IN THE SUPREME COURT OF THE UNITED STATES

CLINTON MACK REID,

PETITIONER,

- v -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S PETITION FOR WRIT OF *CERTIORAR*I TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a district court's finding regarding the objective basis for an officer's inference of criminality for a *Terry* stop is an historical fact subject to clear-error review under *Ornelas v. United States.*

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Clinton Mack Reid, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, reversed the district court's order suppressing evidence seized in violation of the Fourth Amendment.[1] *See United States v. Reid*, 692 F. App'x 825 (9th Cir. 2017). The Ninth Circuit held that, contrary to the district court's finding, there was sufficient reasonable suspicion to detain Petitioner under *Terry v. Ohio,* 392 U.S. 1 (1968), and that the seizure of a firearm was the result of an untainted chain of events flowing from that stop.

[1] A copy of the decision is attached in Appendix A.

Mr. Reid sought rehearing en banc. He argued the panel had failed to apply the correct standard of review to the district court's factual finding, improperly altering the substance and legal significance of the district court's holding.

The panel denied rehearing, and the Ninth Circuit declined to rehear the matter en banc. *See* Appendix B.

JURISDICTION

On June 22, 2017, the Ninth Circuit reversed the district court's order suppressing the seized evidence. *See* Appendix A. On August 29, 2017, it denied his petition for rehearing. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Const. amend. IV

> 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

Mr. Reid is charged with being an ex-felon in possession of a firearm under 18 U.S.C. § 922(g)(1). The district court originally ordered the firearm in question suppressed as seized in violation of the Fourth Amendment. The Government appealed, and the Ninth Circuit reversed. *See Reid*, 692 F. App'x at 826. Following the denial of a petition for rehearing, on September 5, 2017, the Court of Appeals granted a motion to stay its mandate, pending the filing of a Petition for Writ of Certiorari and then until disposition of the Petition by this Court.

The District Court's Ruling on the Motion to Suppress

Mr. Reid was arrested in the course of a sweep of a local park by the San Diego Police Gang Suppression Unit. Mr. Reid was detained and questioned, leading to the discovery that he was on probation and had a so-called 'Fourth waiver.' On that basis, the police searched a nearby car he was seen to access and discovered the firearm that is the subject of the motion to suppress.

The memorandum decision's brief, half-paragraph description/rationale does not do justice to the context and circumstances of the core events. A better picture—one resting on a more direct, evidentiary foundation—is obtained from the district court's unchallenged, factual findings in its written order suppressing the firearm.

> The officers in this case approached a large gathering of African-American families, many of whom were clearly affiliated with the violent Emerald Hills Blood gang, but who were apparently picnicking and celebrating Easter Sunday. Officers planned to watch and see if any of the individuals moved away from the officers, apparently believing avoidance of the police officers provided reasonable suspicion to detain the avoiders. Officers hoped those detained would be on a felony "Fourth waiver," allowing them to conduct a probation search, so they could see if any of the gang members possessed anything illegal. Their technique worked: Defendant Clinton Mack Reid moved away from the officers. They detained him, and he was, in fact, on probation, so they conducted a "Fourth waiver" search and found a loaded gun.
>
> * * *
>
> Emerald Hills Community Park, also known as Kelton Park ("the Park"), is a main hangout for the Emerald Hills Blood gang. It is an area with frequent reports of violence, drug trafficking, and gang activity. San Diego police officers in the Gang Suppression Unit ("GSU") had been debriefed that Easter Sunday was "claimed" as a gang holiday by the Emerald Hills Blood gang.[FN1]

[FN 1: The Emerald Hills Bloods began as the Bunny Boys car gang, hence the affinity with bunnies and Easter.]

On Easter Sunday, April 5, 2015, officers with the SDPD GSU arrived at the Park to check out 911 reports of fighting and marijuana smoking by African-American adults at the Park. The 911 calls did not provide any description of the offenders other than the fact that they were African American. There were no reports of weapons. When they arrived at the Park, officers noticed over 100 people, mostly African Americans, including families and children, picnicking and listening to music. Many were wearing the red and gray Emerald Hills Blood colors. Officers did not see any fighting or drug use.

