NO.

In the

Supreme Court of the United States

Justin Harrington Darrell,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
from the United States Court of
Appeals for the Fifth Circuit

Fifth Circuit Case No. 19-60087

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This petition presents a straightforward case for certiorari review. First, the Fifth Circuit has turned its back on *Terry*, and created a new standard for a *Terry* seizure, one that would open the door for law enforcement to justify any, and all, investigatory encounters with citizens. In affirming the district court, the Fifth Circuit upheld the seizure based upon a claim of "officer safety," rather than the all-too-familiar *Terry* standard that requires reasonable suspicion that criminal activity may be afoot. As explained below, "officer safety" has never been a factor used in the *Terry* seizure analysis. Officer safety has only been used to determine whether a *Terry* search was reasonable.

Second, not only has the Fifth Circuit created a new *Terry* standard, the Fifth Circuit has also reinterpreted a case from this Court – *Illinois v. Wardlow* – by equating "walking away" with "headlong flight." No one, not even the officer at the scene, testified or asserted Mr. Darrell did anything more than increase his pace by walking away. The Fifth Circuit affirmed, equating "walking away" with officer safety concerns.

This Court should accordingly grant review to reaffirm the *Terry* standard for seizures and to correct an improper expansion of its precedent in *Wardlow* that makes a crime out of conduct it certainly did not intend to reach.

QUESTIONS PRESENTED

For over fifty years, it has been established that a law enforcement officer may seize a person if they can point to specific, articulable facts that would lead them to reasonably suspect that criminal activity may be afoot, pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). The first question presented is:

> Whether "officer safety" can justify the seizure of a person for a *Terry* stop, instead of pointing to specific, articulable facts that lead him to reasonably suspect that criminal activity may be afoot?

Second, in 2000, this Court held that headlong flight from police officers, in a high crime area, was sufficient reasonable suspicion for an officer to seize a person, pursuant to *Illinois v. Wardlow*, 528 U.S. 119 (2000). The question presented is:

> Whether "walking away" from police, in a high crime area, without any suspicion that a person is engaged in criminal activity, can provide officers a reasonable suspicion of criminal activity?

PARTIES TO THE PROCEEDING

Petitioner is Justin Darrell, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

COURT PROCEEDINGS

United States v. Justin Darrell, 1:18-CR-003 Northern District of Mississippi; Order Denying Motion to Suppress entered on August 23, 2018.

United States v. Justin Darrell, 1:18-CR-003 Northern District of Mississippi; Judgment entered on January 25, 2019.

United States v. Justin Darrell, Fifth Circuit Case Number 19-60087, 945 F.3d 929 (5th Cir. 2019); Order affirming district court entered on December 23, 2019.

United States v. Justin Darrell, Fifth Circuit Case Number 19-60087, 945 F.3d 929 (5th Cir. 2019); Order denying petition for panel rehearing and petition for *en banc* rehearing entered on February 7, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Justin Harrington Darrell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion was published at *United States v. Darrell*, 945 F.3d 929 (5th Cir. 2019) on December 23, 2019. *See* Appendix A. A petition for panel rehearing and a petition for rehearing *en banc* were filed and denied. *See* Appendix C.

The district court denied Mr. Darrell's Motion to Suppress on August 23, 2018. The district court entered the Judgment sentencing Mr. Darrell to 36 months' imprisonment on January 25, 2019. The Order denying the Motion to Suppress and the Judgment are attached as Appendix B.

JURISDICTION

This Petition for Writ of Certiorari is filed within 150 days after entry of the Fifth Circuit Judgment, as modified by this Court's Order on March 19, 2020, due to COVID-19 concerns. *See* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf; *see also* Rule 13.1 of the Supreme Court Rules. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Fourth Amendment:

> 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 persons or things to be seized.

STATEMENT OF THE CASE

The Fourth Amendment generally prohibits police from unlawfully seizing an individual. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court established a "narrowly drawn" exception to this prohibition. *Id*. As is relevant here, *Terry* permits officers to execute a brief seizure, if the officer can point to specific, articulable facts that the person may be committing criminal activity. *Id*. at 21.

