No. 98-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM WARDLOW, aka SAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a person's unprovoked flight from a clearly identifiable police officer, who is patrolling a high crime area, is sufficiently suspicious to justify a temporary investigatory stop pursuant to *Terry v. Ohio*.

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The opinion of the Illinois Appellate Court, First District, which suppressed the evidence and reversed Respondent's conviction, was entered on March 18, 1997 and is reported at 287 Ill.App.3d 367, 678 N.E.2d 65.

The order of the circuit court denying Respondent's motion to suppress is unreported.

STATEMENT OF JURISDICTION

The order and judgment of the Illinois Supreme Court was entered on September 24, 1998. No Petition for Rehearing was filed. The Petition for a Writ of Certiorari was submitted on December 22, 1998 and was granted by this Court on May 3, 1999.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides that:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent, William Wardlow, was charged with two counts of Unlawful Use of Weapon by a Felon and two counts of Unlawful Use of Weapon under Indictment Number 95-CR-26952. (CLR. C9-C14) Respondent filed a pretrial Motion to Suppress Physical Evidence and a hearing was held on this motion on October 25, 1995. (J.A. 2, CLR. C22)

The only witness called to testify at the hearing was a nine-year veteran Chicago police officer, Timothy Nolan. (J.A. 3, 10) Officer Nolan testified that he was a member of the Chicago Police Department's Special Operations Section. (J.A. 4) On September 9, 1995, he was specifically assigned to the 11th Police District. (J.A. 4)

Officer Nolan testified that one of the locations inside the 11th District that has "high narcotics traffic" is in the vicinity of 4035 West Van Buren. (J.A. 7-8) Officer Nolan stated that his specific assignment on September 9, 1995 was to investigate narcotics sales in this area of the 11th District. (J.A. 8) He also stated that, in his experience, it was common to find weapons in the vicinity where narcotics are sold. (J.A. 11)

Officer Nolan and seven other officers converged on this area in four separate cars. (J.A. 8) As these four police cars were driving east on Van Buren Street, Officer Nolan and his partner, Officer Harvey, were in the last car. (J.A. 4, 8) He could not recall if their police car was marked or unmarked. (J.A. 4) However, on that day Officer Nolan was adorned in his full police uniform which included his badge, name tag and a Chicago Police Department patch on his arm. (J.A. 9) Officer Nolan explained that the purpose for having four cars converge on the same location at the same time is because normally there is an enormous amount of people in such areas, some of whom are there as customers while others serve as lookouts. (J.A. 8)

As the officers were cruising down Van Buren Street, Officer Nolan saw Respondent standing near the front of 4035 West Van Buren Street. (J.A. 7) Respondent looked at the officers and took off running. (J.A. 5,9) Officer Nolan could see that Respondent was carrying a white opaque bag under his arm as he was running. (J.A. 7,9)

Officer Nolan drove his police car southbound toward Congress Street and observed Respondent as he was running down a gangway. (J.A. 6,9) As he kept driving, Officer Nolan then observed Respondent running through an alley. (J.A. 6) Officer Nolan and his partner were eventually able to catch up to and corner Respondent in the vicinity of 4036 West Congress Street because "[h]e ran right towards us." (J.A. 6,9)

Still dressed in uniform, with his badge, patch and name tag visible, Officer Nolan exited his vehicle and stopped Respondent for the purpose of conducting a field interview. (J.A. 6,9,10) Without announcing his office or asking Respondent any questions, Officer Nolan conducted a "protective pat-down" search "for [his] own safety." (J.A. 6) He did this by squeezing the outside of the white opaque plastic bag that Respondent was holding under his arm. (J.A. 7,10) The object that Officer Nolan felt inside the bag was hard, heavy and similar in shape to a revolver. (J.A. 10) Officer Nolan then looked inside the bag and found a Colt .38 caliber handgun loaded with five live

bullets. (J.A. 11) It was at that time that the officer placed Respondent under arrest. (J.A. 7)[1]

The parties presented their arguments to the trial court judge on October 26th and December 6th of 1995. (R. A14-A18, B5-B12) After hearing the respective arguments, the trial judge denied Respondent's suppression motion. (J.A. 14) In denying Respondent's motion, the trial judge found it common knowledge that police officers know of the areas in which drugs are being sold, and do have knowledge of the general areas where contraband, including weapons, are being carried. (J.A. 14) The judge noted that police officers have a right to drive up to these areas. The judge also observed that anybody can identify a police car, be it marked or unmarked. (J.A. 14) Under all of the attendant circumstances, including Respondent's awareness of the circumstances that brought about the officers' presence in that area and his flight upon looking in their direction, the trial judge concluded that the officers had a right to stop and question Respondent, and in doing so, they had a right to protect themselves by conducting a pat-down search. (J.A. 14) Finally, the judge noted that once a person flees, after having looked in the direction of a police officer, "there's reasons to think there's a problem [; the officers] have a right to make inquiry." (J.A. 15)

Following a stipulated bench trial, Respondent was found guilty of Unlawful Use of Weapon by a Felon and sentenced to two years imprisonment. (R. B19, B20)

[1] The transcript of Officer Nolan's testimony does not indicate the precise time of Respondent's arrest. However, Officer Nolan's Arrest Report, as well as the prosecutor's closing argument, indicate that Respondent was arrested at 12:15 p.m. (R.B5,CLR. C4)

SUMMARY OF ARGUMENT

In affirming the Illinois Appellate Court's suppression order, the Illinois Supreme Court held that Respondent's unprovoked flight from a clearly identifiable police officer, alone or in combination with the fact that his flight occurred in a high crime area, could never be sufficient for a temporary investigatory stop. (J.A.22,25) The Illinois Supreme Court required that flight, even in a high crime area, be corroborated by additional facts or circumstances which indicate that Respondent was involved in criminal activity before a stop could be made. (J.A.27)

Petitioner contends that a person's unprovoked flight at the mere sight of a police officer is such innately and objectively suspicious behavior that it alone justifies a temporary investigative stop. Further, even if unprovoked flight could never be alone sufficient justification for the stop, it undoubtedly would be if this flight occurred in a high crime area.

In *Terry v. Ohio*, 392 U.S. 1 (1968) this Court created a limited exception to the Fourth Amendment's probable cause requirement for seizures by providing law enforcement officials with the intermediate response of briefly stopping a suspicious individual to maintain the *status quo*, while ascertaining his identity and obtaining any additional information to verify or dispel their suspicions. The propriety of these temporary seizures is governed by the Fourth Amendment's "reasonableness" requirement.

This Court has stated that in determining the propriety of a seizure, the first inquiry is whether the law enforcement official's activity would have been regarded as a lawful seizure under the common law when our founding fathers framed the Fourth Amendment. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). In the present case, even though the intermediate response permitted in *Terry* did not exist at the time the Framers wrote the Fourth

Amendment, there can be no serious dispute that, by examining certain historical writings and early opinions from this Court, the inherent suspicion attached to a person's flight not only existed in the common law at the time the Fourth Amendment was written, but could be traced back to biblical times ("The wicked flee when no man pursueth, but the innocent are as bold as a lion." Proverbs 28:1). Indeed, the common law would have regarded unprovoked flight as culpable conduct. Accordingly, the Framers would have wholeheartedly embraced the principle that a person's unprovoked flight from the authorities, standing alone, would have provided sufficient reasonable suspicion for a temporary investigatory stop.

Nevertheless, where it cannot be determined if the Framers would have considered flight to be alone sufficient for a *Terry* stop, this Court has stated that the reasonableness of the officer's action should be determined by balancing the degree to which it is needed, for the advancement of legitimate governmental interests, against the degree of this intrusion upon a person's privacy. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995). As to the governmental interest, a person's unprovoked flight at the mere sight of a policeman undeniably demonstrates and exposes that person's consciousness of guilt and is a sure signal that criminal activity may be afoot. Accordingly, in the interest of crime detection and prevention, an officer should be entitled to briefly stop that person and make inquiry. Further, a person's unprovoked flight can precipitate a street pursuit which will place the officers, the suspect and the general public at risk. Thus, such flight should be discouraged.

