NO. 19-8594

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

## REPLY BRIEF FOR THE PETITIONER

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## INTRODUCTION

Contrary to the government's brief in opposition, Mr. Darrell does not ask the Court to abandon the Fourth Amendment touchstone of "reasonableness" when assessing the *Terry* inquiry for seizures. He simply asks the Court to uphold the constitutional lines that this Court has consistently recognized. It is the government that desires to uphold a radical reinterpretation of *Terry v. Ohio*, 392 U.S. 1 (1968).

According to the Government and the Fifth Circuit, an officer may *Terry* seize someone if the person is a potential threat to officer safety, without any reasonable suspicion of criminal activity. By claiming "officer safety," officers' authority to seize is carte blanche. The Government attempts to defend this holding by arguing the Fifth Circuit's opinion only utilized "officer safety" as one factor based on totality of the circumstances. In reality, the opinion fundamentally alters the *Terry* landscape from 50-plus years ago.

Nothing in this Court's jurisprudence supports the government's attempt to overthrow *Terry*. Mr. Darrell is cognizant that officers face dangerous situations all the time when encountering individuals, but officer safety has never been a justification for seizure, especially where the arrest warrant was for a different person. Being in the vicinity of someone whom the officers are looking for is not a crime. Officer safety has only been used as a factor for the ensuing search.

As for *Illinois v. Wardlow*, 528 U.S. 119 (2000), walking away has never equated to headlong flight. This Court should reaffirm *Wardlow*, and reverse the Fifth Circuit. While running from a police officer is not the type of behavior Mr.

Darrell asserts is legal, walking away should be, without further reasonable suspicion of criminal activity, even in a known crime area.

Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted only for compelling reasons. This petition satisfies this criteria as the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court, specifically *Terry v. Ohio* and *Illinois v. Wardlow*. *See* Supreme Court Rule 10(c).

## I. "OFFICER SAFETY" SHOULD NEVER BE A FACTOR USED IN A *TERRY* STOP ANALYSIS BECAUSE IT CIRCUMVENTS THE REQUIREMENT OF REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

### A. The Government's concept of a *Terry* seizure is incompatible with this Court's jurisprudence.

The Government contends that the Fifth Circuit used "officer safety" as one of the many factors in its *Terry* analysis, rather than creating a new standard, therefore barring this Court's review. *See* Opp'n Br. 7-8. To not resolve this issue would give officers a shortcut to validate *Terry* and grant officers' authority to detain anyone they believe may be a threat, even if no suspicion of criminal activity was afoot. Mr. Darrell asserts there is no circumstance where officer safety should be considered in *seizing* an individual.

*Terry* consists of a seizure ("stop") component and a search ("frisk") component. 392 U.S. at 16. This Court has only considered officer safety for the ensuing search, not the seizure:

> The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious

> behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation.
>
> ...
>
> In view of these facts, we cannot blind ourselves to the need for law enforcement officers 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 presently 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 23, 24.

This Court has addressed officer safety in other, similar search contexts. *See e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997) (officer may order passengers out of the car during a traffic stop); *Maryland v. Buie*, 494 U.S. 325, 336 (1990) (protective sweep of house justifiable based on "reasonable belief that the suspect poses a danger"); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) ("protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger"); *Michigan v. Summers*, 452 U.S. 692, 702-703 (1981) ("interest in minimizing the risk of harm to the officers" justifies detaining occupant of premises while search is conducted); *United States v. Robinson*, 414 U.S. 218 (1973) (search of arrestee for weapons permissible, regardless of whether there is reason to believe arrestee is armed and dangerous); *Chimel v. California*, 395 U.S. 752, 763 (1969) (search incident to arrest justified on ground that without search "officer's safety might well be endangered").

The Government acknowledges that *Terry* requires reasonable and articulable suspicion that a person is engaged in potential criminal activity. *See* Opp'n Br. 7. This means a review of the "totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *Id.* at 8. Upon review of cases involving *Terry*, there are few, if any, that consider officer safety as a factor upholding a seizure. Officer safety, however, is an enumerated factor for a *Terry* search. 392 U.S. at 23-24.

Yet, when reviewing the facts, there was no reasonable suspicion of criminal activity committed by Mr. Darrell. *See* Pet'r Br. at 4-5. The prosecution asked the officer why Mr. Darrell was seized. The officer 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."

