IN THE COURT OF APPEALS OF MARYLAND

No. 1
September Term, 2017

JAMAL SIZER,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Appeal from the Circuit Court for Howard County, Maryland
(Lenore R. Gelfman, Judge)

Pursuant to a Writ of Certiorari to the Court of Special Appeals

---

BRIEF OF AMICI CURIAE PUBLIC JUSTICE CENTER, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, AND WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF PETITIONER

Anthony J. May
Murnaghan Appellate Advocacy Fellow
Public Justice Center
One North Charles Street, Suite 200
Baltimore, Maryland 21201
(410) 625-9409
maya@publicjustice.org

Counsel for Amici Curiae

August 7, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTRODUCTION

In this case, the Court is called upon to determine how far police can be permitted to encroach upon the constitutional protections all citizens enjoy under the Fourth Amendment of the United States Constitution and the Maryland Declaration of Rights. Specifically, the Court is presented with an opportunity to uphold the deference trial courts are afforded to determine whether a vague description about an ill-defined geographical area can justify detaining and searching individuals who choose not to engage in police officers' unwarranted stops in those areas. Moreover, the Court is asked to consider how police tactics are traditionally employed against low-income persons of color in determining whether flight from rapidly approaching police officers can be considered "unprovoked" to justify a warrantless seizure. This Court's decision will affect the way police interact with individuals, many of whom are innocent of any wrongdoing but are nevertheless subjected to recurrent stops by law enforcement, the great majority of which courts will never have an opportunity to review. For the foregoing reasons, amici curiae respectfully urge this Court to reverse the Court of Special Appeals's holding and affirm the Howard County Circuit Court's ruling that the State failed to meet its burden to establish under the totality of the circumstances that Petitioner's flight justified police officers chasing, tackling, and subsequently searching him in derogation of his right to be free from unlawful search and seizure.

STATEMENTS OF INTEREST

The **Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to protecting

constitutional rights and ensuring that citizens are free from unlawful restraint at the hands of law enforcement. The PJC has participated as amicus curia in a number of cases seeking to protect the right to be free from police misconduct. The PJC has an interest in this case because of its commitment to ensuring that constitutional protections be afforded to all citizens regardless of where they live and/or the color of their skin.

American Civil Liberties Union of Maryland (ACLU) is the state affiliate of the American Civil Liberties Union, a nationwide organization dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has appeared before Maryland courts as direct counsel and amicus curia seeking to protect against unreasonable Fourth Amendment searches and racial profiling. The ACLU is interested in this case because it receives numerous complaints from and frequently represents individuals who have been subjected to racially-biased police conduct.

Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC) is a non-profit organization founded in 1968 to address issues of racial discrimination and entrenched poverty in the greater Washington D.C. area. The WLC is committed to ending all forms of discrimination, including in the criminal justice system. The WLC has an interest in this case because people of color have disproportionate interaction with law enforcement than their white counterparts.

STATEMENT OF THE CASE, QUESTIONS PRESENTED, AND STATEMENT OF FACTS

Amici curiae join in and adopt by reference the Statement of the Case, Questions Presented, and Statement of Facts set forth in the Petitioner's brief.

ARGUMENT

I. IF AFFIRMED, THE COURT OF SPECIAL APPEALS'S HOLDING WILL DISPROPORTIONATELY SUBJECT PERSONS OF COLOR INNOCENT OF ANY WRONGDOING TO UNNECESSARY AND DAMAGING STOPS AND SEARCHES, DEGRADING FUNDAMENTAL RIGHTS GUARANTEED BY THE FOURTH AMENDMENT AND THE MARYLAND DECLARATION OF RIGHTS.

A. All Citizens Possess the Right to be Free from Unreasonable Searches and Seizures.

"The Fourth Amendment guarantees individuals the right 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." *Grant v. State*, 449 Md. 1, 16 (2016) (quoting U.S. Const. amend. IV). Article 26 of the Maryland Declaration of Rights "has a like, though perhaps not identical, purpose and effect, to prohibit unlawful searches and seizures[.]" *Davis v. State*, 383 Md. 394, 408 (2004), *reversed on other grounds*, *Ford v. State*, 184 Md. App. 535, 558 (2009).

When reviewing *Terry*[1] stops, courts must examine seizures under the totality of the circumstances. *Stokes v. State*, 362 Md. 407, 415 (2001); *see also Ransome v. State*, 373 Md. 99, 104 (2003) ("'[The] demand for specificity in the information upon which police action is predicated is the central teaching of . . . Fourth Amendment jurisprudence.'" (quoting *Terry*, 392 U.S. at 21 n.18)).