On the other hand, a *Terry* stop is a minimal intrusion upon a suspect's privacy interest because it typically occurs in a public place as opposed to the home. Further, the stop is typically brief and merely consists of the officer asking questions to confirm or dispel his suspicions. Accordingly, on balance, the Government's interest in fostering good police work and facilitating the prevention and detection of crime outweighs a person's privacy interest.

Finally, even if it is determined that unprovoked flight can never alone justify a *Terry* stop, the fact that the flight occurs in a high crime location provides a sufficient amalgam of facts to support the temporary investigative stop. This Court has long observed that location is a highly relevant factor in determining the propriety of a seizure. This observation has been echoed by several lower courts as well as commentators. The term "high crime area" is not arbitrary or ephemeral because it can be quantitatively verified. Accordingly, when unprovoked flight occurs in a location plagued by high crime, then these two factors should be sufficient to justify a *Terry* stop.

ARGUMENT

A PERSON'S UNPROVOKED FLIGHT FROM A CLEARLY IDENTIFIABLE POLICE OFFICER, WHO IS PATROLLING A HIGH CRIME AREA, IS SUFFICIENTLY SUSPICIOUS TO JUSTIFY A TEMPORARY INVESTIGATORY STOP PURSUANT TO *TERRY v. OHIO*.

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.

One of the crucial questions presented to this Court is whether a person's unprovoked flight upon seeing a clearly identifiable police officer, standing alone, justifies an investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). As evidenced by *Terry* and other Fourth Amendment authority, the legality of a seizure must be scruti-

nized from the point of view of a reasonable police officer.[2] Petitioner contends that, when viewed from the perspective of a reasonable police officer, an individual's unprovoked flight at the sight of the police is not only unusual, but innately and objectively suspicious behavior that justifies a temporary investigatory stop.

However, in order to effectively conduct an analysis that stems from the point of view of a police officer, it is important to attain a firm understanding of that unique perspective. During a routine patrol, a uniformed police officer will encounter countless citizens on a daily basis. Certainly, an officer who works the day shift in an urban community, like Chicago, passes by hundreds of citizens. In most instances, an officer's encounter with a citizen is uneventful. A citizen's reaction to a uniformed police officer typically constitutes a glance. Those citizens, who feel reassured by the presence of the police in their community, may even greet an officer. Others, who are distrustful, may avoid eye contact or even sneer at the sight of an officer. However, most citizens, regardless of their personal attitude toward the police, do not react by fleeing at the mere sight of a clearly identifiable police officer. A person's unprovoked flight from a police officer is such an extreme reaction that it unquestionably falls outside the boundaries of normal human conduct. Moreover, such a reaction constitutes aberrant behavior whether it takes place in an urban or rural setting. Thus, from the objective point of view of *any* reasonable police officer, applying a common sense conclusion about human behavior, such an abnormal reaction is highly suspicious requiring an investigation.

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[2] *See Terry*, 392 U.S. at 21-22; *United States v. Cortez*, 449 U.S. 411, 418 (1981); *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985); *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989).

The issue presented to this Court does not address an attempt to simply avoid the police, but rather an individual's decision to take flight upon the mere sight of a clearly identifiable police officer. The avoidance of the police is a general factual category that includes a wide spectrum of conduct.[3] A person who avoids eye contact with the police falls at one end of the spectrum. Of course, such conduct alone cannot give rise to an inherent suspicion justifying a temporary investigatory stop. In the middle of the spectrum lie those instances where a person turns around or walks away to avoid contact with the police. Again, such acts of avoidance would certainly require support from other suspicious factors in order to justify a temporary investigatory stop. However, running away from a clearly identifiable police officer belongs on the opposite end of the spectrum and constitutes an innately suspicious reaction to the presence of police.[4]

Indeed, flight is defined as: "the act of fleeing or escaping from danger," *Funk & Wagnalls Standard Desk Dictionary*, 243 (1989); "the act or instance of running away; an escape," *The American Heritage College Dictionary*, 3rd Ed. 520 (1993); "an act or instance of running away," *Webster's Ninth New Collegiate Dictionary*, 473 (1988); "to flee; to disappear quickly," *Chambers Concise Dictionary*, 395 (1992). "Flee" means "to pass away quickly and suddenly; to disappear, vanish." *The Oxford English Dictionary*, 2d Ed. 1037 (1989).

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[3] *See* W.R. LaFave, *Search and Seizure*, "Police Observations of Other Suspicious Circumstances," Sec. 9.4(f), 176-187 (West 1996).

[4] When a person takes flight upon the mere sight of the police, it is reasonable for an officer to suspect that the fleeing person may be, *inter alia*, (1) an escapee from jail; (2) wanted on a warrant, (3) in possession of contraband, (i.e drugs, weapons, stolen goods, etc.); or (4) someone who has just committed another type of crime.

There is no question that in the instant case Respondent took flight upon merely seeing a fully uniformed police officer. A brief summary of the facts establishes that four police cars were driving behind one another in the area of 4035 West Van Buren Street in Chicago. (J.A.8) In the last car were two officers: Officer Timothy Nolan, who was wearing his uniform and badge and Officer Harvey. (J.A.4,8,9) Officer Nolan saw Respondent standing in front of 4035 West Van Buren. (J.A.7) Respondent looked in the uniformed officer's direction and immediately began to run away. (J.A.5,9) Officer Nolan gave chase and saw Respondent run southbound through a gangway, and then through an alley. (J.A.6,9) During this time, Nolan saw that Respondent was holding a white plastic bag under his arm. (J.A.7,9) The officers eventually cornered and stopped Respondent and, upon patting down the plastic bag, recovered a loaded .38 caliber handgun. (J.A.9,11)[5] Hence, from the perspective of Officers Nolan and Harvey, Respondent's *unprovoked* flight at the mere sight of the police did not reflect innocent conduct, but constituted an inherently suspicious reaction to their presence justifying a temporary investigatory stop under Fourth Amendment jurisprudence. The conduct of Officers Nolan and Harvey was unquestionably reasonable. Any other response, Petitioner maintains, would have constituted a dereliction in their duties as law enforcement officers.

Finally, in advocating this position, Petitioner asks this Court to adopt a bright-line rule. Significantly, bright-line rules are no stranger to Fourth Amendment jurisprudence.[6] While some may see tension between a bright-line rule when reasonable suspicion exits and this Court's reliance on the "totality of circumstances" in a given case, bright-line rules are to some degree implicit in the doctrine that reasonableness ultimately constitutes a legal question reviewed *de novo* by appellate courts. *Ornelas v. United States*, 517 U.S. 690, 699 (1996) In fact, the *de novo* standard of review compels an unequivocal answer to the issue before this Court. The unification of precedent, which is the primary purpose of *de novo* review, would be severely defeated if this Court fails to answer the question of whether flight upon the sight of a clearly identifiable officer, as a matter of law, justifies a *Terry* stop. In discussing the disadvantages of applying a deferential standard of review as opposed to *de novo* review in probable cause and reasonable suspicion cases, this Court stated:

> ". . . *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with

[5] In the instant case, the propriety of the search conducted subsequent to the *Terry* stop is not an issue before this Court.

[6] *See* e.g. *United States v. Ross*, 456 U.S. 798 (1982) (Given probable cause, every part and contents of a vehicle can be searched that are capable of concealing the object of that search.); *Wyoming v. Houghton*, 526 U.S. ___, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) (Given probable cause to seize and search driver and his car, all the personal property belonging to a **passenger** can be searched as long as said property is capable of concealing the object of that search.); *California v. Hodari D.*, 499 U.S. 621 (1991) (Show of authority can never amount to a seizure where the subject does not yield.); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (Police officers can order the driver of a lawfully stopped vehicle to exit as a matter of course.); *Maryland v. Wilson*, 519 U.S. 408 (1997) (Police officers can order the passengers of a lawfully stopped car to exit as a matter of course.); and *Michigan v. Summers*, 452 U.S. 692 (1981) (For Fourth Amendment purposes, a search warrant to search for contraband founded on probable cause automatically carries with it the limited authority to detain the occupants of premises while a proper search is conducted).

a defined "set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Ornelas*, 517 U.S. at 697.