In this case, the Fifth Circuit held that a concern for officer safety justified a *Terry* seizure, due to a mere possibility of Mr. Darrell drawing a weapon and by walking away from the officers. In reaching this holding, the Fifth Circuit created a new standard for a *Terry* seizure and expanded *Illinois v. Wardlow*, upsetting years of precedent.

1. On September 13, 2017, during daytime, Officer Mike Billingsley and Deputy Shane Latch sought to execute an arrest warrant for Brandy Smith at her residence. ROA.89, 92-93[1]. Mr. Darrell sat in a vehicle in Brandy Smith's driveway when the officers arrived, pulling in directly behind Darrell's vehicle, preventing any exit. ROA.95. Deputy Latch testified Brandy Smith's residence had a reputation for being a "known drug house" and he had personally made arrests at that residence. ROA.94.

Mr. Darrell got out of the vehicle and began walking toward the house. ROA.95. One of the officers, Mike Billingsley, called out an order for Mr. Darrell to stop. ROA.96. Mr. Darrell allegedly "increased his pace" toward the house, ignoring

[1] ROA references the Record on Appeal in this matter. If requested, the ROA can be forwarded to opposing counsel and the Court.

the officer. ROA.122. Officer Billingsley, a second time, ordered Mr. Darrell to stop and come back. ROA.96, 122. Mr. Darrell stopped, turned around, and walked back toward the officers. ROA.96, 122.

The prosecution argued and Deputy Latch suggested that Mr. Darrell would hinder the arrest of Brandy Smith, thereby giving the officers permission to seize and detain Mr. Darrell. ROA.97-98. The prosecution asked Deputy Latch why Mr. Darrell was seized. ROA.97.

Deputy Latch responded:

> "*For officer safety the main reason* and then didn't know if he – who all was at the house. He could be telling somebody else, if he went around back, that we was there and from – hindering prosecution."

ROA.97 (emphasis added).

Deputy Latch admitted there was no evidence of any crime that had been committed, was being committed, or about to be committed by Justin Darrell prior to seizure. ROA.125.

> Defense: So at that particular point where Darrell has been ordered twice to come back and has been seized, he had not committed a crime as far as you were aware, correct?
>
> Latch: Correct.
>
> Defense: He was not in the midst of committing a crime as far as you're aware?
>
> Latch: As far as we knew at that time.
>
> Defense: And you had no information at that time to suggest he was about to commit a crime?
>
> Latch: No, sir.

Defense: So there was no suspected legal wrongdoing on the part of Justin Darrell at that particular point, correct?

Latch: At that point.

ROA.125. Mr. Darrell was stopped because he was walking toward the house and did not obey the officer's command to stop. ROA.101, 125.

Only after Mr. Darrell returned to the officers, and after Deputy Latch asked Mr. Darrell to identify himself, did the deputy notice two knives in sheaths attached to Mr. Darrell's belt. ROA.102. Because of the knives, the officers patted Mr. Darrell down, deeming him armed and dangerous. ROA.112-14. A gun and drugs were found in Mr. Darrell's pocket, leading to a federal charge of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). ROA.104-05.

2. After hearing the testimony of Deputy Latch, the trial court ruled from the bench, denying the Motion to Suppress. ROA.133-34. Specifically, the court stated, "[the officers] were at a known drug house to make an arrest for a criminal, and that the officers arrived and [Mr. Darrell] started walking away; and when ordered to stop, walking away faster." ROA.134. The district court followed this up by stating that it was of the opinion the officers had "reasonable grounds to suspicion that [Mr. Darrell] was up to no good." ROA.134.

In its written Order, the district court relied on officer safety, citing to the Mississippi statute regarding hindering prosecution. ROA.53-54, 163-64. Because Mr. Darrell ignored the officer's instruction to stop and increased his pace away from the officer, the court deemed there was reasonable suspicion that criminal activity

was afoot. ROA.53. Nothing more specific regarding criminal activity was detailed in the Order.

