No. 98-1036

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ILLINOIS,
Petitioner

v.

WILLIAM WARDLOW, aka SAM WARDLOW,
Respondent

BRIEF FOR RESPONDENT

Filed August 6, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTION PRESENTED FOR REVIEW

Whether a person's flight from four police cars carrying eight police officers caravanning through an undefined area is sufficient to justify an investigative stop pursuant to *Terry v. Ohio* when there is no objective evidence of criminal behavior.

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STATEMENT OF THE CASE

On September 10, 1995, a complaint was filed in the Circuit Court of Cook County charging Sam Wardlow ("Wardlow") with unlawful use of a weapon by a felon. App. 1. A finding of probable cause was made at the preliminary hearing on September 11, 1995, and Wardlow was charged by information with two counts of unlawful use of a weapon by a felon and two counts of unlawful use of a weapon. App. 1. Wardlow filed a Motion to Suppress Physical Evidence on October 11, 1995, which the court heard on October 25, 1995. App. 2.

At the suppression hearing, Officer Timothy Nolan testified that on Saturday, September 9, 1995, he was a uniformed Chicago police officer on duty assigned to the Special Operations Section in the 11th District. App. 4. He and his partner, Officer Harvey, were in the vicinity of 4035 West Van Buren. App. 7. In total, four police cars and eight Chicago police officers converged in that area at the same time; Officers Nolan and Harvey were in the last car. App. 8. Officer Nolan testified that he went to that area because "it's one of the areas in the 11th District that's high narcotics traffic." App. 8. He further testified that the purpose for having four cars converge on the same location was because "[n]ormally in these different areas there's an enormous amount of people, sometimes lookouts, customers." App. 8. Officer Nolan testified that when he first saw Wardlow, he was not violating any laws of the City of Chicago, the State of Illinois or the United States of America. App. 5. Rather, Wardlow looked in the police officers' direction and "began running," which Officer Nolan acknowledged was not against the law. Officer Nolan stated that as he drove southbound down

the street, he observed Wardlow running through the gangway. App. 5-6. Wardlow was cornered in the vicinity of 4036 West Congress. App. 9. Officer Nolan exited his vehicle and "placed a stop on [Wardlow]" but "did not announce his office or ask Wardlow any questions at that time." App. 6. Officer Nolan conducted a protective search for his own safety and squeezed a white opaque bag under Wardlow's arm, feeling a hard object that had a shape similar to a revolver or a gun. App. 6, 10. Officer Nolan then looked into the bag and found a .38 caliber handgun. App. 11. Officer Nolan placed Wardlow under arrest at 12:15 p.m.[1]

The trial judge reserved his ruling until December 6, 1995, at which time he denied the motion to suppress. App. 14. After a stipulated bench trial, the trial court found Wardlow guilty of unlawful use of a weapon by a felon and sentenced him to two years in the Illinois Department of Corrections. App. 16.

Wardlow appealed and on March 18, 1997, the Illinois Appellate Court unanimously reversed the lower court in *People of the State of Illinois v. Sam Wardlow*. App. 33. The Appellate Court held that the record was too vague to support the inference that Defendant was in a high crime area or that Defendant's flight was related to his expectation of the police focusing on him. App. 32. To assure that an individual's reasonable expectation of privacy was not subject to arbitrary invasions solely at the unfettered discretion of police officers, the

[1] Although the exact time of Wardlow's arrest is not contained within the record, it is stated in the police report and mentioned in both the Illinois Appellate and Supreme Court opinions. App. 17, 29.

Appellate Court stated that a high crime area should be a sufficiently localized and identifiable area. App. 33.

The State appealed the decision to the Illinois Supreme Court, which unanimously affirmed the judgment of the Illinois Appellate Court on September 24, 1998. App. 27. The Illinois Supreme Court reiterated that in order to protect the individual's right to personal security, free from arbitrary interference by "the law officers," such limited and investigatory stops are permissible only upon a reasonable suspicion based upon specific and articulable facts that the person has committed, or is about to commit, a crime. App. 18-19.

The State of Illinois petitioned the United States Supreme Court for writ of certiorari on December 22, 1998, which was granted May 3, 1999. App. 34.

SUMMARY OF ARGUMENT

Petitioner's attempt to seek a *per se* rule that flight from police always constitutes reasonable suspicion to justify a *Terry* stop is factually and legally unsupportable and violates core Fourth Amendment principles. A *Terry* stop—briefly and narrowly circumscribed—involves a different kind of intrusion upon individual freedom than a traditional arrest. *See Terry v. Ohio*, 392 U.S. 1 (1968). Under *Terry*, the Court ruled that, in limited circumstances, the government's interest in preventing imminent criminal activity could outweigh the historic and significant privacy interests implicated in such a stop. *See id.* at 27. Therefore, in limited circumstances when the intrusion on the individual was minimal and the law enforcement interests outweighed the privacy interests, a *Terry* stop was consistent with the Fourth Amendment.

Factually, an individual standing in front of a building, violating no city, state or federal laws, who flees at the sight of numerous police cars and officers caravanning through a neighborhood, does not justify a temporary, investigative stop. At best, such flight may be one of several factors to consider in determining whether reasonable suspicion has been sufficiently articulated to authorize police to stop an individual. Contrary to Petitioner's request for a bright-line rule regarding reasonable suspicion, this Court has long held that reasonable suspicion determinations cannot be reduced to a "neat set of legal rules." *United States v. Cortez*, 449 U.S. 411, 417 (1981). Reasonable suspicion must encompass a totality of circumstances. *See id.* at 417-18. To overrule this standard in place of a bright-line rule and disregard contextual circumstances diminishes judicial review, contradicts established totality of the circumstances precedent, and cries out for "a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. United States,* 413 U.S. 266, 273 (1973).

Moreover, the fact that a person in an undefined area flees from police is an insufficiently articulated basis for a *Terry* stop. To the extent Petitioner espouses a high-crime area exception to the Fourth Amendment (location plus evasion), the high crime area must be sufficiently localized and identifiable so that it can be meaningfully reviewed. The Illinois Supreme Court's decision in this case supports the courts' historic role of judicial review to act as a detached and neutral magistrate, scrutinizing the reasonableness of a law enforcement officer's justification for an investigatory stop.

The Illinois Supreme Court correctly concluded that the balance between the public's interest in crime detection and individuals' right to personal security and privacy tilts in favor of freedom from police interference. App. 26. That conclusion finds historical support in both common law and case law. *See Boyd v. United States*, 116 U.S. 616, 630 (1886) (discussing Lord Camden's opinion in *Entick v. Carrington*, 95 Eng. Rep. 807 (1765)).