Most law enforcement officers, at one point or another, encounter an individual who flees at the sight of the police. Officers should know beforehand whether such an abnormal reaction to their presence justifies a temporary stop. Moreover, due to its uncomplicated nature, the issue should not be subjected to varied results. The failure to answer the question, as a matter of law, only encourages *ad hoc* rulings in similar factual scenarios. Thus, in order to attain uniformity, the lower courts also need to know whether an individual's unprovoked flight from a clearly identifiable police officer, in and of itself, justifies a temporary investigatory stop under *Terry*. A Fourth Amendment analysis of the issue demonstrates that a person's flight from authorities is so innately suspicious that it has been historically viewed as proof of guilt giving rise to dire legal consequences under the early common law. In fact, the bright-line rule advocated by Petitioner would have been wholeheartedly accepted by the Framers of our Constitution. Furthermore, assuming, *arguendo*, an inquiry into the common law fails to establish the propriety of the seizure at hand, the Government's interest in fostering good police work and facilitating the detection and prevention of crime overwhelmingly outweighs the limited intrusion of a temporary investigatory stop.

(1).

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.

The Illinois Supreme Court erroneously held that Respondent's unprovoked flight upon seeing the police can never alone justify a temporary investigatory stop. The decision of the Illinois Supreme Court is contrary to the common law upon which this Court's Fourth Amendment jurisprudence is based. A proper analysis of the issue establishes that Fourth Amendment jurisprudence unequivocally supports the bright-line rule that a person's unprovoked flight at the mere sight of a clearly identifiable police officer constitutes such a rare and unnatural reaction to the presence of the police that it, standing alone, justifies a temporary investigatory stop.

The propriety of any seizure or search rests on the fundamental principle of "reasonableness." The Fourth Amendment to the United States Constitution, as it applies to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; U.S. Const., amend XIV. In deciding whether a particular governmental action complies with the Fourth Amendment, this Court first inquires whether the action was regarded as a lawful search or seizure under the common law when the Amendment was framed. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *Wyoming v. Houghton*, 526 U.S. ___, ___, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408, 414 (1999); *Florida v. White*, ___ U.S. ___, 119 S.Ct. 1555, 1558, 143 L.Ed.2d 748, ___ (1999). Where that inquiry yields no answer, this Court then turns, in

the alternative, to a balancing test where it evaluates the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed to advance legitimate governmental interests. *Acton*, 515 U.S. at 652-653; *Houghton*, 119 S.Ct. at 1300; 143 L.Ed.2d at 414. Petitioner maintains that the issue of whether a person's unprovoked flight from a clearly identifiable police officer constitutes reasonable suspicion justifying a temporary investigative stop is decisively answered by the first inquiry.

Obviously, the temporary investigatory stop authorized by this Court in *Terry* did not exist at the time the Framers adopted the Fourth Amendment. In *Terry*, this Court carved out a limited exception to the Fourth Amendment probable cause requirement for seizures. 392 U.S. at 30. In doing so, this Court determined that, in order to foster good police work and facilitate crime prevention, it was necessary to provide law enforcement with an intermediate response. As this Court has stated:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow crime to occur or a criminal to escape. On the contrary, *Terry* recognized that it may be the essence of good police work to adopt an intermediate response." *Adams v. Williams*, 407 U.S. 143, 145 (1972).

Thus, pursuant to *Terry*, a police officer can briefly stop a suspicious individual in order to ascertain his identity or to maintain the *status quo* while obtaining additional information. 392 U.S. at 22.

The fact that there was no *Terry* doctrine at the time the Fourth Amendment was drafted in no way deters the resolution of the instant issue under the first inquiry. An examination of certain historical writings and early opinions of this Court proves that, under the common law, it would have been lawful to seize a person who takes flight to escape detection by the Government. In fact, under the common law, those who fled faced remarkably severe legal consequences for such behavior.

Contemporaneous with the adoption of the Fourth Amendment, a person's flight was considered inherently suspicious behavior constituting conclusive proof of guilt. As pointed out in *California v. Hodari D.*, 499 U.S. 621, 624 n1 (1991), the inherent suspicion attached to a person's flight dates back to biblical times: "The wicked flee where no man pursueth, but the innocent are as bold as a lion." Proverbs 28:1. Significantly, this common sense appraisal of human conduct developed into a legal presumption of guilt that was firmly embedded in the common law at the time the Framers adopted the Fourth Amendment. An 1868 historical writing reveals that the early common law adopted the maxim that "flight from justice was equivalent to confession of guilt: *Fatetur facinus qui judicium furit*." A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII, 472 (1868); *see also* W.M. Best, *Law of Evidence*, 5th Ed. 582 (1870) ("Our ancestors, observing that guilty persons commonly fled justice, adopted the hasty conclusion that it was only the guilty who did so. . . .").

Additionally, the following comments found in Burrill's *Circumstantial Evidence* illustrate that, despite its extreme and inflexible character, the conclusive effect attached to flight rests on a common sense evaluation of human nature:

> "Perhaps no proposition is more easily deducible from the constitution of human nature and the structure of the human mind, or more constantly confirmed by observation of criminal conduct, and even of culpable conduct in daily life, than this,—that delinquency and

guilt naturally shun investigation and seek concealment. The most instinctive impulse which leads the perpetrator of a crime to destroy or otherwise get rid of evidence which would convict him of its commission, has already been alluded to. Where it becomes impossible to conceal a crime by expedients of this description, the criminal consults his safety by *concealing himself*; and where no facilities for such concealment are found, resorts to actual *flight*.

Concealment and flight, as observation constantly shows, are, in themselves, closely connected circumstances; the one aiding the other, and serving as a means of rendering it more effectual, in attaining the common end of both. The criminal flies from the scene of the crime, to reach a place of concealment, even if near at hand; and he often conceals himself temporarily, and sometimes, in one hiding-place after another, with view to further or final and effectual flight, beyond the reach of justice and the danger of pursuit." A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII; 469 (1868) (emphasis in original)

In pointing out that there are situations where criminals have refused to flee, Burrill further noted:

"But cases like these are manifest exceptions to what may be called the general rule, course or habit of criminal conduct. If it be true that some criminals do not conceal themselves or fly, it is equally true that the vast *majority* do. It is sufficient to refer to daily observation and the police reports in the daily prints, for confirmation of this familiar fact.

* * *

In minor crimes, variation from this general rule or habit of criminal conduct is of still more rare occurrence. The incendiary, the burglar, robber and thief, uniformly fly, or at least attempt to fly from the scene of the crime to places of concealment. So natural is this course, and so constantly is it looked for and counted on, that any possible exception to it would

undoubtedly be set down as evidence of mental imbecility * * *

Concealment and flight may, in short, be considered as parts of that grand policy of *secrecy* which has already been described as the natural characteristic of all criminal action, from its earliest stages to its latest consummations." A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII, 471-472 (1868) (emphasis in original)

William Blackstone's *Commentaries on the Laws of England* further supports the determination that in the 1700's, the common law attached a strong presumption of guilt to an individual's flight. In his *Commentaries*, Blackstone specifically noted:

"For *flight* also, on an accusation of treason, felony, or even petit larciny, whether the party be found guilty or acquitted, if the jury finds the flight, the party shall forfeit his goods or chattels: **for the very flight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by law.**" William Blackstone, 4 *Commentaries on the Laws of England*, 380 (1765-1769) (emphasis added).

The fact that a person, whether found guilty or acquitted of the underlying criminal offense, lost his goods or chattel proves that, at the time the Framers adopted the Fourth Amendment, the common law endeavored to attach very severe legal consequences to a person's flight. In fact, this *per se* forfeiture rule demonstrates that the common law from its earliest inception sought to discourage a person's flight from authorities by adopting a bright-line rule.