3. Following a conditional guilty plea in the United States District Court for the Northern District of Mississippi, petitioner, Mr. Darrell, was convicted of felon in possession of a firearm, pursuant to 18 U.S.C. § 922(g). *See* Appendix B. The district court sentenced Mr. Darrell to 36 months' imprisonment. *See* Appendix B. A timely Notice of Appeal was entered.

4. On appeal, Mr. Darrell advanced three arguments, all of which were intertwined with one another. First, that there was no criminal activity suspected, second, a mere hunch cannot satisfy the reasonable suspicion standard, and third, "walking away" cannot amount to reasonable suspicion. The officers never suspected Mr. Darrell of committing a crime or that he was about to commit a crime; rather, they stopped him on the off chance that he could attempt to pull out a firearm (which was unknown at the time) to shoot the officers or "could be" alerting other individuals the police were present. Not only is this a "mere hunch" by the officers, but the officers agreed there was never any criminal activity suspected.

Defense counsel also argued that *Illinois v. Wardlow* only stood for the proposition that "headlong flight" in a high crime area could suffice for reasonable suspicion, but "walking away" in a high crime area could not. Because Mr. Darrell had a constitutional right to walk away and there was no suspicion that he was committing or about to commit a crime, he was seized in violation of the Fourth Amendment.

4. In a 2-1 split, the majority affirmed. *United States v. Darrell*, 945 F.3d 929 (5th Cir. 2019). *See* Appendix A. The Panel opinion did two things: first, it held that officer safety could justify a *Terry* seizure, and second, it focused on the "walking away" issue, holding *Illinois v. Wardlow* controlled the analysis. The Fifth Circuit pointed out that had Mr. Darrell walked out of the officer's line of vision, he could have pulled a gun on the officers, noting "No doubt, this is the kind of tactic Deputy Latch feared when he saw Darrell "start[ing] down the side of the house trying to get out of sight." *Darrell*, 945 F.3d at 936.

Applying *Wardlow*, the Panel expanded "headlong flight" to include "walking away in a high crime area," finding the officers had reasonable suspicion. *Darrell*, 945 F.3d 929, 938 ("Darrell's behavior is a prototypical case of suspicious activity: flight from police in a high-crime area. The *Monsivais* language, together with Wardlow's reliance on these same two factors, plainly contradicts Darrell's claim that his presence in a "high crime area and evasive behavior" are insufficient "to support a finding of reasonable suspicion.").

The Panel opinion credited Deputy Latch's hunch that Darrell could have hindered prosecution and was a danger to officers, if he left their field of vision, providing the requisite "criminal activity may be afoot."

Judge Dennis dissented, arguing that there was no criminal activity and that Darrell's walking away from the officers could not have been inferred to be criminal activity or interpreted as headlong flight. *Darrell*, 945 F.3d at 940 ("I disagree with the majority's conclusion that *Wardlow* applies here. Darrell exited a car and walked

away from it, leaving his vehicle and a passenger in the driveway. Characterizing this as unprovoked flight is essentially speculation—the kind of "inchoate and unparticularized suspicion or 'hunch,' " that is not a reasonable basis for suspicion under *Terry*.").

The Fifth Circuit denied Mr. Darrell's Petition for Rehearing *En Banc* and his Petition for Panel Rehearing. *See* Appendix C.

Mr. Darrell, Petitioner, now seeks review by this Court to settle these important questions of federal law of pure importance that conflict with relevant decisions of this Court.

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review because the Fifth Circuit has created a new standard for a *Terry* seizure – officer safety – that conflicts with this Court's landmark decision *Terry v. Ohio*.

"Warrantless searches and seizures are '*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Katz v. United States*, 389 U.S. 347, 357 (1967). In *Terry v. Ohio*, this Court carved out one such exception: if a law enforcement officer can point to specific, articulable facts that lead him to reasonably suspect "that criminal activity may be afoot," he may briefly detain an individual to investigate. In addition, if the officer reasonably believes that the individual is "armed and presently dangerous to the officer or to others, the officer may conduct a limited *protective search* for concealed weapons—often called a *frisk*." However, this case is not about the search; it is about the seizure.

