No. 98-1036

In the
Supreme Court of the United States

October Term, 1999

State of Illinois, *Petitioners*,

v.

Sam Wardlow, *Respondents*.

On Writ of *Certiorari* to
the Supreme Court of Illinois

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Illinois is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many Fourth Amendment cases. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. Composed of more than 10,000 attorneys and 28,000 affiliate members in 50 states, NACDL is recognized by the American Bar Association as an affiliate organization. It also has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights.

STATEMENT OF THE CASE

The facts are not disputed. Around 12:15 p.m. on September 9, 1995, Officer Timothy Nolan of the Chicago Police Department was in uniform and driving a police cruiser in the vicinity of 4035 Van Buren. Officer Nolan and his partner were in the last car of a four-car police "caravan" involving eight officers. The officers were assigned to investigate narcotics in the area. J.A. 3-7.

While driving, Officer Nolan noticed respondent, Sam Wardlow, standing in front of 4035 West Van Buren. According to Nolan, respondent was doing nothing illegal, nor acting suspiciously. Respondent looked in the officers' direction and then fled. The officers followed respondent in their cruiser and observed him run through a gangway and an alley. Respondent then ran right toward the cruiser and was detained. Officer Nolan frisked respondent. Inside a white opaque plastic bag carried by respondent, Nolan felt a hard object similar in shape to a revolver. Nolan opened the bag and discovered a loaded handgun. Respondent was then arrested. J.A. 4-6.

Respondent was charged with various weapon violations. The trial court denied respondent's suppression motion. Recognizing that an investigative stop requires specific and articulable facts of criminality, the trial court stated that "[t]he police in [respondent's] case had nothing." Nevertheless, the trial court noted that it "is common knowledge police do know of the area where drugs are being sold. They do have knowledge of general areas where contraband, including weapons, are being carried." Applying a totality of the circumstances test, the trial court concluded that respondent's flight justified a stop and frisk. J.A. 12-13. After a bench trial, respondent was convicted of unlawful use of a weapon by a felon.

The intermediate appellate court in Illinois reversed. The appellate court found "no support in the record" for the inference that respondent was in a high crime area. There was no evidence that the police were targeting the area where respondent was observed "because it was known to be a location where drugs were sold." The "officers were simply driving by, on their way to some unidentified location, when they noticed [respondent] standing at 4035 West Van Buren." The court explained that the record "was simply too vague" to support the judgment that respondent was in a place of high narcotics activity, or that his flight "was related to his expectation of police focus on him." Accordingly, the court concluded that respondent's flight, by itself, did not furnish reasonable suspicion to justify an investigatory stop. J.A. 27-28.

The Illinois Supreme Court affirmed. The court first set aside the appellate court's determination that the record did not support the inference that respondent was observed in a high-crime area. According to the court, Officer Nolan's testimony "was sufficient to establish that the incident occurred in a high-crime area." Thus, the sole issue before it was whether respondent's "flight upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop." J.A. 18.

The court concluded that flight alone, even in a high-crime neighborhood, did not provide reasonable suspicion of criminality. Noting this Court's precedents establishing a person's right to avoid police contact, the court adopted the reasoning of other lower courts which had decided that flight from the police was a manner of exercising one's right to avoid a police encounter. J.A. 19. The court also found that the record here did not contain corroborating facts to justify detaining respondent in light of his flight. The police "were not responding to any call or report of suspicious activity in the area." Furthermore, respondent exhibited "no outward indication of involvement in illicit activity prior to the approach" of the police. Because the record revealed "the absence of circumstances corroborating the conclusion that [respondent] was involved in criminal activity, Officer Nolan's testimony reveals nothing more than a hunch." Consequently, the court ruled that the stop and frisk of respondent was unconstitutional. J.A. 22-23.[2]

In this Court, petitioner argues that unprovoked flight from the police *alone* justifies an investigative stop. In the alternative, petitioner submits that, even if unprovoked flight by itself does not justify a stop, flight in a high-crime area does justify a detention. Pet. Br. 5.

SUMMARY OF ARGUMENT

Freedom of movement is an established right that dates back to the common law era. Under our Constitution, all persons possess an unqualified right to stand or move about on the streets free of arbitrary and discretionary police restraint. More specifically, this Court's Fourth Amendment cases have recognized that, absent reasonable suspicion of crime, a person has an affirmative right to avoid police contact, and the exercise of that right cannot be used to justify an investigative detention. The ruling below simply reaffirms this core Fourth Amendment liberty interest.

The right to avoid police contact does not turn on the manner in which one exercises that privilege. Recognizing that no member of this Court has ever questioned the right to avoid police encounters, petitioner proposes the following distinction: Conduct that merely avoids the police is constitutionally protected; flight from the police, however, is suspicious and justifies an immediate detention. Petitioner's distinction is unsound as a normative matter because there is no "police-approved" method of exercising the right to avoid police contact. Nor will this distinction provide practical aid to police officers and judges who must decide whether a person is merely avoiding the police, or is instead exhibiting behavior that is "innately suspicious."

The effect of petitioner's *per se* rule that flight alone constitutes reasonable suspicion will mean that a person who wants to prevent a police encounter *ab initio* cannot immediately and unequivocally indicate his desire to avoid the police without being detained. Flight is just another method of avoiding the police. Although petitioner suggests that only the "guilty" flee the police there are, regrettably, other reasons why people in certain communities might try to avoid police encounters.