In light of the common law tradition to consider flight to be conclusive proof of guilt, as well as the common law's *per se* forfeiture rule aimed at discouraging flight from authorities, it is evident that at the time the Fourth Amendment was framed, a repugnance to flight was so

deeply embedded in the common law that those who fled faced harsh and sweeping legal consequences. In comparison, Petitioner's position appears mild but, nonetheless, in harmony with the early common law. If a person's flight constituted conclusive proof of guilt—that being proof beyond a reasonable doubt—it almost certainly would have met the lower standard of probable cause justifying a full blown arrest under the common law. Needless to say, there can be no question that, under the common law, flight from the police would unquestionably have given rise to the even lower standard of reasonable suspicion, justifying the less intrusive seizure of a temporary investigative stop. As a result, such a seizure would have been considered lawful action under the common law and readily accepted by the Framers of our Constitution.

However, as Burrill also discusses, as the common law evolved, the conclusive effect that was attached to flight was abandoned. In its place, the common law adopted a less severe position by providing that a person's flight established only a factual presumption of guilt. In discussing this evolution, Burrill stated:

> "So impressed was the old common law with considerations of this kind, that it laid down the rule, which passed into a maxim,—that flight from justice was equivalent to confession of guilt: *Fatetur facinus qui judicium furit*. But this maxim, (like some others,) was undoubtedly expressed in too general and sweeping terms. It was defective in not taking notice of, and proving for certain important *exceptions*, having as clear a ground of truth as the maxim itself. For, as we have seen that guilty persons do not, in *all* cases, conceal themselves or fly so it is equally true that persons sometimes do betake themselves to these expedients, who are not, in fact, guilty persons; or, in other words, that *all* who hide themselves or fly are not necessarily and invariably guilty.

> In the modern law of evidence, due attention has been given to these considerations and the exceptions established by them; and rare as they may in fact be, such prominence and weight are allowed to them, as to take from the circumstance of flight, in particular, the conclusive effect formerly attached to it, and to leave it merely its natural *presumptive* character, as an evidence of criminal agency." A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII, 469-473 (1868) (emphasis in original)

Importantly, a quartet of cases decided by this Court, within a 12-month period, reveal that the strong and inflexible legal presumption attached to flight by English common law was firmly interwoven into the fabric of American law. *See Hickory v. United States*, 160 U.S. 408, 422 (1896); (reversing a murder conviction because the instructions given to the jury concerning flight were "tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive, that it was the duty of the jury to act on it as an axiomatic truth"); *Alberty v. United States*, 162 U.S. 499, 510 (1896) (again faced with jury instructions that affixed a conclusive presumption of guilt to flight, this Court stated: "we think it was especially misleading of the court to charge the jury that, from the fact of absconding, they might infer the fact of guilt, and that flight, 'is silent admission by defendant that he is unwilling or unable to face the case against him'".); *Starr v. United States*, 164 U.S. 627, 631-632 (1897) (reversing a murder conviction because the instructions given to the jury were identical to those given in *Hickory* and *Alberty*) and *Allen v. United States*, 164 U.S. 492, 499 (1896) (re-affirming *Hickory* and *Alberty* but clarifying that in neither case "was it intimated that flight of the accused was not a circumstance proper to be laid before the jury. . . Indeed, the law is entirely well settled that flight of the accused is competent evidence against him as having the tendency to prove guilt.") Accordingly, this Court did not renounce the conclusive effect attached

to flight until almost thirty years after Burrill's critical writings and only to the extent that flight alone could not conclusively establish guilt beyond a reasonable doubt.[7]

Additionally, in *Hickory*, this Court, citing to the following historical textbooks, explicitly recognized that the conclusive presumption of guilt attached to flight in American criminal law dates back to English common law: Best, *Presumption*, 323; Burrill, *Circumstantial Evidence*, 473; and Wills, *Circumstantial Evidence*, 70. This Court specifically noted that under the common law:

> "'flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried a forfeiture of the party's goods, whether he was found guilty or acquitted; and the officer always, until the abolition of the practice of the statute, called upon the jury, after the verdict of acquittal, to state whether the party had fled on account of the charge.'" *Hickory*, 160 U.S. at 418, citing Wills, *Circumstantial Evidence*, 70, quoting Baron Gourney, *Regina v. Belany*.

Opponents of the bright-line rule, advocated by Petitioner, may be able to point to the hasty and inflexible nature of the conclusive presumption of guilt historically attached to flight; however, they cannot escape the one and only relevant conclusion to the present analysis: when the Fourth Amendment was framed, the common law viewed flight as conclusive proof of guilt and boldly adopted a *per se* forfeiture law in order to deter flight from authorities. Although the legal significance that the common law affixed to flight was harsh and has since been abandoned, the above-mentioned historical writings and opinions of

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[7] The abandonment of the common law tradition is probably due to the fact that an irrefutable presumption is at odds with the constitutional mandate that the Government bears the burden of establishing guilt beyond a reasonable doubt, based on evidence that proves every essential element of the offense charged. *See County Court v. Allen*, 442 U.S. 140 (1979).

this Court unmistakably show that, when the Fourth Amendment was framed, the common law would have regarded a person's unprovoked flight from the police as highly suspicious behavior evincing conclusive proof of guilt, or at the very least, strong presumptive proof of guilt that would have constituted probable cause justifying a full blown arrest. Also, in light of the *per se* forfeiture rule, the common law places no barriers to the adoption of a bright-line rule that is aimed at discouraging flight from the police. Hence, it takes no great leap in logic or reliance on speculation to conclude that the Framers would have accepted the notion that such an unprovoked flight from authorities meets the lower standard of reasonable suspicion permitting the less intrusive seizure of a temporary investigatory stop.

(2).

A Bright-Line Rule Permitting Police Officers To Conduct A *Terry* Stop Of A Person Who, Without Provocation, Flees At The Mere Sight Of The Police Strikes A Proper Balance Between A Citizen's Privacy Interests And The Government's Interest In Fostering Good Police Work And Facilitating Crime Prevention And Detection.

If an examination of the common law at the time the Fourth Amendment was framed fails to establish that a seizure was lawful, this Court turns, in the alternative, to a balancing test to evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it is needed for the advancement of legitimate governmental interests and, on the other, the degree to which it intrudes upon an individual's privacy. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995); *Wyoming v. Houghton*, 526 U.S. ___, ___, 119 S.Ct. 1297, 1300, 143 L.E.2d 408, 414 (1999). Assuming, *arguendo*, an inquiry into the common law fails

to establish the propriety of the seizure at hand, the traditional standards of reasonableness unquestionably support this Court's adoption of the bright-line rule advocated by Petitioner.[8] In fact, the Government's interest in fostering good police work and facilitating the prevention and detection of crime overwhelmingly outweighs the limited intrusion of a temporary investigatory stop.

In evaluating the reasonableness of any seizure or search, it is important to recognize that the "reasonableness" of a particular intrusion must be judged by an objective standard, namely, whether the facts available to the police officer at the moment of the search or seizure warrant a person of reasonable caution to believe that the action taken was appropriate. *Terry*, 392 U.S. at 21-22. Hence, the officer's conduct must be reasonable under the circumstances known to the officer at the time he initiated the stop. *Id.* at 22. Reasonable suspicion may emerge from seemingly innocent, noncriminal conduct. *Sokolow*, 490 U.S. at 9-10. The question for a court to answer is the degree of suspicion which attaches to the circumstances surrounding a defendant's action. *Id.* at 10. As a result, "the requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment'. . ." *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985). Reasonable suspicion encompasses a "sort

[8] Petitioner recognizes that this Court has traditionally favored a totality-of-the-facts analysis in determining the presence of reasonable suspicion. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *United States v. Sokolow*, 490 U.S. 1, 8 (1989) (The validity of a stop is evaluated under "the totality of the circumstances—the whole picture."). However, this Court has never ruled out the possibility that one circumstance could have such an overriding significance that it could alone provide the requisite reasonable suspicion for a *Terry* stop, or said otherwise, that one piece of the puzzle can give away the whole picture.

of 'common sense conclusio[n] about human behavior' upon which 'practical people—including government officials—are entitled to rely,'" rather than "an 'inchoate and unparticularized suspicion or hunch' . . ." *T.L.O.*, 469 U.S. at 346, quoting *United States v. Cortez*, 449 U.S. at 418 and *Terry v. Ohio*, 392 U.S. at 27.

