No. 19-327

IN THE
SUPREME COURT OF THE UNITED STATES

JAONTE HAIRSTON,
Petitioner,

v.

STATE OF OHIO, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF *AMICI CURIAE* THE OHIO PUBLIC DEFENDER, FRIEDMAN AND GILBERT, HAMILTON COUNTY PUBLIC DEFENDER, JUVENILE JUSTICE COALITION, MONTGOMERY COUNTY PUBLIC DEFENDER, AND THE OHIO CHAPTER OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici in this case are three public defender offices, two non-profit organizations, and a private law firm, each of which advocates on behalf of individuals living in "high-crime" areas throughout the state of Ohio. They are committed to ensuring that all people, no matter where they live or work, receive the same protections under the Fourth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

Chief Justice John Roberts recently instructed lower courts to follow two basic propositions in interpreting the Fourth Amendment: "First, that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power.' Second, and relatedly, that a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" *Carpenter v. United States*, 138 S.Ct. 2206, 2214 (2018). This case violates both of those aims.

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[1] Consistent with this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. *Amici curiae* certify under Rule 37.2 that counsel of record of all parties have consented to the filing of this brief. Each of the *amici* are mistakenly listed as Respondents in this case. They are not parties to this case as they filed an amicus brief in support of the Petitioner in the Ohio Supreme Court. Amici include The Ohio Public Defender, Friedman and Gilbert, Hamilton County Public Defender, Juvenile Justice Coalition, Montgomery County Public Defender, and the Ohio Chapter of the National Lawyers Guild.

If permitted to stand, the Ohio Supreme Court's majority decision will allow Ohio law enforcement officers, after nothing more than hearing unlocatable gunfire in the distance, to drive into a densely populated neighborhood, jump out of their cruisers when they spot an African American man doing nothing more than walking alone in a crosswalk in that neighborhood, draw their guns on him, and call it reasonable. The Ohio Supreme Court rooted its reasonableness determination in the characterization of the area where Mr. Hairston was seen walking as one "known for criminal activity" and an assertion that driving a short distance in that general direction and stopping the first person they see is effectively responsive to the sound of gunshots.

However, what happened to Mr. Hairston was a departure from not only this Court's jurisprudence but the Framers' intended meaning of the Fourth Amendment. It is unconstitutional, but unfortunately, not surprising. It is, at least in considerable part, the culmination of an ongoing erosion of Fourth Amendment protections and the overpolicing of neighborhoods deemed "high-crime." *See* Michelle Alexander, *The New Jim Crow*, 61-71, 105-106, 120-124 (2010). That striking combination is felt most acutely by people of color, who are the predominate residents of "high-crime" areas. *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 677-678 (1994). Amici curiae write not only to urge this Court to grant certiorari, but to convey the deep concern that it shares with citizens in aggressively policed communities.

ARGUMENT

I. THE FOURTH AMENDMENT WAS A RADICAL DEPARTURE FROM THE STATUS QUO.

As the Petitioner notes, at the time of our nation's founding, the government's practice of issuing general warrants and searching citizens at random was rampant. *See Boyd v. United States*, 116 U.S. 616 (1886). These warrants subjected citizens and their property to police scrutiny without any articulable suspicion of criminal conduct. General warrants gave the government blanket authority to search and seize where they pleased. *Id.* at 625. *See also Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *Marron v. United States*, 275 U.S. 192, 195-197 (1927).

The frequent use of general warrants was one of the primary acts of the English government that ignited the colonial resistance in 1761. *Boyd*, 116 U.S. at 625. This discontent with the common law was fresh in the minds of the Framers as they began drafting the language of the Bill of Rights. The Framers recognized that the unrestricted power of search and seizure exercised by the British government could easily stifle liberty and impede citizens' rights to be secure in their own persons. *See Payton v. New York*, 445 U.S. 573, 583-585 (1980); *Marron*, 275 U.S. at 195. The Fourth Amendment was meant to protect citizens from government overreach, turning away from the colonial practice of general warrants and subjecting citizens to searches without any articulable suspicion. *Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Mo.*, 367 U.S. 717, 738 (1961) (Black, J., concurring). By the terms of the Fourth Amendment, every citizen is entitled to a reasonable

expectation of his own privacy unless the government has clear and unquestionable authority to supersede that expectation. *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

II. *TERRY V. OHIO* AND *ILLINOIS V. WARDLOW* HAVE ALREADY BEGUN TO ERODE THESE CRITICAL PROTECTIONS ENVISIONED BY THE FRAMERS.