Officers set up around the Park and planned to watch as a marked patrol car arrived at the Park to see if any individuals tried to leave the Park to avoid the officers. That way, Sgt. Spurlock said in the radio transmission to his fellow officers, officers might be able to "pick some people off" or "rustle some people up" as they left the Park.

As Sgt. Spurlock pulled into the parking lot near the main entrance to the Park in a marked patrol car, he heard a fellow officer report that two African-American men, one of whom later proved to be Mr. Reid [footnote omitted], were walking quickly away from the police car. The officer reported that Mr. Reid appeared to be the "most nervous of the group." Sgt. Spurlock saw him walking downhill and followed as he left the Park, approached a four-door Acura, and briefly sat in the backseat. Sgt. Spurlock saw Mr. Reid make a gesture from his body to the floor of the car. Sgt. Spurlock believed he was "dumping" something into the car, but could not see if Mr. Reid actually had anything in his hands. At the time, Sgt. Spurlock said he "would not be surprised" if Mr. Reid had unloaded a gun into the car. Sgt. Spurlock watched as Mr. Reid then walked back toward the Park.

Believing he had reasonable suspicion to ask Mr. Reid what he might have left in the car, Sgt. Spurlock had Officer Burgess detain him. Officer Burgess handcuffed Mr. Reid for officer safety and brought him over to the curb where he had him sit down, while Officer Brou ran the license plate on the car. Mr. Reid was cooperative and gave his name to the officer, which matched the name on the car registration, but Mr. Reid denied the car was his. He also denied putting anything into the car. Officers looking into the Acura through the car window believed they saw something bulging in the rear seat pocket of the car.

> In response to the officers' questions, Mr. Reid admitted he was on probation. Officer Brou confirmed through a records check that Mr. Reid was, in fact, on probation, and that as a condition of his probation, he had a "Fourth waiver."
>
> Believing this allowed them to search Mr. Reid, officers searched Mr. Reid's person and found the car keys to the Acura. They then searched the Acura, and the back pocket proved to have a loaded Glock-40 with one bullet in the chamber ready to fire.

After citing the correct, legal standards for determining "reasonable suspicion" to stop under *Terry* and expressly noting the deference to officer experience and training required by the case law, the district court held that these facts did not constitute "reasonable suspicion" on the totality of the circumstances.

The factual circumstance that proved crucial to the reversal on appeal was described by the judge as follows (emphasis added):

> Finally, the Government argues that Sgt. Spurlock believed Mr. Reid had "dumped" something in the back of his car. **In fact**, Sgt. Spurlock saw Mr. Reid get into the back of the car briefly and then return toward the park. **Sgt. Spurlock could not say with any certainty whether Mr. Reid had even put anything into the back of the car**. At the scene he said he "would not be surprised" if Mr. Reid had unloaded a gun. **A mere hunch** that someone may have done something illegal is insufficient to provide reasonable suspicion for a stop. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002) (an officer may not rely on a "mere hunch" to justify a stop.).

The district court then went on to reject the Government's alternative arguments based on the automobile exception, independent source, and inevitable discovery.

In light of the lack of "reasonable suspicion" on the totality of the evidence to stop and detain Mr. Reid, the information obtained during that stop leading to the search of the car and seizure of the gun was tainted fruit of the primary illegality.

The court therefore ordered the firearm suppressed.

