S267522

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA	)	Case No. S267522
Plaintiff and Respondent,	)	(2d Crim. B305359)
v.	)	(Sup. Ct. No. BA477784)
MARLON FLORES,	)	
Defendant and Appellant,	)	

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGLES COUNTY
THE HONORABLE MILDRED ESCOBEDO, JUDGE

APPELLANT'S BRIEF ON THE MERITS

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By appointment of the
Supreme Court

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INTRODUCTION

In order dated July 26, 2023, this Court asked the parties to brief the following issue: "Was defendant's detention supported by reasonable suspicion that he was engaged in criminal activity." As the dissenting opinion pointed out below, the answer is an empathic no. (*People v. Flores* (2021) 60 Cal.App.5th 978, 993 - 994 [Stratton, J., dissenting].)

Flores was not detained because police had a reasonable suspicion that he was engaged in criminal activity, he was detained because he is a young, male Hispanic who tried to avoid a police encounter. As of 2016, Hispanics made up 17.6 percent of the United States population but represented 23 percent of all searches and nearly 30 percent of all arrests. (Kenya Downs, *Why Aren't More People Talking About Latinos Killed by Police?*, PBS Newshour (July 14, 2016).)[1] Part of the reason for the over-representation of Hispanics in such police encounters is the racial profiling of Hispanic males.[2]

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[1]/ https://www.pbs.org/newshour/nation/black-men-werent-unarmed-people-killed-police-last-week

[2]/ That such racial profiling is commonplace is born out by the fact that the Legislature found in 2019 that 69% of those in the gang database were Latino; 25% were black and only 6% were white. (Assembly Bill 333, section 2.) It is also evident in a 2020 report of the California Department of Corrections and Rehabilitation, which found that 68% of those in prison with gang enhancements are Hispanic. (2020 Annual Report And Recommendations, Committee on Revision of the Penal Code.)

Further impacting Flores' decision to try to hide from police is the fact that "Hispanic men are nearly twice as likely to be killed by police as white men."[3] (Erwin Chermerinsky, Presumed Guilty, (2021), p. 18.) After all the police killings and instances of excessive force, Flores' act of attempting to avoid a police encounter by hiding behind his vehicle was perfectly rational and did not create a reasonable suspicion that he was presently involved in the commission of a crime.[4] Further, when police approach, any "[m]ovement is incredibly dangerous for anyone because if police deem it sudden, and hence threatening, someone may end up shot." (*People v. Flores, supra,* 60 Cal.App.5th at p. 994 [Stratton, J., dissenting].) As one minority author recently put it:

> "Police officers do risk their lives. But do *I* risk my life every time I pull over for an armed police officer? When I don't have my documents in my hand on the steering wheel and I comply and reach for them, an

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[3]"As of June 9, [2020,] according to a database compiled by the Los Angeles Times, 465 Latinos had been killed by police since 2000 in L.A. County alone. Nationally, 910 Hispanics have been killed since 2015. It's worth noting that Latinos are often undercounted in criminal-justice data since many states report race but not ethnicity." (Julissa Rice, *It's Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, Time Magazine, (July 21, 2020).)

[4]In *Terry v. Ohio*, "the Court greatly expanded the powers of police and contributed significantly to race-based policing." (Erwin Chermerinsky, Presumed Guilty, at p. 108.) "Racial profiling is the inevitable result of the degradation of Fourth Amendment protections." (Elie Mystal, Allow Me to Retort, (2022).)

> officer can shoot me dead like one did Philando Castile. Compliance is not a lifesaver. When I comply completely, like Toledo did, I feel lucky to survive police encounters."[5] (Ibram X. Kendi, *Compliance Will Not Save Me,* The Atlantic (April 19, 2021).)

Indeed, minorities such as Flores are "the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere." (*Utah v. Strieff* (2016) 579 U.S. 232, 254 [195 L.Ed.2d 400, 136 S.Ct. 2056, 2701] [Sotomayor, J, dissenting.) "As our broader cultural views on racial injustice evolve, courts and judges are compelled to acknowledge and confront the problem." (*In re Edgerrin* (2020) 57 Cal.App.5th 752, 771 [Dato, J., concurring], citing *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 31 [Liu, J., concurring][citing "the troubling racial dynamics that have resulted in state-sanctioned violence, including lethal violence, against Black people throughout our history to this very day"]; *Utah v. Strieff, supra*, U.S. 232, 254 [195 L. Ed. 2d 400, 136 S.Ct. 2056, 2070–2071] [Sotomayor, J., dissenting] ["it is no secret that people of color are disproportionate victims of this type of scrutiny" in suspicionless stops].) Appellant urges this Court to keep such racial realities in mind as it considers the arguments which follow.