Petitioner's alternative *per se* rule that flight in a high-crime area justifies an immediate detention is no more convincing than its *per se* rule that flight alone is suspicious. This substitute *per se* rule conflicts with the totality of circumstances test that this Court employs for determining whether reasonable suspicion exists in a particular case. Finally, petitioner's alternative *per se* rule ignores this Court's disapproval of police decisions that calculate reasonable suspicion based upon the character of a neighborhood or the company a person keeps.

ARGUMENT

I. ABSENT OBJECTIVE EVIDENCE OF CRIMINALITY, INDIVIDUALS HAVE AN AFFIRMATIVE RIGHT TO AVOID THE POLICE, AND SUCH AVOIDANCE CANNOT BE USED TO JUSTIFY AN INVESTIGATIVE DETENTION

It is well established that individuals enjoy the rights of freedom of movement and personal security while on the streets. William Blackstone described the privilege this way: "This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 William Blackstone, Commentaries on the Laws of England 134 (1783). Last Term, the Court invalidated a Chicago law which barred criminal street gang members from loitering with one another or with other persons in any public place. *Chicago v. Morales*, __ U.S. __, 119 S.Ct. 1849 (1999). A majority of the Court agreed that Chicago's ordinance was constitutionally flawed because it failed to provide police officers minimal guidelines for deciding whether a person was "loitering" under the statute.[3] The impact the Chicago ordinance had on the right of free movement prompted a plurality of the Court to note that:

> [The] "right to remove from one place to another according to inclination" [i]s "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a "part of our heritage," or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.[4]

Similarly, *Kolender v. Lawson*, 461 U.S. 352 (1983), concluded that a criminal statute was unconstitutionally vague when it required persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence upon the request of a police officer during an investigatory detention. The Court found that the law in *Kolender* "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest." *Id*. at 358. Justice O'Connor explained that such a law "implicates consideration of the constitutional right to freedom of movement." *Id*.

This Court's Fourth Amendment jurisprudence also recognizes that pedestrians are guaranteed the right to move about the streets free of police interference. "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968). Chief Justice Warren's majority opinion in *Terry* noted the common law origins of this right:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry, 392 U.S. at 9, quoting *Union Pac.R.Co. v. Botsford*, 141 U.S. 250, 251 (1891).[5]

Prior to *Terry*, police could not seize an individual unless they possessed probable cause to arrest the person.[6] *Terry* created an exception to the traditional probable cause rule. It held that, where an officer reasonably believes that criminal conduct "may be afoot" and that a suspect "may be armed and presently dangerous," an officer may frisk the suspect for weapons. *Terry*, 392 U.S. at 31.[7] Although this expansion of police power -- the so-called *Terry* stop and frisk -- constituted a significant change in Fourth Amendment doctrine, Chief Justice Warren emphasized that the Court was not retreating from the constitutional norm that citizens were free to come and go as they pleased without official restraint or interference, unless objective evidence warranted a police intrusion. *Id*. at 21-22.

Significantly, other members of the *Terry* Court stressed that the scope of the Fourth Amendment's protection for pedestrians was not limited to the concept of freedom from arbitrary restraint. The amendment also protected the right to avoid police contact *ab initio*. Justice Harlan explained that although a police officer (like every other citizen) is free to address questions to persons standing on the street, the destrian is free to disregard the police inquiry and move on. *Id*. at 32-33 (Harlan, J., concurring)("the person addressed [by a police officer] has an equal right to ignore his interrogator and walk away"). Justice White also emphasized that a pedestrian is under no obligation to cooperate with the police. A person approached by the police has the right to avoid a police encounter *and* the right to leave the scene. *Id*. at 34 (White, J., concurring)("Absent

special circumstances, the person approached [by an officer] may not be detained or frisked but may refuse to cooperate and go on his way").

Since *Terry*, this Court has repeatedly recognized, without dissent, that absent reasonable suspicion, the Fourth Amendment grants individuals an affirmative right to avoid police encounters and move on. Moreover, the choice to refuse police contact cannot be used as a bootstrap to justify an investigative stop. *Brown v. Texas*, 443 U.S. 47 (1979), a case not cited by petitioner, epitomizes this core Fourth Amendment norm particularly well.

In *Brown*, police officers physically detained Brown to determine his identity, after Brown refused the officers' request to identify himself. Brown and another man were observed walking in opposite directions from each other in an alley in an area known for high narcotics traffic. An officer testified that he and his partner believed the two men "had been together or were about to meet until the patrol car appeared." *Id*. at 48. The officers stopped Brown because "the situation `looked suspicious and [they] had never seen [Brown] in that area before.'" *Id*. at 49. Brown refused to identify himself and angrily asserted that the police had no right to stop him. *Id*. A unanimous Court held that, because the officers lacked reasonable suspicion that Brown was involved in criminal conduct, detaining him to ascertain his identity violated the Fourth Amendment.

Similarly, in *Florida v. Royer*, 460 U.S. 491 (1983), no member of the Court expressed disagreement with Justice White's conclusion that a person approached by the police has a fundamental right to withhold his cooperation and "go on his way." Justice White explained:

> The person approached . . . need not answer any question 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; and his refusal to listen or answer does not, without more, furnish those grounds.

Id. at 497-98 (citations omitted).[9]

Finally, in *Florida v. Bostick*, 501 U.S. 429 (1991), Justice O'Connor reaffirmed the norm announced in *Brown* and *Royer* that citizens are under no obligation to tolerate police inquiries and retain the right to refuse cooperation with legitimate law enforcement practices. *Bostick* ruled that police questioning of a passenger on a bus does not automatically constitute a seizure under the Fourth Amendment. Although police questioning is permitted without reasonable suspicion, Justice O'Connor was careful to point out that an individual cannot be penalized for refusing to cooperate with the police. "We have 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 (citations omitted).