While recognizing that an "individual has a right to ignore the police and go about his business," the United States Supreme Court held in *Illinois v. Wardlow* that a person's presence in a "high-crime area" coupled with the person's "unprovoked flight" from

[1] *See generally Terry v. Ohio*, 392 U.S. 1 (1968).

police can be sufficient to establish a reasonable articulable suspicion to justify a stop consistent with the "totality of the circumstances" standard. 528 U.S. 119, 124–25 (2000). In applying *Wardlow*, courts across the country have considered the disparate effects the "high-crime area" factor has on persons of color.

B. *Wardlow* Provides Little Guidance in Defining What Constitutes a "High-Crime Area."

Legal scholars explain the *Wardlow* paradigm as follows:

> On two separate street corners, in two different neighborhoods, two men stand holding two identical paper bags. Police officers patrolling each neighborhood looking for drug dealers spot the men, and in response to police presence, each man flees. One man runs through a poverty-stricken neighborhood known for having the highest incidence of drug crime and murder in the city. The other man runs through an affluent neighborhood that has not had any recorded drug arrests or murders in over a year. Under existing Supreme Court precedent, the police officers may be legally entitled to stop the first man, but not the second. The Fourth Amendment protections of each man are different simply because of the neighborhood in which the police observation occurs.

Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 Am. Univ. L. Rev. 1587, 1588 (2008).

Although *Wardlow* permits a court to consider whether the "high-crime area" and flight factors meet the reasonable articulable suspicion threshold, it does not create a bright-line rule that a finding of both is tantamount to a per se justification for a stop. *See Wardlow*, 528 U.S. at 136 (Stevens, J., concurring in part and dissenting in part) (noting that the majority did not adopt a bright-line rule because "[t]he totality of the circumstances, as always, must dictate the result.").

"The Supreme Court has not defined what constitutes a high-crime area, nor has [it] described what a high-crime area looks like or what attributes and metrics differentiate high-crime areas." Andrew Dammann, *Categorical and Vague Claims that Criminal Activity is Afoot: Solving the High-Crime Area Dilemma through Legislative Action*, 2 Tex. A&M L. Rev. 559, 562 (2015). Merely weighing an officer's training and experience and the character of a neighborhood "results in innocuous behavior being treated as criminal activity based not on objective facts relating to the particular suspect, but on the conclusions of an officer who could not immediately find an innocent explanation to his subjective satisfaction" and instead chose to "use intrusive means to resolve the puzzle in his mind." Thomas R. Fulford, *Writing Scripts for Silent Movies: How Officer Experience and High-Crime Areas Turn Innocuous Behavior into Criminal Conduct*, 45 Suffolk Univ. L. Rev. 497, 498 (2012).

To grapple with this dilemma, courts have consistently applied substantive standards to be met before accepting an officer's conclusory assertion that a specific location can be considered a "high-crime area." *See, e.g.*, *United States v. Wright*, 485 F.3d 45, 53–54 (1st Cir. 2007) (requiring a "nexus between the type of crime most prevalent or common in the area and the type of crime suspected in the instant case," limited boundaries of the evaluated area, and "temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue"); *United States v. Caruthers*, 458 F.3d 459, 468 (6th Cir. 2006) (limiting "high-crime area" to a precise intersection "where officers expect nightly calls regarding robberies or shots fired"); *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (en banc)

(requiring proof of "specific, circumscribed locations where particular crimes occur with unusual regularity"); *United States v. Edmonds*, 240 F.3d 55, 60 (D.C. Cir. 2001) (finding "high-crime area" existed where police established the similarity between the type of crime found in a limited geographic area and the type of crime defendant was suspected of committing); *United States v. Anderson*, No. 11-147, 2012 U.S. Dist. LEXIS 75992, at *20 (M.D. La. May 31, 2012) (finding testimony that a specific block in a particular zip code with "little more than 13 percent of the city's population [accounting] for 25 percent of" city's police calls, "30 percent of [] homicides and 40 percent of [] gun assaults" was a high-crime area); *People of the Virgin Islands v. Fredericks*, 54 V.I. 161, 171 (2011) (finding a search violated the Fourth Amendment because the Territory failed to establish both a geographical and temporal proximity between an ill-defined, "lengthy stretch of roadway" that officers purported was a "high-crime area" and the area where defendant was stopped).

Since *Wardlow*, tensions between communities of color and law enforcement have become even more prevalent among civil rights issues arising in so-called "high-crime areas." "From the West to the East Coast, the streets of urban America have been filled in recent days with blood, mourning, and outrage, as a familiar scenario replays itself all too frequently: of men and boys of color killed by police in our country's urban communities[.]" Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Reform*, 59 How. L. J. 5, 8–9 (2015). Those issues are as salient in Maryland as anywhere else. *See* Robert Koulish, *The Databasing of Freddie Gray*, 16 U. Md. L. J. Race Relig. Gender & Class 179, 183 (2016) (positing that *Wardlow* results in

minority arrests tantamount to "running while black"); *see also* Juana Summers, *Why Trump Discouraging Officers from Being "Too Nice" Matters in Baltimore*, CNN (July 29, 2017, 8:10 AM), http://www.cnn.com/2017/07/29/politics/donald-trump-police-baltimore/index.html.

