No. 98-1036

In the

Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM WARDLOW, aka SAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE(S)

Miscellaneous:

ARGUMENT

A.

Respondent's Unprovoked Flight From A Clearly Identifiable Police Officer Was Sufficient, Standing Alone, To Warrant A Temporary Investigatory Stop Under The Fourth Amendment.

1. Petitioner's Position Does Not Advocate The Elimination Of The Totality Of The Circumstances Test.

Contrary to Respondent's bold assertion that the totality of the circumstances test will be eliminated if Petitioner's position is adopted, this Court has never ruled out the possibility that one circumstance can have such an overriding significance that it alone can provide the requisite suspicion for a *Terry* stop or, said otherwise, that one piece of the puzzle can give away the whole picture. (Pet. Br. 22, n.8) Indeed, this Court has never quantified the number of facts that must be present in order to reach the plateau of "reasonable suspicion."[1] Hence, reasonable suspicion can be established by the presence of ten, five or even one factor. The determining point is not the number of factors but the **degree of suspicion** that each factor provides. Among the wide spectrum of reactions an individual can have to the presence of the police, unprovoked flight possesses the highest degree of suspicion. It is one of those rare and revealing acts that, standing alone, provides reasonable suspicion. Thus, Respondent's claim that Petitioner seeks the reversal of the totality of the circumstances test is inaccurate. The reality is that the singular factor of unprovoked flight from a clearly identifiable police officer provides the requisite "circumstances" to amount to reasonable suspicion.

2. Petitioner's Position Does Not Eliminate Judicial Review.

In responding to Petitioner's brief, Respondent makes a confusing argument concerning judicial review. At points in his brief, Respondent appears to argue that Petitioner's position violates the Warrant

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[1] In essence, Respondent himself advocates a bright-line rule by urging this Court to ignore the degree of suspicion attached to unprovoked flight and hold that one single factor can never give rise to "reasonable suspicion."

Clause of the Fourth Amendment. At other points, Respondent appears to argue that a finding of reasonable suspicion on the basis of a person's unprovoked flight at the mere sight of a clearly identifiable police officer eliminates judicial review of the issue when raised in a motion to suppress. Respondent's arguments, however, were already addressed in the seminal case of *Terry v. Ohio*, 392 U.S. 1 (1968), and are at this juncture non-issues. Moreover, Respondent's essential concern, that the adoption of the proposed bright-line rule would obviate judicial scrutiny of police behavior, is simply untrue.

With respect to his Warrant Clause argument, Respondent claims that "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.' " (Res. Br. 8)[2] Respondent further argues that "[t]he 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." (Res. Br. 8) In support of his position, Respondent quotes from the dissent in *United States v. Rabinowitz*, for the proposition that "a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." 399 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

However, *Terry* confronted and rejected this same Warrant Clause argument. The *Terry* Court found that the Warrant Clause was not applicable to "stop and frisk" situations, stating that:

> "But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry*, 392 U.S. at 20.

[2] Initially, it is important to point out that this statement fails to accurately present Petitioner's position: a person's **unprovoked** flight at the mere sight of a **clearly identifiable police officer** gives rise to a reasonable suspicion justifying a temporary investigatory stop.

Thus, the Warrant Clause of the Fourth Amendment is immaterial to the analysis of a temporary investigatory stop. This does not mean, however, that a *Terry* situation is not subject to judicial scrutiny. As the *Terry* Court stated:

> "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 the light of the particular circumstances." *Terry*, 392 U.S. at 21.

Because of the nature of the "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat," the judicial scrutiny must take place after the investigatory stop.

Despite the adoption of the bright-line rule advocated by Petitioner, the right to file a motion to quash arrest and suppress evidence is not lost. In a suppression hearing, a trial court necessarily will have to examine the facts surrounding the seizure to determine (1) whether the individual took flight from the police; (2) whether the police were clearly identifiable; (3) whether the individual's flight was in direct response to the presence of the police; (4) whether the individual's flight was unprovoked; and (5) whether there were other circumstances that provided an innocent basis for the individual's flight. The procedural history of this case reveals that Respondent enjoyed such judicial review. Therefore, there is absolutely no merit to the contention that Petitioner's bright-line rule would eliminate judicial review.

3. A Bright-Line Rule Permitting Police Officers To Conduct A Temporary Investigatory Stop Of A Person Who Flees At The Mere Sight Of The Police Would Have Been Regarded As A Lawful Seizure Under The Common Law When The Fourth Amendment Was Framed.