A. *Terry v. Ohio* created a narrow exception to Fourth Amendment protections.

In *Terry v. Ohio*, this Court considered the tension between the need of the police to deal "with the rapidly unfolding and often dangerous situations on city streets" and "the law of arrest and search as it ha[d] developed to date in the traditional jurisprudence of the Fourth Amendment." 392 U.S. 1, 10-11 (1968). At the time, police needed probable cause to stop a citizen on the street and conduct a search of his person. But in *Terry,* it became clear that a limited fact-specific exception to the Fourth Amendment's protections was necessary to protect the police and the communities they serve.

In *Terry*, an experienced police detective patrolling the streets of downtown Cleveland came upon two men standing on a busy street corner. The officer observed the two men as they walked back and forth from the corner to a store window. Each of the men followed the same pattern of behavior, completing the trip approximately twelve times. A third man joined the two briefly and then left. Eventually, the other two followed.

While observing the conduct of these three men, the officer grew suspicious that they were planning a robbery and might have a gun. He approached the men, first attempting to speak casually with them. When Mr. Terry mumbled a response to one of the officer's questions, the officer grabbed him, spun him around, and patted down the outside of his clothing, where he found a pistol.

Of course, the officer did not have probable cause to conduct a search at that moment. However, this Court concluded that circumstances like these warrant an exception to the stringency of the Fourth Amendment's protections. Oftentimes, officers must make "on-the-spot observations" that require quick responses. *Terry*, 392 U.S. at 20. Officers must be able "to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id*. at 24. *See also Adams v. Williams*, 407 U.S. 143, 145-146 (1972) ("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 a crime to occur or a criminal to escape."). In balancing that governmental interest with the Fourth Amendment's protections against unreasonable searches and seizures, this Court created a narrow exception allowing a law enforcement officer to briefly stop a citizen when the circumstances he has observed, in combination with his experience as an

officer, lead him to reasonably believe that the citizen has engaged or is about to engage in criminal conduct.

While this was a significant departure from the probable cause standard in place at the time, this Court was clear: *Terry* was to be a narrow exception, one that only applies when an officer has reasonable suspicion that a *particular individual* has engaged in criminal conduct. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996); *United States v. Cortez*, 449 U.S. 411, 417 (1981); *Brown v. Texas*, 443 U.S. 47, 51 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975);

For example, in *Brown*, 443 U.S. at 52, this Court held that an officer's stop of an individual was unconstitutional when the officer could only testify that the individual "looked suspicious" but could not "point to any facts supporting that conclusion." The officer observed Mr. Brown in a neighborhood frequented by drug users, but that alone was not sufficient to conclude that he was engaged in criminal activity. *Id.* at 51-52. This Court noted that Mr. Brown's "activity was no different from the activity of other pedestrians in that neighborhood." *Id.* at 52 And if the Fourth Amendment is to mean anything, it must mean that under those circumstances, an officer needs more.

B. *Illinois v. Wardlow* was an even more significant departure.

Despite allowing law enforcement officers to stop and frisk an individual on even slimmer facts, *Illinois v. Wardlow*, 528 U.S. 119 (2000) maintained the spirit of *Terry* and the protections of the Fourth Amendment.

In *Wardlow*, uniformed officers drove a caravan of four cars into an area known for narcotics trafficking. One of the officers observed Mr. Wardlow standing next to a building holding an opaque bag. When he saw the officers, he ran through an alley and was eventually cornered, stopped, and searched for weapons. This Court concluded that Mr. Wardlow's presence in a high-crime area, combined with his unprovoked flight from the police, provided reasonable suspicion for the officers' search. Mr. Wardlow's Fourth Amendment right to be free from unreasonable search and seizure was not violated in this instance. *Wardlow*, 528 U.S. at 124-125.

Time and again, this Court's jurisprudence has remained steadfast: "the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417 (citing *Brown*, 443 U.S. at 51; *Brignoni-Ponce*, 422 U.S. at 884).