As Petitioner concedes, an investigatory stop and frisk, as described in *Terry*, did not exist at the time the Framers wrote the Fourth Amendment. For this very reason, historical writings, Biblical quotes and common law cannot and do not legally, factually or historically support the notion of flight as culpable conduct.

The Framers would not have considered flight prior to accusation of a crime sufficient for a *Terry* stop because their bedrock concern was privacy and detached judicial review.[2] The Framers did not enact the Fourth Amendment to enhance the police investigative powers; rather, the Fourth Amendment is historically a regulation of warrantless and/or unrestricted searches. Courts must not relinquish their authority to review the decisions of law enforcement officers after a *Terry* stop. If this Court adopts Petitioner's bright-line rule, suppression motions based on flight from police will be reduced to the words: "He fled." A *per se* rule that flight

[2] *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation, Claremont Graduate School (Ann Arbor, MI) (available from UMI Dissertation Services, 300 N Road, Ann Arbor, MI)) at 1547.

from police constitutes reasonable suspicion for a *Terry* stop would unreasonably broaden police discretion and significantly curtail the courts' authority to review police actions. Further, Fourth Amendment jurisprudence recognizes the affirmative right to avoid police contact, which should not be qualified by the manner in which it is exercised.

This Court should affirm the Illinois Supreme Court's decision and uphold the totality of circumstances test.

ARGUMENT

A. A PERSON'S FLIGHT FROM POLICE, ABSENT OBJECTIVE CRITERIA OF CRIMINAL BEHAVIOR, IS NOT SUFFICIENT TO JUSTIFY A TEMPORARY INVESTIGATIVE STOP PURSUANT TO *TERRY v. OHIO.*

Common law, case law, established precedent and particularly this record, do not support Petitioner's proposed *per se* rule that flight from police always constitutes reasonable suspicion to justify a *Terry* stop. Such a rule is factually and legally unsupportable and violates core Fourth Amendment principles.

1. The Fourth Amendment Safeguards the Privacy of Individuals Against Arbitrary Invasions by Government Officials.

The Fourth Amendment to the United States Constitution, as it applies to the states through the Fourteenth Amendment, protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . ." U.S. CONST. amend. IV; U.S. CONST. amend. XIV. The Fourth Amendment was drafted to secure the right of

privacy against arbitrary police entries by taking the decision to search from the police and placing it with a neutral magistrate. The language in *Camara v. Municipal Court* is typical: "The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." 367 U.S. 523, 530-31 (1967). *See also Boyd v. United States*, 116 U.S. 616, 630 (1886).[3] As Justice Frankfurter noted in his dissent in *United States v. Rabinowitz*, 339 U.S. 56 (1950), which was cited with approval in *Chimel v. California*, 395 U.S. 752 (1960), the prohibition against unreasonable searches must be interpreted in light of this purpose:

> One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable.' Words must be read with the gloss of the experience of those who framed them. Be-

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[3] In discussing Lord Camden's opinion in *Entick v. Carrington*, 95 Eng. Rep. 807 (1765), which expressed the basic principles later embodied in the Fourth Amendment, the Court said:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . . [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .

Boyd, 116 U.S. at 630.

> cause the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed 'unreasonable' searches and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

Rabinowitz, 339 U.S. at 70 (Frankfurter, J., dissenting).

Petitioner's request for a *per se* rule that flight from police always constitutes reasonable suspicion for a *Terry* stop is a less than subtle request to diminish the power of the judiciary to "police the police." *See* Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 371 (1974). The scheme of the Fourth Amendment becomes meaningful only when those engaged in the competitive enterprise of ferreting out crime are subjected to the detached, neutral scrutiny of a judge who examines particularized observations, taking into account the totality of circumstances. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

2. *Terry v. Ohio* Requires Reasonable Suspicion Based Upon the Totality of Circumstances that Crime Is Afoot, Prior to a Temporary Investigative Stop.

Terry v. Ohio created a narrow exception to the probable cause requirement of the Fourth Amendment for

certain seizures of a person that do not rise to the level of full-fledged arrests. 392 U.S. 1 (1968). This narrowly drawn exception to the Fourth Amendment places a limit on reasonable suspicion and is grounded in the fundamental, constitutional limits on government intrusion into the privacy and autonomy of citizens.

In *Terry*, Officer McFadden observed two men standing on a street corner in downtown Cleveland. *See Terry*, 392 U.S. at 5. Officer McFadden watched one of the men walk up and down the street, look in a store window, turn around, look in the store window again and then rejoin his companion on the corner. *See id.* at 6. The second man repeated this routine. *See id.* The two men undertook this routine five or six times. *See id.* When a third man joined the group, Officer McFadden suspected the men were "casing a job, a stick up." *Id.* He approached the men, identified himself, and requested identification. *See id.* When the men "mumbled something," Officer McFadden spun one of the men around, patted him down, felt and removed a pistol. *See id.* at 7. A frisk of the second man also revealed a pistol. *See id.*

In *Terry*, the Court held that limited circumstances existed in which the government's interest in preventing imminent criminal activity could outweigh the historic and significant privacy interests implicated in such a stop. *See id.* at 27. A *Terry* stop requires reasonable particularized suspicion—short of probable cause—that criminal activity is afoot. *See id.* at 16. Reasonable suspicion requires some probability that the suspect is engaged or is about to be engaged in criminal activity, supported by particularized observations of the indi-

vidual that distinguishes that individual from the larger universe of law-abiding citizens. *See, e.g.*, *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (stating that facts which describe a very large category of presumably innocent travelers cannot justify a finding of reasonable suspicion).

This Court has affirmatively resisted clearly defining the boundaries of reasonable suspicion, terming it a "common sense, nontechnical standard." *Ornelas v. United States,* 517 U.S. 690, 695 (1996).[4] *See also United States v. Sokolow,* 490 U.S. 1, 7 (1989); *United States v. Cortez,* 449 U.S. 411, 417 (1981). While reasonable suspicion has not been quantified, this Court has previously held that it is something less than probable cause,[5] which has been described as a "fair

[4] *See also Alabama v. White*, 496 U.S. 325, 330 (1990) (rejecting a *per se* rule for determining whether an anonymous tip could be a sufficient basis for a *Terry* stop; stating that reasonable suspicion "is dependent upon both the content of information possessed by police and its degree of reliability."); *Adams v. Williams*, 407 U.S. 143, 147 (1972) (rejecting respondent's argument that reasonable suspicion can only be based on the officer's personal observation; "one simple rule will not cover every situation.").