The starting point for determining whether a law enforcement officer's seizure of a person is constitutional is the *Terry* standard itself. *Terry* is reviewed as one, unified standard: an officer must point to specific, articulable facts that led him to reasonably suspect that criminal activity may be afoot. *See e.g.*, § 11:9.Guiding principles, Warrantless Search Law Deskbook § 11:9(3) ("Investigative detention requires reasonable suspicion to believe a violation of the criminal law has taken place, is taking place, or will imminently take place."). In other words, if there is no allegation of criminal activity that may be afoot, there can be no *Terry* stop. Likewise, if criminal activity may be afoot, but the officer cannot point to specific, articulable

facts, then there can be no *Terry* stop. There must be both specificity as to facts and an allegation that criminal activity may be afoot.

Officer safety, on the other hand, is not and never has been a factor for validating the seizure. Rather, *Terry* mentions officer safety only in the context of searches or frisks, assuming a person has been validly seized. Specifically, in *Terry*, officer safety only comes into action when:

> The officer has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

392 U.S. at 27.

The first case to draw this important distinction is *Pennsylvania v. Mimms*, where this Court held officer safety is a legitimate factor for frisks in the context of valid automobile stops because officer safety is inherently dangerous when confronting people sitting in automobiles. 434 U.S. 106, 110 (1977) ("And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile."). Similarly, in *Ybarra v. Illinois,* while acknowledging officers may pat down a subject for their own safety and protection, this Court noted that the officer must first have a reasonable suspicion to suspect criminal activity may be afoot for seizure purposes. 444 U.S. 85, 93 (1979) ("[A] law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons, but must have a reasonable suspicion to seize someone first....").

Just four years later, this Court reaffirmed that officer safety is an important, if not the most important factor, to justify protective searches after a person has been validly seized. In *Michigan v. Long*, officers arrived to investigate a vehicle that had swerved into a ditch at night. 463 U.S. 1032, 1035-36 (1983). Officers believed Mr. Long was under the influence and noticed a large knife on the floorboard and were worried for their safety if Mr. Long retrieved it. At that point, the officers frisked Mr. Long, finding no weapon. Eventually, his vehicle was searched and marijuana was found. *Id*. at 1036. This Court upheld the search of the vehicle, stating, "Our past cases indicate then that *protection of police and others can justify protective searches* when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect." *Id*. at 1049-50 (emphasis added).

But, importantly, none of these cases asserted officer safety may be used to determine the validity of the seizure itself. An officer may not conduct this protective search for purposes of safety until he has a reasonable suspicion that supports the investigatory stop:

> If the frisk is justified in order to protect the officer during an encounter with a citizen, *the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop.*
>
> *Any person, including a policeman, is at liberty to avoid a person he considers dangerous.*
>
> *If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence.*

> That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection.

Terry, 392 U.S. at 32-33 (Harlan, J., concurring) (emphases added).

Officer safety had nothing to do with the *seizure* of Mr. Mims, Mr. Ybarra, or Mr. Long; officer safety was only a factor for the ensuing *Terry* search. Officer safety is not a basis for a *Terry* seizure.

A. The Fifth Circuit's decision is wrong.

As explained below, the Fifth Circuit attempted to justify Mr. Darrell's seizure based on concerns of officer safety, in lieu of a suspicion of criminal activity as required by *Terry*. It relied on the officers' fear of Mr. Darrell withdrawing a concealed weapon. *Darrell*, 945 F.3d 929 at 931. In other words, the Panel is not expanding *Terry*, it is overriding *Terry* by creating a new factor for a seizure: officer safety. Certiorari is warranted to set right a widespread error and to reaffirm the standard created in 1968.