C. The "High-Crime Area" Factor Disproportionately Encompasses Communities of Color.

1. "High-crime areas" are predominately areas where people of color are found.

The biggest concern "with the use of the high-crime area factor is . . . that high-crime areas are predominately high-black areas, and thus overly policing these areas disparately impact[s] African Americans." Reshaad Shirazi, *It's Time to Dump the High Crime Area Factor*, 21 Berkeley J. Crim. L. 76, 104 (2016). "There is substantial evidence indicating that communities of color, which are often most in need of greater police protections, are in fact disproportionately victims of lethal police force." Terrence Scudieri, *Fleeing While Black: How Massachusetts Reshaped the Contours of the* Terry *Stop*, 54 Am. Crim. L. Rev. Online 42, 43 (2017), available at http://www.americancriminallawreview.com/files/6914/9299/8747/Fleeing_While_Black_Clean_Copy_.pdf.

"[T]he percentage of a neighborhood's black population, particularly the percentage [of] young black men, is significantly associated with perceptions of the severity of the neighborhood's crime problem." Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 Am. J. of Soc. 717, 718 (2001); *see also* David A. Harris,

Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L. J. 659, 677–78 (1994) ("African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas.").

"Residents in those neighborhoods may believe that different rules apply because of race. This perceived discriminatory treatment both undermines the belief that the legal system is fair, and disrupts other social organizing structures in a community." Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas"*, 63 Hastings L. J. 179, 217 (2011). "[A] high-crime area factor exacerbates community police tensions that are already present in those communities, contributing to even greater resentment for the law, increasing rebellious behavior, and inflicting devastating economic consequences to already poor communities." Shirazi at 105. Those economic costs include "less economic development, lower real estate values, increased social disorganization, and reduced opportunities for employment." Ferguson at 230. Further, high-crime labels "create a destructive feedback loop in which property values decline[], causing areas to become less viable socially." *Id.*

2. "Predictive policing" is used to justify unwarranted stops in "high-crime areas," further increasing crime rates in those areas.

"Predictive Policing" is premised on the theory that law enforcement can use crime patterns and data to identify "hot spots" and increase police presence in order to reduce crime. *See* Andrew Guthrie Ferguson, *"Predictive Policing" and the Fourth Amendment*, Am. Crim. L. Rev. Online (Nov. 28, 2011),

http://www.americancriminallawreview.com/aclr-online/predictive-policing-and-fourth-amendment/. A "high-crime area" determination is based only on data that is actually reported, and the severity of the reported crime is later classified at an intake person's discretion. *See* David N. Kelley & Sharon L. McCarthy, *The Report of The Crime Reporting Review Committee To Commissioner Raymond W. Kelly Concerning Compstat Auditing* 13 (Apr. 8, 2013), *available at* http://www.nyc.gov/html/nypd/downloads/pdf/public_information/crime_reporting_review_committee_final_report_2013.pdf. Reports of crime are disproportionately made in communities of color. *See, e.g.*, Human Rts. Watch, *U.S.: Drug Arrests Skewed by Race*, hrw.org (Mar. 2, 2009, 12:01 PM), https://www.hrw.org/news/2009/03/02/us-drug-arrests-skewed-race. "The high-crime label often coincides with an increased police presence in these neighborhoods," resulting in more arrests. Kelly Koss, *Leveraging Predictive Policing Algorithms to Restore Fourth Amendment Protections in High-Crime Areas in a Post*-Wardlow *World*, 90 Chi-Kent L. Rev. 301, 304 (2015).

As a result, data-driven policies create "self-fulfilling cycles of bias" for police departments using this information to make resource allocation decisions. *Id.* at 312 (citations omitted). The data "gives the impression that there are heightened levels of criminal activity in that neighborhood, when in reality, more criminals are getting caught because there are more police officers present to detect crime." *Id.* at 312. Thus, "when neighborhoods targeted for [stop-and-frisks] are predominantly African American and Hispanic, [stop-and-frisk] is likely to strengthen the widely-shared perception of a connection between race and crime," Aziz Hug, *The Consequences of Disparate*

Policing: Evaluating Stop and Frisk as a Modality of Urban Policing, 101 Minn. L. Rev. 2397, 2436–37 (2017), and creates a staggering disparity between white and non-white stops and arrests in the United States. *See* Brad Heath, *Racial Gap in the U.S. Arrest Rates: "Staggering Disparity"*, USA Today (Nov. 18, 2014, 5:13 PM), https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/.