The Ninth Circuit Decision

The Government appealed and the panel reversed. *See Reid*, 692 F. App'x at 826. First, the panel rejected the district court's finding of inadequate suspicion for the *Terry* stop. Key to this holding was the point that "[a]n officer testified at the hearing on the motion to suppress that based on his background, training, and experience, Reid was **likely 'dumping'** illegal contraband in the car." *Id.* at 825 (emphasis added). Second, having found the initial stop lawful, officers validly learned Mr. Reid's status as an ex-felon. *See id.* at 826. This information, combined with the observation of a gun-like bulge, provided "probable cause" to search the car for evidence of being a prohibited possessor of a firearm. *See id.*

Mr. Reid sought rehearing. He argued that, in its characterizations during oral argument and in the memorandum, the panel had improperly altered the district court's factual findings regarding the basis for Sgt. Spurlock's conclusion about the "dumping." The district court had found, as a historical fact, that the sergeant only "believed" Mr. Reid was " 'dumping' something into the car," categorizing his belief that it was contraband as a "mere hunch," as the officer "could not say with any certainty" that anything had been left in the car, let alone what it was. The panel, however, had converted this into a finding that "Reid was likely 'dumping' illegal contraband into the car." 692 F. App'x at 825. In transforming the district court's factual finding on Sgt. Spurlock's belief, the panel violated the degree of deference owed to first-instance judges in the Fourth Amendment context without a finding the judge had clearly erred, as required by *Ornelas v. United States*, 517 U.S. 690, 699 (1996). In effect, it approved a "hunch" as sufficient legal basis to stop, contrary to *Terry*.

The Ninth Circuit declined to rehear the matter. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT CONFLICTS WITH *ORNELAS* ON THE STANDARD OF REVIEW APPLYING TO FACT-FINDING IN FOURTH AMENDMENT CONTEXTS, SUBSTITUTING ON APPEAL A FACTUAL FINDING THAT WAS THE INVERSE OF THE DISTRICT COURT'S

The appellate panel reversed the district court's finding of insufficient "reasonable suspicion" to stop Mr. Reid on the totality of the evidence. Crucial to the panel's holding was that Sgt. Spurlock purportedly testified before the district court that "based on his background, training, and experience, Reid was **likely 'dumping' illegal contraband** in the car." 692 F. App'x at 825 (emphasis added). The district court, however, had characterized Sgt. Spurlock's level of knowledge that anything deposited was contraband as "[a] **mere hunch**" (emphasis added).

This Court has held determinations of "reasonable suspicion" are reviewed on appeal *de novo*. *See Ornelas*, 517 U.S. at 691; *see also United States v. Arvizu*, 534 U.S. 266, 275 (2002). Nevertheless, *Ornelas* added a significant gloss or caveat to the review standard:

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the

> analysis involves only a determination of historical facts, but the second is a mixed question of law and fact.
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> * * *
>
> We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

517 U.S. at 696, 699. *Ornelas* went on to explain the need for this split-level of deference in reviewing Fourth Amendment challenges:

> A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. For example, what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee. That city is unlikely to have been an overnight stop selected at the last minute by a traveler coming from California to points east. … It is a reasonable inference that a Californian stopping in Milwaukee in December is either there to transact business or to visit family or friends. The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts.

Id. at 699-700. Accordingly, the Court stated "An appeals court should give due weight to a trial court's finding that the officer was credible [or not] and the inference was reasonable [or not]." *Id.* at 700. Justice Scalia dissented, arguing that the majority's special deference to the district court's findings was contradictory with an overall *de novo* standard and is unnecessary, if a more deferential standard were mandated in the first place. *See id.* at 704-05.

It is clear from both the majority and the dissent in *Ornelas* that the appellate review standard applicable to suppression rulings requires deference when dealing with findings of historical fact. *Ornelas* recognized that, although, for several reasons, the overall question of "reasonable suspicion" or "probable cause" should be reviewed *de novo*, *see id.* at 695-99, the high deference traditionally accorded to first-instance fact finding must apply. *See id.* at 699. In fact, some courts reflect this deference with a rule that, on appeal of a suppression decision, the evidence is construed in the light most favorable to the prevailing party.[2]