[5] In *United States v. Sokolow*, 831 F.2d 1413 (9th Cir. 1987), *rev'd,* 491 U.S. 1 (1989), the Ninth Circuit rejected an investigatory stop because federal drug agents did not have reasonable suspicion to justify the detention. The Appellate Court ruled that reliance upon a "drug courier profile" would not support a finding of reasonable suspicion unless agents provided "empirical documentation" that "innocent behavior is not so innocent." *Id.* at 1420. The Supreme Court reversed, stating that empirical proof was unnecessary to satisfy the Fourth Amendment standards and ruled that when deciding whether there is reasonable suspicion for detention "one must

(continued...)

probability." *See Illinois v. Gates*, 462 U.S. 213, 238 (1983). Reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence," *Sokolow*, 490 U.S. at 7, and requires more than a mere "inchoate and unparticularized suspicion or hunch." *Terry*, 392 U.S. at 27. Even in high crime areas, where the possibility exists that any given individual is armed, *Terry* requires reasonable individualized suspicion before a frisk for weapons can be conducted. *See Maryland v. BUIE*, 494 U.S. 325, 334 (1990). *See also Ybarra v. Illinois*, 444 U.S. 85 (1979). As this Court stated:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Cortez, 449 U.S. at 417-18. In other words, some particularized observations that implicate an identified individual must be offered to support the claim of reasonable suspicion.

[5] (...continued)
consider the totality of the circumstances—the whole picture." *Sokolow*, 490 U.S. at 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

3. A *Terry* Stop of a Person Who Is Not Violating Any Laws and Flees at the Sight of Four Police Cars and Eight Police Officers Would Have Been Regarded as an Unlawful Seizure at Common Law.

Petitioner correctly concedes that *Terry* stops did not exist at the time of the Constitution's framing or adoption. Petitioner's brief at 5, 14. Nonetheless, Petitioner undertakes a historical-literal analysis and concludes that at common law, flight would have been deemed reasonably suspicious behavior justifying such a stop. Petitioner's brief at 15. Petitioner's brief historical Fourth Amendment analysis of selected writings and opinions regarding flight after a charge has been brought against an individual may be enticing, but it is factually infirm, legally unsound and ultimately unfounded.[6]

Petitioner ignores several exhaustive historical analyses of the Fourth Amendment,[7] instead focusing on isolated quotes taken out of context regarding flight and a mistaken analysis of certain cases. Petitioner suggests that a quote from *Proverbs*[8] "developed into a legal presumption of guilt that was firmly embedded in the common law at the time the Framers adopted the Fourth Amendment." Petitioner's brief at 15. From that Biblical quote to early common law, Petitioner finds a common thread that the guilty flee justice; this thread, however, is unduly frayed and cannot support its argument.

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[6] Petitioner's analysis has been described elsewhere as "lawyers histories."

> [I]t is important that we recognize lawyers' histories for what they are, and for what they are not. This kind of work is not constitutional history, it is not legal history; it is not history. It is a lawyer's selective use of historical data to advance a legal argument. It is part of a time-honored tradition in which most legal scholars who write about constitutional history participate from time to time.

Morgan Cloud, Searching Through History; Searching for History, 63 U. CHI. L. REV. 1707, 1745 (1996).

[7] The most comprehensive history of the amendment ever written sheds some light on the present debate. William J. Cuddihy's 1800-page unpublished Ph.D. dissertation, The Fourth Amendment: Origins and Original Meaning, has been (continued...)

[7] (...continued)

described as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting). Cuddihy's work is "essential reading for students of the Fourth Amendment" and presents "an overwhelming documentary record." Cloud, *supra*, at 1712-13. *See also* Tracey Maclin, When the Cure for the Fourth Amendment is Worse Than the Disease, 68 S. CAL. L. REV. 9-12 (1999). Nonetheless, even Cuddihy acknowledges that the history of the Fourth Amendment is simply too complex and too vast to be reduced to simplistic legal theories. While Cuddihy's work is exhaustive and detailed, he too recognizes:

> [T]he history that preceded the Fourth Amendment, however, reveals a depth and complexity that transcend language. To think of the amendment as a right against general warrants disparages its intricacy. The amendment expressed not a single idea but a family of ideas whose identity and dimensions developed in historical context . . . Those who advocate adherence to the amendment's original understanding should consider that its authors expressed conflicting understandings of probable cause and of an enforcement mechanism.

Cuddihy, *supra,* at 1555-56.

[8] "The wicked flee where no man pursueth." *Proverbs* 28:1.

Petitioner's reliance on Nineteenth Century literature to support its argument that flight imports guilt, which highlights isolated quotations from A.M. Burrill's Circumstantial Evidence (1868) and William Blackstone's Commentary on the Law of England (1765-1769), is misplaced. Those commentaries shed little light on the Framers' intent as they regard an issue not yet contemplated at that time. Indeed, those references relate to inferences of flight after an accusation of criminal activity, which is hardly equivalent to inferences of flight prior to accusation.

Likewise, Petitioner's historic references to "flight" within the context of Nineteenth Century case law are equally flawed. Again, the cases cited by Petitioner involve individuals who fled subsequent to being charged with a crime.[9] *See Hickory v. United States,* 160 U.S. 408, 422 (1896) (reversing a murder conviction because the instructions given to the jury concerning flight after a charge had been brought were "tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth"); *Starr v. United States*, 164 U.S. 627, 631-32 (1897) (reversing a murder conviction because the instructions given to the jury were identical to those in *Hickory* and *Alberty v. United States*, 162 U.S. 499

[9] *See, e.g.,* 2 John H. Wigmore, Evidence § 276, at 122 (James H. Chadbourn ed. 1979) ("It is universally conceded today that the fact of an accused flight . . . is admissible as evidence of consciousness of guilt, and thus of guilt itself."). The inferences to be drawn from the flight after accusation bear no relationship to the inferences to be drawn from the flight of an individual prior to accusation. *See id.*

(1896)); *Allen v. United States*, 164 U.S. 492, 499 (1896) (reaffirming *Hickory* and *Alberty*, stating that "flight of the accused is competent evidence against him as having a tendency to establish his guilt."). Indeed in these cases, an individual fled from the police specifically because he was charged with a crime. Flight did not precede the charge of criminal activity. Equally interesting was the Court's prescient acknowledgment that sometimes innocent men flee through fear of being misapprehended as the guilty party or through fear of humiliation.[10] *See Alberty,* 162 U.S. at 511. Nevertheless, in each case, the Court held that it was error to charge the jury that flight created a legal presumption of guilt.

Petitioner's support for its assertion that "when the Fourth Amendment was framed, the common law would have regarded . . . flight from police as . . . evincing conclusive proof of guilt . . . that would have constituted probable cause justifying a full blown arrest," is misplaced. Petitioner's brief at 21. Again, flight after a charge hardly carries the equivalent inferences of flight prior to a charge. This argument, simply stated, fails in its entirety.