In sum, *Terry* and its progeny permit investigative detentions of persons where reasonable suspicion of criminal behavior exists. However, the exception created for *Terry* stops was never meant to displace or challenge the core right of all persons to avoid police encounters where objective evidence of criminality is lacking to warrant an intrusion upon one's liberty and personal security. Indeed, since *Terry*, the Court has spoken with one voice and left no doubt that individuals have an affirmative right to avoid police contact and that the exercise of that right, by itself, cannot justify an investigative detention.

A.The Right To Avoid Police Contact Does Not Turn On The Manner In Which One Exercises That Privilege

Recognizing that no member of the Court has questioned an individual's right to avoid police contact, petitioner attempts to draw a distinction between conduct that "simply avoids the police," and a decision to "take flight," which petitioner argues justifies an investigative stop. Pet. Br. 9; *id*. at 31, n.12 (proposed *per se* rule "does not encompass conduct aimed at merely avoiding the police, but rather, a person's unprovoked flight" from the police). Adopting a slightly different tack, the United States, as *amicus curiae*, concedes that the suspicious aspect of respondent's conduct "was not running *per se*." Rather it "was the fact that respondent deviated dramatically from his prior course of conduct in response to the officers' arrival, and for the apparent purpose of avoiding police scrutiny." U.S. Br. 20, n.11.[10]

The distinctions drawn by petitioner and its *amici* cannot be reconciled with the mandates of the Court's cases. The statements coming from the Court could not be clearer: Unless reasonable suspicion exists, the Fourth Amendment provides individuals the affirmative right to avoid police contact. The positive right to avoid police officers articulated by the Court stands in sharp contrast to the Solicitor General's characterization of that right. According to the Solicitor General, *Royer*'s recognization of an individual's right to "go on his way" and its assertion that the exercise of that right cannot justify a detention, 460 U.S. at 498, "are best understood to refer to situations in which a person simply refuses to cease or modify his

behavior in response to police entreaties." U.S. Br. 19. This is a superficial description of the constitutional privilege to avoid the police. The defendant in *Brown v. Texas* did not "simply refuse[] to cease or modify his behavior in response to police entreaties." Rather, Brown discernibly altered his conduct, and tried (unsuccessfully) to avoid police officers who were approaching him.[11]

This Court's cases have never suggested that the right to avoid police contact turns on the manner in which one exercises that privilege. Nor has the Court indicated that the choice to exercise the privilege can be second-guessed by police officers. For example, in *Brown v. Texas*, if Brown had moved more quickly and eluded the officers in the alley, a later detention of Brown after the police caught up with him would have also violated the Fourth Amendment. Or, in *Bostick*, if instead of listening to the officers' questions and agreeing to a consent search of his luggage, Bostick had abruptly left his seat and headed for the restroom, or hurriedly departed the bus, the officers still would have lacked reasonable suspicion for a detention.[12] This is because there is no "police-approved" method of exercising the right to "move on." Nor is there a constitutionally prescribed way to signal that one intends to "decline" all police inquiries and intends to "go on his way." *Royer*, 460 U.S. at 498. Where reasonable suspicion of criminality is lacking, "the balance between the public interest and [the individual's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. at 52.

Moreover, the distinctions drawn by petitioner and its *amici* will not work. Under petitioner's analysis, police officers and judges would be forced to decide where on "a wide spectrum of conduct," Pet. Br. 9, a person's deportment falls to determine whether the person is exercising his or her unequivocal right to avoid the police, or is instead exhibiting behavior that is "innately suspicious." According to petitioner, cases where a person "turns around or walks away to avoid contact with the police" fall in the middle of the spectrum and do not justify *Terry* stops. Pet. Br. 9. By contrast, flight falls on the opposite end of the spectrum yunder petitioner's proposed framework because it is "an innately suspicious reaction to the presence of the police." *Id*.

Petitioner purports to rest this artificial construct on "common sense." In fact, it neither conforms to this Court's cases nor to common police practices. Patrol officers interpret any form of avoidance or concern about the presence of the police as suspicious, including conduct that petitioner concedes cannot constitute reasonable suspicion.[13] Petitioner suggests that the constitutional definition of reasonable suspicion must be constructed from the "point of view of a police officer," Pet. Br. 8, but this approach obviously proves too much: Police officers are trained to be overly suspicious[14], and often consider suspicious conduct that is constitutionally protected.[15]

More importantly, petitioner's *per se* rule would eventually overwhelm the right to avoid police contact. Petitioner insists that "flight" or "running away" from the police is innately suspicious. But what if, instead of "running away" from Officer Nolan's "caravan," respondent immediately jumped on his bicycle and pedaled away, or hurriedly entered a taxi waiting at a taxi-stand and told the driver to leave? Both movements could be considered "flight." Or, what if respondent, after noticing the police, immediately turned around and entered the building located at 4035 West Van Buren? To the typical officer, riding away on a bike, entering a car and driving off, or disappearing inside a building, in response to approaching officers is likely to be seen as the equivalent of "flight" or "running away," and thus, justify a seizure.[16] If these choices warrant a detention, then the right to avoid police has been reduced to a privilege only to "walk away" from the police in an orderly manner. On the other hand, if petitioner's bright-line proposal does not cover these choices, then petitioner's rule provides no illumination for officers and judges who must decide whether certain conduct constitutes "flight" or is merely "avoidance" of the police. If petitioner's rule does not encompass such conduct, then officers, judges and citizens will be left guessing what forms of "flight" are constitutionally protected.