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[5]Adam Toledo was a 13-year who was shot and killed by police in a predominantly Latino community on Chicago's West Side in 2021. Philando Castile, an African American man, was fatally shot during a traffic stop by police in the Minneapolis– Saint Paul metropolitan area in 2016. (Kendi, *Compliance Will Not Save Me,* The Atlantic.)

STATEMENT OF THE CASE

An information charged appellant, Marlon Flores, with the following two counts: (1) possession of a controlled substance with a firearm in violation of Health and Safety Code section 11370.1, subdivision (a); and (2) carrying a loaded, non-registered handgun in violation of Penal Code section 25850, subdivision (a). (C.T. pp. 30 - 31.)

Defense counsel filed a motion to suppress evidence pursuant to Penal Code section 1538.5, which the Superior Court denied because it found that the officers had reasonable suspicion to detain Flores. Appellant then waived his constitutional rights and pled no contest to carrying a loaded, non-registered handgun. The court suspended imposition of sentence and placed Flores on formal probation for three years. (*People v. Flores, supra,* 60 Cal.App.5th at p. 988) Pursuant to section 1538.5, subdivision (m), Flores filed a timely notice of appeal from the denial of the motion to suppress. (C.T. p. 63.)

On February 16, 2021, in a two-to-one vote, Division Eight of the Second Appellate District Court of Appeal issued a published opinion affirming the Superior Court's denial of Flores' motion to suppress. (*Id.*, at pp. 981, 989 - 990) Justice Stratton dissented. (*Id.,* at p. 990 [Stratton, J., dissenting].)

On April 21, 2021, this Court granted appellant's petition for review and "deferred pending consideration and disposition of a related issue in *People v. Tacardon,* S264219." On July 26, 2023, the Court directed the parties to brief the

following issue: "Was defendant's detention supported by reasonable suspicion that he was engaged in criminal activity."

STATEMENT OF FACTS

On May 10, 2019, at about 10:00 p.m., Los Angeles Gang Unit Officer Daniel Guy and his partner, Officer Marino, were patrolling in a known narcotics and gang area. They drove into a cul-de-sac they knew "to be a gang haunt" and in which taggers spray paint gang graffiti daily. One of the two officers had made a drug arrest at that location the night before. (*People v. Flores, supra,* 60 Cal.App.5th at p. 982.)

Upon entering the cul-de-sac, the officers observed Flores standing in the street behind a car that was parked against a red curb. As the officers approached, he ducked down behind the rear passenger panel of the automobile and "pretended" to tie his shoe. The officers parked behind the car and illuminated Flores with their spotlight. The video from Officer Guy's body cam showed that Flores did not immediately stand up when he was illuminated with the light. Rather, it took him twenty seconds to stand up as the officer approached on foot. (*Ibid.*)

The officers ordered him to stand and put his hands on his head. They then handcuffed and patted him down for "officer safety." During the patdown, Officer Guy observed a methamphetamine pipe in plain view inside the car. Guy then asked Flores for identification. Flores told him that his wallet was located inside the vehicle. The officer recovered the wallet himself. Inside, he found a folded up dollar bill secreting methamphetamine. This discovery caused the officers to search

the vehicle in its entirety. Upon doing so, they found a revolver inside a backpack. Prior to detaining Flores, the officers did not know the vehicle belonged to him. (*Ibid.*)

ARGUMENT

Police detained, and immediately patted down, Flores because he bent down behind his parked car in what officers believed to be an attempt to avoid an encounter with police. Imagine that – a male Hispanic in a bad neighborhood not wanting to have a consensual encounter with police. However, even in a high crime area, police need to have a reasonable suspicion that the particular person is engaged in criminal activity before they detain a citizen on the street. This is true even if that citizen takes legal measures to attempt to avoid a "consensual" police encounter. Here, the officers lacked the reasonable suspicion necessary to detain appellant,