To achieve the right to be secure from arbitrary intrusions, the Framers of the Fourth Amendment interposed the search warrant requirement between the public and the police, reflecting the conviction that,

[10] More recently, it has been argued that people also flee out of fear of misidentification, harassment, beatings or having evidence planted on them. *See* David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 IND. L.J. 659, 680 (1994).

except in special circumstances, the decision to enter and search a particular place should not rest with the officer in the field, but with a neutral magistrate whose approval could issue only for a particular place and after a showing of probable cause.[11]

Petitioner concludes that "it takes no great leap in logic or reliance on speculation" to find that the Framers would have agreed that, standing alone, unprovoked flight from police would have permitted a temporary investigatory stop. Petitioner's brief at 21. Respondent has demonstrated that Petitioner's conclusion is ill-founded. Petitioner's abbreviated survey of Biblical quotations and common law do not support its conclusion that flight from authorities, prior to accusation, would have been presumptive of guilt. In fact, in light of Fourth Amendment jurisprudence, the Framers were less concerned with the identification of unreasonable searches and seizures "than with the broader rights, including privacy." Cuddihy, *supra*, at 1545. Moreover, the Framers reflected a constitutional preference for judicial, not police, determination of the factors that justify a temporary stop. Petitioner's argument is unsupported, contrary to the common law and, in view of

[11] *See McDonald v. United States*, 335 U.S. 451, 455-56 (1948):

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

Id.

the historic preference for judicial review, wrong.[12] Finally, Petitioner ignores the fact that the provisions for the protection of life, liberty and property are largely, liberally and historically construed in favor of the individual.[13]

[12] Thus, Petitioner's bold claim that opponents of a bright-line rule "cannot escape the one and only relevant conclusion to the present analysis when the Fourth Amendment was framed, the common law viewed flight as conclusive proof of guilt and boldly adopted a *per se* forfeiture law in order to deter flight from authorities," has been conclusively rebutted. Petitioner's brief at 20. Flight after-the-fact does not carry the same legal presumption as flight before-the-fact.

[13]
> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

Boyd v. United States, 116 U.S. 616, 635 (1886). Thus, Petitioner's argument that *Terry* stops are justified because they are minimal, brief intrusions typically occurring in a public place which foster good police work is nonetheless an illegitimate and unconstitutional practice, even in its modest and least repulsive form. Petitioner's brief at 6.

B. THIS COURT SHOULD UPHOLD THE TOTALITY OF CIRCUMSTANCES TEST TO DETERMINE REASONABLE SUSPICION FOR A *TERRY* STOP.

For nearly twenty years, courts have applied a totality of the circumstances test to determine whether reasonable suspicion existed to justify a *Terry* stop. In *United States v. Cortez*, the Court stated that in order to perform a brief, investigatory stop, "the totality of the circumstances—the whole picture—must be taken into account." 449 U.S. 411, 418 (1981). This consists of two elements, both of which must be present. First, an assessment based on all circumstances must be made, which includes objective observations as well as subjective analysis of the information and observations gathered. Second, the assessment of the whole picture must raise a suspicion that the individual being stopped is engaged in criminal conduct. *See id.* The decision to conduct a stop, in light of the totality of the circumstances, is then subject to the detached review by a judicial officer. This test has rightfully been upheld for almost twenty years because it embodies core constitutional values and mandates discretion before infringing upon personal rights. Petitioner, however, seeks to eviscerate this test and abandon judicial review in favor of a bright-line rule that will enable police to perform *Terry* stops whenever someone simply flees from them.

1. Police Must Consider Contextual Circumstances in Determining Reasonable Suspicion.

Petitioner also argues that the government's interest in fostering good police work and preventing and detecting crime overwhelmingly outweighs the limited intrusion of a temporary investigative stop of an individual who flees at the sight of police. Petitioner's brief at 6, 22. However, this argument fails to answer the question "when, if ever, that interest outweighs the interest in personal liberty." *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 914 (1992) (Stevens, J., concurring in part and dissenting in part) (referring to the conflict surrounding Pennsylvania state abortion law and the Constitution). Petitioner apparently suggests that flight from police, regardless of context, always justifies a *Terry* stop, outweighing an individual's personal liberties.[14] The frailty of Petitioner's argument lies in the fact that context (i.e., time, place, location, number of persons present, weather, furtive gestures) provides the necessary articulation to determine when the government's interest outweighs the individual's privacy. Petitioner's failure to articulate the context of Respondent's flight prevents meaningful

[14] Petitioner also argues that if flight alone does not constitute reasonable suspicion, then police officers must stand idly by while crime occurs and a potential criminal escapes. Petitioner's brief at 36; United States brief at 17. Of course, an officer who observes a crime can make an immediate arrest. *See United States v. Watson*, 423 U.S. 411 (1976). Further, in *California v. Hodari D.*, 499 U.S. 621 (1991) and *Michigan v. Chesternut*, 486 U.S. 567 (1998), this Court ruled that police pursuits do not trigger Fourth Amendment safeguards in all circumstances. In *Chesternut*, this Court held that a police vehicle's brief pursuit of a man who ran from police was not a seizure under the Fourth Amendment and therefore did not require reasonable suspicion. 486 U.S. at 576. In *Hodari D.*, this Court held that a police show of authority directed to a person fleeing did not effectuate a seizure. 499 U.S. at 626. While police do not need reasonable suspicion to pursue, observe, or further investigate the facts surrounding the flight, they need articulable reasonable suspicion to perform a stop.

judicial review. Simply stated, no such testimony exists in this record.[15] Reasonable suspicion determinations must be made based on articulable facts which, together with rational inferences, provide a particularized and objective basis for suspecting an individual of criminal activity. *See Terry,* 392 U.S. at 16. In the present case, the Illinois Supreme Court correctly applied the totality of circumstances test, examined the record, found it lacking, and determined on the facts available that Respondent's flight, standing alone, was insufficient to create a reasonable suspicion of involvement in criminal conduct.

Petitioner discusses, at some length, a day in the life of a law enforcement officer. Petitioner's brief at 8. On routine patrol, a police officer will encounter numerous citizens engaged in their daily activities whose reactions to police will vary from reassurance to fear, from a greeting to a glance and, for some, avoidance. That some citizens will ignore, avoid, walk away, or flee from police is hardly uncommon in certain areas at certain times. Avoidant behavior, then, be it walking away, running, jogging or fleeing at top speed is ambiguous. However, Petitioner ignores the fact that through its

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[15] *See, e.g., State v. Valentine,* 636 A.2d 505, 514 (N.J. 1994) (Clifford, J., dissenting) ("This case strikes me as not much more than a challenge to our ingenuity in teasing out of this slim record a range of nuances of conduct and speech that lead to a result favoring either admissibility or suppression.").