In the instant case, the Illinois Supreme Court explicitly rejected the bright-line rule that permits a police officer to conduct a *Terry* stop of an individual who flees, without provocation, at the mere sight of a clearly identifiable police officer. *People v. Wardlow*, (J.A. 27). However, the Illinois Supreme Court's decision, with all due respect, lacks insight into human behavior and unduly curtails the function of the intermediate response that this Court embraced in *Terry* by ignoring the limited nature and scope of a temporary investigatory stop.

Although the Illinois Supreme Court acknowledged that Respondent's flight from a clearly identifiable officer gives rise to an "inference of guilt," the court also held that such flight does not constitute reasonable suspicion for a temporary investigatory stop. (J.A. 27) Petitioner maintains that such reasoning is illogical. It is inexplicable how a person's flight could be considered proof of guilt in one instance, but deemed incapable of providing an officer with a "reasonable suspicion" that criminal activity may be afoot in another instance. Indeed, the court totally disregarded the legal significance that has been historically attached to flight. (*See* Petitioner's Arg. A.(1)) Unprovoked flight at the sight of the police is not only unusual, but innately suspicious behavior. In fact, it has been said that "[f]light invites pursuit and colors conduct which hitherto has appeared innocent." *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977). This statement is based both on common sense and a keen understanding of human behavior. Unlike any other noncriminal human reaction, an individual's flight from an officer provides a strong

indication that criminal activity may be afoot.[9] From the perspective of a trained police officer, applying a common sense conclusion about human behavior, an innocent person would certainly not flee at the mere sight of the police. Therefore, it is no surprise that, in the companion case to *Terry*, this Court also recognized that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea* and 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).[10]

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[9] Notably, in denying defendant's motion to quash arrest and suppress evidence, the trial court found that once a person flees after having looked at the direction of a police officer, "there is reason to think there's a problem, [and officers] have a right to make inquiry." (J.A. 15)

[10] Significantly, the *Sibron* opinion clarifies any confusion that may have been created by *Wong Sun v. United States*, 371 U.S. 471 (1963), with respect to this Court's recognition that a person's flight is evidence of a guilty state of mind. In *Wong Sun*, the petitioner, James Wah Toy, argued that his flight when the officers appeared at his door did not justify an inference of guilt sufficient to establish probable cause. The facts of *Wong Sun* show that narcotics agents, acting on an unverified tip concerning drugs, approached a building containing a laundry business and the home of Toy. 371 U.S. at 473-474. An agent knocked on the door and when Toy answered, the agent identified himself as a customer. Toy told the agent that his establishment was not open for business and started to close the door. As the agent began to identify himself as a law enforcement officer, Toy slammed the door and fled down the hallway through the laundry into his apartment where his wife and child were sleeping in the bedroom. *Id.* at 474.

Since the agent affirmatively misrepresented his mission and "never adequately dispelled the misimpression engendered by his own ruse," this Court viewed Toy's flight as ambiguous conduct that "signified a guilty knowledge no more clearly than it did a

(continued...)

Here, the officer did not rely on Respondent's unprovoked flight to make a full blown arrest, but simply to conduct a temporary investigatory stop in order to determine the cause of the suspicious flight.

Additionally, many federal and state courts have held that a person's unprovoked flight at the mere sight of the police is sufficient to justify a temporary investigatory stop. *See United States v. Jackson*, 741 F.2d 223, 224 (8th Cir. 1984) (flight alone is sufficient for a *Terry* stop); *United States v. Tookes*, 633 F.2d 712, 716 (5th Cir. 1980) (defendant's flight justified the officers' decision to chase him and ask further questions); *United States v. Pope*, 561 F.2d 663, 668-669 (6th Cir. 1977) (flight from a clearly identifiable police officer sufficient for a *Terry* stop); *Au Yi Lau v. United States Immigration and Naturalization Service*, 445 F.2d 217, 233 n.10 (D.C. Cir. 1971) (suggesting that flight has the capacity to provide

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[10] (...continued)

natural desire to repel an apparently unauthorized intrusion." *Id* at 482-483. Under these circumstances, this Court found that Toy's flight did not establish probable cause to arrest.

The fact that Toy's flight did not rise to the level of probable cause does not undermine Petitioner's position that a person's unprovoked flight from a clearly identifiable police officer satisfies the lesser standard of reasonable suspicion. First, it cannot be said that Toy fled from a clearly identifiable police officer since the narcotics agent affirmatively misrepresented his office and failed to adequately dispel any misimpression. Second, the stop of Toy took place in his living quarters where his wife and daughter slept. Thus, the seizure in *Wong Sun* was far more intrusive than the *Terry* stop of Respondent which took place on a public street. In fact, under the Fourth Amendment, law enforcement officials have greater latitude in exercising their duties in public places. *Florida v. White*, ___ U.S. ___, 119 S.Ct. 1555, 1559 (1999). Hence, the *Wong Sun* opinion does not thwart the bright-line rule advocated by Petitioner because it has no bearing on the issue at hand.

reasonable suspicion for a temporary investigatory stop); *Platt v. State*, 589 N.E.2d 222 (Ind. 1992) (hasty flight sufficient for a *Terry* stop); *Harris v. State*, 423 S.E.2d 723 (Ga. 1992) (flight from police sufficient reason to conduct a *Terry* stop); *State v. Anderson*, 454 N.W.2d 763 (Wis. 1990) (flight alone is sufficient to warrant a temporary investigative stop); *State v. Stinnett*, 760 P.2d 124 (Nev. 1988) (suggesting that unprovoked flight would justify an investigative stop); *City of St. Paul v. Vaughn*, 237 N.W.2d 365 (Minn. 1975) (recognizing that flight from the police will serve to furnish the basis for an investigative stop). ***But see*** *United States v. Quinn*, 83 F.3d 917, 921-922 (7th Cir. 1996) (recognizing that while flight is not necessarily enough standing alone for a *Terry* stop, it is a relevant and probative factor in establishing reasonable suspicion); *United States v. Bennett*, 514 A.2d 414, 416-417 (D.C. Court of Appeals, 1986) (although flight alone is insufficient, it may be considered among other factors in order to justify a *Terry* stop); *United States v. Embry*, 546 F.2d 552, 555-556 (3rd Cir. 1976) (flight one factor to consider in determining reasonable suspicion); *Britt v. State*, 673 So. 2d 934 (Fla. 1996) (noting that flight from the police is not alone enough to support a *Terry* stop); *People v. Holmes*, 619 N.E.2d 396 (N.Y. 1993) (flight not alone sufficient to justify police pursuit); *State v. Hicks*, 488 N.W.2d 359 (Neb. 1992) (flight not sufficient standing alone to justify a *Terry* stop); *People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985), cert. granted, 475 U.S. 1094, cert. vacated, 478 U.S. 1017 (flight alone not sufficient for a *Terry* stop).

In refusing to recognize the innately suspicious nature of a person's flight, some courts have unsoundly reasoned that flight is an ambiguous act and, therefore, is insufficient to justify an investigatory stop. *See People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985). However, such reasoning lacks common sense and an understanding of police work. "[S]uspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity." *State v. Anderson*, 454 N.W.2d at 766. In addressing this very issue in *Anderson*, the Supreme Court of Wisconsin also stated:

> Flight at the sight of police is undeniably suspicious behavior. Although many explanations could be hypothesized as the reason for the flight, a reasonable officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well. Under these circumstances, "[i]t would be poor police work indeed for an officer . . . to have failed to investigate further." 454 N.W.2d at 766, citing *Terry*, 392 U.S. at 23.

The Supreme Court of Wisconsin, therefore, held that sudden flight at the sight of the police officer, as a matter of law, justifies a temporary investigatory stop under the *Terry* doctrine.