Petitioner's opening brief firmly establishes that a bright-line rule permitting police officers to conduct a temporary investigatory stop

of a person who flees at the mere sight of the police would have been regarded as a lawful seizure under the common law when the Fourth Amendment was framed.[3] Specifically, Petitioner established that the early common law adopted the maxim that flight from justice was equivalent to confession of guilt. A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII, 472 (1868); W.M. Best, *Law of Evidence*, 5th Ed 582 (1870). Relying on William Blackstone's *Commentaries on the Laws of England*, Petitioner also demonstrated that at the time the Framers adopted the Fourth Amendment, the common law attached very severe legal consequences to a person's flight by applying a *per se* forfeiture rule. Under this *per se* forfeiture rule, a person, on an accusation of treason, felony or even petit larceny, lost his goods or chattels if a jury made a finding of flight. William Blackstone, 4 *Commentaries on the Laws of England* 380 (1765-1769).[4] Significantly, this forfeiture rule applied whether the person was found guilty or acquitted of the underlying offense. *Id.* Since the common law boldly employed a *per se* forfeiture law to deter flight from authorities, it places no barriers to the adoption of a bright-line rule that is also aimed at discouraging flight from the police. Thus, the strong and inflexible legal presumption attached to

[3] Significantly, the "night walker" statutes provide historic precedent for the power to detain suspicious persons under English common law. *See Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring). These statutes support the concept of a *Terry* stop based on reasonable suspicion and do not support an absolute right to movement, as under English common law or the laws of this country, "every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself." 2 W. Hawkins, Pleas of the Crown, ch. 13, § 6, 129 (8th ed. 1824); 1 E. East, Pleas of the Crown, ch. 5, § 70, 303 (1803); *see also Mayo v. Wilson*, 1 N.H. 53 (1817); *Lawrence v. Hedger*, 3 Taunt. 14, 128 Eng. Rep. 6 (1810); *Roberts v. Missouri*, 14 Mo. 138, 145 (1851).

[4] Respondent's characterization of Petitioner's reliance on these writings as "lawyer's histories" or "Nineteenth Century Literature" fails to rebut the substantive content of these writings. Moreover, contrary to Respondent's casual dismissal of Blackstone's work as "lawyer's histories," this Court acknowledged that Blackstone's work "constituted the preeminent authority on English Law for the founding generation. . ." *Alden v. Maine*, 119 S. Ct. 2240, 2248 (1999); *see also Washington v. Glucksberg*, 521 U.S. 702, 711 (1997) (noting Blackstone was also a primary legal authority for 18th and 19th century American lawyers).

flight was firmly interwoven into the fabric of American law. *See Hickory v. United States*, 160 U.S. 408, 422 (1896); *Alberty v. United States*, 162 U.S. 499, 510 (1896); *Starr v. United States*, 164 U.S. 627, 631-632 (1897); *Allen v. United States*, 164 U.S. 492, 499 (1896).

Respondent, however, endeavors to escape the inevitable conclusion that under the common law it would have been lawful to seize a person who took flight to escape detection by the Government. Respondent attempts to establish a distinction between a person's flight prior to accusation and a person's flight after a charge has been brought against that individual. (Res. Br. 12, 15-17) Respondent asserts that the historical writings and the opinions cited by Petitioner deal with flight after accusation. He reasons that the common law, therefore, does not support the conclusion that flight from authorities, prior to accusation, would have been presumptive of guilt. *Id.* at 16. Initially, it is important to point out that Respondent's characterization of Petitioner's referenced historical writings is incorrect. A thorough reading of Blackstone's Commentaries does not establish that the forfeiture rule encompassed only flight after accusation. Likewise, Burrill's writings made no distinction between a person's flight before being charged and a person's flight after accusation. To the contrary, Burrill's writings dealt with the legal presumption of guilt attached to an individual's flight from "the scene of the crime." (Pet. Br. 16)

Respondent relies upon Wigmore to support his position that the common law drew a distinction between flight before and after accusation. Respondent sets forth the following quote from 2 John H. Wigmore, *Evidence*, Sec. 276 at 122:

> "It is universally conceded today that the fact of an accused['s] flight . . . is admissible as evidence of consciousness of guilt, and thus guilt itself." (Res. Br. 14, n. 9)

Respondent then infers from this quotation that "[t]he 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." (Res. Br. 14, n.9) A thorough reading of Wigmore's writings on the subject, however, fails to support Respondent's distinction between flight before or after accusation. After an extensive discussion on the topic that "[f]light from justice and its analogous

conduct, have always been deemed indicative of consciousness of guilt,"[5] Wigmore points out that:

> "It is occasionally required that the accused should have been aware that he was charged or suspected. This is unnecessary; **it is the act of departure that is itself evidential**; ignorance of the charge is merely a circumstance that tends to explain away the guilty significance of the conduct." 2 John H. Wigmore, *Evidence*, Sec. 276 at 129 (emphasis added).