A person's "presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at at 124. Otherwise, two Fourth Amendments would result—one guaranteeing protection to citizens fortunate enough to work and live in lower-crime neighborhoods, and another nullifying protections for those who cannot remove themselves from higher-crime neighborhoods and returning to the days of the general warrant. It cannot be that the Fourth Amendment protects some citizens more than others.

Police have immense power to stop citizens and perform searches based on very limited facts. But even

after this Court's decision in *Illinois v. Wardlow*, the Fourth Amendment remains intact: police must have some articulable suspicion about the individual they stop and search.

III. WHAT HAPPENED TO MR. HAIRSTON WAS ANYTHING BUT REASONABLE, EVEN UNDER THIS COURT'S CURRENT JURISPRUDENCE.

"[T]he 'touchstone of the Fourth Amendment is reasonableness.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). Reasonableness is measured by examining the totality of the circumstances. The circumstances in this case were not disputed:

- Officers were responding to a domestic disturbance in a Columbus neighborhood at 9:00pm.
- Officers heard gunfire coming from what they believed was the west.
- Officers drove to a school southwest of their original location because they "guesstimated" the location of the gunfire.
- Officers drove approximately four tenths of a mile for thirty seconds to one minute.
- Officers saw Mr. Hairston walking alone, in a crosswalk, talking on a cellphone.
- Officers had a "hunch" that he might be responsible for the gunfire.
- Without further observation, the officers sprung out of their car with guns drawn and ordered Mr. Hairston to stop.
- Officers directed Mr. Hairston to put his hands behind his back.
- Officers asked Mr. Hairston if he had heard gunshots. He replied that he had.

- Officers asked Mr. Hairston if he had a weapon on him. He replied that he did.
- Officers conducted a pat-down search and recovered his firearm.
- Officers arrested Mr. Hairston and charged him with one count of carrying a concealed weapon.
- Officers neither charged Mr. Hairston with, nor further investigated him, for any crimes related to the earlier gunfire.

The Ohio Supreme Court's decision concluded that the police were reasonable in their treatment of Mr. Hairston because (1) one of the officers "personally heard the sound of gunshots," which he believed were "not faint and sounded close-by;" (2) that same officer "knew from personal experience that crime often occurred at night in the area where the stop took place;" and (3) "the stop occurred very close in time to the gunshots and Hairston was the only person in the area from which the shots emanated." *State v. Hairston*, 156 Ohio St.3d 363, 2019-Ohio-1622, 126 N.E.3d 1132, ¶ 11-13. However, what happened to Mr. Hairston was anything but reasonable.

All the police officers knew was that a gun had recently been fired, possibly somewhere west of their location. They did not know if it had been fired at someone, if there was a victim, if it was purposeful, or whether the shots were fired indoors or outdoors. No information to clarify the location or circumstances of the offense had been provided to them by a dispatcher. No 911 calls had been placed. They did not have any information regarding a suspect or what direction he or she was heading after firing the weapon, whether they were walking or traveling by vehicle, or if they had moved at all. Nevertheless, the officers jumped into their cruiser, left the domestic-disturbance incident they were dispatched to address, and traveled

southwest on a hunch to Independence High School, a school serving a predominantly African-American student population. *R. 59, Transcript of Proceedings, filed May 31, 2016 ("R. 59, Tr."), pp. 16, 20* ("From my guesstimate, it was about the school."). They stopped in front of the high school when they saw Mr. Hairston walking in a crosswalk, with his cellphone to his ear. *Id.* at 16, 23. They got out of the cruiser with guns drawn and ordered him to stop. *Id.* at 24.

At the suppression hearing, the officers admitted they "guesstimated" the location of the gunshots. *Id.* at 16. They chose that school because it was located in a densely populated neighborhood known for "drug activity" and other crimes. *Id.* at 8, 16. One of the officers testified that he had a "hunch" that Mr. Hairston might have fired the shots because he was "in the general vicinity" of the area where they believed the shots were fired and they did not see anyone else. *Id.* at 19. They could not point to any specific, articulable factors linking Mr. Hairston to the earlier gunfire. Mr. Hairston did not run from the officers when their cruiser approached, he did not put his hands in his pockets to conceal a weapon, and he did not demonstrate any nervousness prior to being stopped at gunpoint by the officers.