Furthermore, as made evident by the factual scenario in *Terry*, the determination that a person's unprovoked flight from the police is ambiguous and susceptible to innocent interpretation does not defeat the position that such unusual conduct establishes reasonable suspicion, because reasonable suspicion may emerge from seemingly innocent, noncriminal conduct. *Sokolow*, 490 U.S. 17-18. In *Terry*, the factors that justified the defendant's limited seizure were that the defendant walked down the street, looked inside a store window several times and spoke to another person on the corner. Terry's conduct was susceptible to innocent explanations. Defendant Terry could have been an indecisive shopper, or a disgruntled customer looking for the person who sold him defective goods. He could have been a snoopy competitor sizing up his compe-

tition. He could have been a prospective buyer of the business and curious about its present success or failure. He could have been the store's lessor checking on the lessee. He could have been waiting to meet a friend after work. He could have been a jealous boyfriend or husband checking upon his girlfriend or wife. In fact, there are a myriad of innocent explanations for Terry's conduct. However, the focus in the Court's analysis was not to determine whether Terry had innocent intentions, but rather to assess the reasonableness of the officer's suspicions. As one court astutely noted, "[i]t must be rare indeed that an officer observes behavior consistent *only* with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (2nd Cir. 1979) (emphasis in original). Moreover, this Court in *Terry* recognized the fact that the officer was a trained professional with a unique perspective and determined that it would have been "poor police work" if the officer had not conducted an investigation. 392 U.S. at 23.

Moreover, due to the limited scope of a *Terry* stop, the Government's interests in fostering good police work and facilitating the prevention and detection of crime overwhelmingly outweigh an individual's privacy interests. A temporary investigatory stop is based on the determination that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). This Court, therefore, recognized that it may be "the essence of good police work to adopt an intermediate response." *Id.* As a result, a police officer can briefly stop a suspicious individual in order to ascertain his identity or to maintain the *status quo* while obtaining additional information. *Id.* at 146. Therefore, police officers are entitled to conduct *Terry* stops "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity **may be** afoot." 392 U.S. at 30 (emphasis added). Respondent's unprovoked flight at the mere sight of the police constitutes such unusual conduct.

Certainly, the authority to conduct a temporary investigatory stop, after an unprovoked flight, does not give police officers "carte blanche to make arbitrary or capricious stops," nor does it alter what constitutes probable cause. *Platt*, 589 N.E.2d at 226. As pointed out by the Indiana Supreme Court, the temporary stop authorized by *Terry* is just that: temporary. It is not, without more, an arrest. The stop authorizes only a limited intrusion for the purpose of conducting an investigation of the individual's suspicious conduct. In other words, "[i]t is the right to temporarily freeze the situation in order to make investigative inquiry." *Anderson*, 454 N.W.2d at 768.

In holding to the contrary, the Illinois Supreme Court determined that:

> "[a]llowing flight alone to justify an investigative stop would undercut the very values *Terry* sought to safeguard. *Terry* is based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable on the street as it is in the home. Thus, while the police officer does not violate the Fourth Amendment by approaching an individual in a public place and asking if the person will answer questions, neither is the person under any obligation to answer." *Wardlow*, J.A. 21, quoting, *State v. Hicks*, 488 N.W.2d 359, 364 (Neb. 1992).

However, this reasoning disregards the fact that ". . . Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places." *Florida v. White*, ___ U.S. ___, 119 S.Ct. at 1559. This Court has drawn a definite "distinction between warrantless seizure in an

open area and such seizure on private premises." *Id.* Under the Illinois Supreme Court's rationale, which fails to make this distinction, any warrantless seizure or search conducted on the street, absent exigent circumstances, would be unconstitutional. However, law enforcement officers are indeed given greater latitude in exercising their duties in public streets because a search or seizure on the street is less intrusive than one conducted in a private residence. Simply put, a person has greater privacy interests in his own home than on a public street.[11]

Moreover, the bright-line rule advocated by Petitioner does not alter the limited nature of a *Terry* stop. In *Berkemer v. McCarthy*, 468 U.S. 420 (1984), this Court discussed the narrow scope of a *Terry* stop, and stated that:

> "'[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" (citations omitted) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released." 468 U.S. at 439-440.

In fact, in the instant case, had the officers not found a weapon during the *Terry* patdown, Respondent would have been free to decide not to answer questions and to go on his way. Petitioner's bright-line rule speaks to the factors that trigger a *Terry* stop, not to the limited nature of the stop itself.

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[11] Even English common law recognized that ". . . in criminal causes, the public safety supersedes the private." Blackstone, 4 *Commentaries on the Laws of England* at 223.

Additionally, Petitioner's position comports with the requirement that an officer's "reasonable suspicion" be founded on a particularized and objective basis that criminal activity may be afoot. This Court has instructed that "reasonable suspicion" is a commonsense, nontechnical concept that deals with "the factual and practical considerations of everyday life in which reasonable and prudent men, not legal technicians act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). This Court has described the standard as "a particularized and objective basis" for suspecting that criminal activity may be afoot. 517 U.S. at 695. As pointed out by the Supreme Court of Wisconsin, a police officer's stop of an individual, who suddenly, and without provocation, flees at the mere sight of the police, does not represent an "inchoate and unparticularized hunch" condemned by the *Terry* Court:

> "Rather, it furnishes an affirmative answer to the question in *Terry*: whether a reasonably prudent person in the circumstances of the officer would be warranted in the belief that the action taken was appropriate.
>
> Accordingly, we hold that behavior which evinces in the mind of a reasonable officer an intent to flee from police is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police. Such flight, although not illegal, gives rise to a reasonable suspicion that some sort of wrongful activity is afoot." *Anderson*, 454 N.W.2d at 768.

Thus, when an officer can point to objective evidence that an individual has taken flight in direct response to the known presence of the police, a temporary investigatory stop complies with the strictures found in *Terry*.[12]

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[12] Notably, criminal law scholar Wayne R. LaFave opines that a person's flight from the police is sufficient, standing alone, to

(continued...)

Significantly, Justices of this Court have recognized not only the innately suspicious nature of flight at the sight of the police, but also the right of a police officer to conduct a temporary investigatory stop under such circumstances. Although not asked to address the instant issue in *California v. Hodari D.*, 499 U.S. 621 (1991), this Court was faced with a remarkably similar factual scenario. In that case, Hodari and a group of other youths fled at the approach of an unmarked police car, occupied by two police officers. *Hodari D.*, 499 U.S. at 622-623. The officers were suspicious and gave chase. At the time, the officers were wearing jackets with "Police" embossed on their front. One of the officers left the car. *Id.* He did not follow Hodari directly but took a circuitous route that brought the two face to face on a parallel street. Hodari, however, was looking behind him as he ran and did not

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[12] (...continued)

justify a temporary investigatory stop. In that regard, LaFave states:

> "It has been held that 'behavior which evinces in the mind of a reasonable police officer an intent to flee is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police.' This is a correct conclusion if read literally, but should not be construed to cover instances in which the suspect, at best, merely manifested a desire 'to avoid contact with the police.' The Rule is not objectionable on the ground that the flight may not suggest a particular variety of criminal conduct, for 'nothing in the fourth amendment * * * requires that a police officer's suspicions relate to a particular criminal activity.'" W.R. LaFave, *Search and Seizure*, Sec. 9.4(f), 181-182 (West 1996) (citation omitted)

As pointed out earlier, the bright-line rule, advocated by Petitioner, does not encompass conduct aimed at merely avoiding the police, but rather, a person's unprovoked flight at the mere sight of a clearly identifiable police officer. Such conduct certainly is a form of concealment and manifests a clear intent to avoid law enforcement detection. As a result, Petitioner's position is not objectionable in LaFave's opinion. See, Petitioner's Argument I. A. (1).

turn to see the officer until the officer was almost upon him. *Id.* At that point, Hodari tossed away a small rock. The officer tackled him, and the police recovered the rock, which proved to be crack cocaine. *Id.*

In reviewing the legality of Hodari's seizure, this Court considered only the issue of whether Hodari, at the time he dropped the drugs, had been "seized" within the meaning of the Fourth Amendment. This Court determined that the chase did not constitute a seizure for Fourth Amendment purposes. *Id.* at 626. While not addressing the present issue, the majority of this Court, aptly noted:

> "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts common sense. See Proverbs 28:1 ("The wicked flee when no man pursueth")." 499 U.S. at 623-624 n.1.