This was error, as the Fifth Circuit leapt to the officer safety rationale for a protective frisk for weapons, ignoring the mandate in *Terry* that there must be reasonable suspicion of on-going criminal activity justifying a stop *before* a coercive frisk may be constitutionally employed. *See, e.g.*, *United States v. Hughes*, 517 F.3d 1013, 1019 (8th Cir. 2008); *Adams v. Williams*, 407 U.S. 143, 146 (1972) ("So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in

scope to this protective purpose" (emphasis added) (footnote omitted)). In other words, "[t]o conduct such a protective search, an officer must first have reasonable suspicion support by articulable facts that criminal activity may be afoot." *United States v. Burton*, 228 F.3d 524, 528 (4th Cir. 2000).

For over fifty-years, courts have followed the standard set forth in *Terry*. Not much has changed, as all twelve Circuits follow the dictates of *Terry*: *See e.g.*, *United States v. Belin*, 868 F.3d 43, 49 (1st Cir. 2017) (following *Terry* for investigative seizures); *United States v. Singletary*, 798 F.3d 55, 59 (2d Cir. 2015) (same); *United States v. Lowe*, 791 F.3d 424, 430 (3d Cir. 2015) (same); *United States v. Foster*, 824 F.3d 84, 88 (4th Cir. 2016) (same); *United States v. Mays*, 643 F.3d 537, 541 (6th Cir. 2011) (same); *United States v. Richmond*, 924 F.3d 404, 411 (7th Cir. 2019), *cert. denied sub nom. RICHMOND, ANTOINE v. UNITED STATES*, No. 19-6343, 2020 WL 872444 (U.S. Feb. 24, 2020) (same); *United States v. Polite*, 910 F.3d 384, 387 (8th Cir. 2018) (same); *United States v. Brown*, 925 F.3d 1150, 1153 (9th Cir. 2019) (same); *United States v. Windom*, 863 F.3d 1322, 1327 (10th Cir. 2017) (same); *United States v. Valerio*, 718 F.3d 1321, 1324 (11th Cir. 2013) (same); *United States v. Jones*, 584 F.3d 1083, 1088 (D.C. Cir. 2009) (same).

Judge Dennis, in his dissent, made this same observation, by stating, "The Government argues that this seizure was justified under *Terry* in part because the officers needed to secure Darrell to prevent him from retrieving a weapon or warning the target of the arrest warrant of the police's presence. However, the purpose of a *Terry* stop is inherently investigatory, and, absent reasonable suspicion, *Terry* does

not permit an officer to seize a person for the practical, non-investigative purpose of preventing the individual from interfering with the execution of a warrant." *Darrell*, 945 F.3d at 942. By resting its decision on the affirmation that the seizure was justified under *Terry* because the officers needed to secure Mr. Darrell to prevent him from retrieving a weapon or warning the target of the arrest warrant of the police's presence, the majority erred.

Furthermore, Judge Dennis stated that the purpose of a *Terry* stop is inherently investigatory, and, absent reasonable suspicion, *Terry* does not permit an officer to seize a person for the practical, non-investigative purpose of preventing the individual from interfering with the execution of a warrant. *Id*. at 942 *FN2 (citing *Terry*) ("[A] police officer may in appropriate circumstances and in an appropriate manner approach a person *for purposes of investigating possibly criminal behavior* even though there is no probable cause to make an arrest." (emphasis added)). An initial *Terry* stop is justified only when the officer has reasonable suspicion that an individual is committing or will imminently commit a crime. *See e.g.*, *Arizona v. Johnson*, 555 U.S. 323, 326 (2009). Here, while it would certainly have been a crime for Mr. Darrell to retrieve a weapon and harm the officers or to warn the target of the warrant in order to help her evade arrest, the government has not pointed to any specific and articulable facts that support a reasonable suspicion that Mr. Darrell would have engaged in these crimes. *Id*.