Thus, Respondent's own authority belies his claim that the common law drew a distinction between flight before or after accusation.

Respondent correctly points out that the quartet of cases decided by this Court, upon which Petitioner relies, revolves around flight after accusation. This fact, however, does not defeat Petitioner's position that these cases demonstrate that a conclusive presumption of guilt was adopted by early American law. This Court has never adopted the absurd and illogical notion that flight before a charge does not give rise to an inference of a consciousness of guilt. To the contrary, in the companion case to *Terry*, this Court recognized that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea* and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Sibron v. New York*, 392 U.S. 40, 66-67 (1968). Significantly, this holding was made in the context of a defendant's flight prior to accusation. 392 U.S. at 66-67. Therefore, this Court should reject Respondent's baseless distinction between flight before or after accusation.

The only other attack that Respondent poses against Petitioner's common law argument is that Petitioner ignores several exhaustive

[5] Respondent criticizes Petitioner for quoting the Bible and relying on the common law forfeiture rule in establishing the strong presumption of guilt historically attached to flight. (Res. Br. 5, 13, 16) However, Wigmore's writings, Respondent's own authority, also begin the historical analysis of the presumption of guilt attached to flight with the Biblical quote that "The wicked flee, even when no man pursueth; but the righteous are bold as a lion" and a discussion concerning the common law forfeiture rule. Wigmore, Sec. 276 at 129.

historical analyses of the Fourth Amendment. However, Respondent fails to identify *any* historical analysis that refutes the writings of Burrill, Blackstone or Best on the conclusive presumption of guilt attached to flight under the common law. Respondent identifies William J. Cuddihy's 1800-page unpublished Ph.D. dissertation, The Fourth Amendment: Origins and Original Meaning, as the most comprehensive history of the amendment ever written. (Res. Br. 12, n.7) However, Cuddihy's writings primarily dealt with the Warrant Clause of the Fourth Amendment[6] and did not analyze the legal presumption attached to flight under the common law. Perhaps most notable about Respondent's reliance upon this unpublished document is that Cuddihy himself asserts that the Fourth Amendment is simply too complex for legal analysis. (Res. Br. 12, n.7) Petitioner is at a loss to understand how Cuddihy's authoritative concession regarding the complexity of the Fourth Amendment undermines Petitioner's straightforward, commonsensical recognition that flight is inherently suspicious behavior evincing a consciousness of guilt and has been so deemed since the beginning of common law.

4. Respondent's Novel Claim Of A Constitutional Right To Flight Is Contrary To The Fourth Amendment.

Respondent's claim that he possesses a constitutional right to avoid police contact based on an undefined right of movement should be seen, and rejected, for what it is: a right to flight. Respondent shrouds himself in a panoply of descriptive terms including the "fundamental right[7] to withhold cooperation and 'go on his

[6] Notably, in his analysis of the Fourth Amendment, Cuddihy concluded that the amendment contains two separate clauses: the Warrant Clause and the Reasonableness Clause. Cuddihy, *supra*, at 1545. Hence, his analysis supports this Court's determination in *Terry* that the Warrant Clause was inapplicable to the question of whether a temporary investigatory stop on the basis of reasonable suspicion comports with the Fourth Amendment.

[7] Respondent and Amicus ACLU both cite to the plurality opinion in *Florida v. Royer*, 460 U.S. 491 (1983), as recognizing this "fundamental right." The *Royer* plurality, however, never expressed, let alone discussed, whether any such right existed and certainly did not state that a fundamental right was present.

way.' "[8] This scattergun approach ignores that a "careful description" of the proposed constitutional right is necessary in order to assess the existence and application of that right. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Respondent, however, has been unable to identify, define, or even consistently label this multifarious right that could apply to all movement regardless of Respondent's intent or presence of the police. This Court should reject Respondent's amorphous description of this alleged right and stay its prudent course of looking to the concrete facts of a case to determine what right is at issue. *Glucksberg*, 521 U.S. at 722-724.