Such deference was particularly warranted in this case, because the specific point on which the panel differed with the district judge was one for which appellate courts must give high deference: determination whether objective, specific, and articulable facts exist for the claim of "reasonable suspicion." The existence *vel non* of these predicate facts for a *Terry* stop is a task well suited for first-instance deference. First, district judges are able to assess the evidence directly, placing them in a superior position to determine what actually happened and what facts were apparent at the time of the stop. This superiority partly stems from their ability to assess witness credibility by observation of testimony: "we give singular deference to a trial court's judgments about the credibility of witnesses. That is proper, we have

[2] *See, e.g., United States v. Casellas-Toro,* 807 F.3d 380, 390 (1st Cir. 2015); *United States v. Hill,* 852 F.3d 377, 381 (4th Cir. 2017); *United States v. Wallace,* 866 F.3d 605, 608 (5th Cir. 2017); *United States v. Collazo,* 818 F.3d 247, 253 (6th Cir. 2016); *United States v. Webster,* 809 F.3d 1158, 1164 (10th Cir. 2016); *United States v. Mathurin,* 868 F.3d 921, 927 (11th Cir. 2017).

explained, because the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record." *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) (citations omitted). More broadly, however, deference is justified as a reflection of the proper division of labor between the levels of courts. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574–75 (1985).

Here, the district judge who viewed Sgt. Spurlock's testimony on why he ordered the *Terry* stop was in the superior position to assess the officer's testimony and weigh the existence of objective and articulable facts for the stop. The crucial facts for "reasonable suspicion" analysis are: (1) the officer's inference of criminal activity afoot and (2) his ability to articulate reasonable, objective bases for that belief. "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry,* 392 U.S. at 21. In that context, the district judge here found that, although the sergeant "believed Mr. Reid had 'dumped' something in the back of his car," "**[i]n fact** … Sgt. Spurlock could not say **with any degree of certainty** whether Mr. Reid had **even placed anything** into the back of the car." (emphasis added). Thus, the district judge made a factual finding that the officer had no objective and articulable basis to infer contraband—or anything at all—had been deposited in the car. For that reason, she described the officer's inference of criminality as "[a] mere hunch."

The district court's finding was one of historical fact regarding what objective circumstances existed to support the stop. The only reasonable, articulable basis for finding a visit to the car suspicious was Sgt. Spurlock's "belief" that a gun might have been deposited there. But, as a factual matter, the judge found nothing objective supported that subjective belief. That made it a prototypical hunch: "a conclusion derived from intuition in the absence of articulable, objective facts." *United States v. Singletary*, 798 F.3d 55, 60 (2d Cir. 2015).

The Ninth Circuit did not defer to the district judge's finding of historical fact, nor did it articulate reasons for finding the judge clearly erred. Instead, it simply substituted its "likely 'dumping' illegal contraband" for the district court's absence of "any certainty whether Mr. Reid had even put anything" into the car. The panel's substituting a different finding on appeal cannot be subsumed under the umbrella of the *de novo* standard. Appellate courts since *Ornelas* routinely reject Fourth Amendment challenges predicated on attacks to underlying factual findings, notwithstanding the overarching *de novo* standard. *See, e.g.*, *United States v. Hawkins,* 279 F.3d 83, 85-86 (1st Cir. 2002) (no clear error in finding police had unwritten policy to open closed containers during inventory); *United States v. Scroggins* 599 F.3d 433, 441 (5th Cir. 2010) (no clear error in finding resident consented to police entry); *United States v. Salas*, 756 F.3d 1196, 1200-02 (10th Cir.

2014) (court did not err in finding defendant violated traffic law twice, despite video evidence); 29 AM. JUR. 2D *Evidence* § 666 (2017) ("The scope of appellate review of an order on a motion to suppress evidence is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, *in which event they are conclusively binding on appeal,* and whether those factual findings in turn support the judge's ultimate conclusions of law.") (emphasis added).