Further, predictive prevalence is weakened when a designated area is not limited in size. "[I]f the predicted area covered an entire neighborhood or police district, then the predictive relevance of a man holding a bag outside a house is weakened." Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 Emory L. J. 259, 311 (2012). "For the predictive technology to add any value to the totality of circumstances test, there must be a nexus between prediction, crime, and observed activity. A disconnect in any of those factors removes the value of the prediction for reasonable suspicion." *Id.* Thus, in reality, the "prevalence of suspicionless stops ha[s] 'created an expectation among residents . . . that they will be stopped, interrogated, and frisked numerous times in the course of a month, or even a single week.'" *State v. Edmonds*, 323 Conn. 34, 81 (2016) (Rogers, C.J., concurring) (quoting Koss at 323).

II. THE COURT OF SPECIAL APPEALS ERRED IN CREATING A PER SE RULE, PLACING UNDUE WEIGHT ON AN ILL-DEFINED "HIGH-CRIME AREA" FACTOR TO JUSTIFY A WARRANTLESS STOP, INSTEAD OF AFFORDING DEFERENCE TO THE TRIAL COURT UNDER THE TOTALITY OF THE CIRCUMSTANCES.

Reversing the circuit court's ruling, the Court of Special Appeals essentially adopted a per se rule that anytime officers use the magic words "high-crime area," coupled with a defendant's flight, a subsequent stop is justified as a matter of law. *State v. Sizer*, 230 Md. App. 640, 652–660 (2016). In doing so, the court stripped trial courts of their authority to weigh the factors under the totality of the circumstances, adopted a legally impermissible standard that goes well beyond *Wardlow* itself, and overrode longstanding Fourth Amendment jurisprudence disfavoring bright-line rules and favoring a trial court's ability to weigh the totality of the circumstances. By placing greater weight on the police's general assertion that the Owen Brown Village area was a "high-crime area," the Court of Special Appeals embraced a standard that will result in the unlawful erosion of Fourth Amendment protections for persons of color living in purportedly "high-crime areas," the great majority of whom are innocent of any wrongdoing, without affording deference to the trial court's weighing of facts presented, and must be rejected.

A. The Court of Special Appeals Impermissibly Overrode the Trial Court's Discretion Affording Little Weight to the "High-Crime Area" Factor Under the Totality of the Circumstances.

The circuit court found that "[i]n general, the area [within which Petitioner was stopped] is considered a high or higher-crime area in Columbia," seemingly basing this conclusion on the fact that there "had been a number of robberies[.]" E.78. Specifically,

one officer testified generally that there had been "an ongoing robbery series . . . concentrated to the Owen Brown area," and agreed that it was "considered a high crime area" "in comparison to other parts of Columbia." E.17.

Another testified that "the Owen Brown Village Center" had a "higher" "volume of crime" compared to "other areas of the County at large." E.38. He purported that a police satellite office had been set up in "that vicinity to increase police presence" because police were "seeing volumes of calls for service or crime in that area," *id.*, but offered no further explanation as to the frequency or nature of those calls. Although he testified that he had actually been assigned to patrol the "Wilde Lake" area, he stated, without further justification, that "as a team, [police] focused in Owen Brown." E.37. He also testified that on the night in question, he and other officers were "passively patrolling the *ninety-plus miles* of pathway that traverses [sic] through Columbia" (prompting the trial court to respond, "Really?"). E.38 (emphasis added).

Even with this testimony, the circuit court, although apparently finding that the officers' testimony was "truthful and credible" and that the Owen Brown Village Area was a "high or higher-crime area in Columbia," E.78, nevertheless concluded that the totality of the circumstances did not give rise to reasonable suspicion in this particular instance. "Although I can understand the heat of the moment, I can understand the high-

crime area, the fact that [Petitioner] ran, in and of itself, *based on the particular scenario that's being given here today*, is not sufficient." E.80 (emphasis added).[2]

Rather than according the requisite deference to the circuit court's weighing of these factors "based on the particular scenario," the Court of Special Appeals reversed its grant of Petitioner's motion to suppress, *Sizer*, 230 Md. App. at 652, requiring reversal. *See Longshore v. State*, 399 Md. 486, 498 (2007) ("[W]hen there is a conflict in the evidence, an appellate court will give great deference to a hearing judge's determination and weighing of first-level findings of fact. It will not disturb either the determinations or the weight given to them, unless they are shown to be clearly erroneous.").