Respondent and Amicus ACLU have been unable to identify the basis for this new right to flight, but appear to claim that this right to flight is based, at least in part, on the Due Process Clause of the Fourteenth Amendment.[9] Respondent's clandestine claim of a substantive due process right to flight fails to appreciate that the issue of the reasonableness of his seizure lies squarely under the umbrella of the Fourth Amendment. This Court has refused to search the substantive depths of the relatively narrow Due Process Clause and implement its corresponding analytical framework when there is a specific constitutional amendment that establishes and governs the right at issue. *See Graham v. Connor*, 490 U.S. 386 (1989). As a

[8] Respondent also refers to the "choice to refuse police contact" and not "to tolerate police inquiries;" the "core right of all persons to avoid police in the absence of objective evidence of criminality;" the "freedom of movement;" and the all-encompassing "suspicious conduct that is otherwise constitutionally protected." (Res. Br. 27-28, 38) Amicus ACLU supplements this litany with the "unqualified right to stand or move about on the streets;" the "power of locomotion," and the right to "move on." (ACLU Br. 4-6, 8, 14)

[9] Both Respondent and Amicus ACLU cite to the plurality opinion in *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999), and *Kolender v. Lawson*, 461 U.S. 352 (1983) (Res. Br. 38; ACLU Br. 6-7). Neither of these cases, however, support Respondent's claim of a fundamental right to flight. In both cases, a majority of the Court addressed the constitutionality of loitering ordinances under the traditional vagueness analysis of the Fourteenth Amendment. Those decisions did not recognize any constitutionally protected conduct akin to that at issue here. Rather, a majority of the Court determined that the respective ordinance was vague because it was capable of arbitrary enforcement. *Kolender*, 461 U.S. at 359; *Morales*, 119 S. Ct. at 1864. These cases, and the textually-based analysis therein employed, are inapplicable.

general matter, this Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115 (1991). Rather, this Court has limited the Due Process Clause to a relatively narrow group of non-enumerated substantive rights, which are "otherwise homeless." *Albright v. Oliver*, 510 U.S. 266, 288 (1994) (Souter, J., concurring). Following this approach, this Court has rejected the proposed application of substantive due process in cases, such as this one, where the underlying constitutional right was secured by the Fourth Amendment. *See Graham*, 490 U.S. at 394-95[10]; *see also Albright*, 510 U.S. at 272 (Rehnquist, C.J., plurality opinion). In light of this clear precedent, Respondent's proposed right to flight, or any lesser component of that right, cannot be considered a substantive due process right and, as such, his claim must be analyzed exclusively under the Fourth Amendment.[11]

Respondent's proposed restructuring of the Fourth Amendment, however, is based on a frail and flawed logical framework. Respondent proclaims that he has a constitutional right to avoid police contact. (Res. Br. 26-27) Respondent then reasons that flight is nothing more than an anticipatory refusal to cooperate with a police officer's potential decision to approach. (Res. Br. 26-27) Respondent completes his enigmatic progression by stating that there must be no

[10] In *Graham*, this Court held that a section 1983 claim alleging excessive force during an arrest must be analyzed under the objective reasonableness standard of the Fourth Amendment. This Court rejected the idea of reliance on a "generic right," instead of the Fourth or Eighth Amendment, which were the "two most textually obvious sources of constitutional protection." *Graham*, 490 U.S. at 393. The Court explained: "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham*, 490 U.S. at 395.

[11] Interestingly, the Court has recently said that *Rochin v. California*, 342 U.S. 165 (1952), which established the "shock the conscience" test for due process violations, would be decided under the Fourth Amendment, and not the Fourteenth Amendment, if decided today. *County of Sacramento v. Lewis*, 523 U.S. 833, n.9 (1998).

restrictions on the manner in which he is allowed to exercise this right and, as such, he can certainly refuse to avoid police contact and go on his way at top speed. (Res. Br. 30) Presto—Respondent has turned unprovoked flight at top speed from a clearly identifiable police officer into a constitutionally protected right. And in so doing, Respondent has asked this Court to focus on an ill-defined constitutional right at the expense of the balance struck by this Court in *Terry*, and at the expense of the straight-forward issue that balance presents as applied in this case: whether unprovoked flight from a clearly identifiable police officer gives that officer reasonable suspicion that criminal activity may be afoot.