And, while the prosecution emphasized that this was a split-second decision based on the need to ensure officer safety and the integrity of the law enforcement

operation, the Supreme Court has previously addressed Fourth Amendment concerns regarding the need to seize individuals without reasonable suspicion for these purposes through a separate exception to the warrant requirement. For example, in *Michigan v. Summers*, the Court held that a search warrant for contraband carries with it the authority to detain individuals on the premises of the targeted dwelling while the warrant is executed irrespective of whether there is any reason to believe they are involved in criminal activity. 452 U.S. 692, 702–03 (1981). The motivations for this rule include the need to protect the executing officers from harm and to prevent the spoliation of evidence. *Id.* However, never has this Court extended *Summers* to cover the execution of an *arrest* warrant, and the prosecution did not raise *Summers* or its progeny as support for its authority to detain Mr. Darrell.

The police never suspected Mr. Darrell of being engaged in criminal activity prior to being seized. *See above,* pg. 3 testimony from Deputy Latch, cited to ROA.125. Nor was he the person the officers were trying to arrest. Mr. Darrell was seized because the officer was worried about his safety. *Darrell*, 945 F.3d at 936, 938. For Mr. Darrell to have been seized legally, the officer would have had to point to specific, articulable facts that he was committing or about to commit legal wrongdoing – something the officers admit they could not do.

B. This case presents an ideal vehicle for deciding this important, novel question.

The question presented is important. There have been over 1,300 cases concerning *Terry* in the past three years alone.[2] These cases involve routine traffic stops, encounters with citizens on the street, and situations at people's homes. The Fourth Amendment guarantees a right to be free from unreasonable searches and seizures and a right to be secure in their persons, houses, papers, and effects. U.S. Const. amend. IV.

The Fifth Circuit decision creates a rule that will likely undermine the protections of the Fourth Amendment, and will essentially allow police officers to seize every innocent citizen in the vicinity of an attempted arrest since they "might be a threat to officer safety." If "office safety" can be used to justify a seizure, it could potentially open the floodgates to let officers seize anyone, anywhere, and for whatever reason, regardless of a reasonable suspicion of criminal activity, thereby nullifying the protections of the Fourth Amendment and *Terry*.

Instead of having to point to specific, articulable facts that criminal activity may be afoot, the officer can allege "officer safety" to rationalize the stop. This supposition is a slippery slope, one that could erode individuals' constitutional right to go about their lives free from arbitrary police interference. 945 F.3d at 943 (Dennis, J. dissenting).

[2] *See* Westlaw and search for *Terry v. Ohio* and reasonable suspicion.

Only one other Circuit case has faced the question of whether law enforcement officers can claim "officer safety" as a valid reason to seize an individual, and it declined to rule on this issue. In *United States v. Hart*, the district court concluded that the stop was justified based on officer safety, reasoning that officers securing an area to conduct an investigation could stop an individual present at the scene whom they reasonably suspected of concealing a weapon. 674 F.3d 33, 39 (1st Cir. 2012).

Mr. Hart countered that officer safety only becomes relevant after officers have executed a legitimate *Terry* stop, just as Mr. Darrell asserts. The First Circuit passed on ruling on this issue of whether "officer safety" can be used to justify a seizure; instead, it affirmed the district court based on the totality of the circumstances. There, the police were dispatched to find three escapees with a description that Mr. Hart somewhat matched (Mr. Darrell was not the person police sought), Mr. Hart was being warned police were approaching (Mr. Darrell was not warned), he appeared startled and walked away from the officers (Mr. Darrell walked towards the house), ducked behind a car, and clutched at his waistband (Mr. Darrell did not make any furtive gestures or reach into his waistband). *Id.* ("[W]e do not reach Hart's contention as to the district court's rationale because, based on the totality of the circumstances, we hold that the troopers had reasonable suspicion to stop Hart.).

Without reasonable suspicion of criminal activity afoot, an officer cannot institute a *Terry* seizure – doing so violates *Terry* and the Fourth Amendment. Officer safety is only a relevant factor for the ensuing frisk of a person, but has no place in determining whether an officer can detain a person. The Fifth Circuit,

therefore, has erroneously created a new standard that expands *Terry* well-beyond its original intent.

II. This Court should grant review because the Fifth Circuit has expanded this Court's decision in *Illinois v. Wardlow* to equate "walking away" with headlong flight.

