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Supreme Court of California
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S267522

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
) No. S_______
Plaintiff and Respondent,)
) 2d Crim. No.
V.) B305359
)
MARLON FLORES,) (Superior
) Court No.
Defendant and Appellant.) BA477784)
____)

PETITION FOR REVIEW

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By Appointment of the
Court of Appeal

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS. 2

TABLE OF AUTHORITIES. 4

PETITION FOR REVIEW.. 7

ISSUES PRESENTED FOR REVIEW. 8

STATEMENT OF THE CASE.. 10

STATEMENT OF FACTS. 11

NECESSITY FOR REVIEW. 13

ARGUMENT.. 14

I. PETITIONER WAS DETAINED THE MOMENT THE OFFICERS PULLED BEHIND THE PARKED CAR; ILLUMINATED HIM WITH THEIR SPOTLIGHT; AND APPROACHED IN SUCH A MANNER AS TO PREVENT HIM FROM WALKING AWAY. 14

A. A Detention Occurs When A Reasonable Person Would Not Believe He Or She Was Free To Leave. 14

B. When Are The Occupants Of A Parked Vehicle, Or A Pedestrian, Considered Detained?. 14

C. Petitioner Was Detained As Soon As The Officers Pulled Behind His Parked Car; Illuminated Him With Their Spotlight; And Approached From Different Sides, So As

To Block Petitioner's Ability To Walk Away. . . 17

II. AT NO POINT PRIOR TO PETITIONER COMPLYING WITH THE OFFICERS' COMMAND TO STAND UP, DID POLICE HAVE THE REASONABLE SUSPICION NECESSARY TO DETAIN HIM.. 19

A. *Terry v. Ohio*. 19

B. Presence In A High Crime Area Does Not, By Itself Create Reasonable Suspicion To Detain. 20

C. Even Those In Present In High Crime Areas Have The Constitutional Right To Avoid A Consensual Encounter With Police.. 21

D. The Evidence Found In Appellant's Vehicle Must Be Suppressed As Fruit Of The Poisonous Tree.. 22

III. UNDER *ROYER* AND *WARDLOW*, A CITIZEN, REGARDLESS OF RACE, SHOULD BE FREE TO AVOID A CONSENSUAL ENCOUNTER WITH POLICE BY DUCKING BEHIND A PARKED CAR. 24

CONCLUSION. 29

WORD COUNT CERTIFICATION. 30

EXHIBIT A. 31

PROOF OF SERVICE. 32

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Brown v. Texas (1979)
443 U.S. 47 [61 L.Ed.2d 357, 99 S.Ct. 2637]. 20, 28

Dozier v. United States (D.C. 2019)
220 A.3d 933. 24

Florida v. Bostick (1991)
501 U.S. 429. . . . . 14, 18

Florida v. Royer (1983)
460 U.S. 491. . . . . 21, 22, 24, 26, 27

Illinois v. Wardlow (2000)
528 U.S. 119 [145 L.Ed.2d 570, 120 S.Ct. 673]. 26, 27

Terry v. Ohio (1968)
392 U.S. 1 [20 L.Ed.2d 889, 88 S.Ct. 1868]. 19

United States v. Arvizu (2002)
534 U.S. 266. 19

United States v. Cortez (1981)
449 U.S. 411 [66 L.Ed.2d 621, 101 S.Ct. 690]. 19

United States v. Mendenhall (1980)
446 U.S. 544 [64 L.Ed.2d 497, 100 S.Ct. 1870]. 14, 18

United States v. Sokolow (1989)
490 U.S. 1,7 [104 L.Ed.2d 1, 109 S.Ct. 1581]. 19

Wong Sun v. United States (1963)
371 U.S. 471. 22

STATE CASES

People v. Aldridge (1984)
35 Cal.3d 473.. 22

People v. Bailey (1985)
176 Cal.App.3d 402. 17

People v. Brown (2015)
61 Cal.4th 968. 15

People v. Durazo (2004)
124 Cal.App.4th 728. 21

People v. Franklin (1987)
192 Cal.App.3d 935. 14

People v. Garry (2007)
156 Cal.App.4th 1100. . . . . 13, 15, 16, 18

People v. Kidd (2019)
36 Cal.App.5th 12... . . . . 15, 16, 17, 18

People v. Loewen (1983)
35 Cal.3d 117.. 20

People v. Mayfield (1997)
14 Cal.4th 668. 22

People v. Perrusquia (2007)
150 Cal.App.4th 228. 21

People v. Roth (1990)
219 Cal.App.3d 211. . . . . 13, 15, 18

People v. Souza (1994)
9 Cal.4th 224. . . . . 19, 26

People v. Tacardon (2020)
53 Cal.App.5th 89. 17

People v. Wilkins (1986)
186 Cal.App.3d 804. 15

STATE STATUTES

Health and Safety Code section:

11370.1. 10

Penal Code sections:

1538.5. 10

25850.. 10

CALIFORNIA RULES OF COURT

Rule:

8.500. 13

Other source:

California sheriff's department releases video from fatal shooting,
Nikeas, Peter, CNN.com (Feb. 19, 2021). 25

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	.
	)	No. S_______
Plaintiff and Respondent,	)	
	)	2d Crim. No.
V.	)	B305359
	)	
MARLON FLORES,	)	(Superior
	)	Court No.
Defendant and Appellant.	)	BA477784)
	)	

PETITION FOR REVIEW

TO: THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Marlon Flores, defendant and appellant, respectfully petitions for review from the Second District Court of Appeal, Division Eight's published opinion filed on February 16, 2021. A copy of that opinion, including the seven-page dissent, is attached as Exhibit A.

ISSUES PRESENTED FOR REVIEW

1) Two gang unit police officers were patrolling in a known narcotics and gang area after dark. They observed a vehicle parked in a cul-de-sac. Petitioner was standing in the roadway next to the vehicle. As the officers approached, petitioner ducked down behind the rear passenger panel of the automobile and "pretended" to tie his shoe. The officers illuminated him with their spotlight and "positioned their marked patrol car a little askew to and behind appellant's car[.]" (Dissenting Opn. p. 4.) Both officers exited the patrol car and approached petitioner from different sides. As a result, petitioner "had no 'escape route' even if he wanted to walk away." (Dissenting Opn. p. 4.) The question is: Was petitioner detained, as the dissenting opinion maintains, at the moment the officers exited the patrol car and approached in such a way as to prevent him from walking away?

2) Both the Superior Court and the majority of the Court of Appeal below concluded that petitioner was not detained until the officers ordered him to stand up and put his hands on his head so he could be handcuffed. Both courts further found that such a detention was warranted because petitioner attempted to avoid a police contact by hiding behind his vehicle. Even if petitioner was not detained until he complied with the order to stand up, the following question remains: Did petitioner's act of bending down behind his vehicle give the

officers the reasonable suspicion necessary to constitutionally detain him?

3) Most importantly, petitioner requests this Court confirm what steps a citizen, regardless of race, national origin, gender or age, may take in order to avoid a consensual encounter with police, as is his or her right, without fear that law enforcement will use this avoidance to justify an otherwise unconstitutional detention? Without clear guidance, unconstitutional detentions will continue to occur and people, usually of color, will continue to be wrestled to the ground and shot like Kurt Reinhold when they try exercise their rights.

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 the officers had reasonable suspicion to detain Flores. (Slip Opn. p. 11.) Flores 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. (Slip Opn. p. 11.) 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. (Slip Opn. pp. 3, 14.) Justice Stratton dissented.

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. (Slip Opn. p. 3.)

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 the 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.[1] (Slip Opn. p. 3.)

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

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[1] This was the crucial fact upon which the Superior Court based its finding that the officers had reasonable suspicion to detain Flores. (Slip Opn. pp. 10 - 11.)

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. (Slip Opn. p. 4.)

NECESSITY FOR REVIEW

Under California Rules of Court, rule 8.500, subdivision (b)(1), review is necessary to settle three questions of constitutional law, the importance of which has been underscored by recent excessive force cases around the country – including that of Eric Garner. (Dissenting Opn. 7.) Review is also necessary to secure uniformity of decision. As the dissent points out, the majority opinion directly contradicts the opinions in *People v. Garry* (2007) 156 Cal.App.4th 1100; *People v. Roth* (1990) 219 Cal.App.3d 211. (Dissenting Opn. p. 3.)

ARGUMENT

I.

PETITIONER WAS DETAINED THE MOMENT THE OFFICERS PULLED BEHIND THE PARKED CAR; ILLUMINATED HIM WITH THEIR SPOTLIGHT; AND APPROACHED IN SUCH A MANNER AS TO PREVENT HIM FROM WALKING AWAY.

A. A Detention Occurs When A Reasonable Person Would Not Believe He Or She Was Free To Leave.

According to the United States Supreme Court, a seizure of a person has occurred for Fourth Amendment purposes the moment a reasonable person would not have felt free to leave without responding or yielding to the officer. (*Florida v. Bostick* (1991) 501 U.S. 429, 437 - 438 [115 L.Ed.2d 389, 111 S.Ct. 2382].) As the dissenting opinion laid out, "[t]he test to determine whether an individual has been detained is 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" (Dissenting Opn. p. 3; quoting *United States v. Mendenhall* (1980) 446 U.S. 544, 554 [64 L.Ed.2d 497, 100 S.Ct. 1870].)

B. When Are The Occupants Of A Parked Vehicle, Or A Pedestrian, Considered Detained?

It has been held that the mere fact a law enforcement officer simply parks behind a suspect's vehicle does not constitute a detention. (*People v. Franklin* (1987) 192 Cal.App.3d 935, 940.) Conversely, the occupants of a parked car are considered to be

detained when an officer "stopped his marked patrol vehicle … in such a way that the exit of the parked vehicle was prevented[.]" (*People v. Wilkins* (1986) 186 Cal.App.3d 804, 809.) And, in *People v. Brown* (2015) 61 Cal.4th 968, this Court confirmed that pulling behind a person sitting in a parked car and activating the patrol car's emergency lights constitutes a detention in most circumstances.[2] (*Id.,* at pp. 975 - 980.)

It has also been repeatedly held that when police illuminate a person on the street with their spotlight as they approach, a detention has occurred for Fourth Amendment purposes. (See *People v. Roth, supra,* 219 Cal.App.3d 211; *People v. Garry, supra,* 156 Cal.App.4th 1100; *People v. Kidd* (2019) 36 Cal.App.5th 12.) In *Roth*, the Court of Appeal found that a detention had occurred under the following circumstances: a deputy shined his spotlight on the suspect, two deputies exited the patrol car and one commanded the defendant to approach. (*People v. Roth, supra,* 219 Cal.App.3d at p. 215.) "In this situation, a reasonable person would not believe himself or herself free to leave." (*Ibid.*)

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[2] This Court cautioned that it was not establishing a bright line rule that every time an officer pulls behind a parked car and activates its emergency lights it constitutes a detention. For instance, in the case of a disabled vehicle, pulling up behind and activating a patrol car's emergency lights would not constitute a detention for Fourth Amendment purposes. In the case of the ordinary parked car, however, pulling up behind and activating the emergency lights signals to the occupants that they are not free to leave. (*Id.,* at p. 980.)

In *Garry,* the appellate court noted that opinions addressing warrantless detentions "place great significance on how the officers physically approached their subjects." (*People v. Garry, supra,* 156 Cal.App.4th at p. 1110.) Whether the officers blocked the subject from attempting to avoid a police encounter is a key consideration. (*Id.,* at p. 1111.) Further, while merely illuminating a person with a spotlight does not constitute a detention, it is an important factor in deciding whether a detention has occurred. (*Ibid.*) In this case, Division Two of the First Appellate District held that a detention had occurred where an officer parked his patrol vehicle 35 feet away from a pedestrian and, after five to eight seconds of observation, "bathed [him] in light, exited his police vehicle, and, armed and in uniform, 'briskly' walked 35 feet in 'two and a half, three seconds' directly to him while questioning him about his legal status," the officer's "show of authority" was so intimidating as to communicate to any reasonable person that he or she was """not free to decline [his] requests or otherwise terminate the encounter.""" (*People v. Garry, supra,* 156 Cal.App.4th at pp. 1111–1112.)

In *Kidd*, the court concluded "that Kidd was detained when the officer made a U-turn to pull in behind him and trained spotlights on his car." (*Id.*, at p. 22.) While the court noted that "[t]he officer did not block Kidd's car in, and he did not illuminate his colored emergency lights, so as to unambiguously signal a detention[,]" it found that "motorists are trained to yield

immediately when a law enforcement vehicle pulls in behind them and turns on its lights." (*Ibid.*) Hence, "a reasonable person in Kidd's circumstances 'would expect that if he drove off, the officer would respond by following with red light on and siren sounding … .'" (*Ibid.,* citing *People v. Bailey* (1985) 176 Cal.App.3d 402, 406.) Finally, the Fourth District found that any ambiguity as to whether Kidd was detained or not vanished once "the officer more or less immediately exited his patrol vehicle and began to approach Kidd's car." (*People v. Kidd, supra,* 36 Cal.App.5th at p. 22; but see *People v. Tacardon* (2020) 53 Cal.App.5th 89, 99 - 100.)[3]

C. Petitioner Was Detained As Soon As The Officers Pulled Behind His Parked Car; Illuminated Him With Their Spotlight; And Approached From Different Sides, So As To Block Petitioner's Ability To Walk Away.

Here, as the dissenting opinion lays out, "the interaction between the officers and [petitioner] ripened into a detention when the officers positioned their marked patrol car a little askew to and behind [petitioner's] car, shined a "huge" spotlight on him,

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[3] In *Tacardon*, the Third District Court of Appeal took it upon itself to disagree with the Fourth District's decision in *Kidd,* that pulling behind the defendant's vehicle, illuminating it with a spotlight and approaching the vehicle on foot elevated the police contact into a detention. The Third District reached the contrary conclusion even though the defense in *Tacardon* never argued, "either in his initial briefing or in his supplemental brief, that a detention occurred when the deputy illuminated the BMW with the spotlight and began to approach on foot." (*Id.,* at p. 99.)

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." (Dissenting Opn. p. 4.) In short, the officers afforded petitioner no "escape route" by which he could have walked away from the police encounter even if he wanted to do so. Thus, petitioner was detained at this point. (Dissenting Opn. p. 4; see also *United States v. Mendenhall, supra*, 446 U.S. at pp. 554 - 555; *Florida v. Bostick, supra,* 501 U.S. at pp. 437 - 438.)

Because the major of the Court of Appeal concluded he was not detained until the officers ordered him to stand up and he complied, petitioner respectfully requests this Court to grant his petition for review. By doing so, this Court can clarify whether a detention occurs when officers pull up behind a parked car, illuminate a nearby pedestrian with their spotlight and approach in such a manner as to prevent that citizen from walking away. It will also enable this Court to resolve the difference of opinions expressed in the instant Court of Appeal opinion and those in *Roth, Garry* and even *Kidd.*

II.

AT NO POINT PRIOR TO PETITIONER COMPLYING WITH THE OFFICERS' COMMAND TO STAND UP, DID POLICE HAVE THE REASONABLE SUSPICION NECESSARY TO DETAIN HIM.

A. Terry v. Ohio.

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* (1968) 392 U.S. 1, 21 [20 L.Ed.2d 889, 88 S.Ct. 1868].) Reasonable suspicion exists only when 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 a 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].) Thus, "[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.)

Here, Officer Guy testified that petitioner's act of ducking behind the parked car caused the two officers to conduct a pedestrian stop. (Slip Opn. p. 4.) As the dissenting opinion points out, however, "[t]he testifying officer could not articulate what criminal activity he suspected [petitioner] was engaged in. He just thought it was suspicious when [petitioner] moved from one side of the car to another and then bent over." (Dissenting Opn. p. 5.)

B. Presence In A High Crime Area Does Not, By Itself Create Reasonable Suspicion To Detain.

Officer Guy testified that the area was known for narcotic and gang-related activity.[4] (Slip Opn. p. 5.) Presence in a high crime area, however, is not enough to give rise to reasonable suspicion justifying a stop. (*Brown v. Texas* (1979) 443 U.S. 47, 52-53 [61 L.Ed.2d 357, 99 S.Ct. 2637].) "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* (1983) 35 Cal.3d 117, 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

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[4] Officer Guy was the only witness who testified at the preliminary hearing, at which the motion to suppress was initially heard.

day in so-called high crime areas.'" (*Ibid.*)

Furthermore, 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].) In this case, 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 pulled behind him, illuminated him with their spotlight and approached in such a manner as to prevent him from walking away. And, merely being a young Hispanic male in a bad neighborhood does not give rise to a reasonable suspicion that a particular individual is engaged in criminal activity.

C. Even Those In Present In High Crime Areas Have The Constitutional Right To Avoid A Consensual Encounter With Police.

Even accepting the Superior Court's finding that petitioner was trying to avoid an encounter with police when he ducked down and "pretended" to tie his shoe, it is uniformly accepted that a person has an absolute right to avoid a consensual police encounter. (See *Florida v. Royer* (1983) 460 U.S. 491, 497 - 498 [75 L.Ed.2d 229, 103 S.Ct. 1319].) 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.) As the this Court has opined, "[t]he departure of [a] defendant . . . from an

imminent intrusion cannot bootstrap an illegal detention into one that is legal." (*People v. Aldridge* (1984) 35 Cal.3d 473, 479.) In other words, a citizen is free to walk away from officers attempting an illegal detention and, in doing so, does not create the reasonable suspicion necessary to justify his or her eventual detention. (*Ibid.*) "Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer refuse." (*Florida v. Royer, supra,* 460 U.S. at p. 498.)

As the officers in this case did not reasonably suspect that petitioner was engaged in criminal activity prior to him complying with their command to stand up and put his hands on his head, petitioner's detention was unconstitutional no matter when it commenced. This conclusion is not altered by the fact that petitioner tried to exercise his right to avoid either a consensual encounter or an unlawful detention by ducking behind his parked car. Petitioner's act of trying to hide from police did not transform what was clearly going to be an unconstitutional detention into one that was suddenly reasonable.

D. 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]; *Wong Sun v. United States* (1963) 371 U.S. 471, 485 - 488 [9 L.Ed.2d 441, 83 S.Ct. 407].) As the Court of Appeal affirmed the Superior Court's refusal to suppress the fruits of his unconstitutional detention, petitioner respectfully asks this Court to grant his petition for review and, ultimately, reverse the Superior Court's denial of his motion to suppress.

III.

UNDER *ROYER* AND *WARDLOW*, A CITIZEN, REGARDLESS OF RACE, SHOULD BE FREE TO AVOID A CONSENSUAL ENCOUNTER WITH POLICE BY DUCKING BEHIND A PARKED CAR.

Under *Royer,* "a person can avoid police contact without arousing reasonable suspicion by walking away, refusing to listen to, or declining to participate in police questioning. A person may go about one's business."[5] (Dissenting Opn. p. 5, citing *Florida v. Royer, supra,* 460 U.S. at pp. 497 - 498.) But, as the dissenting opinion asks, how does one go about exercising the right to avoid

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[5] 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 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.)

a consensual police encounter if actively trying to do so furnishes the reasonable suspicion necessary for a constitutional detention? And, if a homeless black man can end up wrestled to the ground, shot and killed for walking away from sheriff's deputies trying to detain him for a questionable jaywalking infraction,[6] how is this constitutional right going to be protected in practice, outside the courtroom?

Here, the prosecutor argued, and two courts accepted, that petitioner's act of "crouch[ing] down as if to hide from [the officers] as to get out of police presence" created reasonable suspicion to detain. (Slip Opn. p. 10.) Thus, according to the majority opinion, ducking behind a parked car is not an acceptable means of avoiding a consensual encounter with police. As he was blocked in by the approaching officers, petitioner

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[6] In September of 2020, Orange County Sheriff's Deputies physically tackled Kurt Reinhold, a homeless black man in San Clemente, when he refused to submit to a detention over his alleged jaywalking. While the two deputies wrestled with Reinhold, one said that Reinhold had a hold of his gun. Reinhold was then shot twice at point blank range and killed. The two deputies who initiated the jaywalking stop were assigned as "homeless liaison officers." Their job was to "assist the homeless population and provide them with access to available resources and services while protecting the quality of life for the citizens of Orange County through proactive enforcement." (*California sheriff's department releases video from fatal shooting,* Nikeas, Peter, CNN.com (Feb. 19, 2021).) To date, the Orange County Sheriff's Department has not determined whether the officers committed a crime or violated departmental policy in the shooting of an unarmed, homeless back man suspected only of jaywalking. (*Ibid.*)

asserts that ducking was the only available means by which he could attempt to exercise his recognized right to avoid a police contact.

Given the events of last summer that led to nation-wide protests, anyone can understand why a person of color would want to avoid a police encounter even when they are not engaged in criminal activity. 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).) Thus, an individual's flight at the sight of a police vehicle does not invariably constitute reasonable suspicion that he or she has committed a crime. Rather, it simply means he or she would rather avoid, what experience has taught, could be a dangerous situation.

The United States Supreme Court in *Royer* gave all people, regardless of race, national origin, gender or age, the constitutional right to avoid a consensual police encounter and simply go about their business. (*Florida v. Royer, supra,* 460 U.S. at pp. 497 - 498.) However, there are some limits as to how a person may exercise this right without fear of being lawfully detained by police. Most important among these was expressed by the United States Supreme Court in *Illinois v. Wardlow* (2000) 528 U.S. 119 [145 L.Ed.2d 570, 120 S.Ct. 673]. There, the

Supreme Court held that "headlong" flight creates reasonable suspicion to detain because "unprovoked flight is the exact opposite of going about one's business." (*Id.*, at p. 121.) In so doing, however, the Court in *Wardlow* created a standard that "avoids deeming commonplace conduct suspicious." (Dissenting Opn. p. 6.)

The question presented here is where does ducking behind a parked car fall on the spectrum between unsuspicious walking away from police and suspicious "headlong flight" from police? Petitioner submits that it falls much closer to the former than it does to the headlong flight present in *Wardlow.* The majority opinion below found otherwise. (Slip Opn. pp. 13 - 14.) The conclusion of the majority, that petitioner's conduct created reasonable suspicion to detain because he waited "too long" to rise from behind the car, "will apply to a wide array of conduct that cannot provide an objective basis for reasonable suspicion." (Dissenting Opn. p. 6.) As the dissent concludes, petitioner's "reaction was neither abnormal nor suspicious…. 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." (Dissenting Opn. p. 6.)

According to the majority, the petitioner's only option was to immediately stand up from behind the car "and politely inquire about the purpose of the stop, a conversation we all have an absolute right not to start." (Dissenting Opn. p. 7; see also *Florida v. Royer, supra,* 460 U.S. at pp. 497 - 498.) The United

States Supreme Court, however, has never recognized a "stand still and submit" requirement for a citizen not reasonably suspected of criminal activity. This is even true when that citizen happens to be present in a high crime area.

Without objective criteria demonstrating a reasonable suspicion of criminal activity, "the risk of arbitrary and abusive police practices exceeds tolerable limits." (*Brown v. Texas, supra*, 443 U.S. at p. 52.) Petitioner, therefore, submits that simply ducking behind a parked car in an effort to avoid police contact is, without more, insufficient to create the reasonable suspicion necessary to constitutionally authorize a detention. As the Court of Appeal concluded otherwise, petitioner respectfully asks this Court to grant review. On review, petitioner will ask the Court to clarify the measures all citizens may take, in an effort to exercise their constitutional right to avoid a consensual encounter with police without creating reasonable suspicion to justify their detention. If citizens have the right to avoid a consensual encounter, there must be a manner in which they can exercise that right without fear of being detained, tackled, tasered or shot in the back like Jonathan Price in Texas.

CONCLUSION

For the foregoing reasons, petitioner and appellant Marlon Flores respectfully requests this Court to grant review from the Court of Appeal's published opinion affirming the denial of his motion to suppress.

Dated: March 9, 2021 Respectfully submitted,

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RICHARD L. FITZER

Attorney for Appellant

WORD COUNT CERTIFICATION

People v. Marlon Flores
Court of Appeal No. B305359

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 4,602 words.

____
Richard L. Fitzer

EXHIBIT A

COURT OF APPEAL – SECOND DIST.
FILED
Feb 16, 2021
DANIEL P. POTTER, Clerk
Richard Cardenas Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARLON FLORES, Defendant and Appellant.	B305359 (Los Angeles County Super. Ct. No. BA477784)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Zee Rodriguez, Supervising Deputy Attorney General, and Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.

____

A police officer is allowed to question people on the street, who themselves are free both to refuse to answer the officer and to refuse even to listen to the officer. People are fully at liberty merely to go on their way. (*Florida v. Royer* (1983) 460 U.S. 491, 497–498 (plur. opn. of White, J.).)

These are core American freedoms. Refusal to cooperate with police, without more, does not create an objective justification for an investigative detention. (*Florida v. Bostick* (1991) 501 U.S. 429, 437.)

But some reactions to police can be telltale. These reactions may suggest consciousness of guilt and may entitle police to investigate further. Under the rule of *Terry v. Ohio* (1968) 392 U.S. 1, police patrolling a high crime area reasonably become suspicious when a person sees them and runs. This reasonable suspicion justifies detaining the runner for investigation: a *Terry* stop. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124–125 (*Wardlow*).) Nervous and evasive behavior is a pertinent factor in determining whether suspicion is reasonable. (*Id.* at p. 124.)

"Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." (*Wardlow*, *supra*, 528 U.S. at p. 124; see also *Kansas v. Glover* (2020) __ U.S. __, __ [140 S.Ct. 1183, 1188–1189] (*Glover*) [reaffirming *Wardlow*].)

Judicial determinations of reasonable suspicion "must be based on commonsense judgments and inferences about human behavior." (*Wardlow*, *supra*, 528 U.S. at p. 125.) There are innocent explanations for avoiding police, so flight does not *necessarily* indicate ongoing criminal activity. But unprovoked flight upon noticing the police entering a high crime area gives an

officer a reasonable basis to detain the runner to investigate further. (*Id.* at pp. 121–125.) The Fourth Amendment allows the officer "to resolve the ambiguity." (*Id.* at p. 125.)

This federal approach governs us. We are not permitted some state law departure. (*People v. Souza* (1994) 9 Cal.4th 224, 232–233.)

We affirm the trial court's denial of a motion to suppress evidence.

I

A

The police here were patrolling a high crime area. They knew this particular street. They patrolled it daily because it was a narcotics hangout. One officer on this two-man team had made a drug arrest in that cul-de-sac the night before. They also knew this cul-de-sac to be a gang haunt; taggers daily sprayed gang graffiti there.

About 10:00 p.m., the two officers drove into this cul-de-sac. At the preliminary hearing, Officer Michael Marino testified Marlon Flores was standing in the street behind a car that was parked on the red curb at the dead end. "After we initially saw him, he went over to the passenger side rear fender area, appeared to be ducking down as if trying to hide or conceal something from us."

The officers believed Flores "was attempting to conceal himself from the police." An officer got out of the police car and approached the crouching Flores, who continued to crouch for some 20 seconds as the officer walked toward him with the flashlight. The police believed Flores was pretending to tie his shoe.

The police thought Flores's actions were suspicious. They ordered him to stand and put his hands on his head. They handcuffed Flores out of concern for their safety. One officer checked Flores for weapons. This officer patted an electronic car key on Flores that activated the lights on the parked car. The other officer looked through the car window and saw a methamphetamine bong. The officer suspected the car might contain other contraband.

The police asked Flores if this was his car; Flores said yes. They asked for identification. Flores directed the police to his wallet, which was inside the car in the driver's side door. Flores gave his consent for the police to get his wallet. In the wallet police found a bindle of what looked like methamphetamine. Police then searched Flores's car and found a loaded and unlicensed gun inside a backpack on the front passenger seat.

B

The trial court denied Flores's motion to suppress the gun evidence. This hearing was brief: just one witness.

Judge Escobedo asked the prosecutor, Juan Mejia, to call his first witness. Mejia summoned Officer Daniel Guy to the stand. Guy testified he and his partner Marino saw Flores on the day in question.

Q BY MR. MEJIA: And what, if anything, did you see the defendant doing?

A The defendant was standing in the roadway next to a silver Nissan. And as we approached closer, he ducked behind the rear passenger panel of the vehicle.

Q And did that cause you to do anything?

A Yes. We conducted a pedestrian stop.

. . . .

Q And did—when you were approaching the defendant and that vehicle, did he look in your direction?

A Yes.

Q And what, if anything, did the defendant do when he looked in your direction?

A He proceeded to the passenger side of the vehicle and began to crouch.

Q Did that cause any suspicion?

A Yes.

MS. PRESCOP: Objection. Leading.

THE COURT: Overruled.

Q BY MR. MEJIA: And based on that suspicion—or what was the suspicion that caused you to believe?

A Based on the suspicion this is a known narcotics [area]. I myself have made an arrest just prior, the night prior for narcotics. So my suspicion believed that he was there loitering for the use or sales of narcotics.

Q And him getting—crouching down like that, that caused you to believe that there was some crime occurring perhaps?

A That he was attempting to conceal himself from the police.

Flores's attorney, Julianne Prescop, cross-examined Guy.

Q And when you said that when he saw you, he ducked towards the passenger side of the car; is that correct?

A That's correct.

Q And at that point he was at the curb area; is that correct?

A Yes.

Q Okay. And when he ducked to that side he was there for approximately a minute before you pulled over or before you—

A It was probably less than a minute.

. . . .

Q Okay. He was—when you approached him he was leaning down tying his shoes?

A I believe he pretended to tie his shoe.

At this point, the defense showed a video from a police body-worn camera. Prescop noted there was no audio for the first part of the video. The transcript notes the video was played in open court but was not reported by the court reporter. This portion of the hearing is not transcribed. Prescop continued her cross-examination and asked about the video images that people at the hearing had just been watching.

Q So [that video is] a fair and accurate depiction of what you saw before you approached him that day; is that correct,?

A No. The body worn camera only faces a certain direction. My head can go in another direction.

We describe the contents of this video, which is in the record.

The video is two minutes and four seconds long. It begins with a view from the interior of what seems to be a marked police car. A slice of the outside world is visible through the windshield and the right passenger window. The camera is pointed upward at an angle. At that angle, the roadway and people at street level are out of the frame at the outset. Rather the beginning shows only sky, rooftops, upper portions of buildings, and tree tops. The sky is dark. It is nighttime.

The first few seconds show the police car is moving forward and eventually stopping. Flores is not within the camera's frame; we cannot see him at all. The camera angle is not pointed in his direction. As the car rolls forward, the camera view continues to change, as though the camera were mounted on a dolly. At the

seven second mark, the car stops and the video view becomes static. Flores still is not within the camera's view.

At about the 12 second mark, you can see some sort of motion in a dark area in the extreme lower left corner of the wide-angle view. At about the 15 second mark, Flores's head rises into view. Flores stands and seems to be making some sort of motion with one arm, as though he is working it in a circle to stretch or loosen his shoulder or back muscles.

At the 37 second mark, Flores crouches down and his head drops out of view.

At the 41 second mark, Flores raises his head again.

At the 45 second mark, again Flores drops from view and remains out of the camera's picture.

At about the 50 second mark, the body camera shows an officer wearing the camera opening his front passenger door and getting out of the police car. At 53 seconds this camera moves forward. We see the officer must be walking towards Flores. The officer's flashlight is illuminating the way, but Flores remains out of view behind the car.

At 54 seconds, the officer wearing the camera continues to walk forward and then around the car. The officer's and camera's forward motion brings Flores into the camera's view.

At 55 seconds, we see Flores crouched, facing away from the camera with both hands near his right shoe. His back is to the camera: his body conceals his hands and his right shoe from the approaching officer and the camera. The upper right corner of the picture shows the officer's flashlight pointing at Flores.

Flores does not raise his head or turn toward the source of the approaching light, which is very bright and now has suddenly and sharply cast Flores's shadow in front of him. Flores does not

raise his hands above his head or make any visible response to the sudden illumination. Rather he remains in a crouch and continues to move his elbows and arms as though he is toying with his feet, but we still cannot see his hands or his right foot.

At 57 seconds, the audio comes on and the officer continues to walk towards Flores with the bright light shining on Flores. The chatter from the officer's walkie-talkie is noisy. Flores is silent: he does not respond to this approaching noise and light. Flores continues to crouch and to toy with his right foot, which remains out of the camera's view.

At one minute and one second, the officer and his camera stop their forward motion. Flores remains crouched in the same position, facing away from the camera and the officer, hands still concealed.

At about one minute and three seconds, an officer asks Flores to stand up.

Flores remains in this crouched position, ignoring the officer and continuing to toy with the area around his foot.

An officer again asks Flores to stand up at the one minute and 12 second mark.

Flores remains in his crouch.

At one minute and 14 seconds, the officer says "Hey, hurry up." Now Flores begins to stand.

At one minute and 16 seconds, the officer tells Flores, "your hands behind your head," and Flores complies. The police handcuff Flores and have him stand near a fence.

In sum, at 10:00 p.m. at night, on a cul-de-sac known for its illegal drug and gang activity, police see a man in the street who, when he sees them, goes around and ducks behind a car. The man looks up, ducks behind the car again, looks up again, and

then ducks down again. When an officer approaches to see what is going on, the man remains crouched, with his hands out of sight and with his moving arms away from the approaching officer and his bright flashlight, which casts an obvious beam on the man. The beam contrasts sharply with the dark street and sidewalk and casts the man's shadow in front of him, in the man's line of sight. The approaching officer's radio is noisy. Despite the approaching light and noise, the man continues to face away from it, to move his arms, and to keep his hands out of the officer's view. He stays ducked down for about 20 seconds. The officer testifies he suspects the man is "there loitering for the use or sales of narcotics." Officers find the man has methamphetamine, a methamphetamine bong, and a loaded gun.

C

At the hearing, Judge Escobedo invited argument on Flores's suppression motion.

Defense attorney Prescop argued the detention was illegal from the start and the drugs and the gun were the fruit of the poisonous tree. Judge Escobedo asked, "So your argument is essentially that the fact that he was standing by a car and ducked down is not enough?" Prescop agreed: that was her argument.

Prosecutor Mejia argued the encounter was a classic *Terry* stop. Mejia recounted the video. He noted Flores "continued to stay down in a bent position, which was very unusual. Usually when a citizen is approached by a police officer you would stand up and pay attention or—but he continued in that crouched position even as the officers were approaching him from two different sides."

Judge Escobedo remarked what the video showed was "odd."

Mejia continued: Flores "crouched down as if to hide from them as to get out of the police presence. That's the reasonable suspicion."

Mejia said the video showed the officers see Flores "do a furtive gesture and then [he] continued to do that. It's not like, you know, you do go down and tie your shoe. You have to bend down. But he looked like he was, according to the testimony, was first hiding. And then you see it on the video. He stays down in that position in a very, very odd suspicious manner."

Judge Escobedo said, "The question here for the Court truly is whether there [were] specific articulable facts that appear to be enough ground for suspicion. And really the bottom line is the Court to determine does it sound like they're just coming up with something to give them reason to go and disrupt this citizen's activity or was there true reasonable suspicion."

"The Court is struggling with this in this way. Had the defendant been standing there and the car approaches and the defendant continued to just stand there and the officers approached, I don't think there would have been sufficient articulable facts. [¶] What happens in this scenario is defendant does, as in these other cases, try to avoid contact because he sees the police officers and he ducks. The defendant argues he's tying his shoe. Let's just assume I accept that for a second, and he's tying his shoe. [¶] Well, the minute the police officers stop and shine the light on him, any normal human being would stand up and say, 'Oh, you scared me' or 'Oh, what can I help you with?' Or 'Oh, why are you coming towards me?' [¶] But the video clearly shows he ducks down. He pretends to be tying his shoe or

is tying his shoe. And as Mr. Mejia points out, and it struck the Court as well in viewing the video, he doesn't stand up. He's still crouched down toying with his feet. And the officers are walking towards him with a huge light on him. Because you can see that his pants are below his waist. His underwear is showing. He's still ducked down, not moving, nothing is being said. The officers say something as they're approaching, and the person is still hunched over. [¶] That's odd. That's odd behavior. That's not normal. That's suspicious. [¶] So when the officers approached and they say, 'Hey, stand up,' even then he's not standing up. That's sufficient for the Court to find that there's specific articulable facts. [¶] And that's what I was struggling with. Had he just gotten up even if he was tying his shoe while they're approaching him. But that didn't occur. It was far too long a period of time. And he didn't even get up until the officer said, 'Hey, stand up.' That was odd, and I think that that's suspect. [¶] And I think the ducking and remaining hunched over is more than enough for this Court to find that there were articulable facts to find suspicion and enough for the officers to detain him, enough for the officers to thereafter question about identification."

After Judge Escobedo denied his suppression motion, Flores pleaded no contest to carrying a loaded, unregistered handgun in violation of Penal Code section 25850, subdivision (a). The court suspended imposition of the sentence, placed Flores on formal probation for three years with conditions including a drug program and 45 days of CalTrans work, and gave him credit for 10 days served.

II

Flores challenges the legality of this street encounter.

In reviewing an order on a motion to suppress, we defer to the trial court's factual findings, express or implied, if substantial evidence supports them. We exercise independent judgment in determining whether, on those facts, the police action was reasonable under the Fourth Amendment. (*People v. Silveria* (2020) 10 Cal.5th 195, 232 (*Silveria*).) We view the evidence in the light most favorable to the order denying suppression, as the familiar rule governing appellate review requires. (*People v. Ellis* (1993) 14 Cal.App.4th 1198, 1200.) We must draw all presumptions in favor of the trial court's ruling. Where there are no express findings of fact, we imply whatever findings are necessary to support the order. We must uphold express and implied findings if substantial evidence supports them. (*People v. Fulkman* (1991) 235 Cal.App.3d 555, 560.)

The Fourth Amendment permits police to initiate a brief investigative stop when they have a particularized and objective basis for suspecting the person of criminal activity. A mere hunch is too little. This standard requires considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than what is necessary for a finding of probable cause. The standard depends on the practical considerations of everyday life on which reasonable and prudent people act. Courts must permit officers to make commonsense judgments and inferences about human behavior. (*Silveria*, *supra*, 10 Cal.5th at p. 236.)

Citing *People v. Kidd* (2019) 36 Cal.App.5th 12, 21–22, Flores contends the *Terry* stop began when the police shined a flashlight on him. With our italics, the *Kidd* decision stated that, "[w]ithout more, a law enforcement officer shining a spotlight on a person does *not* constitute a detention." (*Id.* at p. 21; cf. *Terry v.*

Ohio (1968) 392 U.S. 1, 16 ["whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person"].)

The *Terry* stop began when the officer told Flores to stand and put his hands behind his head.

The trial court ruled that, at that point, Flores's suspicious actions meant a *Terry* stop was proper.

The trial court's ruling was sound.

Judge Escobedo expressly found three facts. First, Flores saw police and tried to avoid contact with them by ducking down behind a parked car.

Second, during Flores's ducking and crouching, Flores was "toying with his feet." Flores did not freeze or remain still. Rather than remain motionless, Flores continued doing something with his hands. He persisted despite the approaching light and radio noise, which obviously were from an officer from the police car Flores had seen before ducking. Flores kept moving his hands. Flores kept his hands out of the sight of the approaching officer with the camera.

Third, as police that night approached in an obvious way "with a huge light on him," Flores persisted in his odd crouch position for "far too long a period of time."

Judge Escobedo concluded Flores's conduct was "more than enough for this Court to find that there were articulable facts to find suspicion and enough for the officers to detain him, enough for the officers to thereafter question about identification."

The combination of these facts did not establish Flores was engaged in illegal drug activity, but the trial court was right that together the facts justified this *Terry* stop.

Flores asks, how do you know if a person is pretending to tie his shoe? The answer is you would have valid suspicions if the person picked an unlikely moment for the task—in the dark, just after seeing police, and just after ducking once already—and if the person took an unusually long time at it. The trial court found Flores kept crouching for a suspiciously long time. Common sense takes context into account.

Certainly there are innocent possibilities. But, in combination with the other factors, a reasonable officer had a reasonable basis for investigating further to resolve this ambiguity, because nervous and evasive behavior is a pertinent factor in determining whether suspicion is reasonable. (*Wardlow*, *supra*, 528 U.S. at p. 124.) Courts must permit police to make commonsense judgments and inferences about human behavior. (*Glover*, *supra*, __ U.S. at p. __ [140 S.Ct. at p. 1188].)

DISPOSITION

The judgment is affirmed.

WILEY, J.

I concur:

GRIMES, Acting P. J.

STRATTON, J., Dissenting.

I dissent. After dark, in a high crime neighborhood, a Hispanic man in a tank top ducked halfway behind his car after he saw police, and then failed to rise immediately "like a normal human being" and express his surprise at being approached and put under a spotlight. Instead, he froze and straightened up only when told to do so by the police. On these facts alone, he and his vehicle were searched. That was unlawful because the officers had no reasonable suspicion that a criminal act was afoot.[1]

The majority concludes that ducking, freezing, and not rising fast enough under these circumstances gave those officers reasonable suspicion to conduct a *Terry* stop. I cannot abide this holding as it threatens to allow police detention based on commonplace conduct subject to interpretation. The majority's overbroad view of what sort of conduct can be deemed suggestive of wrongdoing ignores applicable law and the realities of twenty-first century America. In the case of a person wary of police interaction, the majority's approach leaves virtually no room for that person's conduct to be deemed "normal" and hence not suspicious.

First, let's review the evidence. When the police notice appellant, he is standing next to the driver's side of a parked car. The body cam video is very clear that the suspicious activity described by the police was appellant moving from a standing position in the street outside the driver's side of his car to a bending position between the sidewalk and the curb outside the

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[1] It goes without saying that everything discovered after this unlawful detention should have been suppressed as the fruit of the poisonous tree. (*Wong Sun v. United States* (1963) 371 U.S. 471.)

rear passenger side of the car. The two police officers approach in a marked car. They believe appellant moved out of the street to hide in reaction to their presence. The two officers drive up and stop behind appellant's car. When the officers shine their spotlight on appellant, he is bent over at the waist with his derriere high in the air (like a diver doing a jack knife). His arms are stretched down to the ground and his hands are near his feet. The video shows appellant is not completely "hidden" behind the side of the car; instead, his body protrudes past the back end of the car. Thus, his body is plainly visible from both behind the car and next to it. According to the testifying officer, he was "pretending to tie his shoe."[2]

The trial court described the incident accurately and then made its findings. It did not adopt the officer's testimony that appellant appeared to be hiding. Nor did it find appellant was not tying his shoe, although at one point the trial court remarked he appeared to be "toying" with it. (While the majority deems "toying" part of the articulable facts in support of reasonable suspicion, the trial court did not. The officer testified he saw plainly what appellant was doing with his hands.) The trial court found appellant was "try[ing] to avoid police contact because he sees the police officers and he ducks." The court implied that this action was not that suspicious, saying, "Had he just gotten up even if he was tying his shoe while they're approaching him." What mattered to the trial court was that appellant froze in that jackknife position when the officers shined their light on him, and he remained motionless and silent until commanded to stand:

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[2] As an aside, how do you know if someone is "pretending" to tie his shoe?

“He’s still ducked down, not moving, nothing is being said. The officers say something as they’re approaching, and the person is still hunched over. [¶] That’s odd. That’s odd behavior. That’s not normal. That’s suspicious.” According to the trial court, “any normal human being would stand up and say, ‘Oh, you scared me’ or ‘Oh, what can I help you with?’ Or ‘Oh, why are you coming towards me?’ ” when the police approached, shining their light on him. The fact that Flores did not move until the officers told him to “was odd, and I think that that’s suspect,” said the trial court. The trial court concluded, “It was far too long a period of time. And he didn’t even get up until the officers said, ‘Hey, stand up.’ That was odd, and I think that that’s suspect.”

The trial court apparently found the detention occurred after appellant delayed too long in rising to his full height. The majority agrees with the trial court. I don’t.

When did the detention occur? The test to determine whether an individual has been detained is “only if, in view of all 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, 554.) The required show of authority is measured by an objective test. (*Ibid.*) The evidence we consider is limited to that presented at the suppression hearing. (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.)

Two cases appear to be right on point factually. In *People v. Garry* (2007) 156 Cal.App.4th 1100, a detention occurred because the officer shined his spotlight on the defendant, exited his patrol vehicle, walked briskly towards the defendant, and immediately asked about his parole or probation status. (*Id.* at pp. 1111–1112.) In *People v. Roth* (1990) 219 Cal.App.3d 211, a

detention occurred because a deputy shined his spotlight on the defendant, two deputies exited the patrol car, and one commanded the defendant to approach. (*Id.* at p. 215.)

The circumstances here show that the interaction between the officers and appellant ripened into a detention 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. At this point appellant was detained.

Under these circumstances, a reasonable person, surrounded and under a spotlight, would not feel free to leave. This is especially so because all motorists are trained to acquiesce immediately when police officers pull up behind them and turn on their lights. Thus, I disagree with the holding of the trial court and the majority that the detention occurred only later--after appellant froze for too long.

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. The trial court apparently agreed as it started the detention clock at the point when appellant delayed in standing up.

This brings me to the second issue with which I disagree with the majority--the issue of reasonable suspicion. Let's assume the detention occurred at the point when appellant did not immediately stand erect of his own accord. 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. The court found it "odd" and therefore suspicious that appellant did not move or speak when the spotlight came on and did not rise until the officers commanded him to do so. To the trial court, reasonable suspicion was created because appellant bent over *and*, unlike "any normal human being," waited "too long" (an amorphous concept not quantified by the witness or the court) to stand erect and remained silent.

I accept the trial court's finding that appellant was trying to avoid police contact by ducking. But, as we know, appellant had an absolute right to avoid police contact. In *Florida v. Royer* (1983) 460 U.S. 491, the Supreme Court reiterated that a person can avoid police contact without arousing reasonable suspicion by walking away, refusing to listen to, or declining to participate in police questioning. A person may go about one's business. (*Id.* at pp. 497-498.) Under the trial court's ruling and the majority opinion, however, how does one avoid police contact without creating reasonable suspicion justifying detention?

Courts have already decided that being alone at night in a high crime neighborhood does not amount to reasonable suspicion. Moreover, the facts upon which reasonable suspicion can be based must be articulable and objective. (*Brown v. Texas* (1979) 443 U.S. 47.) In other words, not subject to the subjective perspective of the persons doing the interpreting. The majority's

decision undercuts that rule and threatens to subject people to *Terry* stops for commonplace conduct. By way of analogy, the Court in *Illinois v. Wardlow* (2000) 528 U.S. 119 focused on "headlong" flight as a permissible articulable fact in determining reasonable suspicion. It chose "headlong" flight because "unprovoked flight is the exact opposite of going about one's business." (*Id*. at p. 121.) It created a standard that, by and large, avoids deeming commonplace conduct suspicious. For example, only in exceedingly rare cases could a person credibly confuse a daylight neighborhood jog with headlong flight from police.[3]

The majority's approach that appellant froze and waited "too long" to rise will apply to a wide array of conduct that cannot provide an objective basis for reasonable suspicion. 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.) 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.

Even outside of communities distrustful of police authority, how safe is it anytime or anywhere to move suddenly when police approach? Movement is incredibly dangerous for anyone because if police deem it sudden, and hence threatening, someone may end up shot. On top of that, we know for some populations, to stand up from a bent position as the police approach would effectively be suicidal, as it would likely be interpreted as a

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[3] I say credibly because recall the reasons given for shooting to death daylight jogger Ahmaud Marquez Arbery.

threatening act. To find freezing and waiting “too long” reasonably suspicious is irresponsible and dangerous to both law enforcement and those with whom it interacts.

The majority says you can’t duck and freeze and then wait too long to stand up. What’s left? The only option for a “normal” human being, according to the majority, is to immediately stand erect and politely inquire about the purpose of the stop, a conversation we all have an absolute right not to start. In effect, the majority compels those in a high crime area to “stand still” in a way the police subjectively believe is not furtive so as not to create reasonable suspicion that criminal activity is afoot. Without objective criteria pointing to a reasonable suspicion of criminal activity, “the risk of arbitrary and abusive police practices exceeds tolerable limits.” (*Brown v. Texas, supra*, 443 U.S. at p. 52.) The majority opinion narrows the options for those who want to be judged “normal” and hence beyond suspicion. They must stand erect and chat up the officers who approach them. Tell that to Eric Garner.

STRATTON, J.

People v. Marlon Flores **Court of Appeal No. B305359**

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PROOF OF SERVICE

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 March 9, 2021, I served the **Petition for Review**, a copy of which is attached, by mailing a copy to each addressee named below by regular United States mail at Long Beach, California.

California Appellate Project
(E-served at capdocs@lacap.com)

Attorney General
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I declare under penalty of perjury that the foregoing is true and correct. Executed March 9, 2021 at Long Beach, California.

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Richard L. Fitzer