The Ninth Circuit's transformation of the district court's finding of a "hunch" into "likely 'dumping' illegal contraband" effectively re-wrote the district judge's factual finding on the objective basis for the stop.[3] Moreover, the district judge expressly acknowledged the need to defer to officer experience and training in its analysis. But, on viewing the testimony, it simply did not find the predicate facts sufficed to make the surmise of stashing contraband more than a "hunch." This Court has emphasized that the meaning of objective facts can change, depending on the circumstances of their presentation in court:

> At the suppression hearing, Stoddard testified about the children's waving several times, and the record suggests that he physically demonstrated it as well. The District Court Judge, who saw and heard Stoddard, then characterized the waving as "methodical," "mechanical,"

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[3] The degree to which the panel's characterization of the factual basis diverged from the district court's is shown also by the discussion at oral argument. *See* Audio recording of oral argument, United States v. Reid, 16-50015, ECF #41 (9th Cir. June 12, 2017). Despite the district court's finding Sgt. Spurlock "could not say with any certainty whether Mr. Reid had even put anything into the back of the car," at argument panel members asserted that the police "know" he put a gun in the car (Audio recording at 3:00), that the object placed "appears to be a gun" (16:19), and that he "obviously secretes something in the car" (23:00). Again, the panel's "know" and "obviously" differs strikingly from the district judge's factual characterizations.

> "abnormal," and "certainly ... a fact that is odd and would lead a reasonable officer to wonder why they are doing this." App. to Pet. for Cert. 25a. Though the issue of this case does not turn on the children's idiosyncratic actions, the Court of Appeals should not have casually rejected this factor in light of the District Court's superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom.

Arvizu, 534 U.S. at 276 (footnote omitted).

The Ninth Circuit's divergence from *Ornelas* and the otherwise consistent line of circuits applying it raises an important question of federal law. Not only does the decision contravene clear precedent of this Court, but it exacerbates an already vexed question of standards of review in the Fourth Amendment context. *See* 6 W. LaFave, SEARCH AND SEIZURE § 11.7(c), pp. 554-55 (5th ed. 2012) (noting lack of case law attention to standards of review, quoting one court as decrying that all levels of court decisions are "equally bereft of any in-depth guidance as to what the appropriate standard of appellate review is—let alone as to why it is"). Which standard applies to which parts of the *Terry* analysis remains a source of divergence in the lower courts, state and federal, and "there is again 'a split … regarding the proper standard of review.' " *Id.* at pp. 567-68 (noting variation among courts on where they draw the line between facts and conclusions, and so which review standard applies). The Ninth Circuit's unexplained and unjustified deviation from *Ornelas* only muddies the water further.

The Ninth Circuit diverged from the standard of review applying to factual findings in the context of a Fourth Amendment analysis under *Ornelas*. It did so by changing the district judge's finding of a "mere hunch" into the panel's "likely 'dumping' " and her reference to any deposited object as an indefinite "something" and "anything" into the panel's specific description of it as "illegal contraband." *Ornelas* was concerned that the standard of review for Fourth Amendment analysis promote uniformity by providing clear precedent. *See* 517 U.S. at 697-98. However, the Court of Appeals starkly departed from the principles of *Ornelas*, threatening to unsettle an important question of federal law. This Court should grant review to address this stark divergence. *See* Sup. Ct. R. 10(c).

Similarly to *Arvizu*, 534 U.S. at 276, the Ninth Circuit "should not have casually rejected" the district court's finding on historical fact by substituting its own characterization of Sgt. Spurlock's observations. This was especially so, because the district judge had *already* factored in deference to the officer's experience and training in finding the inference was still no more than a "hunch." The Ninth Circuit's citing that factor again in its assessment was effectively a doubling up on officer deference, bringing this case close to the "good-faith" assessment of officer conduct which this Court rejected long ago in *Terry*:

> Anything less [than the objective standard] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple " 'good faith on the part of the arresting officer is not enough.' … 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."

392 U.S. at 22 (citations omitted; ellipses in original).

CONCLUSION

The Ninth Circuit wrongly reversed the district court's order by re-writing the factual findings, without making any finding of clear error. This reasoning violated *Ornelas* and the general standard of review for fact finding. This Court should grant the writ to address these divergences from the principles of its settled precedents and the requirements of the Fourth Amendment.

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Respectfully submitted,

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