A. General Fourth Amendment Principles.

On review from a motion to suppress made pursuant to Penal Code section 1538.5, the trial court's factual findings, "whether express or implied, must be upheld if they are supported by substantial evidence." (*People v. Lawler* (1973) 9 Cal.3d 156, 160; see also *People v. Ramos* (2004) 34 Cal.4th 494, 505; *People v. Ayala* (2000) 23 Cal.4th 225, 255.) Because the reasonableness of a search is an issue of law, however, an appellate court should conduct an independent review of the trial court's conclusion. (*People v. Loewen* (1983) 35 Cal.3d 117, 123; *People v. Ramos, supra*, 34 Cal.4th at p. 505; *People v. Ayala, supra*, 23 Cal.4th at p. 255.) If the search or seizure in question does not satisfy the constitutional standard of reasonableness

mandated by the Fourth Amendment, then the evidence seized should have been excluded. (*People v. Gallant* (1990) 225 Cal.App.3d 200, 206, citing *Mapp v. Ohio* (1961) 367 U.S. 643, 655 [6 L.Ed.2d 1081, 81 S.Ct. 1684].)

The touchstone of the Fourth Amendment is reasonableness. Courts are, therefore, required to evaluate a search "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (See *Wyoming v. Houghton* (1999) 526 U.S. 295, 300 [143 L.Ed.2d 408, 119 S.Ct. 1297].) A warrantless search is presumptively unreasonable, and therefore unconstitutional, unless it falls within one of the recognized exceptions to the warrant requirement. (*Katz v. United States* (1967) 389 U.S. 347, 357 [19 L.Ed.2d 576, 88 S.Ct. 507]; *People v. Bravo* (1987) 43 Cal.3d 600, 609.) The burden of proving that the search falls within one of these narrow exceptions rests with the People. (*People v. Williams* (1999) 20 Cal.4th 119, 127.)

B. Under People v. Tacardon, Appellant Was Detained The Moment The Officers Pulled Behind His Vehicle, Shone Their Spotlight On Him, Blocked His Exit Routes And Quickly Approached Him On Foot.

As in *People v. Tacardon* (2022) 14 Cal.5th 235, "[t]he outcome here [may well] turn[] on the distinction between a consensual encounter and a detention." (*Id.*, at p. 241.) Police officers are permitted to approach pedestrians and engage them

in consensual conversation. (*People v. Brown* (2015) 61 Cal.4th 968, 974.) "When an encounter is voluntary, no constitutionally protected right is implicated." (*United States v. Summers* (9th Cir. 2001) 268 F.3d 683, 686.) Conversely, a detention must be supported by reasonable suspicion. (*Terry v. Ohio* (1968) 392 U.S. 1, 21 [20 L.Ed.2d 889, 88 S.Ct. 1868].) According to the United States Supreme Court, "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (*United States v. Mendenhall* (1980) 446 U.S. 544 [64 L.Ed.2d 497, 100 S.Ct. 1870]; see also *Florida v. Bostick* (1991) 501 U.S. 429, 437 - 438 [115 L.Ed.2d 389, 111 S.Ct. 2382].)

The Supreme Court in *Mendenhall* concluded that race of the detainee is not "irrelevant" to the determination as to whether he was "seized" and, if so, at what point. (*United States v. Mendenhall, supra,* 446 U.S. at p. 558.) Several Federal Circuit Courts of Appeal have expressly found that the detainee's race is relevant to the resolution of Fourth Amendment claims. (See e.g., *United States v. Smith* (7th Cir. 2015) 794 F.3d 681, 687-88 [recognizing "relevance of race in everyday police encounters with citizens in Milwaukee and around the country …. [and] empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system" in determining whether a seizure had occurred]; *United States v. Washington* (9th Cir. 2007) 490 F.3d

765, 768 [recognizing that "Recent relations between police and the African–American community in Portland are also pertinent to our analysis" of whether a search was consensual."].) In this case, appellant asserts that his being Hispanic is relevant to the determination of whether there was reasonable suspicion to detain in this case.