Respondent's innovative theoretical posturing is entirely inconsistent with the very fabric of this Court's decision in *Terry v. Ohio* and its 30 years of progeny. Imagine if Respondent's claim of removable and free-standing rights, unfettered by countervailing societal interests, were applied in *Terry v. Ohio*. Officer McFadden could not have considered that Terry was standing on a street corner speaking with other individuals as that would have improperly infringed upon Terry's right of assembly or association. Nor could Officer McFadden consider that he observed Terry and his companion walking back and forth in front of a store window as that would impermissibly infringe on his right to move freely. Finally, Officer McFadden could not consider that when he walked up to Terry and his companions and asked for their names, they mumbled something in response because such mumbling was, at the very least, an implicit refusal to cooperate if not an exercise of protected First Amendment conduct. Thus, Officer McFadden could not have detained Terry because Terry was just engaging in constitutionally protected conduct.

The Court, however, upheld Officer McFadden's action as a reasonable seizure under the Fourth Amendment. In so doing, the Court looked at the entire spectrum of interests and balanced them to determine what was reasonable; the Court did not examine Terry's conduct or that of Officer McFadden in a vacuum. The Court specifically considered the "rapidly unfolding and often dangerous situations on the city streets," the need for an "escalating set of flexible responses," the interests of effective law enforcement, and the limited nature of an investigatory detention. *Terry*, 392 U.S. at 10-11. This Court also considered the principles that "the authority

of the police must be strictly circumscribed by the law of arrest and search" and the need for a "requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution." *Terry*, 392 U.S. at 11-12. The reasonable suspicion standard forged in *Terry* represents the sound constitutional balance used to assess a citizen's right to be free from unreasonable seizures that this Court has applied consistently. This Court has never altered the balance struck in *Terry* and has never recognized any independent or free-standing rights that roam unfettered within the rubric of the Fourth Amendment.[12] Respondent's proposed right is inconsistent with the entire bulwark of this Court's Fourth Amendment jurisprudence which has repeatedly rejected the existence of such a right.[13]

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[12] *Brown v. Texas*, 443 U.S. 47 (1979), does not support Respondent's claim of a right to flight. Respondent correctly notes that *Brown* determined that a refusal to identify oneself after the investigative detention occurred could not be used as a bootstrap to justify the original stop. Respondent, however, then makes the unwarranted assumption that "an individual's decision to refuse contact cannot be used to justify the stop." (Res. Br. 29) In so arguing, Respondent has incorrectly characterized the holding of *Brown* as a complete bar to any consideration, by the police and the courts, of any conduct that could be interpreted as an implied refusal to cooperate. Respondent portrays *Brown* as a prophylactic measure by overlooking the central fact that Brown's refusal occurred after the baseless investigatory detention.

[13] *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258 (1990). Respondent relies on basic propositions culled from a line of cases, including the plurality opinion in *Florida v. Royer*, 469 U.S. 491 (1983), *Florida v. Bostick*, 501 U.S. 429 (1991), and *United States v. Mendenhall*, 446 U.S. 544 (1980), in crafting his right to flight. These cases, however, do not support Respondent's claim of a right to flight. Rather, these cases discuss when a seizure occurs, generally in the context of a police-citizen encounter. In *Royer*, the encounter in an airport between Royer and the police was initially consensual, even when officers asked Royer for his airline ticket and driver's license, and that encounter did not become a seizure until Royer was escorted to a small room while the officers kept his driver's license, airline ticket and luggage. Similarly in *Mendenhall*, the encounter in the airport was initially consensual even after Mendenhall agreed to accompany the agents to an office approximately 50 feet away where she consented to the search of her person and

(continued...)

Respondent's assertion of a new right to flight is particularly circumspect as it asks this Court to stray from its precedent to give constitutional protection to a hazardous activity that lacks any redeeming value. Respondent conveniently ignores this Court's controlling decision in *California v. Hodari D.*, 499 U.S. 621 (1991), in advancing his right to flight.[14] In *Hodari D.*, this Court expressly rejected the expansion of the Fourth Amendment to protect the respondent's flight from police, stating "We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges." *Hodari D.*, 499 U.S. at 627; *see also Michigan v. Chesternut*, 486 U.S. 567, 576-77 (1988) (Kennedy, J., concurring). This Court also recognized the highly questionable value of flight, stating that "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged." *Hodari D.*, 499 U.S. at 627.

Respondent's entire theoretical framework ignores the fundamental and undeniable differences between the flight from an identifiable police officer and a mere refusal to cooperate.[15] *See People v. Souza*,

(...continued)
handbag. A majority of the Court in two separate opinions ruled the stop and subsequent search were valid. Finally, in *Bostick*, two officers acting as part of a routine drug interdiction encountered defendant on a bus and asked to see his ticket and identification. After Bostick's ticket and identification were returned to him, the officers asked to search his bag and the defendant consented. This Court ruled the search was subject to a valid consent. The refusal to cooperate, let alone flight from the police, was never at issue in these cases. Instead, Respondent elevates a description of a potential outcome of a police-citizen encounter from a series of distinguishable cases and presents it as a fundamental and affirmative right to flight.

[14] Amicus Rutherford Institute apparently recognizes the controlling nature of this Court's decision in *Hodari D.* on the issue of a right to flight and asks this Court to overrule its prior decision. There is no reason for the Court to revisit its sound decision, however, especially as all considerations raised by Amicus were apparent to the Court in *Hodari D.*

[15] Respondent's reliance on *Brown v. Texas* also exhibits a fundamental flaw that runs throughout Respondent's argument: unprovoked flight from a (continued...)

9 Cal. 4th 224, 234-35, 885 P.2d 982 (1994) (because flight "shows not only an unwillingness to partake in questioning but also unwillingness to be observed and possibly identified, it is a much stronger indicator of the consciousness of guilt"). A refusal to cooperate cannot be expanded to encompass the aberrant behavior of flight just because a minor aspect of a refusal to cooperate is implicit in flight. Flight injects an unreasonable level of urgency into an otherwise ordinary encounter and is also assuredly motivated by more than a desire not to cooperate, since an individual would not unnecessarily draw attention to himself unless his fear of detection and the reward of escape were great.[16] This is especially so where a mere refusal would successfully accomplish the very same goal supposedly justifying the need for his right to flight.[17]

In sum, Respondent's call for a constitutional right to flight should be rejected as he has been unable to sufficiently define this amorphous right or provide a definitive constitutional provision in which that right is grounded. Respondent's claim that the right to flight is a substantive due process right must be rejected where his investigatory detention falls squarely under the Fourth Amendment. Any recognition of a free-standing right within the rubric of the Fourth

(...continued)
clearly identifiable police officer cannot be equated with a mere refusal to cooperate as was involved in *Brown*.

[16] Amicus Rutherford Institute cites to Proverbs 22:3: "A prudent man sees danger and takes refuge" in its critique of this Court's opinion in *Hodari D.* This principle, however, demonstrates the relevance of flight—a prudent criminal sees danger and takes refuge.

[17] The facts of this case demonstrate that the framework adopted by this Court in establishing the continuum of police-citizen contacts is well-grounded and not in need of an overhaul. Here, Respondent was standing in front of a building when he made eye contact with a clearly identifiable police officer and fled. Respondent could have stood there or walked away. The officers could have approached him and asked him a question, asked for identification or followed alongside him. *Florida v. Bostick*, 501 U.S. at 434; *Michigan v. Chesternut*, 486 U.S. at 574-75. Respondent could have refused the officer's request and walked away. There is no need to skew this wide spectrum of reasonable behavior that both the citizen and officer could undertake by recognizing the right to flight.

Amendment would unnecessarily disrupt the balance struck in *Terry* to grant constitutional protection to hazardous and aberrant behavior.

5. The Subjective Motivations of Police Officers Have No Play in Fourth Amendment Jurisprudence.

The Amici briefs of the ACLU and the NAACP, filed in support of Respondent, ask this Court to take into consideration that African-Americans and other minorities may flee from police because of fear that they will be subjected to harassment. (ACLU Br. 8-21; NAACP Br. 21-24) Such a position is in reality a veiled invitation to reconsider the Fourth Amendment analysis established in *Terry*. In essence, amici request this Court to reconfigure the objective reasonable suspicion inquiry to include the subjective motivations of rogue police officers. Moreover, amici also ask this Court to establish a separate *Terry* analysis based on the individual characteristics of the person seized. However, *Terry* and more recent precedent of this Court firmly establish that Fourth Amendment jurisprudence entails an objective assessment of police action in which the subjective motives of police officers are irrelevant. The Fourth Amendment is and should remain "color blind" in the protection of the citizenry as a whole.