(emphasis added). *Id.* The testimony supports Mr. Darrell's assertion that officer safety was the officer's primary reason for seizing Mr. Darrell, and that the possibility of hindering prosecution was second. Without any evidence, other than the mere allegation, the seizure was affirmed. This Court has required more than an officer's hunch and his subjective good faith belief – "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.'" *Terry*, 392 U.S. at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

The Government repeatedly attempts to justify the seizure, by looking at the totality of the circumstances – namely that Mr. Darrell was at a person's home where

the officers intended to arrest the person inside the house, that Mr. Darrell began walking towards the back of the house[1] once the officers arrived, and there was a possibility of Mr. Darrell drawing a weapon or hindering prosecution – yet, overlooks the fundamental basis of *Terry* and its requirement of reasonable suspicion of criminal activity based on objective facts, not subjective ones or their own inchoate hunches.

The officer could not and did not point to a single shred of evidence that Mr. Darrell was armed and dangerous, prior to seizure, or was about to hinder prosecution. In fact, the officer testified that Mr. Darrell was not suspected of any legal wrongdoing before being seized.

> 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?
>
> Officer: Correct.
>
> Defense: He was not in the midst of committing a crime as far as you're aware?
>
> Officer: 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?
>
> Officer: No, sir.
>
> Defense: So there was no suspected legal wrongdoing on the part of Justin Darrell at that particular point, correct?

[1] The officer at the suppression hearing opined that Mr. Darrell was heading to the back of the house, but walking to the back of the house and to the house are one in the same.

Officer: At that point.

Further, and more importantly, the Government has not presented one single case to strengthen its argument that officer safety is a valid reason for a *Terry* seizure, sans reasonable suspicion of criminal activity.

Without an allegation of any criminal activity of legal wrongdoing, the only fact that could justify Mr. Darrell's seizure was "officer safety," which was testified to at the suppression hearing and was relied upon by the Fifth Circuit. *See* Opp'n Br. 6; *see also United States v. Darrell*, 945 F.3d 929, 938 (5th Cir. 2019).

There is no doubt that armed criminals pose a serious threat to public safety. But, these Court's decisions have recognized this danger and created *Terry* 's rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. *Florida v. J.L.*, 529 U.S. 266, 272 (2000). Allowing officers power to seize someone based on their mere hunch that a person could harm them or could hinder prosecution, without more evidence, goes against the very essence of *Terry* and its progeny.

If the Fifth Circuit's opinion stands, then officers will invoke officer safety as the reason for seizure, curtailing citizens' right to be free from seizure and giving officers a shortcut to arrest someone they believe *might* be a danger to them.

### B. The Government's reliance on *Michigan v. Summers* and *Illinois v. McArthur* is misplaced.

The Government incorrectly cites *Michigan v. Summers*, 452 U.S. 692 (1981) and *Illinois v. McArthur*, 531 U.S. 326 (2001), as precedent for its position in

opposition. Both stand for the proposition that officers may detain individuals, based on officer safety, when executing *search* warrants; it does not grant officers unlimited power to *Terry* seize an individual based on officer safety, even in the presence of an arrest warrant. The Government glosses over this critical difference.

The text of the Fourth Amendment imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. *See Payton v. New York,* 445 U.S. 573, 584 (1980). Importantly, search warrants require probable cause, a higher standard than reasonable suspicion. This means officers would not need to satisfy *Terry* because probable cause exceeds that requirement. *See e.g., Summers,* 452 U.S. 692 ("For Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.").

In *Bailey v. United States,* this Court performed an in-depth analysis of the *Summers* rule as applied to areas beyond the immediate vicinity of the premises covered by a search warrant: officer safety was one of the primary factors. 568 U.S. 186, 194-97 (2013). It is undisputed that officers should search without fear that occupants, who are on the premises and able to observe the course of the search, will become disruptive, dangerous, or otherwise frustrate the search. *Id.* at 195. But this only applies to execution of search warrants.