IV. UNREASONABLE POLICE ACTIONS CANNOT BECOME CONSTITUTIONAL SIMPLY BECAUSE THEY OCCUR IN A PURPORTEDLY "HIGH-CRIME" AREA.

Even people who live in "high-crime" neighborhoods have an expectation of privacy. Yet, if the Ohio Supreme Court decision in this case is left to stand, the nature of where someone lives, or is just passing through, can be used exclusively as justification to

infringe upon that person's privacy, security, and bodily integrity.

To be clear, the officers in this case did not know that the recent gunfire occurred in an area known for criminal activity. Instead, the officers heard gunfire to the west of their location and traveled southwest to "an area known for criminal activity" because they "guesstimated" that was where the shots were fired. *R. 59, Tr., p. 16.* As the term itself implies, the officers could not articulate any particularized suspicion relative to the area or Mr. Hairston, who the officers admitted they stopped because of a "hunch." *Id.* at 19. Mr. Hairston could have done nothing more to objectively demonstrate that he was not involved in criminal activity.

As the Chief Justice of the Ohio Supreme Court pointed out in her dissent, the area where Mr. Hairston was stopped is a "dense residential area." *Hairston*, 156 Ohio St.3d 363, 2019-Ohio-1622, 126 N.E.3d 1132, ¶ 47 (O'Connor, C.J., dissenting). "Hairston may have been the only person Officer Moore saw while driving to the high school, but there were certainly numerous people in the neighborhood and, importantly, a lot of places to hide. . . . Although the officers had no duty to search each house and yard, absent any additional specific and articulable facts to support the officers' belief that Hairston was engaged in criminal activity, the fact that Hairston was the only person walking down the street does not help meet the reasonable-suspicion standard." *Id.* at ¶ 48.

There were multiple routes that the officers could have taken to go west. They could have traveled down Refugee Road. They could have turned right onto Gentry Lane. They could have driven around multiple neighborhoods looking for victims or ongoing strife. Instead, they drove directly to the guesstimated

"high-crime" area and stopped the first person they saw. Nothing in their engagement with Mr. Hairston identified him as a suspect, yet they stopped investigating the gunfire to arrest Mr. Hairston.

The Ohio Supreme Court's decision is inconsistent with the protections guaranteed by the Fourth Amendment as interpreted by this Court and intermediate courts of appeals throughout the country. In addition to the cases presented by Petitioner, two federal court of appeals decisions are particularly illustrative of the Ohio Supreme Court's failed interpretation of the Fourth Amendment.

In *United States v. Sewell*, 381 Fed. Appx. 159 (3d Cir. 2010), the Third Circuit Court of Appeals considered officer conduct following recent gunfire. A veteran officer was on patrol in a "high-crime" area after midnight. He heard a radio call of shots fired nearby and then observed Mr. Sewell running from the area where the shots reportedly had been fired. Once he saw the officer, Mr. Sewell slowed to a walk, nervously glanced back at the officer, and put his hands in his pockets. The Third Circuit concluded that based on those facts the officer had reasonable suspicion to stop Mr. Sewell, pointing to the following factors: (1) the late hour; (2) the high-crime nature of the area; (3) the stop occurred in close geographical and temporal proximity to a crime; (4) Mr. Sewell was observed jogging away from the scene of the shooting; and (5) he acted nervously once he noticed the police car nearby. *Id.* at 161.

Like Mr. Sewell, Mr. Hairston was walking in a residential neighborhood known as a "high-crime" area and he was stopped in close temporal proximity to the gunfire. However, that is where their similarities end. Mr. Hairston was out walking at an earlier hour and it is unknown whether he was stopped in

close geographic proximity to the purported gunfire because the officers merely "guesstimated" the gunfire's location. And most importantly, unlike Mr. Sewell, Mr. Hairston did not exhibit any suspicious behaviors indicating he had engaged in criminal conduct.