In support of their position, both aforenoted amici cite to documented cases where police officers have engaged in discriminatory law enforcement tactics. However, as acknowledged by the ACLU, these isolated incidents do not show that most police officers engage in such behavior. (ACLU Br. 24) Unfortunately, discriminatory law enforcement tactics at the hands of some rogue police officers are and have been a reality. However, this is not a novel concern for this Court. The *Terry* Court considered this very issue when it crafted the reasonable suspicion doctrine. Significantly, prior to addressing the propriety of temporary investigatory stops on the basis of reasonable suspicion, the *Terry* Court pointed out that "[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial." *Terry*, 392 U.S. at 14-15. Thus, the *Terry* Court itself was fully cognizant of and shared amici's concerns regarding discriminatory

law enforcement. Rather than craft *Terry* to encompass this issue, as amici would have this Court do, the *Terry* Court opted to create an objective test of reasonable suspicion. The remedy for the *Terry* Court was not the alteration of the *Terry* doctrine and the resultant exclusion of evidence. Instead, the *Terry* Court encouraged the employment of remedies other than the exclusionary rule to curtail such abuses. 392 U.S. at 15.[18]

Hence, the *Terry* Court set clear parameters concerning Fourth Amendment jurisprudence by establishing that the Fourth Amendment contemplates an objective assessment of law enforcement actions and the subjective motives of police officers play no part in the evaluation of search and seizure issues. To now countenance amici's suggestion, to consider the subjective motivations of police officers with respect to particular racial characteristics of the citizenry, would undermine *Terry* itself. The very reason *Terry* is workable is because of its objectivity.

Significantly, the boundaries set in *Terry* have been re-affirmed in more recent cases by this Court. In *Scott v. United States*, this Court stressed the fact that "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." 436 U.S. 128, 137 (1978). Hence, this Court held that "the fact the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott*, 436 U.S. at 138. This Court further acknowledged that motives are not always to be disregarded in a suppression inquiry, but stated that the focus on intent becomes relevant *only*

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[18] In doing so, this Court explained that "rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." 392 U.S. at 15. "And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate." 392 U.S. at 15.

after a court determines that the Constitution was in fact violated. *Scott*, 436 U.S. at 139.

Significantly, this Court re-affirmed the position that a police officer's actual motivations cannot invalidate a seizure which is objectively justified in the recent case of *Whren v. United States*, 517 U.S. 806 (1996). This Court also held that the claim of selective law enforcement on the basis of race plays no part in the Fourth Amendment analysis. In that regard, this Court held that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment Analysis." 517 U.S. at 813. Thus, in light of *Scott* and *Whren*, this Court should reject the amici's veiled invitation to revisit the analysis established in *Terry*.[19] The subjective motivations of police officers should not now be allowed to alter the *Terry* doctrine.

Moreover, this Court's Fourth Amendment jurisprudence wisely perceives the Fourth Amendment as a "color blind" constitutional provision. To place a judicial stamp of approval on the application of different standards based on the race of the subject would upset the objectivity that makes *Terry* workable. *Terry* works, constitutionally, precisely because it can be scrutinized, and applied, in an objective manner that applies—across the board—to the citizenry as a whole. Applying amici's varying standards to different races would actually inject racial profiling into the constitutional analysis, thereby producing the opposite effect desired by Respondent's amici. Petitioner urges this Court to refrain from embarking on such a dangerous journey. The Fourth Amendment must remain color blind, as it always has been.

[19] Notably, Respondent has never raised the claim that he was subjected to a *Terry* stop on the basis of his race. As pointed out by *Terry* and *Whren*, had Respondent made such an allegation, he would have had other remedies available to him, including a Section 1983 claim, an equal protection claim and any administrative remedy available at the state or city level.

6. Law Enforcement Officials Do Not Engage In Provocative Conduct When Four Police Cars Containing Eight Officers Simply Drive Down A Street Together.

Respondent argues that the "police must observe, and not create, articulable suspicion." (Res. Br. 21) In other words, Respondent insists that the police cannot provoke those factors which in turn give them articulable suspicion to conduct a *Terry* stop. This is exactly what Petitioner in its opening brief clearly and repeatedly stated, perhaps to the point of *ad nauseam*, namely, that Respondent's flight must be *unprovoked* for a lawful seizure to occur.

Respondent goes on to state that, "arguably and inferentially," in the instant case the sight of four police vehicles containing eight officers constituted provocation.[20] (Res. Br. 24) Respondent's argument assumes too much. As the record establishes, four police cars containing eight officers were driving, or as Officer Nolan termed it, "caravanning," eastbound on Van Buren Street. (J.A. 8) It was as they were proceeding down Van Buren Street when Officer Nolan, who was driving the last car, first saw Respondent. (J.A. 4, 8-9)

Respondent's contention that the flight in this case was provoked strains credulity. The thought that the simple act of driving through a city street would be so provocative as to cause pedestrians to scatter and run through gangways and alleys would make practically all police activity provocative.

B.