Under any scenario, petitioner's proposal should be rejected. The right to avoid police contact is an affirmative right. Its existence does not turn on the manner in which one exercises that privilege, nor does it require police approval that the decision to shun approaching officers seemed more like "avoidance" than "flight." The personal security guaranteed by the Fourth Amendment should not turn on such standardless judgments that are bound to yield unprincipled results and are too easily subject to abuse by the officer in the field. As Justice Kennedy noted in another context, "[l]iberty comes not from officials by grace but from the Constitution by right." *Maryland v. Wilson*, 519 U.S. 408, 424 (1997)(dissenting opinion). Put another way, a right that is sometimes not a right is no right at all.

B. Flight From The Police Cannot Justify A Detention; Otherwise, A Person's Right To Avoid Police Contact Is Meaningless

Brown v. Texas, *Royer* and *Bostick* recognize that, unless reasonable suspicion exists, all persons retain a fundamental right to refuse cooperation with the police, to avoid police questions, and to terminate police encounters. Petitioner, however, contends that "most citizens, regardless of their personal attitude toward the police, do not react by fleeing at the mere sight" of the police. Pet. Br. 8. In petitioner's view, unprovoked flight is "aberrant behavior" that justifies an immediate detention. *Id*. Petitioner's *per se* rule would make the right to avoid police contact meaningless.

At its core, petitioner's proposal is a repudiation of the right to avoid police contact. One commentator has aptly explained why, if flight alone is grounds for a detention, the right to avoid police contact is illusory for someone who wants to prevent a police encounter from the beginning:

> [I]ndividuals have a right to avoid answering police questions where detention is not justified. Implicit in that right is the right to avoid being questioned in the first place. To require a person to wait for a police officer to approach before turning away would suspend the individual's right to go on his way from the time he became aware of the officer's approach [or presence] until some magic moment when the right reappeared.[17]

Several lower courts, including the court below, have ruled that allowing officers to forcibly detain a person because of flight "belies the proposition that citizens are free to ignore police." *Id*. at 223.[18] By holding that flight alone cannot justify a detention, the ruling below reaffirms what Justices Harlan and White stated explicitly in *Terry*, and what is implicit in *Brown v. Texas*, *Royer* and *Bostick*: Because there is no obligation to respond to police inquiries, it follows *a fortiori* that the otherwise nonsuspicious person who immediately and unequivocally indicates his desire to avoid the police cannot be detained.[19]

Petitioner seeks to avoid this logic by asserting that unprovoked flight from the police is "aberrant behavior" and is highly suspicious. Pet. Br. 8. This legal conclusion regarding the suspicious nature of flight is not based on any empirical data.[20] Instead, the foundation for petitioner's conclusion rests on the perspective of the police officer. "[F]rom the objective point of view of *any* reasonable police officer, applying a common sense conclusion about human behavior, [flight is] an abnormal reaction [that] is highly suspicious requiring an investigation." *Id*. (emphasis in original).

As an initial matter, petitioner's deduction regarding flight is curious. Because an officer's experience tells her that "most citizens . . . do not react by fleeing," *id*., petitioner asserts that flight is "aberrant behavior" and thus suspicious. Using this logic, an officer might also find that a citizen's refusal to permit a consent search is suspicious. After all, the experience of many officers is that most citizens allow them to search their cars, luggage and other possessions.[21] Under petitioner's reasoning, the unusual person who refuses to allow a consent search, or who refuses to cooperate with a police request,[22] is exhibiting "aberrant behavior" and thus provides grounds for an investigative detention. This Court has never endorsed such logic.[23]

Furthermore, petitioner's categorical judgment regarding flight fails to consider other, unfortunately documented reasons an individual might have for avoiding the police.[24] For example, petitioner's assertion that individuals who flee from the police are "innately suspicious" persons, Pet. Br. 9, wrongly accuses the innocent young men in Dayton, Ohio who ran from an anti-drug police unit because of fear.[25] Petitioner's conclusions about flight also mistakenly categorizes the person who flees at the sight of police because he does not wish to drop his pants -- as many minority men in Boston were forced to do -- simply because the police suspect he belongs to a gang or is selling drugs. After investigating charges that the Boston Police Department had repeatedly searched persons without cause, the Massachusetts Attorney General concluded:

> We conclude that Boston police officers engaged in improper, and unconstitutional, conduct in the 1989-90 period with respect to stops and searches of minority individuals in the Roxbury, Dorchester, and Mattapan communities . . . . We do not credit all of the allegations of all of the complainants. However, these allegations are widespread, common in nature, in some cases supported by witnesses, and consistent with other information we have received. Although we cannot say with precision how widespread this illegal conduct was, we believe that it was sufficiently common to justify changes in Department practices.

Implicit in petitioner's *per se* rule is the notion that only the guilty would flee from the police. But concern with approaching officers is not "solely the lot of the guilty." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 465 (1990) (Stevens, J.,

dissenting). Indeed, at the time of respondent's arrest, residents of the Austin area on the West Side of Chicago were complaining about "crooked officers planting evidence on suspects, stealing money from drug dealers and behaving like gang members as they patrolled the streets."[28] Distrust and fear of the police were conspicuous:

> People hanging out on the streets and front stoops complain that police still harass, beat and sometimes arrest them for simply being in areas that are hot spots for drugs. "They are still doing the same stuff; if you don't got nothing, they still try to put something on you," complained Jimmy Ross, an ex-drug offender . . . . "They get mad because they don't catch you with nothing."[29]

Four Chicago police officers from the Austin District were eventually convicted in federal court on police corruption charges, and three other officers pleaded guilty to corruption charges.[30] One of the convicted officers, Edward "PacMan" Jackson, had a reputation among police and neighborhood residents for planting drugs on persons found on the street.[31]

The point of this recitation is not that most police engage in such behavior. It is that these incidents of police misbehavior have been widely publicized in the affected communities, which more often than not are high crime areas, both through the media and by word-of-mouth. In light of these incidents and the perceptions they engender, the court below was correct to hold that respondent's flight by itself did not constitute reasonable suspicion.