Again, the record fails to inform any court as to the following relevant information: Did all four police cars stop at the same time? How many police officers got out of their cars? What is Wardlow's age (18 to 65)? Height? Weight? Was Wardlow wearing gym shoes or worker's boots?

own discretionary authority, police officers often initiate encounters—proactive police work—as opposed to reactive, citizen-initiated police work. Reactive police encounters result from citizen complaints, which direct police to specific locations, suspects or potentially criminal acts. In proactive, police-initiated encounters, the police have the discretion to select locations and individuals for attention. In reactive situations, police officers have received information that may form the foundation of articulable, reasonable suspicions upon their arrival at certain locations. In proactive situations, however, police must observe, and not create, articulable suspicion.[16] Here, four police cars were "caravanning" through the area. "They were not responding to any call or report of suspicious activity in the area" which may have provided a contextual basis for reasonable suspicion. App. 24. In other words, they were engaged in proactive policing. Respondent was simply standing in front of a building, not violating any laws, when the officers drove by. Respondent gave no

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[16] The concepts "reactive" and "proactive" derive from the origins of individual action, the former referring to actions originating in the environment, the latter to those originating within the actor. *See* Murray, Toward a Classification of Interactions, Toward a General Theory of Action, 434 (1987). Professor LaFave describes "stop and frisk" as "a time-honored police procedure [where] officers . . . stop suspicious persons for questioning and, occasionally . . . search these persons for dangerous weapons." Wayne R. LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters,* and Beyond, 67 MICH. L. REV. 39, 42 (1968). According to LaFave, stop and frisk "is a distinct law enforcement technique which has characteristics quite different from other police practices such as arrest or search incident to arrest, and has long been viewed by the police in this way." *Id.*

indication that he was involved in any illicit activity prior to the approach of police. In this case, the police, by their own observations and testimony, could not articulate a reasonable suspicion to justify stopping Respondent.

2. The Illinois Courts Never Characterized Respondent's Flight as "Unprovoked."

Petitioner repeatedly argues that a person's sudden and unprovoked flight from police officers in a high crime area is innately suspicious, justifying a temporary *Terry* stop. Neither the Illinois Supreme Court nor Appellate Court ever referred to Wardlow's flight as "unprovoked."[17] Indeed, while the record does not disclose sirens blaring or commands to stop, neither does it support "mere flight" or "lack of provocation." Respondent was not talking or standing with others, made no furtive gestures, nor was he near an identifiable drug location. *See, e.g., Minnesota v. Dickerson*, 113 U.S. 2130 (1993). Petitioner's representation of the facts—Respondent was "running away from a clearly identifiable police officer"—simply does not conform to

[17] Petitioner plucked the word "unprovoked" from *Michigan v. Chesternut*, wherein Justice Kennedy stated: "It is no bold step to conclude, as the Court does, that the evidence should have been admitted, for [Chesternut's] unprovoked flight gave the police ample cause to stop him." 486 U.S. 567, 576 (1991) (Kennedy, J., concurring). Indeed, the talismanic invocation of "unprovoked" is a bit like Humpty Dumpty's use of the word "impenetrability" with Alice. When she asks him what it means and what he means when he uses it, Humpty responded, "When I make a word do a lot of work like that, I always pay it extra." Lewis Carroll, Through the Looking Glass and What Alice Found There 125 (1993).

the record. Petitioner's brief at 9. Arguably, Respondent fled at the sight of four police cars and eight police officers, who converged on that location simultaneously. This behavior is not innately suspicious and is not the "unprovoked flight from a police officer" that Petitioner suggests. Petitioner's brief at 8. The record was too vague to make this finding.[18] More importantly, the officers knew that absent their approach, there was no basis for a *Terry* stop; a person standing alone in front of a building, in and of itself, is not suspicious.[19]

[18] In a similar vein, Justice O'Connor, in her dissent in *Vernonia Sch. District 47J v. Acton* where the majority upheld random drug testing of students, stated "[p]erhaps there is a drug problem at the grade school, but no one would know it from this record." 515 U.S. 646, 684 (1995) (O'Connor, J., dissenting). O'Connor also noted that judges should "stay close to the record in each case that appears before them, and make their judgments based on that alone." *Id.* at 686 (O'Connor, J., dissenting).

[19] *See, e.g., United States v. Embry*, 546 F.2d 552 (3d Cir. 1976):

> Here, prior to the flight, the officers knew that [defendant] had merely been leaning against the building. Viewed objectively, what prompted his flight was not the desire to escape from the scene of a crime, but the desire to avoid being subjected to a forcible stop and frisk. Because he did not wait to be forcibly searched . . . but ran instead, we are told that it is reasonable to believe that [defendant] was engaging in criminal activity. The hidden assumption is that only a criminal would object to being frisked. By parity of reasoning, every refusal to consent to a search is sufficient cause to conduct the search without consent.

Id. at 559 (Seitz, J., dissenting).

Respondent's flight from a caravan of police cars,[20] when viewed in "the whole picture," did not provide objective criteria pointing to a reasonable suspicion of criminal activity.

C. FLIGHT MAY BE ONE FACTOR IN DETERMINING REASONABLE SUSPICION OF CRIMINAL ACTIVITY, BUT FLIGHT ALONE CANNOT SUPPORT A *TERRY* STOP.

Numerous federal and state courts have held that flight alone at the sight of police is insufficient to justify a temporary investigatory stop. *See, e.g., United States v. Quinn,* 83 F.3d 917, 921-22 (7th Cir. 1996) (flight is not necessarily enough standing alone for a *Terry* stop, but it is a relevant and probative factor in establishing reasonable suspicion); *United States v. Bennett*, 514 A.2d 414, 416-17 (D.C. Cir. 1986) (although flight alone is insufficient, it may be considered among other factors in order to justify a *Terry* stop); *United States v. Embry*, 546 F.2d 552, 555-56 (3d Cir. 1976) (flight is but one factor to consider in determining reasonable suspicion); *Britt v. State*, 673 So. 2d 934 (Fla. 1996) (flight from police alone is not enough to support a *Terry* stop); *People v. Holmes*, 619 N.E.2d 396 (N.Y. 1993) (flight is not sufficient, standing alone, to justify police pursuit); *State v. Hicks*, 488 N.W.2d 359 (Neb. 1992) (flight is not sufficient, standing alone, to justify a *Terry* stop); *People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985) (flight alone is not sufficient for a *Terry* stop). Were it otherwise, "anyone who does not desire to talk to the police and who either walks or runs away from them would always be subject to legal arrest," which can hardly "be countenanced under the Fourth and Fourteenth Amendments." *United States v. Margeson*, 259 F.Supp. 256, 265 (E.D. Pa. 1966).