A Person's Unprovoked Flight At The Mere Sight Of An Identifiable Police Officer In A High Crime Area Provides The Particularized Grounds For Reasonable Suspicion That Criminal Activity May Be Afoot.

Respondent agrees that flight is one factor to be considered in determining if reasonable suspicion is present for a *Terry* stop. (Res.

[20] Respondent notes that the Illinois Appellate Court and the Illinois Supreme Court have never characterized his flight as being unprovoked. (Res. Br. 22) This is of course true for the obvious reason that Respondent has **never** questioned, at any level, whether his flight was provoked by the police and has, in fact, argued directly to the contrary below.

Br. 24, 30) Also, Respondent does not dispute this Court's jurisprudence and Professor LaFave's statement that a high crime location is a highly relevant consideration in determining reasonable suspicion.[21] (Pet. Br. 37-40) Logically then, if both flight and location are relevant factors in determining reasonable suspicion, they each must carry weight. If this Court disagrees that unprovoked flight from a clearly identifiable police officer is insufficient standing alone, it is Petitioner's position that when the weight of both factors is added together, the combined weight adds up to reasonable suspicion.[22]

In order to escape the obvious, that Respondent's flight in a high crime area produces a reasonable suspicion that crime may be afoot, Respondent attempts, as the Illinois Appellate Court did before him, to eliminate the location factor from consideration. Respondent insists that the high crime area here was not sufficiently localized or identified as, for example, in *Minnesota v. Dickerson*, 481 N.W.2d 840 (Minn. 1992), where the area was localized to a single building. In making this statement, however, Respondent simply ignores the five cases from this Court that Petitioner cited in its opening brief and the size of the geographical areas that this Court found relevant to probable cause and reasonable suspicion. (Pet. Br. 37-39)

Additionally, Respondent apparently ignores that the trial judge credited the testimony of Officer Timothy Nolan and found the area in question to be a high narcotics crime area. (J.A. 14) This Court must defer to this finding of historical fact reliably made by the trial judge. *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996). Accordingly, the Illinois Supreme Court partially overruled the Appellate Court's opinion and held that the location where Respondent was standing was indeed "a high crime area." (J.A. 19-20) The supreme

[21] Amicus ACLU agrees that a geographic area may be considered when deciding whether reasonable suspicion exists. (ACLU Br. 27)

[22] Amicus ACLU argues that when flight and location are the only two factors to be considered, the location cannot be the decisive factor in determining reasonable suspicion. (ACLU Br. 27) Petitioner submits that it is a pointless exercise to ponder whether location is the determining factor and flight is the underlying factor or *vice versa*. The point is that, when combined, they amount to reasonable suspicion.

court's holding was more than adequately supported by the record as evidenced by the following colloquy:

> Q. And let me ask you, Officer, why was it that you went to *that location* on that date and time?
>
> A. It's *one of the areas* in the 11th District that's high narcotics traffic. (J.A. 7-8)

Thus, as can be plainly seen, Officer Nolan, a member of the Special Operations Section, was specifically assigned that day to patrol certain areas *within* the 11th District that had a high incidence of narcotics crime.[23] One of these locations was the area of 4035 West Van Buren. Further, as the Illinois Supreme Court held, and as Petitioner initially pointed out, Officer Nolan's statement that the location at 4035 West Van Buren was a high narcotics crime area was "uncontradicted and undisputed" by defense counsel during the suppression hearing.[24] (Pet. Br. 40, J.A. 19) Thus, Respondent's assertion that 4035 West Van Buren was not sufficiently identified as a high crime area is baseless and should be rejected by this Court.

In sum, the high crime location here was sufficiently identified and, when coupled with flight, provided individualized reasonable suspicion. Accordingly, the officer was entitled to make a brief investigatory stop. If not, Officer Nolan would have been left to shrug his shoulders and watch a person who was possibly wanted on a warrant, an escapee from jail or who had committed a crime, to simply run away.

[23] As such, Respondent's assertion that the high crime area that Officer Nolan was referring to was a vast, undefined, heavily populated neighborhood of nearly 100,000 people encompassing the whole 11th District is incorrect. (Res. Br. 34)

[24] This could well have been because, as the record establishes, Respondent had two pending cases for possessing, as well as selling, narcotics at 3841 and 3843 West Van Buren, a mere two blocks from 4035 West Van Buren. (R. B21, B25-B29)

CONCLUSION

For the aforementioned reasons, and for the reasons stated in Petitioner's opening brief, the judgment of the Illinois Supreme Court should be reversed and this case remanded for further proceedings.

Respectfully submitted,

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