The Court of Special Appeals's holding highlights the inherent dangers of creating a bright-line rule subject to an officer's vague description of an area to justify a warrantless search. The officers' testimony did not specify the geographic area in question or provide objective, particularized information to support their assertion that it was a "high-crime area" such that would warrant giving that factor significant weight. Instead, the officers made general, conclusory statements that the Owen Brown Village Area had higher rates of crime than "other areas of Columbia or even the County at large." E.36–38. They failed to specify the geographical parameters of the Owen Brown Village Area, instead described a "ninety-plus mile" stretch of bike path, and provided no

[2] Although Petitioner did not note a cross-appeal in the Court of Special Appeals regarding the circuit court's factual finding that the Owen Brown Village area was a "high-crime area," Petitioner does point out, and amici curiae agree, that the officers' testimony with respect to the "high-crime area" factor "is meaningless without information about the amount of crime in other parts of Columbia" and without further defining the parameters of the geographical area in question. Pet'r's Br. at 32.

particularized information about the "calls for service" in that area and how they compared to similar calls in other areas of Columbia or Howard County. E.38, 53. Nor did they establish any temporal proximity with those calls, save a single call the day before alleging that an unknown individual was "reportedly armed with a handgun." E.43. Moreover, they failed to establish any nexus between alleged prior crimes in the area, i.e., robberies, and the purported illicit activity that the officers observed on the night in question, i.e., littering (tossing a bottle). E.43; *see Wright*, 485 F.3d at 53–54.

While Maryland's appellate courts have generally held that Article 26 does not necessarily "provide[] greater protection from the State interference than its federal counterpart," *Padilla v. State*, 180 Md. App. 210, 227 (2008), it has been "noted repeatedly . . . that each provision is independent[.]" *King v. State*, 434 Md. 472, 482 (2013) (citations omitted). In that regard, Maryland appellate courts have embraced the totality of the circumstances test as the crux of a reasonable articulable suspicion inquiry. *See Turkes v. State*, 199 Md. App. 96, 117 (2011) ("The concept of 'reasonable articulable suspicion' cannot be 'reduced to a rigid analytical framework or a set of specific, bright-line rules.'" (quoting *Ferris v. State*, 355 Md. 356, 384–85 (1999)).

Moreover, this Court has held that "[u]nder the totality of the circumstances, no one factor is dispositive." *In re David S.*, 367 Md. 523, 535 (2002) (citations omitted). Accordingly, the circuit court could not have clearly erred in giving the "high-crime area" less weight under the circumstances, as that ultimate decision, as mandated by the Fourth Amendment and Article 26, was left solely to the discretion of the trial court, and the Court of Special Appeals holding should be reversed.

B. The Court of Special Appeals Adopted a Per Se Rule that Went Beyond the Holding of *Wardlow* itself, and Which, if Affirmed, Will Result in Devastating Constitutional Restrictions on Persons of Color Living in "High-Crime Areas."

As the current Chief Judge of the United States Court of Appeals for the Fourth Circuit has stated:

> [A]ny person walking in a high-crime neighborhood becomes vulnerable to a police search. . . . By creating zones of lower constitutional protection in poor neighborhoods [courts] engage[] in a blatant display of class discrimination of the basest variety. . . . It is written into the fiber of our Constitution that the protections granted therein apply equally to all Americans, regardless of whether they are returning home to the grandest of mansions or the humblest of shanties. Such a broad reading of "reasonable articulable suspicion" significantly limits the freedom of people who happen to be in an area deemed "high-crime." Surely, the Constitution cannot support such an arbitrary and discriminatory result.

United States v. Black, 525 F.3d 359, 370 (4th Cir. 2008) (Gregory, J., dissenting).

Far from "trivializ[ing *Wardlow*'s holding] into inconsequentiality," *Sizer*, 230 Md. App. at 656, Petitioner raises significant reasons why a trial court might find that a stop was unwarranted given the totality of the circumstances. "The fact that an area has had the misfortune of being the site of greater than ordinary criminal activity does not . . . justify the diminution, however slight, of the constitutional rights of people in that area." *Cobb v. State*, 511 So. 2d 698, 699–700 (Fla. Dist. Ct. App. 1987). "Otherwise, the character of the 'neighborhood' is too broad a factor; it fails to meaningfully distinguish one citizen in that area from another, and therefore should not enter into the reasonable-suspicion analysis at all." Margaret Anne Hoehl, *Usual Suspects Beware: "Walk, Don't Run" Through Dangerous Neighborhoods*, 35 U. Rich. L. Rev. 111, 131 (2011).

For example, eleven of Maryland's twenty-four counties, including Howard County and Baltimore City, are currently designated by the High Intensity Drug Trafficking Areas (HIDTA) program as "designated counties" targeted for drug trafficking. Washington/Baltimore HIDTA, *High Intensity Drug Trafficking Areas*, HIDTA.org (2017), http://www.hidta.org/ (last visited July 19, 2017).[3] These areas are "eligible for extra resources that local law enforcement cannot provide on their own." *Id.* HIDTA's website does not provide any further detail as to whether its designation applies to the counties (or Baltimore City) in their entirety, or is limited to certain areas. *But see* Shirazi at 101 ("According to Baltimore police officer Joe Crystal . . . the entire city of Baltimore is considered a high-crime area.").