In *Tacardon,* this Court opined that "use of a spotlight, standing alone, does not necessarily effect a detention." (*People v. Tacardon, supra*, 14 Cal.5th at p. 247.) Similarly, "an officer's mere approach does not constitute a seizure." (*Id.,* at p. 250, citing *Florida v. Bostick, supra*, 501 U.S. at p. 434; *Michigan v. Chesternut* (1988) 486 U.S. 567, 575 - 576 [100 L.Ed.2d 565, 108 S.Ct. 1975] 575–576; *INS v. Delgado* (1984) 466 U.S. 210, 216 [80 L.Ed.2d 247, 104 S.Ct. 1758]; *Florida v. Royer* (1983) 460 U.S. 491, 497 [75 L.Ed.2d 229, 103 S.Ct. 1319] (plur. opn. of White, J.).) Because the deputy in *Tacardon* "did not walk rapidly, pose any questions to Tacardon, or accuse him of anything. The deputy's nighttime approach, aided by a spotlight for illumination, did not, without more, effect a detention." (*People v. Tacardon, supra*, 14 Cal.5th at p. 251.) Something more is needed. (*Ibid.*)

The Court in *Tacardon* cited two Court of Appeal opinions where that something more was present. First, in *People v. Garry* (2007) 156 Cal.App.4th 1100, an officer on night patrol noticed the defendant standing near a parked car. The officer pulled within 35 feet, turned his spotlight on the defendant

and walked "briskly" toward him. The Court of Appeal found that anyone who is suddenly illuminated by a spotlight and faced with an armed police rushing toward them is going to believe he or she is "'under compulsion of a direct command by the officer.'" (*Id.*, at p. 1112, quoting *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1034.) Second, in *People v. Kasrawi* (2021) 65 Cal.App.5th 751, review granted September 1, 2021, S270040, the Court of Appeal concluded that the officer detained the defendant by turning a spotlight on his vehicle; pulling behind and to the side of the defendant's vehicle; immediately approaching the defendant's car on foot with "sped and surety;" and then asking a pointed question and demanding an answer. (*Id.,* at pp. 759 - 760.)

In this case, "[t]he trial court apparently found the detention occurred after appellant delayed too long in rising to his full height. The majority agree[d] with the trial court." (*People v. Flores, supra,* 60 Cal.App.5th at p. 992 [Stratton, J., dissenting].) The dissent did not. (*Ibid.*) The dissenting opinion believed, however, that the detention occurred as follows:

> "when the officers positioned their marked patrol car a little askew to and behind appellant's car, shined a 'huge' spotlight on him, and converged on him, one approaching him from behind (where the patrol car is parked) and the other approaching him on the sidewalk from the other side, having walked around the front of the car in the meantime. The car and an iron spiked fence blocked the other directions. Appellant had no 'escape route' even if he wanted to walk away." (*Ibid.*)

As in both *Garry* and *Kasrawi,* the officers did more than shine a spotlight on a person they were approaching for a casual, nighttime conversation. After parking their vehicle "a little askew" and behind Flores car, the officers "converged" on him from different directions. This was every bit as coercive as what occurred in *Garry* and *Kasrawi.* Further, unlike in those two cases, the officers positioned their vehicle and themselves so that appellant had no escape route. (*People v. Flores, supra,* 60 Cal.App.5th at p. 992 [Stratton, J. dissenting].) Blocking a person's means of exiting a scene on foot constitutes a detention. (See *United States v. Summers, supra*, 268 F.3d at p. 687.) Under these circumstances, any reasonable person in appellant's position, minority or not, would not have felt free to leave. (*People v. Flores, supra,* 60 Cal.App.5th at p. 992 [Stratton, J. dissenting].) Thus, contrary to the majority opinion below, this was a detention from the moment the officers began to converge on Flores, trapping him the cul-de-sac.