[20] On this point, Respondent agrees with Amicus Curiae of the Criminal Justice Legal Foundation that "if an officer tries to scare someone into fleeing the flight is no longer suspicious and the attempt to provoke the flight is unconstitutional." Charles L. Hobson, Flight and *Terry*: Providing the Necessary Bright Line, 3 MD. J. CONTEMP. LEG. ISSUES 119, 150 (1992). *See* Brief Amicus Curiae of the Criminal Justice Legal Foundation at 17. Indeed, in this case, Wardlow's flight at the sight of four police vehicles and eight police officers may arguably and inferentially be indicia of provocation. Respondent's flight may also have been based upon fear of harassment, gunfire in the neighborhood, an imminent arrest or such other reasonable belief that precipitated the arrival of so many police cars and officers.

Petitioner's proposed bright-line rule regarding flight from law enforcement officers ignores the totality of the circumstances test, eviscerates the particularized basis for individualized suspicion and seeks to replace it with a *per se* evasion test. The result: observations of minimal significance (standing in front of a building and fleeing upon the appearance of four police cars) would be instantly elevated to reasonable suspicion without any particularized basis for that suspicion. Worse yet, upon the testimonial incantation of "He fled", judicial review of suppression motions would be eliminated, undermining the court's historic role as a detached, neutral magistrate.

The argument that flight alone cannot support reasonable suspicion is logically founded on the idea that, at the stage when an officer could not compel cooperation, an individual's flight simply anticipates refusal to cooperate with the officer's potential decision

to stop. *See, e.g., People v. Holmes*, 619 N.E.2d 396, 398 (N.Y. 1983) ("flight alone or even in conjunction with equivocal circumstances that might justify a police request for information is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry") (citations omitted).

In *Florida v. Royer*, two Drug Enforcement Agency (DEA) agents approached the defendant in an airport and asked to see his driver's license and airplane ticket. 460 U.S. 491, 493-94 (1983). When the names on the two documents did not correspond, the agents identified themselves and told Royer they suspected him of transporting narcotics. *See id.* at 494. The agents withheld Royer's license and ticket and requested that he accompany them for further questioning. *See id.* Subsequently, Royer consented to a search of his luggage. *See id.*

The issue before this Court was whether the consent was the fruit of an unlawful seizure. *See id.* at 493. Justice White, writing for the majority, found that Royer had been seized. *See id.* at 501. Justice White stated that the request for Royer's license and ticket was permissible, however, when Royer was asked to accompany the agents to a police room without indicating that he was free to refuse, the agents effectively seized him. *See id.* at 492. This Court stated that a person approached by the police has the fundamental right to withhold cooperation and "go on his way." As Justice White explained, "The person approached . . . need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily

without reasonable objective grounds for doing so." *Id.* at 497-98 (citations omitted).[21]

Also, in *Florida v. Bostick*, this Court reaffirmed that citizens are not required to tolerate police inquiries and may refuse to cooperate with legitimate law enforcement practices. 501 U.S. 429 (1991). Although police questioning was permitted without reasonable suspicion, the Court carefully pointed out that it had "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id.* at 437. The Court has not made it a prerequisite that a citizen first allow an officer to approach him before exercising his right to ignore the officer. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (stating that a citizen has a right to ignore his interrogator and walk away).

Furthermore, in *Brown v. Texas*, Brown and another individual were observed walking in opposite directions from each other in an area known for high narcotics traffic. 443 U.S. 47, 52 (1979). Police officers detained Brown after he refused to reveal his identity. *See id.* at 49. The officers stopped Brown because "the situation looked suspicious and they had never seen Brown in that area before." *Id.* A unanimous court invalidated the statute, holding that because the officers lacked reasonable suspicion that Brown was involved in crim-

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[21] *See also INS v. Delgado*, 466 U.S. 210, 216-17 (1984). The Court stated that "if the person refuses to answer and the police take additional steps—such as those taken in *Brown*—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *Id.*

inal conduct, his detention to ascertain his identity violated the Fourth Amendment. *See id.* at 51-52. Further, the choice to refuse police contact could not be used as a bootstrap to justify an investigative stop.

Thus, while *Terry* and its progeny permit temporary investigatory detentions of persons where reasonable suspicion of criminal behavior exists, it is clear that the core right of all persons to avoid police in the absence of objective evidence of criminality has never been questioned. Indeed, if a person approached may decline to listen and go on his way, he may certainly go on his way quickly. To permit law enforcement officers the unbridled discretion to decide if the individual walked away too quickly, ran or fled, or got on a bike or in a cab at the sight of police, would grant them unfettered discretion to arbitrarily decide the difference between avoidance and flight.[22] Inherent in such an analysis is that law enforcement officers may often consider suspicious conduct that is otherwise constitutionally protected.[23]

[22] The Solicitor General approaches this dilemma from a different perspective. Rather than arguing that running in the opposite direction from identifiable law enforcement officers is suspicious, he instead argues, "To the contrary, respondent dramatically altered his behavior in direct response to the officers' arrival." Brief for the United States at 19. The Solicitor General argues that the right to "go on his way" depends on how it is exercised. Under the Solicitor General's theory, the affirmative right to locomotion is limited by an officer's interpretation of how it is exercised.

[23] In this case, Officer Nolan testified that the reason for having four police cars converge on the location was because "[n]ormally in these different areas, there's an enormous

(continued...)

The *Terry* court stressed that the Fourth Amendment's protection was not limited to the concept of freedom from arbitrary restraint. The Amendment also protected the right to avoid police contact. "The person addressed (by a police officer) has an equal right to ignore his interrogator and walk away." *Terry,* 392 U.S. at 32-33 (Harlan, J., concurring). This Court has recognized that an individual's decision to refuse police contact cannot be used against the individual to justify an investigative stop. *See Brown v. Texas*, 443 U.S. 47,

[23] (...continued)

amount of people, sometimes lookouts, customers." App. 8. Actually, it was lunch time in a Chicago neighborhood. *See, e.g., Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) ("The agent's belief that [Reid] and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an 'inchoate and unparticularized suspicion or hunch,' than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.") (quoting *Terry*, 392 U.S. at 27); *Brown v. Texas*, 443 U.S. 47, 49 (1979) (officer's testimony that suspect looked suspicious and had never been seen before does not constitute reasonable suspicion); *Sibron v. New York*, 392 U.S. 40, 62 (1968) (officer testified that he approached and searched Sibron because he saw Sibron in the company of known narcotic addicts; "the inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."). *See also State v. Ellington*, where the majority held there was no reasonable suspicion to stop a person in an area "known for high drug activity" who, upon seeing the officer, put his hands in his pocket as if attempting to conceal something. 680 So. 2d 174, 175 (La. Ct. App. 1996); *Tumblin v. State*, 664 N.E.2d 783, 785 (Ind. Ct. App. 1996) ("The color of one's skin, the neighborhood one happens to be in, and the fact that one turns away from the police are not sufficient, individually or collectively, to establish a reasonable suspicion of criminal activity.").