It is possible, then, that an area may be classified as a "high-crime area" in one instance, but not another. Constitutional protections, however, cannot be permitted to ebb and flow based solely on an officer's subjective, ad hoc testimony. *See, e.g., State v. Cooper*, 830 So. 2d 440, 445 n.5 (La. Ct. App. 2002) ("One is tempted to imagine a 'low-crime area.' Does such exist? . . . Could it be that the term 'high-crime area' is so over-

[3] According to its website, HIDTA is "a federal program administered by the White House Office of National Drug Control Policy [ONDCP], designed to provide resources to federal, state, local, and tribal agencies to coordinate activities to address drug trafficking in specifically designated areas of the country." *Who We Are*, HIDTA.org, (2017), http://www.hidta.org/about-hidta/ (last visited July 19, 2017). "A coalition of law enforcement agencies from an area may petition for designation as a HIDTA" and request "that the ONDCP Director designate specific counties as additions to the respective HIDTA." *HIDTA Designation Process & Authorizing Language*, Whitehouse.gov (2017), https://www.whitehouse.gov/ondcp/hidta-designation-process (last visited July 19, 2017).

used, and crime is so rampant, that a better definition of same today may be the entire State of Louisiana?"); Hoehl at 131 ("If the converse of *Wardlow* is taken as true, then in the absence of other 'specific, articulable facts,' the exact same behavior being used to establish reasonable suspicion in one part of town could be excused just a few miles away."). "Such a location-based differential should be vehemently rejected . . . for it allows police to use factors which have a disproportionate impact on a lower socioeconomic class in order to establish reasonable suspicion, engendering fresh tensions between the police and the poor[.]" *Id.* at 131–32.

The Court of Special Appeals's holding would permit a police officer to simply "take[] the stand, explain[] his actions, testif[y] to his suspicions, add[] the magic words—'high crime area'[coupled with flight,]—and reasonable suspicion is found as a matter of constitutional law." Ferguson & Bernache at 1590–91; *see also Bost v. State*, 406 Md. 341, 365 (2008) (Bell, C.J., dissenting) (opining that "a law enforcement officer's invocation of 'buzzwords'—'high crime area,' 'my training and my experience,' 'reasonable, articulable suspicion'—[should not] substitute for the judicial function"). By rejecting Petitioner's contentions scrutinizing what constitutes a "high-crime area," the Court of Special Appeals approved the use of vague, general "zones" to justify the warrantless stop of individuals who, as discussed *infra*, have legitimate reasons for avoiding police.

If affirmed, this ruling will open the door for the continued erosion of privacy rights and "effectively remove[] the protections of the Fourth Amendment from individuals that need it the most, namely minorities who have faced historic

discrimination at the hands of the police." Amy Ronner, *Fleeing While Black, the Fourth Amendment Apartheid*, 32 Colum. Hum. Rts. L. Rev. 383, 385 (2001). This Court should reject this bright-line rule and instead continue to afford deference to the trial court's findings under the totality of the circumstances. Moreover, this Court should direct trial courts to consider whether the State has provided particularized evidence regarding an area's specific geographical confines, specific types of crimes committed compared to other areas, and how those crimes relate to the alleged wrongdoing in a case before affording considerable weight to the "high-crime area" factor.

III. THE COURT OF SPECIAL APPEALS'S HOLDING THAT PETITIONER'S FLIGHT WAS "UNPROVOKED" FAILS TO CONSIDER THE EXPERIENCE OF PERSONS OF COLOR LIVING IN PERCEIVED "HIGH-CRIME AREAS" AND THEIR HISTORY OF INTERACTIONS WITH LAW ENFORCEMENT.

A. The Record is Unclear as to Whether Petitioner Recognized the Charging Group as Officers.

Justice Stevens explained the relationship the maxim set forth at the outset of the Court of Appeals's decision has on this country's most vulnerable citizens:

> *Compare*, *e.g.*, Proverbs 28:1 ("The wicked flee when no man pursueth: but the righteous are as bold as a lion") *with* Proverbs 22:3 ("A shrewd man sees trouble coming and lies low; the simple walk into it and pay the penalty"). I have rejected reliance on the former proverb in the past, because its "ivory-towered analysis of the real world" fails to account for the experiences of many citizens of this country, particularly those who are minorities. *See California v. Hodari D.*, 499 U.S. 621, 630 n.4 (1991) (Stevens, J., dissenting).

Wardlow, 528 U.S. at 129 n.3 (internal parallel citations omitted).

Amici curiae agree that the record is "unclear whether the approaching pack of cyclists was instantly recognizable as police officers." Pet'r's Br. at 9. It is the State's

burden to show that an officer had a reasonable articulable suspicion to justify an investigatory stop. *See Henderson v. State*, 416 Md. 125, 148 (2010) ("A warrantless search . . . is presumptively unreasonable, and the State has the burden of overcoming that presumption.").