In 2000, the Supreme Court decided *Illinois v. Wardlow*, which held a person's sudden and unprovoked flight from identifiable police officers, patrolling a high crime area, was sufficiently suspicious to justify the officers' *Terry* stop of that person. 528 U.S. 119. Flight is the consummate act of evasion. *Id*. at 124. But, there's a distinction between someone channeling their inner Usain Bolt by sprinting away and walking away at an increased pace from law enforcement. The Fifth Circuit now reinterprets *Wardlow* to include situations where the defendant is seen walking, not running, away from law enforcement, in a high crime area. *Darrell*, 945 F.3d 938-39.

A. This case presents an ideal vehicle to clarify *Wardlow*.

This case presents a clean issue for deciding whether "walking away" in a high crime area sufficiently satisfies *Wardlow's* finding of reasonable suspicion. There was no other criminal activity observed or claimed by the officers.

This Court has never held that walking away in a high crime area, without more, could sustain a *Terry* seizure. Indeed, people have a constitutional right to walk away from police officers. For example, in *Florida v. Royer*, this Court held that a person has a right to ignore the police and go about his or her business, where the officer does not have reasonable suspicion or probable cause. 460 U.S. 491 (1983). And any "refusal to cooperate, without more, does not furnish the minimal level of

objective justification needed for a detention or seizure." *Florida v. Bostick,* 501 U.S. 429, 437 (1991). Behavior that appears evasive could, of course, have any number of innocent explanations. *Id.* at 128–29 (Stevens, J.). In other words, "there are unquestionably circumstances in which a person's flight is suspicious, and undeniably instances in which a person runs for entirely innocent reasons." *Id.*

Typically, when courts face reasonable suspicion questions dealing with defendants who evade law enforcement, most situations involve discernible facts or a combination of facts "specifically linking the fleeing individual to reasonably suspected criminality – *e.g.*, flight in a high crime area or flight after receipt of a tip indicating criminality." *United States v. Monsivais*, 848 F.3d 353, 361 (5th Cir. 2017). Here, there was nothing discernible nor was there a combination of facts that would give officers a reason to become suspicious of Mr. Darrell – he was walking away, not running, he was not the person the officers were there to arrest, nor was he suspected of any legal wrongdoing.

It was the officer's mere hunch, his own subjective opinion, that Mr. Darrell could pull a weapon or hinder prosecution if he was not stopped. *Darrell*, 945 F.3d at 931 ("Deputy Latch later testified that if Darrell had walked an additional fifteen to twenty feet, he would have been behind the house and outside the officers' field of vision. Once out of their sight, the officers feared, Darrell might have withdrawn a concealed weapon or warned Ms. Smith of her impending apprehension—a crime under Mississippi law.").

In Mr. Darrell's case, the Fifth Circuit refused to address the question *en banc* despite the unreasonable expansion of *Wardlow*.

B. The Fifth Circuit's decision is wrong.

The Panel found that walking away, in a high crime area, is sufficient to uphold a *Terry* seizure as reasonable suspicion that criminal activity may be afoot. *Darrell*, 945 F.3d at 939.

This is error. Walking away is not the equivalent to running away, let alone headlong flight. Chief Justice Rehnquist clearly articulated that Mr. Wardlow's unprovoked, headlong flight was the consummate act of evasion: It was not necessarily indicative of wrongdoing, but it is certainly suggestive of such. *Wardlow*, 528 U.S. at 124. While headlong flight was not defined in the opinion, the facts certainly suggest that it is more than walking away.

Justice Stevens, however, wrote separately to explain why flight could not always be equated with guilt:

> "[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'
>
> Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

Id. at 131 (quoting *Alberty v. United States,* 162 U.S. 499, 511 (1896)).