C. The Detention In This Case, Whenever It Occurred, Violated The General Principles Of Terry v. Ohio.

"Circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation." (*In re Tony C.* (1978) 21 Cal.3d 888, 892.) According to the United States Superior Court, an officer may make a brief investigatory stop if he has knowledge of "specific and articulable facts [which cause]

him to suspect that (1) some activity relating to crime has taken place or is occurring or is about to occur, and (2) the person he intends to stop or detain is involved in that activity." (*Terry v. Ohio, supra,* 392 U.S. at p. 21.) Reasonable suspicion exists only where an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion. (*United States v. Cortez* (1981) 449 U.S. 411, 418 [66 L.Ed.2d 621, 101 S.Ct. 690].) Whether there was reasonable suspicion is determined under the totality of the circumstances approach (*United States v. Sokolow* (1989) 490 U.S. 1,7 [104 L.Ed.2d 1, 109 S.Ct. 1581]; *United States v. Arvizu* (2002) 534 U.S. 266, 273 - 275 [151 L.Ed.2d 740, 172 S.Ct. 744]), and is based on the circumstances known to the officer at the moment the detention commenced. (See *In re Jaime P.* (2006) 40 Cal.4th 128, 133.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 230.)

If the detention occurred before the officers ordered appellant to stand up, as the dissent maintains, then the officers lacked the reasonable suspicion necessary to detain Flores. As Justice Stratton pointed out in her dissenting opinion: "At the point when appellant was detained under the spotlight, all the officers knew was that he was standing next to a car in a high

crime neighborhood and had moved out of the street to the other side of the car and bent over when they believed he had seen their patrol car. These are not articulable facts supporting reasonable suspicion." (*People v. Flores, supra,* 60 Cal.App.5th at p. 992 [Stratton, J. dissenting].) That a minority was "acting shady" is not grounds for a detention. (*In re Edgerrin, supra,* 57 Cal.App.5th at p. 765.)

Even assuming arguendo, as the dissent did below, that "the detention occurred at the point when appellant did not immediately stand erect of his own accord[]" (*Id.,* at pp. 992 - 993), the officers still did not have the reasonable suspicion necessary to detain Flores. "The testifying officer could not articulate what criminal activity he suspected appellant was engaged in. He just thought it was suspicious when appellant moved from one side of the car to another and then bent over." (*Id.,* at p. 993.)

D. Flores' Act Of Bending Down Behind His Vehicle Did Not Give Police The Reasonable Suspicion Necessary To Detain Him.

The fact that appellant tried to hide from officers does not, by itself, create the reasonable suspicion necessary for a detention. It is uniformly acknowledged that citizens are free to avoid a consensual encounter with police.[6] (*Florida v. Royer*

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[6] In theory the right to avoid a consensual police encounter applies to all citizens. In practice, however, it does not apply to many minorities. For example, "As is known from well-publicized

(1983) 460 U.S. 491, 497 - 498 [75 L.Ed.2d 229, 103 S.Ct. 1319]; *People v. Souza, supra,* 9 Cal.4th at p. 230.) Indeed, citizens are permitted to exit their vehicle and attempt to walk away from approaching officers who do not have a legal basis to detain. (See *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 234 - 235.) If fleeing alone is insufficient to give police the reasonable suspicion to detain a citizen (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [145 L.Ed.2d 570, 120 S.Ct. 673]; *People v. Souza, supra*, 9 Cal.4th at pp. 230 - 231), then Flores' mere act of crouching down next to his vehicle as the patrol car approached is also insufficient to give officers reasonable suspicion to detain him. Likewise, if backing up with one's hands raised when officers approach does not give rise to a reasonable suspicion (*People v. Cuadra* (2021) 71

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and documented examples, an African-American man facing armed policemen would reasonably be especially apprehensive. ... A person who reasonably is apprehensive that walking away, ignoring police presence, or refusing to answer police questions or requests might lead to detention and, possibly, more aggressive police action, is not truly free to exercise a constitutional prerogative — 'to be secure in their persons,' even if they do not submit — in the same manner as a person who is not viewed with similar suspicion by police and, as a result, largely unafraid of triggering an aggressive reaction. We cannot turn a blind eye to the reality that not all encounters with the police proceed from the same footing, but are based on experiences and expectations, including stereotypical impressions, on both sides. Our job in this case is not to judge their truth or validity but to recognize they exist and take them into account in light of '[o]ur precedents [which] direct [us to] take an 'earthy' and realistic approach to such street encounters.'" (*Dozier v. United States* (D.C. 2019) 220 A.3d 933, 944 - 945.)

Cal.App.5th 348, 353 [Stratton, J., maj. opn.]), than neither does freezing in place. (*People v. Flores, supra,* 60 Cal.App.5th at pp. 993 - 994 [Stratton, J. dissenting]; see also *Utah v. Strieff, supra,* 579 U.S. at p. 354 [136 S.Ct. at p. 2070] [Sotomayor, J, dissenting] ["For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street . . . ."].) Given the realities of police encounters with minorities, officers needed something more to detain Mr. Flores, other than his clear attempt to avoid police, and that something more was missing.

E. The Nature Of The Area Did Not Create A Reasonable Suspicion To Detain.

Officer Guy also testified that the area was known for narcotic and gang-related activity. (*People v. Flores, supra,* 60 Cal.App.5th at p. 982.) Presence in a high crime area, however, is not enough to give rise to reasonable suspicion justifying a stop.[7]

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[7] Indeed, even "[n]ervousness, in a high-crime area, without more, is not sufficient to establish reasonable suspicion to detain an individual. [Citation.] Although 'in some circumstances an individual's flight from law enforcement in a high crime area can justify an investigatory seizure[,]' . . . a suspect's 'simple act of walking away from the officers' is not the equivalent of flight. [Citation.]" (*United States v. Reid* (S.D.Cal. 2015) 144 F.Supp.3d 1159, 1163.) In *Reid,* the federal court declined to find that, "in today's highly charged climate, . . . an African American who walks away from police in what appears to be an attempt to avoid police contact, is reasonably suspicious." (*Id.,* at pp. 1163 - 1164.) In Southern California, the same holds true for members of the Hispanic community.

(*Brown v. Texas* (1979) 443 U.S. 47, 52-53 [61 L.Ed.2d 357, 99 S.Ct. 2637]; *People v. Verin* (1990) 220 Cal.App.3d 551, 558.) "An officer's assertion that the location lay in a 'high crime' area does not elevate . . . facts into reasonable suspicion of criminality. The 'high crime area' factor is not an 'activity' of an individual." (*People v. Loewen, supra*, 35 Cal.3d at p. 124.) "Many citizens of this state are forced to live in areas that have 'high crime' rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas.'" (*Ibid.*) Nevertheless, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." (*Katz v. United States, supra,* 389 U.S. at p. 359.)

Hence, merely being a Hispanic male in a bad neighborhood does not give rise to a reasonable suspicion that a particular individual is engaged in criminal activity. Under the Constitution, a detention simply cannot be justified solely on stereotypical, racial grounds. (See *People v. Durazo* (2004) 124 Cal.App.4th 728, 735 - 736 [being a male Hispanic is not enough to warrant a detention].) Here, there was no testimony that the officers reasonably believed Flores to be a gang member or that he was involved in narcotic-related activity when they illuminated him with their spotlight. All the officers knew was that this male Hispanic tried to avoid police contact by bending down by the side of his car. This alone was insufficient to justify a detention.

Given the recent events that have led to nation-wide protests (and, unfortunately, riots), anyone can understand why a person of color would want to avoid a police encounter even when he or she is not engaged in criminal activity. "Appellant's reaction was neither abnormal nor suspicious. Indeed, some even might instruct their children remaining still is a prudent course of action (and even then, it may not work. #BlackLivesMatter.)" (*People v. Flores, supra,* 60 Cal.App.5th at pp. 993 - 994 [Stratton, J. dissenting].)

Indeed, it is "the unfortunate reality that some individuals in our society, often members of minority groups, improperly view the police more as sources of harassment than of protection. These individuals may innocently flee at the first sight of police in order to avoid an encounter that their experience has taught them might be troublesome." (*People v. Souza, supra*, 9 Cal.4th at p. 243 (Mosk, j. concurring).) As the events of 2020 make clear, "'neither society nor our enforcement of the laws is yet color-blind,'" and the resulting "uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement." (*United States v. Brown* (9th Cir. 2019) 925 F.3d 1150, 1156.) While older, white men might believe that police are there to protect them, members of minority communities believe otherwise and the deaths of George Floyd, Ahmaud Marquez Arbery, Eric Garner and Andrés

Guardado[8] validate their distrust and fear of law enforcement.

Thus, the fact a minority flees or hides at the sight of a police vehicle must not invariably constitute reasonable suspicion that person has committed a crime. Again, something more is required for a detention and, in this case, Officer Guy failed to testify to additional facts which would allow a court to find that he had the reasonable suspicion necessary to constitutionally detain Flores. "To hold otherwise ignores the deep-seated mistrust certain communities feel toward police and how that mistrust manifests in the behavior of people interacting with them." (*People v. Flores, supra,* 60 Cal.App.5th at p. 994 [Stratton, J. dissenting].)

F. The Totality Of The Circumstances.

In determining whether reasonable suspicion exists, the United States Supreme Court has stated that courts must take into account the totality of the circumstances. (*United States v. Sokolow, supra,* 490 U.S. at p. 7.) Erwin Chermerinsky, dean of the School of Law at Berkley, wrote in his book Presumed Guilty (2021): "'Totality of the circumstances' is so amorphous as

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[8] On June 18, 2020, Andrés Guardado, an 18-year-old Salvadoran American, was shot and killed by a Los Angeles sheriff's deputies. Deputies alleged that Guardado had a gun, but his family has repeatedly disputed the account. The official autopsy report showed that Guardado was shot five times in the back and had two other graze wounds. (Julissa Rice, *It's Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, Time Magazine.)

a legal test as to allow a court to find almost anything to be enough to justify a stop and to allow the evidence gained to be used against the defendant." (Erwin Chermerinsky, Presumed Guilty, (2021), p. 226.) But, not in this case. Here, police had no conceivable basis for constitutionally detaining Mr. Flores. Indeed, Officer Guy never testified as to what crime he suspected Flores of committing. Specifically, the officer never testified that he suspected Flores was a gang member or a drug dealer – which would have been consistent with the area's reputation. Simply bending down beside a vehicle in order to avoid a "consensual" police encounter is not a crime and, therefore, does not create the reasonable suspicion necessary for a lawful detention and an immediate patdown. Being a male Hispanic in a bad neighborhood does not alter this conclusion. (*People v. Durazo, supra,* 124 Cal.App.4th at pp. 735 - 736.)

G. The Evidence Found In Appellant's Vehicle Must Be Suppressed As Fruit Of The Poisonous Tree.

As all of the officers' subsequent observations, as well as their recovery of the narcotics and the revolver, flowed directly from Flores' illegal detention, this evidence should have been excluded. (*People v. Mayfield* (1997) 14 Cal.4th 668, 760 [facts officers learn after the detention cannot be used to justify the detention itself].) The revolver and the methamphetamine constitute "fruit of the poisonous tree" and should have been suppressed in accordance with the exclusionary rule. (*Wong Sun v. United States* (1963) 371 U.S. 471, 485 - 488 [9 L.Ed.2d 441, 83

S.Ct. 407].) The Superior Court's failure to do so constitutes reversible error. When the reviewing court finds the search to be illegal, the judgment must be reversed and the cause remanded so that the defendant can be given the opportunity to withdraw his plea. (*People v. Ruggles* (1985) 39 Cal.3d 1, 13; *People v. Miller* (1983) 33 Cal.3d 545, 566 [the harmless error rule is inapplicable where the defendant has pled guilty following the erroneous denial of a motion to suppress].)

CONCLUSION

Because police did not have the reasonable suspicion to constitutionally detain Flores, appellant respectfully requests this Court to reverse the denial of his motion to suppress.

DATED: August 10, 2023

Respectfully submitted,

Richard L. Fitzer
RICHARD FITZER
Attorney for Appellant

WORD COUNT CERTIFICATION

People v. Marlon Flores

Supreme Court No. S267522

I, Richard Fitzer, certify that this petition was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 5,128 words.

Richard L. Fitzer

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I am a citizen of the United States, over the age of 18 years, employed in Los Angeles County with my business address as stated above. I am not a party to this case. On August 10, 2023, I served the **appellant's opening brief on the merits,** a copy of which is attached, by mailing a copy to each addressee named below by regular United States mail at Long Beach, California.

Marlon Flores
(address unknown)

Hon. Mildred Escobedo
Los Angeles Superior Court
Dept. # 126
210 West Temple Street
Los Angeles, CA 90012

And by emailing and e-filing through Truefiling a true copy thereof to:

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I declare under penalty of perjury that the foregoing is true and correct. Executed August 10, 2023 at Long Beach, California.

Richard L. Fitzer
Richard L. Fitzer

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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