*McArthur*, likewise, provides no support for the Government's position. The officers obtained a search warrant based on firsthand knowledge of drugs inside the residence. 531 U.S. at 331-32. The detention, albeit without a warrant, was incident to the search warrant and probable cause of illegal activity ongoing inside. *Id.* Neither *Summers* nor *McArthur* concern *Terry* seizures, only seizures incident to search warrants where officers have probable cause of criminal conduct. When executing search warrants, officers enter buildings unaware of the number of people inside, if weapons or drugs are present, and whether the people inside are aware of the officers which is why officer safety is a spelled-out factor recognized by this Court.

The Government has cited to no cases corroborating their position where the *Terry* seizure was based on officer safety or one factor being officer safety. That's because *Terry* has always required reasonable suspicion of criminal activity, not officer safety.

The Fifth Circuit and the district court agreed that the possibility of Mr. Darrell's pulling a weapon could satisfy *Terry*. *See* Opp'n Br. 6 (The court observed that the "officers 'reasonably feared' [Mr. Darrell] might draw a weapon or warn the target of their arrest warrant if he were permitted to withdraw from view."). Even assuming *arguendo* that officer safety was only one factor used to satisfy *Terry*, it was an incredibly weighted factor, one that would surely satisfy any district court's finding of reasonable suspicion by itself, and would be affirmed by any Circuit Court on appeal.

To allow an officer's claim of "officer safety" to justify a seizure would usurp the fundamental meaning of *Terry*, which is reasonable suspicion of criminal activity.

## II. WALKING AWAY IS NOT THE SAME AS HEADLONG FLIGHT.

The Government's defense of the Fifth Circuit is factual only. It agrees, like the Fifth Circuit, that Mr. Darrell was not channeling his inner Usain Bolt and fleeing from officers; he was merely walking towards the house. *See* Opp'n Br. 8-9 ("The court of appeals acknowledged that the evasive behavior in this case was less pronounced than in *Wardlow*, as [Mr. Darrell] walked rather than ran away from police."]. *Wardlow*, however, took place in an entirely different context, where headlong flight clearly indicated suspicious activity. 528 U.S. at 124. There, a caravan of police were patrolling a high crime neighborhood on the lookout for drug transactions. *Id.* at 121-22. When Mr. Wardlow bolted in the opposite direction, running to escape, after making eye contact with the officers, the cops had reasonable suspicion of criminal activity. *Id.* at 122, 124-25. Mr. Darrell never made eye contact with the officers, and walked away from the officers who were blocking his vehicle in the driveway – Mr. Darrell had nowhere to go. The officers were going to seize Mr. Darrell, regardless of his actions:

- Had Mr. Darrell stayed in his vehicle, the officers were going to seize him;
- Had Mr. Darrell ran towards the house, or ran anywhere, he would have been seized;
- Had Mr. Darrell walked towards the officers, he would have been seized.

The *Wardlow* Court stated that headlong flight is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. *Id.* at 124. But, it also reiterated that individuals have the right to walk away from police and go about their business. *See Florida v. Royer*, 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). The Court's holding did not consider whether "walking away" was sufficient to uphold *Wardlow*, it only considered headlong flight.

Applying that context and that same analysis to Mr. Darrell's case is a misapplication of precedent. By having never held that "walking away" could satisfy *Wardlow*, even in an area known for criminal activity, the Fifth Circuit erred. Here, the Government does not contend that Mr. Darrell did anything more than walk away from the officers, nor did the Fifth Circuit. *See* Opp'n Br. 2-3, 5. The Fifth Circuit, however, labeled Mr. Darrell's walking away as flight, upholding the conviction because the "officers 'reasonably feared' [Mr. Darrell] might draw a weapon or warn the target of their arrest warrant if he were permitted to withdraw from view." *See* Opp'n Br. 6.

The Government's final contention is the notion that Mr. Darrell *could* have hindered prosecution, thereby strengthening the *Wardlow* analysis. *See* Opp'n Br. 9. There was no evidence to suggest Mr. Darrell was going to alert the occupant of the residence, other than the officer's subjective opinion. Doubling back to the *Summers* and *McArthur* arguments, those cases dealt with search warrants, not arrest

warrants, and certainly not arrest warrants for a person other than the person whom was stopped.

Absent reasonable suspicion of criminal activity, Mr. Darrell should not have been seized. Walking away, at a known drug house, with only the possibility of a weapon being drawn or hindering prosecution, should not replace the familiar *Terry* standard for seizure.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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