Persons living in perceived "high-crime areas" have several reasons for fleeing from a group of individuals rushing at them. "Certainly four cars slowly cruising through a neighborhood known for a high incidence of criminal activity would appear suspicious—and conceivably dangerous—even to an impartial bystander, who might then find it prudent to leave the scene at a rapid pace." Hoehl at 130. If a group of individuals suddenly jumped out of one of those cars, one would find it equally prudent to run away, rather than subject oneself to potential gang violence, robbery, or any other potential harmful effects of known or perceived crime in the area.

Moreover, and as the police readily acknowledged below, police often employ surprise tactics in "high-crime areas" that leave innocent bystanders without the luxury of assessing the status of the people charging at them. E.22, 43–44. For example, "[i]n today's cities, police 'jump-outs' are prevalent and orders are often given to officers by their superiors to stop every person walking the streets in particular areas of a city." *United States v. Coleman*, No. 08-107, 2009 U.S. Dist. LEXIS 11423, at *22 n.6 (D. Del. Feb. 17, 2009) (internal citations omitted). A "jump-out" is a tactic where "multiple officers unexpectedly jump out of an unmarked car" to surprise pedestrians. Nicole Flatow, *If You Thought Stop-And-Frisk was Bad, You Should Know About Jump-Outs*,

ThinkProgress, https://thinkprogress.org/if-you-thought-stop-and-frisk-was-bad-you-should-know-about-jump-outs-385b89fc08d3 (last visited July 26, 2017).

The trial court did not make an express finding that it was apparent, "based on the particular scenario" before it, E.80, that Petitioner recognized the oncoming group as police officers. "[B]ecause the State bears the burden of articulating a sufficient factual basis for the stop, [an] appellate court[] cannot fill in blanks in the evidentiary record," *In re Jeremy P.*, 197 Md. App. 1, 22 (2011), and the trial court properly afforded less weight to the flight factor under the circumstances.

B. Even if Petitioner Recognized the Charging Group as Police Officers, His Flight Cannot be Considered "Unprovoked."

While recognizing that individuals have a right to ignore the police and go about their business, the *Wardlow* Court nevertheless concluded that an individual's constitutional rights can be constrained based upon the *speed* at which that person chooses to distance himself from law enforcement. *Compare Florida v. Royer*, 460 U.S. 491 (1983) (recognizing an individual's right to ignore police); *with Wardlow*, 528 U.S. at 125 ("Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite."); *see also* Keven Kercher, *The Investigative Stop: What Happens When we Run?*, 77 N.D. L. Rev. 123, 134 (2001) ("Even the speed at which the flight occurred has come into question; some courts have held that quickening one's pace at the sight of the police does not justify a stop, while others have held that high speed flight does.").

Respectfully, *Wardlow*'s majority, and, as a result, the Court of Special Appeals in the instant case, failed to appreciate that many individuals, a majority of which are

persons of color and innocent of any wrongdoing, have very real fears about engaging with law enforcement that would justify distancing themselves from police as quickly as possible.

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal."

Wardlow, 528 U.S. at 132–33 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

To put it mildly, "[r]ace does matter when it comes to a person's decision to flee from police[.]" Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion"* Terry *Stops*, 6 Mich. J. Race & L. 355, 358 (2001). "'Young minority males in particular are strongly motivated to avoid [the police]' and 'strive to avoid running into the police, believing that such encounters are all too often the prelude to abuse.'" *C.E.L. v. State*, 24 So. 3d 1181, 1191 (Fla. 2009) (Pariente, J., concurring) (quoting Malcolm D. Holmes & Brad W. Smith, *Race and Police Brutality: Roots of an Urban Dilemma* 94 (2008)). Data gathered by the Wall Street Journal in 2010 shows that "of 137,301 stop and frisks in New York City, 56% of those stopped were black, 31% Hispanic, and only 10% white, while 100,000 (72.8%) of those stops did not lead to an arrest." Theresa Nolan Breslin, *Fleeing Time Below the Poverty Line–Is it a Crime?* C.E.L. v. State *and Its Impact on Indigent Defense and Police-Citizen Relations*, 66 U. Miami L. Rev. 783, 784–85 (2012). It is not surprising,

then, that New York's "stop-and-frisk" policy was deemed unconstitutional. *Floyd v. City of N.Y.*, 959 F. Supp. 2d 959, 562 (S.D. N.Y. 2013).

Very recently, the Supreme Judicial Court of Massachusetts highlighted the need for courts to examine race as a relevant consideration for a person's flight from police:

> We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, . . . the finding that black males in Boston are disproportionately and repeatedly targeted for [stop-and-frisk] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males . . . a judge should, in appropriate cases, consider [those circumstances] in weighing flight as a factor in the reasonable suspicion calculus.

Commonwealth v. Warren, 475 Mass. 530, 539–40 (2016).

The now Chief Judge of the District of Columbia Court of Appeals has expressed similar concerns regarding application of *Wardlow*:

> I think the Fourth Amendment necessitates a more exacting legal standard, requiring particularized findings. . . . These concerns have particular resonance in the District of Columbia and other urban areas where an overly strict and formulaic application of *Wardlow* and its progeny could lead to unequal protection of citizens' Fourth Amendment rights, depending upon where a person lives or frequents, and the justification of seizures that are unsupported by any actual, particularized suspicions of wrongdoings by that person.

Henson v. United States, 55 A.3d 859, 871–72 (D.C. 2012) (Blackburne-Rigsby, J., concurring).

It cannot be disputed that persons of color living in Maryland are subjected to mistreatment at the hands of law enforcement. *See generally United States v. Balt. Police Dep't*, No. JKB-17-99, 2017 U.S. Dist. LEXIS 53454 (D. Md. Apr. 7, 2017); *Maryland*

Police Chief Responds After Cop Questions Citizen Over Immigration Status, CBS News (Jan. 30, 2017, 12:04 PM), http://www.cbsnews.com/news/maryland-police-chief-responds-after-citizen-aravinda-pillalamarri-questioned-over-immigration-status/; Michael E. Miller, *Howard County Sheriff Resigns Over Alleged Racist, Anti-Semitic Remarks*, Wash. Post (Oct. 11, 2016), https://www.washingtonpost.com/local/howard-county-sheriff-resigns-over-alleged-racist-anti-semitic-remarks/2016/10/11/1086c9ea-8fd8-11e6-9c52-0b10449e33c4_story.html?utm_term=.5685198ad1fd.

In Howard County, where Petitioner was stopped, in 2016, "black drivers were targeted in 37 percent of stops and 43 percent of [motor vehicle] searches, despite black people making up just 18 percent of the population." Kevin Rector, *Black Motorists in Md. are Pulled Over, Searched at Higher Rates*, Balt. Sun (Nov. 16, 2016, 7:38 PM), http://www.baltimoresun.com/news/maryland/crime/bs-md-police-traffic-stops-20161116-story.html. Maryland Attorney General Brian Frosh has recognized the continued presence of racial profiling in Maryland: "'Racial profiling continues despite the fact that it is against the law of the United States; it's against Maryland law.'" Sheryl Gay Stolberg, *Maryland Restricts Racial Profiling in New Guidelines for Law Enforcement*, N.Y. Times (Aug. 25, 2015), https://www.nytimes.com/2015/08/26/us/maryland-restricts-racial-profiling-in-new-guidelines-for-law-enforcement.html.

It is conceivable and entirely appropriate, then, that the circuit court considered this when it ruled that "the fact that [Petitioner] ran, in and of itself, based on the particular scenario that's being given here today, is not sufficient." E.80. If the Court of

Special Appelas's holding is affirmed, "[f]or all practical purposes, those who have the most to fear from an encounter with the police [will be] stripped of their fundamental constitutional right to go about their business (especially if they choose to exercise that right 'at top speed')[.]" Hoehl at 137 (citations omitted).

Given ever-present reminders of tense race-relations between persons of color and police, this Court should hold that trial courts must consider individualized circumstances, such as minority experiences with police, and, if present, afford less weight to the flight factor under the totality of the circumstances when determining whether the State has met its burden to establish that an officer had a reasonable articulable suspicion to justify a Fourth Amendment stop. Moreover, the Court should hold that such a finding should be given great deference unless clearly erroneous.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that this Court reverse the Court of Special Appeals's holding, give proper deference to the Howard County Circuit Court's findings under the totality of the circumstances, and conclude that the circuit court did not clearly err when it ruled that flight from police in an area that, without any objective or particularized support, law enforcement has deemed a "high-crime area," alone, is insufficient to overcome the constitutional presumption that an individual possesses the inalienable right to be free from unlawful searches and seizures at the hands of the State.

Respectfully submitted,

Anthony J. May
Murnaghan Appellate Advocacy Fellow
Public Justice Center
One North Charles Street, Suite 200
Baltimore, Maryland 21201
(410) 625-9409
maya@publicjustice.org

Counsel for Amici Curiae

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6,488 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 13-point, Times New Roman font in compliance with Rule 8-112.

Anthony J. May

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2017, two copies of the foregoing brief of amici curiae were sent via first-class mail, postage prepaid to:

Paul B. DeWolfe
Public Defender
Helki Philipsen
Assistant Public Defender
Office of the Public Defender
Appellate Division
6 Saint Paul Street, Suite 1302
Baltimore, Maryland 21202

Counsel for Petitioner

Carrie J. Williams
Chief Counsel
Criminal Appeals Division
Office of the Attorney General
200 Saint Paul Place, 17th Floor
Baltimore, Maryland 21202

Counsel for Respondent

Anthony J. May