53 (1979). Since the right to avoid police contact is an affirmative right, its existence should not be subject to the manner or speed with which it is exercised.

Here, Wardlow was standing alone in front of a building at 4035 West Van Buren. App. 7. At the time Officer Nolan first observed Wardlow, he was not violating any laws; indeed, he was not speaking or engaged with anyone. The police officers were "not responding to any call or report of suspicious activity in the area" and he "gave no outward indication of involvement in illicit activity prior to the approach of Officer Nolan's vehicle. Defendant was simply standing alone in front of a building when the officers drove by." App. 24, 25. Officer Nolan offered no testimony of any suspicious activity by Wardlow prior to his flight from the multiple police cars and officers.

Respondent does not argue that flight from police under certain circumstances may never be relevant to a determination of reasonable suspicion. Rather, Respondent submits that absent corroborating circumstances that an individual was involved in criminal activity prior to flight, an officer's observation of flight "reveals nothing more than a hunch." App. 26. The officers' observation of Respondent's running away undoubtedly created a suspicious hunch, its articulation being, "He ran from me, he must have done something." The Illinois Supreme Court wisely determined that absent specific facts corroborating the inference of guilt gleaned from Respondent's flight, his stop and subsequent arrest were constitutionally infirm. App. 27.

The Illinois Supreme Court's narrow holding recognized that *Terry* was "based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable in the street as it is in the home." App. 21 (quoting *State v. Hicks*, 488 N.W.2d 359, 363 (Neb. 1992)). The Illinois Supreme Court left for another day the myriad instances of flight plus other factors that would constitute reasonable suspicion for a *Terry* stop. This Court should preserve the totality of the circumstances test as the best means to ensure judicial review of law officers' reasonable suspicion determinations.

D. TO PASS CONSTITUTIONAL MUSTER, A "HIGH CRIME AREA" SHOULD BE SUFFICIENTLY LOCALIZED TO ASSURE THAT AN INDIVIDUAL'S REASONABLE EXPECTATION OF PRIVACY IS NOT SUBJECT TO THE UNFETTERED DISCRETION OF POLICE.

Petitioner's high crime area exception to the Fourth Amendment (location plus evasion) suggests that if a person finds himself in a high crime area, he may be searched without particularized facts or individualized suspicion. This theory is flawed in that it eliminates the requirement of individualized suspicion, which is fundamental to Fourth Amendment jurisprudence.

The Illinois Appellate Court, performing a *de novo* review, found, "The record here is simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking or, for that matter, that defendant's flight was related to his expectation of police focus on him." App. 32. The appellate court emphasized the limited nature of its holding, stating that it did not hold that "the presence of a suspect in a high crime location together with his subsequent flight from police is never grounds for a *Terry* stop." App. 33. Rather, that court emphasized that "[t]o

pass constitutional muster, however, the high crime area should be a sufficiently localized and identifiable location . . . to 'assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.'" *Id.* (quoting *Brown v. Texas,* 443 U.S. 47, 51 (1979)).[24]

Petitioner argues that in the instant case, the "'high crime area' is not arbitrary or ephemeral because it can be quantitatively verified." Petitioner's brief at 7, 38. The record does not support this sweeping statement. The police presented no evidence of quantitative verification that identified the precise location or boundaries of the area known by the officers to have a high incidence of narcotics trafficking. App. 32. Indeed, Officer Nolan's testimony indicated only that the officers were headed somewhere in the general area. *See id.* The officers were not investigating a specific area, and they had no reason to believe a crime had been

[24] The Illinois Supreme Court, disagreeing with the appellate court in its *de novo* review, determined that there was sufficient evidence "to establish that the incident occurred in a high-crime area." App. 20. As this Court held in *Ornelas v. United States,* reasonable suspicion determinations should be subject to *de novo* review. 517 U.S. 690 (1996). In so ruling, the Court took care to distinguish the underlying facts, noting that "[t]he background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference." *Id.* at 699. To perform a *de novo* review, courts should require particularized observations to make their determinations. Both the appellate and supreme courts herein were hampered in this task by the inadequacy of the record on which they were asked to make their determinations. Nonetheless, in requiring particularized observations, the character of the neighborhood alone cannot constitute reasonable suspicion. *See Brown v. Texas,* 443 U.S. 47 (1979).

committed. *See id.* The Illinois Appellate Court found the record "too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking." *Id.* The Illinois Supreme Court echoed the appellate court's findings and further agreed with other jurisdictions that "a person's presence in such a [high crime] area by itself does not warrant a suspicion that that person is involved in crime."[25] App. 25. The "high crime area" factor is not an activity of an individual and cannot be determinative of reasonable suspicion.

The present case differs significantly from *Minnesota v. Dickerson*, which involved conduct at a specific location. 508 U.S. 366 (1993). In *Dickerson,* the question before this Court was whether a lower court may admit into evidence contraband found by an officer using only his sense of touch during an otherwise proper stop and

[25] The Illinois Supreme Court undoubtedly appraised this factor with caution and, like other courts, was reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circumstances justifying the seizure of an individual. *See, e.g., People v. Bower,* 597 P.2d 115, 117 (Cal. 1979) (holding there was no reasonable suspicion to stop "a white man . . . with a group of black men in a black residential area" where the officer testified that he had never observed a white person in the projects and thus thought that either drugs or weapons were involved); *New v. State,* 674 So. 2d 1377 (Ala. Crim. App. 1995) (finding no reasonable suspicion where three white youths were driving at 3:30 a.m. at a low speed in a predominantly black neighborhood); *State v. Nealen,* 616 N.E.2d 944, 945 (Ohio Ct. App. 1992) (finding no reasonable suspicion where police observed a young white male in an "all black extremely high crime area" with his hand closed in a fist); *State v. Weitman,* 525 P.2d 293 (Ariz. Ct. App. 1974) (finding no reasonable suspicion to stop vehicle, which slowed down in front of a tavern; trial court excluded testimony that the tavern had a reputation for drug trafficking).

frisk. *See id.* at 368. Dickerson was observed leaving a multi-unit apartment building "known to be a notorious crackhouse." *Id.* at 368. One of the officers had previously participated in the execution of search warrants at that building. *See id.* Neither officer knew the defendant, where he had been in the building, or any reason to connect him to prior illegal activity in the building. *See id.* Upon seeing the police car and making eye contact with the officer, Dickerson stopped, turned and proceeded in a different direction. *See id.* at 369. Based on these facts—a location known for criminal activity and evasive action—the officers followed Dickerson into the alley, stopped and frisked him. *See id.* The police found cocaine in Dickerson's pocket. *See id.* This Court did not rule on the propriety of the stop and frisk; however, the Minnesota Supreme Court concluded the stop was justified. While "merely being in a high crime area will not justify a stop . . . defendant's evasive conduct, after eye contact with police, combined with his departure from a building with a history of drug activity, justified police in reasonably suspecting criminal activity." 481 N.W.2d 840, 843 (Minn. 1992) (emphasis added).