Similarly, the Third and Ninth Circuits have agreed that "walking away" cannot meet the reasonable suspicion standard standing alone. In *United States v. Kitchen,* the Ninth Circuit determined that an officer does not have reasonable suspicion merely because a suspect walks away from the police in a high-crime area. 11 Fed. Appx. 844, 846 (9th Cir. 2001). While patrolling a high-crime neighborhood, two police officers saw two suspects "make hand-to-hand contact" in a parking lot. *Id.* When the suspects saw the patrol car, they "they turned away from each other, placing their hands in their pockets, and walked away in separate directions" at a normal pace. *Id.* One suspect "looked over his shoulder in the direction of the officers a couple of times." *Id.* The Ninth Circuit reversed the district court and held that the stop was unlawful, stating that the suspect's conduct "inculpates too much innocent behavior." *Id.*

The Third Circuit reached a similar conclusion in *United States v. Navedo,* 694 F.3d 463, 471 (3d Cir. 2012). There, two police officers observed one suspect take a gun from a bag and show it to a second suspect. *Id.* at 466. When the officers exited a nearby patrol car to investigate, the suspects ran. *Id.* The Third Circuit vacated and remanded the district court's holding that the stop was lawful, saying that *Illinois v. Wardlaw* "cannot be used to justify stopping everyone who flees from police" because the "underlying circumstances" control. *Id.* at 471.

In reaching its conclusion that walking away was sufficient to provide the officers reasonable suspicion, the Fifth Circuit Panel relied on three cases that involved walking away. *Darrell*, 945 F.3d at 935-36. However, each case shares one

common factor that was not present in Mr. Darrell's case – an *additional reason* to suspect criminal activity.

- Officers went to a street address after receiving a tip that stolen vehicles were present there. The officers surveilled the residence, and noticed Tuggle appearing to conduct a drug transaction. At that point, Tuggle walked away from the officers, towards a stolen vehicle, and was detained. *United States v. Tuggle*, 284 Fed. App'x 218, 220-21 (5th Cir 2008).
- Officers were investigating an individual nicknamed "G Dog," who was responsible for several armed robberies, when they came across Lawson, who matched their description and began to run. Lawson ran through several lanes of traffic and into a parking lot where he fell down and was arrested. *United States v. Lawson*, 233 Fed. App'x 367, 368, 370 (5th Cir. 2007) (stating Lawson's behavior approached the conduct in *Wardlow*).
- Officers received a complaint that a suspicious man, wearing a tan jacket, with a gun was on premise. Officers arrived and saw a group of 8-10 people. Sanders matched the description and began walking away. Officers told Sanders to get down on the ground, but he refused. Backup officers arrived, arresting Sanders. *United States v. Sanders*, 994 F.2d 200, 201-02 (5th Cir. 1993).

In all three cases, the requisite "reasonable suspicion of criminal activity afoot" was already present, as the officers already had specific, articulable facts that criminal activity was afoot – investigating stolen vehicles, investigating armed

robberies, and receiving a complaint of a suspicious person in possession of a firearm. Then, once the defendants noticed the police, the defendants began walking away from the officers. That "additional" criminal investigation or seeking a person matching the same description was not present in Mr. Darrell's case.

The officers were seeking to execute an arrest warrant for a female, not Mr. Darrell. This is what distinguishes Mr. Darrell's case: there was no reasonable suspicion of criminal activity afoot by Mr. Darrell.

Merely walking away is not indicative of anything illegal. Indeed, it is undisputed that Mr. Darrell never broke into a full sprint or even sped up beyond power walking. *Darrell*, 945 F.3d at 935. This is not a case of "[h]eadlong flight" at "the mere sight of a police officer." *Compare Wardlow*, 528 U.S. at 121–22, 124, (police had reasonable suspicion to seize man who "looked in the direction of the officers" and "ran"); *see e.g.*, *Lawson*, 233 Fed. App'x at 368, 370; *see also United States v. Michelletti*, 13 F.3d 838, 841 (5th. Cir. 1994) (police had a "reasonable basis to investigate a man who had just turned and run evasively at the mere sight of a patrol car"). This was innocent behavior.

The Fifth Circuit has issued an opinion that conflicts with Supreme Court precedent, essentially redefining *Wardlow*, upsetting years of precedent. This Court should grant certiorari and allow the parties to proceed on the merits and oral argument.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and allow him to proceed with briefing on the merits and oral argument.

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Respectfully submitted,

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