In *United States v. Baldwin*, 114 Fed. Appx. 675 (6th Cir. 2004), a Sixth Circuit Court of Appeals panel considered a similar set of facts. In *Baldwin*, an officer patrolling a "high-crime" area at 5:00am heard multiple gunshots. The officer testified that he was able to pinpoint the location of the gunfire because of his extensive experience. When the officer looked toward the area where he believed the shots had been fired, he observed an individual running from that direction. After failing to catch that person, the officer saw a parked car, occupied by Mr. Baldwin and his uncle. Based on the facts that the officer had recently heard gunfire, he was able to pinpoint the location of that gunfire, and the men were in the only occupied car parked in a high-crime area at a very early hour, the officer seized Mr. Baldwin and conducted a pat-down of his outer clothing. The Sixth Circuit Court of Appeals concluded that the police conduct violated the Fourth Amendment in this instance because Mr. Baldwin and his uncle were not the only two individuals in the area (one man had already fled from the scene) and the officers could not point to any specific, articulable facts giving rise to a reasonable suspicion that Mr. Baldwin was the person responsible for the gunfire. *Id*. at 680-681.

Similarly, Mr. Hairston was not the only person in the neighborhood at the time the officers seized him. He was merely the first person they found. Mr. Hairston was walking through a dense residential neighborhood at a less suspicious time of night, when many other people are awake and going about their

lives. *Terry* and *Wardlow* direct courts to consider the totality of the circumstances. When considering the officers' actions in this case and their negligible knowledge of both the alleged crime and the culprit, no legitimate argument can be made that this search and seizure were reasonable under the Fourth Amendment. All they had was a "hunch."

In *Wardlow*, the "high-crime" nature of the community was coupled with headlong flight from police officers. In *Cortez*, the "high-crime" nature of the area was coupled with a suspicious pattern of driving matching prior investigation and indicative of criminal behavior. In *Adams*, the "high-crime" nature of the community was coupled with a late hour (2:30am) and a tip from a known informant. In *Sewell*, the "high-crime" nature of the area was coupled with nervousness and jogging away from the police. On the other hand, in *Brown*, *Baldwin*, and the instant case, the seizures were based on nothing more than presence in a high-crime area and other nonspecific circumstantial factors. The officers lacked reasonable suspicion of criminal activity and therefore their conduct was deemed unconstitutional.[2] Here, at 9:00pm, in a residential neighborhood, Mr. Hairston was walking in a crosswalk and talking on a cellphone. Like Mr. Brown

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[2] In another analogous case, *United States v. Moore*, 817 F.2d 1105 (4th Cir. 1987), the Fourth Circuit Court of Appeals found that facts somewhat similar to this case amounted to reasonable suspicion justifying a stop. Mr. Moore was observed walking away from a closed church building in a "high-crime" area only a few minutes after a silent alarm was triggered, indicating a burglary had occurred. He was the only person in the area, and it was nearly midnight. However, the cases are distinguishable: (1) Mr. Moore was found in a non-residential area; (2) this occurred at a much later hour; (3) the location of the crime was precisely known by the investigating officers; and (4) Mr. Moore was seen walking away from that specific location.

and Mr. Baldwin, Mr. Hairston was doing nothing out of the ordinary, and the only justification for his stop was his presence in a purportedly "high-crime" neighborhood.

CONCLUSION

"[U]nlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name." *Utah v. Strieff*, 136 S.Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting). The intrusion that occurred in this case was significant and severe. Jaonte Hairston was walking in a crosswalk, around 9:00pm, talking on his cellphone. He was engaged in no objective behaviors that could be construed as "suspicious." Nevertheless, two police officers saw him, immediately exited their cruiser, ordered him to stop while displaying lethal force, told him to put his hands behind his back, and then interrogated him about the gunfire they had heard and whether he had any weapons. Whatever the proffered interest, the police-community engagement here was intense, escalating, and intimidating, and it occurred simply because Mr. Hairston was out for a walk.

The Fourth Amendment does not permit officers to guesstimate the location of gunfire and stop the first person they have a hunch might be responsible for the nonspecific incident. To hold otherwise would elevate one's presence in an "area known for criminal activity" to per se evidence of criminal activity. This Court has never allowed such weakening of the Fourth Amendment and therefore it should grant the petition for certiorari.

Respectfully Submitted,

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