Petitioner's claim that flight alone justifies an investigative stop cannot be reconciled with the right to avoid police contact. Like entering a waiting taxi and telling the driver to leave the scene, flight is simply another method of avoiding police contact. If, as this Court has already stated, criminality cannot be inferred from a person's submissiveness or failure to argue with an officer,[32] it certainly should not be inferred by one's willingness to exercise a constitutional right in the presence of the police.

C. A Ruling That Flight Alone Does Not Justify A Detention Still Permits Police Observation Or An "Investigatory Pursuit" Of One Who Flees

Petitioner contends that if flight does not constitute reasonable suspicion, then "police officers would be left no other alternative but to shrug their shoulders and stand by helplessly while crime occurs and a potential criminal escapes." Pet. Br. 36.[33] Of course, the ruling below will not require any officer to "stand by helplessly while crime occurs and a potential criminal escapes." An officer who observes a crime can make an immediate arrest. *See United States v. Watson*, 423 U.S. 411 (1976). Furthermore, this Court's Fourth Amendment rulings provide officers ample means to observe and question individuals who flee.

United States v. Knotts, 460 U.S. 276, 281 (1983), made clear that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts* held that police monitoring of an electronic beeper that was placed in a container of chemicals did not implicate the Fourth Amendment when it revealed no information that could not have been obtained through visual surveillance. *Knotts*' reasoning obviously extends to pedestrians. Hence, the Fourth Amendment was not violated when Officer Nolan observed respondent's movements on the street. *See id*. at 282.

More recently, in *California v. Hodari D.*, 499 U.S. 621 (1991), and *Michigan v. Chesternut*, 486 U.S. 567 (1988), the Court ruled that police pursuits of individuals do not trigger Fourth Amendment safeguards unless certain circumstances occur. In *Chesternut*, a unanimous Court held that a police vehicle's "investigatory pursuit" of a man who ran from the police -- "a brief acceleration to catch up with [Chesternut], followed by a short drive alongside him" -- was not a seizure under the Fourth Amendment and, thus, did not require reasonable suspicion. *Id*. at 576. *Hodari D*. held that a police show of authority conveyed to a person fleeing from the police did not effectuate a seizure where the person did not yield. Because no seizure occurred in either case, officers could seize contraband abandoned by defendants who ran from the police, despite the absence of reasonable suspicion.

The rulings in *Hodari D.*, *Chesternut* and *Knotts* refute the claim that "the effect of flight is to foreclose the possibility that close observation of the individual will reveal additional signs of unlawful behavior." U.S. Br. 17. Police do not need reasonable suspicion to pursue or observe a person who flees when they approach. If the person abandons contraband while running, not only may the police seize the contraband, the evidence itself will provide, at a minimum, reasonable suspicion

for a detention, or probable cause for arrest. If the person stops fleeing, officers may question him about his flight, *see Delgado*, 466 U.S. at 215-17; *Royer*, 460 U.S. at 497, provided their actions indicate to the reasonable person that he is "free to disregard the police presence and go about his business." *Chesternut*, 486 U.S. at 576.

II. FLIGHT IN A HIGH-CRIME AREA DOES NOT JUSTIFY A *PER SE* RULE THAT REASONABLE SUSPICION EXISTS

As an alternative argument, petitioner contends that, even if flight alone does not justify a stop, flight in a high-crime area justifies a detention. Pet. Br. 36. In effect, petitioner substitutes one *per se* rule for another *per se* rule. The court below, however, refused to adopt any *per se* rule to determine whether respondent's flight in a "high-crime" area constitutes reasonable suspicion. Following this Court's totality of the circumstances test for determining whether reasonable suspicion exists, the court below found respondent's seizure illegal because the police were unable to show specific, individualized facts that respondent was engaged in criminal activity. That narrow ruling is consistent with this Court's precedents.

Flight from the police in a "high-crime" neighborhood does not justify an automatic investigative detention. Petitioner correctly notes that this Court's Fourth Amendment cases have stated that the character of a geographic area may be considered when deciding whether probable cause or reasonable suspicion exists in a particular case. Pet. Br. 37-39. But petitioner is not proposing a rule where the character of a neighborhood is a relevant factor in determining reasonable suspicion. Rather, under petitioner's rule, the character of the area becomes the decisive factor in the reasonable suspicion inquiry. Petitioner's alternative *per se* rule conflicts with the established pattern of this Court's cases, which is to consider "the totality of the circumstances -- the whole picture," *United States v. Cortez*, 449 U.S. 411, 417 (1981), for determining whether reasonable suspicion exists in a particular case. *See also United States v. Sokolow*, 490 U.S. 1, 8 (1989).

