances for flight.

By contrast, permitting the officer to stop and inquire does not genuinely impair the legitimate right to refuse to answer, because the fleeing person can still decline to cooperate after he or she has been stopped and inquiry has been made. The cause of both order and liberty is furthered by permitting the police to seek the explanation for flight, whether innocent or culpable, through a brief *Terry* stop.

CONCLUSION

The decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

EDWARD B. FOLEY
State Solicitor
ROBERT C. MAIER*
ALEJANDRO ALMAGUER
Assistant Solicitors
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980
Counsel for *Amici* States

June 29, 1999