Unlike *Dickerson*, in which the activity took place in a single building and provided a particularized and localized location, Wardlow presented the Illinois Supreme Court with a vast, undefined, heavily populated area. Describing a neighborhood of nearly 100,000 people[26] as a high crime area is drastically different from identifying a single building because, regardless

[26] Appendix II of Amicus Curiae Brief of the National Association of Police Organizations, et al., reflects that the total population for the 11th District is 98,544 people.

of the neighborhood's high level of crime, large numbers of innocent persons still live and work there. *Dickerson* involves both identifiable conduct at a specific location, rather than mere presence in a neighborhood, and cannot be analogized to the present case.

Probable cause to search a person must be based on "a reasonable belief or suspicion directed at the person to be frisked." *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). In *Ybarra*, pursuant to a warrant, officers searched a tavern and its occupants for narcotics. *See id.* at 88. Ybarra was a patron of the tavern at the time of the search. *See id.* Ybarra was frisked as a safety measure and narcotics were found. *See id.* This court invalidated the search of Ybarra, explaining that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91. Justice Stewart rejected the argument that the frisk of Ybarra was proper under *Terry* due to his location on "compact premises subject to a search warrant." *Id.* at 94. Justice Stewart concluded that a person does not lose Fourth Amendment protection merely because he is found in the presence of others suspected of crime. *See id.* at 94-96. *See also Maryland v. BUIE*, 494 U.S. 325, 334-35 (1990).

Here, Officer Nolan's testimony reveals that he frisked Respondent because in his experience, it was common for weapons to be in narcotics areas. App. 11. Officer Nolan did not articulate any reasonable belief or suspicion that Wardlow was engaged in narcotics trafficking or that he reasonably believed or suspected Wardlow to be armed. In *Terry*, the Court permitted a pat down of the defendant for the officer's safety only

if an officer was able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the frisk. *See Terry*, 392 U.S. at 30. In this case, Officer Nolan testified generally that Respondent was stopped in an area of "high narcotics traffic" and that in his experience, weapons were in the vicinity. App. 7, 9-10. "Common knowledge" is insufficient to support a frisk. An officer must have individualized suspicion "directed at the person to be frisked" in order to justify a search. *Ybarra*, 444 U.S. at 94. No such basis existed in this case.

E. BY REQUIRING LAW ENFORCEMENT OFFICERS TO ARTICULATE THOSE OBSERVATIONS THAT CONSTITUTE REASONABLE SUSPICION, THE COURTS MAINTAIN JUDICIAL REVIEW, ELIMINATE ARBITRARY POLICE DISCRETION AND BALANCE THE PUBLIC'S RIGHT TO PERSONAL SECURITY AND PRIVACY IN FAVOR OF FREEDOM FROM POLICE INTERFERENCE.

Investigative stops are legitimate only when there is effective judicial oversight to justify those stops. *Terry* was premised on the requirement that police actions must be subjected to the "detached, neutral scrutiny" of a judicial officer. *See Terry,* 392 U.S. at 21 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."). Petitioner's proposed *per se* rule undermines the judiciary's meaningful role to scrutinize the reasonable-

ness of a particularized justification for a *Terry* stop,[27] leaving police discretion virtually unchecked.

In the past, this Court has rightfully prevented states from undermining judicial review. For example, in *Richards v. Wisconsin*, this Court rejected Wisconsin's attempt to adopt a blanket exception to the "knock and announce" requirement for the execution of search warrants and felony drug investigations, holding that such an approach "impermissibly insulates these cases from judicial review." 520 U.S. 385, 393 (1997). Instead, the Court required the State to show that the investigating officers had a reasonable suspicion that knocking would be dangerous, futile or would inhibit the investigation. *See id.* The Court concluded that the circumstances present in *Richards*—the suspect's recognition

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[27] *See, e.g.*, 4 Wayne R. LaFave, Search and Seizure § 9.4(f), 189-90 (3d ed. 1996).

> In view of the readiness with which courts make this characterization (as a high crime area), even as to better neighborhoods, it would seem that greater circumspection is called for here. Unspecific assertions that there is a crime problem in a particular area should be given little weight, at least to more particular indications that a certain type of criminal conduct of the kind suspected is prevalent in that area.

Id. See also Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 YALE L.J. 214, 222 n.42 (1983) ("The basis for declaring an area crime prone may be flimsy. Some police officers describe all areas as crime prone."). "Both the factors of class and neighborhood may be easily used as facades for race; this possibility should induce additional reluctance about attaching substantial weight to their presence." *Id.* at 256. *See also* Harris, *supra,* at 672-75 (arguing that "location" and "evasion" are used as proxies for race in reasonable suspicion determinations).

that there was a police officer at the door, plus the "easily disposable nature of the drugs"—sufficed to create the necessary reasonable suspicion. *Id.* at 396.

Further, rather than adopting a bright-line rule regarding flight in a high crime area that unduly infringes upon all citizens' rights to freedom of movement, the totality of circumstances test insures a system of checks and balances that best preserves personal privacy and assures effective law enforcement. The Illinois Supreme and Appellate Courts upheld the totality of circumstances test, knowing that a *per se* rule regarding flight in a high crime area would open the door further to arbitrary and discriminatory enforcement.[28]

The sparse facts of this case do not support the reversal of the totality of circumstances test. Moreover, it provides the very reason why such a test should be upheld. So long as law enforcement officers are performing their job properly, they do not need a bright-line rule. Citizens, however, must know that they may freely move—regardless of the neighborhoods in which they live and work—without fear of harassment and knee-jerk suspicions by police. The totality of the circumstances test best assures this result.

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[28] In *City of Chicago v. Morales*, the Illinois Supreme Court expressed concern that the loitering ordinance in question provided absolute discretion to police officers to determine what activities constitute loitering. 687 N.E.2d 53, 63 (1997). This Court affirmed, noting that the ordinance delegates too much discretion to the police. 119 S. Ct. 1849, 1861, ___ U.S. ___ (1999).

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully Submitted,

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