Moreover, petitioner's alternative *per se* rule ignores this Court's disapproval of police decisions that calculate reasonable suspicion by relying upon the character of a neighborhood or the company a person keeps. *Sibron v. New York*, 392 U.S. 40, is especially instructive. There, an officer testified that he had observed Sibron continually for eight hours and saw Sibron converse with six or eight known narcotics addicts. Later, the officer confronted Sibron outside a restaurant, put his hands in Sibron's pocket, and discovered narcotics inside. The officer's investigative search was ruled illegal. The Court explained: "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." *Id*. at 62. If it is unreasonable for the police to infer that a person who associates and speaks with narcotic addicts is engaged in criminal behavior, it is equally unreasonable to infer that a person's mere presence in a "high-crime" area is a decisive factor when considering whether reasonable suspicion exists.

Similarly, in *Ybarra v. Illinois*, 444 U.S. 85 (1979), officers held a warrant to search a tavern and its bartender for narcotics. Ybarra was a patron of the tavern when the warrant was executed. All of the patrons were frisked as a safety measure, and narcotics were found on Ybarra. This Court invalidated the search of Ybarra. Justice Stewart explained 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 also rejected the claim that the frisk of Ybarra was proper under *Terry* due to his location on "`compact' premises subject to a search warrant." *Id*. at 94. Relying on the "governing principle" of *United States v. Di Re*, 332 U.S. 581, 586 (1948), 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. *Ybarra*, 444 U.S. at 94-96.[34]

This Court's cases teach that respondent's presence in a "high-crime" area cannot be the decisive factor for detaining him after he ran from the police. "Guilt-by-association" or "guilt-by-vicinity" has never been a legitimate method for proving reasonable suspicion. Instead, an officer must be able "to point to specific and articulable facts" that suggest criminality.[35] The ruling below reaffirms this principle.

CONCLUSION

For the reasons stated above, the judgment of the Illinois Supreme Court should be affirmed.

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1 Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part and no person, other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

2 The result below is quite narrow: The holding of the Illinois Supreme Court does not address whether flight, coupled with other furtive actions, constituted reasonable suspicion. Nor does it directly address whether flight can be a factor in deciding whether there are sufficient grounds for an investigative stop.

3 See Morales, 119 S.Ct. at 186162.

4 Id. at 185758 (plurality opinion)(citations and footnotes omitted); cf. id. at 1865 (Kennedy, J., concurring in part and concurring in the judgment)(noting that, as interpreted by the state court, "the Chicago ordinance would reach a broad range of innocent conduct").

5 Petitioner argues that "the Framers would have accepted the notion" that flight from officials "meets the lower standard of reasonable suspicion" to justify an investigative stop. Pet. Br. 21. Of course, when the Fourth Amendment was adopted, constables and sheriffs held no general power to detain suspicious persons. Constables and sheriffs could arrest or detain

individuals only where positive law authorized the intrusion. See, e.g., Entick v. Carrington, 95 Eng.Rep. 807, 817 (K.B. 1765)(rejecting a messenger's claim that he was obliged by his office to seize a man's books and papers: "[I]f this was law it would be found in our books, but no such law has ever existed in this country . . . if he will tread upon his neighbor's ground, he must justify it by law"); Blackstone, supra (explaining that the power of locomotion "cannot ever be abridged at the mere discretion of magistrate, without the explicit permission of the laws"). Petitioner has identified no positive law extant in 1791 authorizing the seizure of an individual who ran from approaching constables or other officers.

Justice Scalia?s reliance on the "night walker" statutes as historic precedent for the power to detain suspicious persons does not aid the state here. First, Justice Scalia?s concurring opinion in Minnesota v. Dickerson, 508 U.S. 366, 380 (1993), was not joined by any other member of the Court. Second, Britain?s "night walker" statutes had largely fallen "into disuse" long before our Constitution was adopted, see Sir James Fitzgerald Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 189 n.2 (1883); in this country, "[t]he nightwatch was only a stopgap measure," at best. See Douglas Greenberg, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK 16911776, at 158 (1974). Third, even the "night walker" statutes would not have justified the daylight detention of respondent in this case.

6 See Dunaway v. New York, 442 U.S. 200, 20709 (1979); Florida v. Royer, 460 U.S. 491, 498 (1983)(plurality opinion).

7 The term "reasonable suspicion" was not used by the Terry majority. "[N]owhere in Chief Justice Warren's opinion will you find the words `reasonable suspicion' that have come to exemplify the Terry standard. Instead, the opinion carefully employs and adapts the language of Brinegar v. United States, [338 U.S. 160 (1949)], the classical statement of the probable cause standard, while recognizing that officers may conduct protective searches when possessed of a lesser quantum of information." Earl C. Dudley, Jr., "Terry v. Ohio, The Warren Court, and The Fourth Amendment: A Law Clerk's Perspective," 72 St. John's L.Rev. 891, 896 (1998)(footnotes omitted); 4 Wayne F. LaFave, SEARCH AND SEIZURE ? 9.5(a) at 251 (3d ed. 1996)(same). It was in later cases that the Court began using the term "reasonable suspicion" to describe the quantum of evidence needed to justify an investigative detention of a person. See United States v. BrignoniPonce, 422 U.S. 873, 881-84 (1975); Brown v. Texas, 443 U.S. 47, 52-53 (1979).

8 Cf. Brinegar v. United States, 338 U.S. 160, 177 (1949)("[T]he citizen who has given no good cause for believing he is engaged in [criminal] activity is entitled to proceed on his way without interference")(footnote omitted); Carroll v. United States, 267 U.S. 132, 154 (1925)("[T]hose lawfully within the country [are] entitled to use the public highways [and] have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise").