In *Michigan v. Chesternut*, 486 U.S. 567 (1991), this Court also dealt with the issue of whether an officer's pursuit of an individual constituted a "seizure" implicating the Fourth Amendment protections. In that case, four officers riding in a marked police car were engaged in routine patrol duties. *Id.* at 569. As their squad car came to an intersection, one of the officers saw a car pull over to the curb. A man got out of the car and approached Chesternut, who was standing alone on the corner. When Chesternut saw the patrol car nearing the corner where he stood, he turned around and began to run. The patrol car followed Chesternut, quickly caught up with him and drove alongside him for a short distance. *Id.* As the squad car drove beside him, the officers saw Chesternut discard a number of packets he pulled from his right-hand pocket. One of the officers got out of the car and examined the packets and discovered they contained pills, which he believed contained codeine. *Id.* Meanwhile, Chesternut ran a few paces further, stopped, and was placed under arrest.

This Court determined that Chesternut was not unlawfully seized during the initial pursuit for Fourth Amendment purposes. Significantly, in a concurring opinion, joined by Justice Scalia, Justice Kennedy stated:

> "It is no bold step to conclude, as the Court does, that the evidence should have been admitted, for **[Chesternut's] unprovoked flight gave the police ample cause to stop him**." 486 U.S. at 576. (emphasis added)

Both *Hodari D.* and *Chesternut* also reflect the balance that this Court has struck between the opposing interests of an individual's right to avoid contact with the police and the Government's interest in the prevention and detection of crime. Of course, in deciding that pursuit of a fleeing individual was not a "seizure" for Fourth Amendment purposes, this Court had to balance these competing interests. Significantly, this Court ruled in a manner to restrict the definition of "seizure" under the Fourth Amendment. In determining that the officers' pursuit of a fleeing youth was not a seizure, this Court in *Hodari D.* stated 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.[13] Thus, with respect to the issue at bar, giving police officers the right to conduct an investigatory stop in the instant scenario comports with the balance struck in *Hodari D.* and *Chesternut*.

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[13] In addition to placing the public and potential suspects at risk, the failure to encourage compliance with police orders places police officers in danger. The 1998 Unified Crime Report, submitted by the Federal Bureau of Investigation, disclosed that in 1997, 65 officers were killed in the line of duty. Significantly, 9 were slain while investigating suspicious persons or circumstances. Uniformed Crime Report, Sec. I, "Law Enforcement Officers Killed," p. 3.

As evidenced by the preceding discussion, both an inquiry into the common law at the time the Fourth Amendment was framed, as well as the traditional standards of reasonableness, support the bright-line rule advocated by Petitioner. Hence, Fourth Amendment jurisprudence fully supports the determination that a persons's unprovoked flight at the mere sight of a clearly identifiable police officer is sufficient, in and of itself, to justify a temporary investigatory stop under *Terry*. Under such an investigatory stop, an officer is given the opportunity to conduct a brief inquiry aimed at confirming or dispelling his suspicion. Notably, in such an inquiry an officer could gain further information that may raise his suspicion to the level of probable cause. However, it is equally true that the officer may learn that his suspicion was incorrect or even that the person who fled was in need of police assistance. *Terry* did not discourage street encounters between the police and citizens, but set forth certain boundaries to the intermediate response of a temporary investigatory stop. In the context of flight, such an intermediate response is a necessary law enforcement tool in community policing.

Turning to the facts of this case, Officer Nolan's testimony unquestionably proves that Respondent, without provocation, took flight in direct response to the presence of Chicago police officers. Officer Nolan testified that on September 9, 1995, around 12:00 in the afternoon, he and his partner were in a police car. Although the officer could not recall whether the car was a marked or unmarked police car, he was travelling in a caravan of four police cars. Even if all the cars were unmarked, they were still clearly identifiable.[14] Officer Nolan was in full uniform

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[14] In denying Respondent's motion to suppress, the trial court specifically noted that "[a]lmost anybody can identify a police car[,] marked or obviously unmarked just as obviously." (R. B13).

and was wearing his badge as the caravan of police cars drove near the area of 4035 West Van Buren. Officer Nolan stated that as his police car drove past that area, Respondent looked in the uniformed officer's direction and immediately ran away. Officer Nolan turned his police car southbound to follow Respondent. He saw Respondent run southbound through a gangway, and then through an alley. (R. A6)

Under these circumstances, it was reasonable for Officer Nolan to conclude, when he saw Respondent immediately run away at the mere sight of the police, that criminal activity may be afoot. Pursuant to *Terry*, Officer Nolan was entitled to stop Respondent and conduct a field interview. Said otherwise, 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. Petitioner, therefore, respectfully asks this Honorable Court to reverse the decision of the Illinois Supreme Court.

B.

If A Person's Flight Alone Is Insufficient To Justify A *Terry* Stop, Then Flight In A High Crime Area Provides The Particularized Grounds Necessary To Support A Reasonable Suspicion That Criminal Activity May Be Afoot.

If this Court declines to embrace the bright-line rule advocated by Petitioner, the fact that Respondent's unprovoked flight from the police took place in a location where there was a high incidence of narcotics trafficking provides the particularized grounds necessary to support a reasonable suspicion. This Court has indicated that the assessment of the totality of circumstances or the "whole picture" contains two elements, each of which must be present before a stop is permissible. *United States v.*

Cortez, 449 U.S. 411, 418 (1981). First, the assessment must be based upon all the circumstances and second, the assessment of the totality of the circumstances "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* at 418. In other words, "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is or is about to be engaged in criminal activity." *Id.* at 417. In this regard, a trained police officer is given great latitude in assessing the "whole picture," including the consideration of "various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kind of lawbreakers." *Id.* at 418. This Court noted that "[f]rom these data, a trained officer draws inferences and makes deductions—inferences and deductions that might elude an untrained person." *Id.*

It is no secret that drug traffickers and other criminal agents (i.e. prostitution, illegal gambling rings, etc.) engage in a pattern of operation that often includes concentrating their illegal activities in certain designated areas. The identification of such areas is a critical tool in the execution of law enforcement duties. The lack of such intelligence not only cripples the fight against crime, but also places law enforcement officers in danger. Therefore, under Fourth Amendment jurisprudence, a geographic area's reputation for criminal activity is a highly relevant factor in determining the propriety of a seizure or search. As early as 1824, in assessing the existence of probable cause to seize a vessel, this Court noted that:

> "It has been very justly observed at the bar, that the Court is bound to take notice of public facts and geographical positions; and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be

gathered from the public documents." *In re Apollon*, 22 U.S. 362, 374 (1824).[15]

Significantly, in *Carroll v. United States*, 267 U.S. 132 (1925), this Court relied on the above-quoted language found in *Apollon* to take judicial notice that:

> ". . . Grand Rapids is about 152 miles from Detroit and that Detroit and its neighborhood along the Detroit River, which is the International Boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior." 267 U.S. at 160.

Hence, this Court relied on the reputation of a geographic area, in addition to other factors, to find that there was probable cause to stop a driver, known to be a "bootlegger" and search the car which was found to illegally contain 68 bottles of liquor. *Also see Brinegar v. United States*, 338 U.S. 160, 167-170 (1949) (fact that the area was known to be one of the worst active centers for bootleggers was relevant to the probable cause determination).

Therefore, it is no surprise that upon the development of the law respecting *Terry* stops, this Court explicitly identified the characteristics of a geographic area as a relevant factor in determining the existence of reasonable suspicion. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), this Court was faced with the propriety of a

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[15] Although this Court recognized that a geographical area's reputation for criminal activity is an appropriate factor to consider in determining probable cause, this Court in *Apollon* found that the question of whether the vessel intended to engage in unlawful traffic "must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources." 22 U.S. at 374. Significantly, the record in the instant case contains uncontradicted evidence that the geographical area where Respondent took flight from the police was plagued with a high incidence of drug trafficking. *See infra* pp. 40-41.

Border Patrol's *Terry* stop of a car near the Mexican border. In that case, this Court explained:

> "Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. They may also consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support reasonable suspicion." 422 U.S. at 885 (citations omitted).

See also United States v. Sharpe, 470 U.S. 675, 682-683 (1985) (Court noting that defendants' flight and evasive actions coupled with the fact that their cars were travelling in an area near the coast known to be frequented by drug traffickers were relevant in establishing reasonable suspicion); *United States v. Lane*, 909 F.2d 895 (6th Cir. 1990) (reasonable suspicion existed where officers, pursuant to an unverified tip, entered a building known to be a location for drug trafficking and saw four men, who stood inside a building, run at the sight of the officers); *State v. Wade*, 390 So.2d 1309 (La. 1980) (defendant's evasive conduct and flight at the mere sight of the police in a high crime area provided the reasonable suspicion to justify a *Terry* stop). *But see State v. Hewston*, No. 59095. 1990 Ohio App. LEXIS 3192 (Ohio App. August 2, 1990) (per curiam) (fact that defendant, who was standing with two men on a street corner of a high drug area, fled at the sight of approaching officers did not constitute reasonable suspicion); *Smith v. United States*, 558 A.2d 312 (D.C. App. 1987) (defendant's attempt to leave hurriedly when officers suddenly appeared in an area that was plagued with high narcotics trafficking did not provide reasonable suspicion).

Notably, Professor Wayne R. LaFave recognizes that "the area in which the suspect is found is itself a highly relevant consideration." W.R. LaFave, *Search and Seizure*, "Police Observations of Other Suspicious Circumstances," Sec. 9.4(f), 189 (West 1996). LaFave explains that the character of the area may cast a different light upon certain conduct. *Id.* at 189. However, LaFave cautions that "[u]nspecific assertions that there is a crime problem in a particular area should be given little weight, at least compared to more particular indications that a certain type of criminal conduct of the kind specified is prevalent in that area." *Id.* at 189-190.

Significantly, LaFave's concerns about vague assertions of a high crime area are unfounded in the instant case because Officer Timothy Nolan's testimony provides overwhelming evidence that Respondent was encountered in an area that is afflicted with a high incidence of drug trafficking. In fact, Officer Nolan's testimony concerning the reputation of the geographic area, where Respondent stood just prior to taking flight, is uncontradicted and undisputed and thus provides the objective manifestation that Respondent fled from the police because he was engaged, or was about to engage, in criminal activity.[16]

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[16] In denying Respondent's motion to quash arrest and suppress evidence, the trial court stated that "[i]t is common knowledge [that the] police know of the area where drugs are sold. They do have knowledge where contraband, including weapons, are being carried." (J.A. 14) Notably, the Illinois Appellate Court erroneously determined that the record did not support the contention that Respondent was in a high crime location. (J.A. 32) However, the Illinois Supreme Court properly found that "Officer Nolan's uncontradicted and undisputed testimony, which was accepted by the trial court, was sufficient to establish that the incident occurred in a high-crime area." (J.A. 20) *See Ornelas v. United States*, 517 U.S. at 699 (noting that in reviewing determinations of reasonable suspicion and probable cause, reviewing courts (continued...)

On September 9, 1995, Officer Nolan and seven other police officers were assigned to the Special Operations Section of the Chicago Police Department to investigate narcotics sales in the 11th District. (J.A. 4,7-8) With that specific purpose in mind, four police cars, containing eight officers, converged on the general vicinity of 4035 West Van Buren Street. (J.A. 8) Officer Nolan knew that this particular area of his police district was plagued with a high incidence of narcotics trafficking. In fact, the officers travelled together in a caravan of four police cars because they expected to confront a large number of people, including customers and lookouts. (J.A. 8) Officer Nolan, who was in full uniform, with his badge, patch and name tag visible, observed Respondent standing near the front of 4035 West Van Buren Street. (J.A. 4,7,9) Respondent then looked in the officers' direction, at which time he began to run away. (J.A. 5,9) Officer Nolan turned his car southbound and saw Respondent run through a gangway, and then through an alley. (J.A. 6) At this point, Officer Nolan noticed that Respondent was holding a white, plastic bag under his arm. (J.A. 9) Officer Nolan eventually cornered Respondent on the street in the vicinity of 4036 West Congress. (J.A. 9) Thus, looking at the totality of the circumstances or the "whole picture," the fact that Respondent fled at the mere sight of the police, in an area that was plagued with a high incidence of drug trafficking, established the necessary particularized suspicion to justify a temporary investigatory stop.

In determining that no reasonable suspicion existed, the Illinois Supreme Court noted that "the officers were not responding to any call or report of suspicious activity in the area." (J.A. 24) This assessment totally disregards the

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[16] (...continued)
should take care to give due weight to inferences drawn from those facts by judges and local law enforcement officers).

fact that the officers were assigned to a special operation aimed at investigating narcotics sales in the area where they encountered Respondent. In light of the fact that Officer Nolan and seven other officers of the Special Operations Section were specifically assigned to investigate the narcotics sales in the vicinity of 4035 West Van Buren, it is obvious that Officer Nolan's characterization of that area is based both on his personal experience and departmental intelligence.[17]

Additionally, the Illinois Supreme Court erroneously stated that Respondent "gave no outward indication of involvement in illicit activity." (J.A. 25) However, this assessment totally disregards the fact that Respondent, without provocation, fled at the mere sight of a clearly identifiable police officer. Respondent's unprovoked flight at the mere sight of the police is certainly an objective manifestation that he was involved in criminal activity. Hence, applying a common sense understanding about human behavior, it was reasonable for Officer Nolan and his partner to conclude, based on their experience and knowledge of the area in question and Respondent's aberrant reaction to the presence of the police, that Respondent sought to escape law enforcement detection because he was engaged, or was about to engage, in criminal activity.

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[17] Significantly, " 'high crime areas' are absolutely not determined in an arbitrary and capricious manner, but are so defined based on verifiable quantitative and qualitative factors, as well as strong anecdotal evidence." *See Amicus Curiae* Brief of the National Association of Police Organizations, Police Benevolent and Protective Association of Illinois and Illinois Police Association, Argument II. B. 19-26. Indeed, law enforcement agencies' identification of high crime areas is based on verifiable and objective criteria, including statistical data and sophisticated mapping techniques.

Furthermore, the fact that Respondent was holding a bag under his arm provides further objective manifestation that he was engaged or was about to engage in illegal activity. The bag could have contained either narcotics or a weapon. Officer Nolan testified that, based on his experience in the investigation of drug trafficking areas, "it is common for there to be weapons in the vicinity." (J.A. 11) Importantly, the factual scenario in *United States v. Sharpe*, 470 U.S. at 682-683, provides a strong indication that this factor further supports the existence of reasonable suspicion in the instant case. In that case, Drug Enforcement Agents observed two vehicles traveling in tandem for twenty miles in an area near the coast known to be frequented by drug trafficking. 470 U.S. at 682-683. A DEA agent testified that pick-up trucks with camper shells were frequently used to transport large quantities of marijuana. One of the vehicles was a pick-up truck that appeared to be heavily loaded, and the windows of the truck were covered with bedsheets instead of curtains. Although the existence of reasonable suspicion was not an issue in *Sharpe*, this Court stated that these factors established a reasonable suspicion justifying a temporary investigatory stop. *Id.* The bag under Respondent's arm, like the heavy loaded truck in *Sharpe*, in conjunction with Respondent's unprovoked flight in a drug trafficking area, unquestionably establishes reasonable suspicion.

As the preceding discussion demonstrates, under Fourth Amendment jurisprudence, the inherently suspicious nature of a person's flight at the mere sight of the police, in conjunction with the person's presence in a high crime area, gives rise to reasonable suspicion justifying the limited intrusion of a temporary investigatory stop. Therefore, the Petitioner respectfully requests that this Honorable Court reverse the Illinois Supreme Court's decision.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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