9 See also United States v. Mendenhall, 446 U.S. 544, 55354 (1980) (opinion of Stewart, J., joined by Rehnquist, J.) (recognizing that no seizure occurs within the meaning of the Fourth Amendment "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away"); cf. INS v. Delgado, 466 U.S. 210, 21617 (1984) (opinion of Rehnquist, J., for the majority)(While concluding that police questioning, by itself, does not implicate the Fourth Amendment, "if the person refuses to answer and the police take additional steps -- such as [detaining him] -- to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure").

10 See also Brief of Ohio, et al. as Amici Curiae at 4 (arguing that "the freedom to move away from an inquiring officer is not directly implicated here. What this record presents is flight upon learning police are present in [a high crime] vicinity").

11 See 443 U.S. at 48 ("Although [Brown and another man] were a few feet apart when they first were seen, Officer Venegas later testified that both officers believed the two had been together or were about to meet until the patrol car appeared").

12 Cf. Brief for United States as Amicus Curiae Supporting Petitioner at 20, Florida v. Bostick, No. 891717 ("As an initial matter, the fact that [Bostick] could have moved from his seat showed that he was `free to leave.' He could have told the officers that he did not want to talk to them and walked down the aisle or into the bathroom on the bus if he wished to distance himself from the officers").

13 See e.g., Michael K. Brown, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 175 (1988)("Flight from an approaching patrol car implies guilt; an innocent person, patrolmen reason, would have nothing to fear from the police and would not walk away . . . ."); Jerome H. Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 45 (2d ed. 1975)(quoting an article by a police expert discussing which

persons to select for field interrogation: officers are told to detain, inter alia, persons "who attempt to avoid or evade the officer," persons who exhibit "[e]xaggerated unconcern over contact with the officer," and persons "visibly `rattled' when near the policeman"); Jonathan Rubinstein, CITY POLICE 236 (1973)("Anyone who indicates an intention of flight at the appearance of a patrolman immediately comes under suspicion. Obviously, when a policeman turns a corner and suddenly someone begins running, he suspects them of fleeing from his presence. But even if he does not connect their flight with his appearance, he takes it as evidence that something is amiss in the area. Young boys are often stopped simply because the patrolman sees them running down the street, and often that is all they are doing"); Lawrence P. Tiffany, et al., DETECTION OF CRIME 32 (1967)("A person who manifests concern for the presence of the police, who repeatedly glances at the officer, who changes his direction in an apparent attempt to avoid confronting the officer, or who flees at the sight of an officer will commonly be detained and questioned").

14 See Skolnick, supra 45-48 (noting an officer "develops a perceptual shorthand to identify certain kinds of people as symbolic assailants," and that an officer's "conception of order emphasize[s] regularity and predictability").

15 See e.g., Reid v. Georgia, 448 U.S. 438, 441 (1980)(per curiam)(officer's belief that defendant and his companion were attempting to conceal the fact that they were traveling together is insufficient to justify seizure)(citation omitted); Brown v. Texas, 443 U.S. at 49 (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)(although officer testified he approached and searched Sibron because he saw Sibron in the company of known narcotics addicts over an eighthour period, "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").

16 See supra note 13.

17 Rachel A. Van Cleave, "Michigan v. Chesternut and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?," 40 Hastings L.J. 203, 216 (1988).

18 See, e.g., State v. Tucker, 642 A.2d 401, 408 (N.J.Sup.Ct. 1994); People v. Holmes, 619 N.E.2d 396, 397 (N.Y.Ct.App. 1993); State v. Hicks, 488 N.W.2d 359, 363 (Neb.Sup.Ct. 1992); People v. Shabaz, 378 N.W.2d 451, 460 (Mich.Sup.Ct. 1985); People v. Thomas, 660 P.2d 1272, 1275 (Colo.Sup.Ct. 1983)(en banc); Watkins v. State, 420 A.2d 270, 274 (Md.Ct.App. 1980).

19 It is undisputed, that prior to respondent's flight, there is no evidence that respondent had violated any law. J.A. 4.

20 As the Solicitor General acknowledges, there are "no empirical studies regarding the frequency with which persons detained on the basis of flight are found to be involved in criminal activity." U.S. Br. 10, n.4.

21 See, e.g., Gary Webb, "Driving While Black," Esquire 118, 125 (April 1999)(noting in an investigation of "Operation Pipeline," a federal program that trains police officers to identify drug couriers, that "nine out of ten people" agree to consent searches of their automobiles when asked by officers).

22 Cf. Delgado, 466 U.S. at 216 ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response").

23 In Bostick, the Solicitor General stated that no suspicious inferences may be drawn from a person's refusal to cooperate with police officers:

> Moreover, it is clear that law enforcement officers may draw no inference justifying a search or seizure from a refusal to cooperate. That is, officers lacking legal justification to detain a person may not bootstrap noncompliance into justification for a detention, because in that event a citizen would in effect have no way of declining to participate in a "consensual" encounter with the police.

Brief of the United States as Amicus Curiae Supporting Petitioner at 25, Florida v. Bostick, No. 89-1717. See also 3 Wayne F. LaFave, SEARCH AND SEIZURE ?8.1 at 597, n.9 (refusal to consent to a search, by itself, cannot constitute reasonable suspicion justifying a Terry stop)(citing cases); Rachel Karen Laser, "Unreasonable Suspicion: Relying on Refusals to Support Terry Stops," 62 U.Chic.L.Rev. 1161, 1178 (1995) ("Th[e] `right' to refuse [a consent search] is undermined, however, if the exercise of that right can be used against a person").

24 See, e.g., Editorial, "For Some Running Away Not Suspicious But Rational: Fleeing From A Police Officer Should Not Be The Sole Basis For A Search," Portland Press Herald (Maine), May 11, 1999 (noting that recent incidents of racial profiling by the police "show that some officers will react differently to people depending on their skin color or age. For someone who has had that experience, running away at the sight of police wouldn't be suspicious behavior, it would be sensible"); Richard W. Stevenson, "Los Angeles Chief Taunted at Hearing: U.S. Plans Wide Inquiry on Brutality," N.Y. Times, Mar. 15, 1991, at A16 (quoting California Assemblyman Curtis Tucker saying after the Rodney King beating: "When black people in Los Angeles see a police car approaching, `They don't know whether justice will me meted out or whether judge, jury and executioner is pulling up behind them'").

Recently, the New Jersey Attorney General acknowledged that "minority motorists have been treated differently [by New Jersey State Troopers] than nonminority motorists during the course of traffic stops on the New Jersey Turnpike." According to the Attorney General, "the problem of disparate treatment is real - not imagined." Interim Report of the [New Jersey] State Police Review Team Regarding Allegations of Racial Profiling 8 (1999). The Attorney General noted that such treatment "leaves persons of color with a sense of powerlessness, hostility, and anger." Id. at 41.

25 The Wall Street Journal described the fear and anger in the black community of Dayton caused by the tactics of an antidrug police task force. See Alex Kotlowitz, "Drug War's Emphasis On Law Enforcement Takes a Toll on Police," Wall Street Journal, Jan. 11, 1991, at A1 ("Black leaders complained that innocent people were picked up in the drug sweeps . . . . Some teenagers were so scared of the task force they ran even if they weren't selling drugs"). The Journal reported that one officer "once whacked a fleeing suspect across the forehead with an aluminum flashlight. Another time he shoved a drug suspect against the van, shattering a window. `If [a suspect] ran and got caught, he took an asswhipping'").

26 See Report of the Attorney General's Civil Rights Division On Boston Police Department Practices 36-46 (1990)(Mass. Report)(detailing allegations of illegal searches); Commonwealth v. Phillips and Woody, No. 080275-6, Memorandum and Order (Suffolk Sup.Ct. Sept 17, 1989)(ruling that a police directive that all known gang members and their associates would be searched on sight was "a proclamation of martial law in Roxbury for a narrow class of people, young blacks, suspected of membership in a gang or perceived by the police to be in the company of someone thought to be a member"); Peter S. Canellos, "Youths Decry Search Tactics," Boston Globe, Jan. 14, 1990, at 1 (describing how black youths were stopped, frisked, and strip searched by police without reasonable suspicion of crime).

27 Mass. Report at 60.

28 Don Terry, "Worst Fears Are Realized With Officers' Arrest," N.Y. Times, Dec. 30, 1996.

29 Jerry Thomas, "Trust Builds Slowly In Austin; Cops Yet To Repair Scandal's Damage," Chicago Tribune, Dec. 27, 1997.

30See Matt O'Connor, "4 Austin Officers Convicted, Face Stiff Prison Sentences," Chicago Tribune, May 22, 1998.

31 See, e.g., O'Connor, supra ("According to prosecutors, Jackson, 27, was a renegade, out-of-control officer who robbed drug dealers, planted dope on others and did the bidding of gang bosses"); Andrew Martin & Bob Secter, et al., "Lines Blur For Some Cops On Streets," Chicago Tribune, Dec. 22, 1996 ("[Officer] Jackson, police sources said, gained his nickname by allegedly planting packs of cocaine on Austin residents to frame them and extort money. `If you didn't have a pack on you when he came, you'd have a pack on you when he left,' explained one source"); Terry, supra note 28 ("The investigation that brought about the officers' arrest was begun after months of complaints from the community. Officer Jackson, [one neighborhood activist] said, was known as PacMan, because people said he planted packs of drugs on suspects").

32See United States v. Di Re, 332 U.S. 581, 594-95 (1948)(Government argues that officers "could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station . . . . Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman").

33 See also U.S. Br. 17 ("An immediate seizure is particularly appropriate in cases, like the present one, in which officers have no practical alternative means of further investigating the suspicious individual").

34 See also Brown v. Texas, 443 U.S. at 52 ("The fact that [Brown] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [Brown] himself was engaged in criminal conduct").

35 Apart from the lack of specific facts to justify a stop of respondent, there are no individualized facts that support frisking respondent. Officer Nolan testified that respondent was stopped in an area of "high narcotics traffic," and that in his experience weapons were in the vicinity. J.A. 7, 9-10. An officer's "common knowledge" that weapons may be in the area, or

belief that persons who traffic in illegal narcotics carry weapons, do not support a frisk. To justify a frisk, an officer must have an individualized suspicion "directed at the persons to be frisked." Ybarra, 444 U.S. at 94; see also Terry, 392 U.S. at 21, n.18 ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence"). Cf. Richards v. Wisconsin, 520 U.S. 385, 393 (1997)(Rejecting a blanket rule permitting a noknock entry whenever police execute a felonydrug search warrant. "The fact that felony drug investigations may frequently present circumstances warranting a no-knock entry" does not eliminate requirement that a judge find individualized facts indicating a reasonable suspicion that knocking and announcing police presence, under the particular circumstances, would be dangerous or futile, or allow the destruction of evidence); Maryland v. Buie, 494 U.S. 325 (1990)(rejecting state's per se rule that a protective sweep is valid whenever police arrest violent felon in a home; protective sweep is permissible only when there is reasonable suspicion based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene).