

No. _____ 101273 APR 15 2011

OFFICE OF THE CLERK
In The
Supreme Court of the United States

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STATE OF ARKANSAS,

Petitioner,

V.

ANTWAN LAVAN FOWLER,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The Supreme Court Of Arkansas**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Does this Court's decision in *Illinois v. Wardlow*, 528 U.S. 119 (2000), holding that unprovoked flight from the police may constitute reasonable suspicion justifying a brief investigative detention under *Terry v. Ohio*, 392 U.S. 1 (1968), limit the power of police to arrest a suspect whose flight constitutes a criminal offense under State law?

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The State of Arkansas respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Arkansas.



OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported at 2010 Ark. 431, 2010 WL 4518013 and reproduced in the appendix at 1-15. The Court's order denying rehearing is reproduced in the appendix at 28. The opinion of the Arkansas Court of Appeals is reported at 2010 Ark. App. 23, 2010 WL 135209 and is reproduced in the appendix at 16-23.



JURISDICTION

On discretionary review of a decision of the Arkansas Court of Appeals, the Supreme Court of Arkansas reversed and remanded the circuit court's decision denying respondent's motion to suppress. The court delivered its opinion on November 11, 2010, Appendix at 1, and subsequently denied the State's petition for rehearing in an order entered on December 16, 2010. Appendix at 28. On March 9, 2011, Justice Alito granted the State's application for an extension of time until April 15, 2011, to file this petition for certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Arkansas Code Annotated § 5-54-125 (Repl. 2005), which makes fleeing on foot from an arrest or an attempted detention a misdemeanor offense, is reproduced in the appendix at 30-31.

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STATEMENT OF THE CASE

At about 7:25 a.m. on October 22, 2007, officers Shawn Schichtl and Paul Burnett of the Conway, Arkansas, Police Department were patrolling the “school zones” about a half a block from Conway High School, whereupon they encountered respondent walking through the backyard of private property. (R. 229-30) Respondent’s presence on private property at that hour of the morning, as well as his close proximity to the school, caused Officer Schichtl to suspect that respondent might be a truant student or had broken into a nearby home. (R. 230, 231) Officer

Schichtl called to respondent and asked him to approach his patrol unit. (R. 230) Respondent started to approach the patrol unit, but when Officer Schichtl asked him his name, he blurted "Jason" and fled. (R. 230, 267)

Officer Schichtl pursued respondent in his patrol unit while Officer Burnett pursued him on foot. (R. 231-32) Respondent managed to elude Officer Burnett by running through nearby housing, but Officer Schichtl eventually caught up with him. After respondent said that he was "giving up," Officer Schichtl arrested him for misdemeanor fleeing. (R. 233, 247) Respondent gave the police his real name after his arrest, whereupon they learned that he was on parole. (R. 264, 268) Respondent later told his parole officer that he had a gun and drugs in his apartment (R. 310), and a search indeed revealed a gun, drugs, and drug paraphernalia. (R. 271, 312) The State subsequently charged respondent with six felonies, including simultaneous possession of drugs and firearms, felon in possession of a firearm, maintaining a drug premises, possession with intent to deliver a controlled substance, possession of drug paraphernalia, and theft. The State also charged respondent with two misdemeanors, fleeing and obstruction of justice. (R. 6-7)

Respondent moved to suppress the statements that he made to his parole officer, as well as all of the evidence that the police seized from his apartment. Specifically, he alleged that suppression was warranted because his initial stop and arrest were

unreasonable under the Fourth Amendment, his parole officer failed to warn him pursuant to *Miranda v. Arizona*, 348 U.S. 436 (1966), before taking his statements concerning his possession of drugs and a firearm, and because the warrantless search of his apartment violated the Fourth Amendment. (R. 21-23, 38-39, 114-15) The trial court denied respondent's motion to suppress, whereupon respondent entered a plea of guilty to felon in possession of a firearm that was conditioned on appellate review of the trial court's denial of his suppression motion. (R. 130-31)

The Arkansas Court of Appeals reversed respondent's conviction, holding that his statements to his parole officer were taken in violation of *Miranda*, and, also, that the firearm and drugs seized from his apartment should be suppressed as the fruits of the illegally-obtained statement. (Appendix at 20-23.) The State petitioned for discretionary review in the Supreme Court of Arkansas, urging the court to grant review on the novel question of whether parolees must be warned according to *Miranda* before submitting to questioning by their parole officers. Additionally, the State asserted that the Arkansas Court of Appeals' holding that the items seized during the search of respondent's apartment must be suppressed as the fruit of an illegally-obtained statement was contrary to *United States v. Patane*, 546 U.S. 630, 643-44 (2004).

The Supreme Court of Arkansas granted the State's petition for review, and, on *de novo* review, bypassed the *Miranda* and *Patane* issues and

suppressed respondent's statements and the items seized from his apartment as the fruits of an illegal seizure. Applying *Illinois v. Wardlow*, 528 U.S. 119 (2000), the Court held that respondent's post-flight arrest became unreasonable when the police failed to briefly investigate, consistently with *Wardlow*, their initial suspicions that he was trespassing or truant. Appendix at 8-9. Justice Robert Brown dissented, stating that the majority opinion focused too narrowly on whether there was probable cause to arrest Fowler as a parole violator, and, consequently, did not address the "salient issue" of whether there was probable cause to arrest Fowler for fleeing or obstruction of justice. Appendix at 9-10. According to Justice Brown, "the two police officers were justified in arresting Fowler for either fleeing or obstruction or both." Appendix at 10.

The State filed a petition for rehearing, arguing that the Supreme Court of Arkansas overlooked that respondent's flight after his encounter with the police provided probable cause to arrest him for an offense committed in the officers' presence – fleeing as defined by Ark. Code Ann. § 5-54-125 – and, thus, misapplied *Wardlow* to restrict the scope of his post-flight detention to a brief investigation of the officers' initial suspicions that he was trespassing or truant. The Supreme Court of Arkansas denied the State's petition for rehearing on December 16, 2010, Appendix at 28, and recalled its mandate on April 7, 2011, pending disposition of this petition.



REASONS FOR GRANTING THE WRIT

The Supreme Court Of Arkansas Erred By Concluding That All Post-Flight Seizures, Including Arrests For Violations Of State Fleeing Statutes, Are Limited To The Brief Investigative Detentions Permitted By *Terry v. Ohio*, 392 U.S. 1 (1968).

The Supreme Court of Arkansas's holding in this case, that respondent's arrest for violating Arkansas's fleeing statute was unreasonable because the police did not investigate their initial suspicions that he was trespassing or truant before placing him in custody, is based on the state court's mistaken belief that *Illinois v. Wardlow*, 528 U.S. 119 (2000), limits all post-flight seizures – including those based on flight violating state law – to the brief investigative stops permitted in *Terry v. Ohio*, 392 U.S. 1 (1968), and, thereby, binds police officers to further investigate and develop probable cause of another offense before making an arrest. The Supreme Court of Arkansas's application of *Wardlow* to arrests for violations of Arkansas's fleeing statute directly conflicts with precedent from this Court establishing that police officers may arrest for violations of the law committed in their presence, and, in the absence of extraordinary circumstances, those arrests, when supported by probable cause, are reasonable without the scope limitations imposed on seizures based on lesser justification. Therefore, this Court should grant certiorari and summarily reverse the Supreme Court of Arkansas's judgment.

1. “Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest,” *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004), and respondent’s flight from the Conway police officers’ attempted detention, as a violation of Arkansas’s fleeing statute, was the consummate crime committed in the officers’ presence, for which this Court, “in a long line of cases,” *Virginia v. Moore*, 553 U.S. 164, 171 (2008), has authorized custodial arrests. *Id.*; *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender”). Moreover, unless those arrests are conducted in an “extraordinary manner, unusually harmful to . . . individual[s]’ privacy or even physical interests,” *Whren v. United States*, 517 U.S. 806, 818 (1996), the probable cause that supports the arrests adequately strikes the balance between the private and public interests involved. *See, e.g., Moore*, 553 U.S. at 171. Thus, they are reasonable under the Fourth Amendment without *Terry*’s requirement that stops based on less than probable cause be “reasonably related in scope to the justification for their initiation,” *id.*, 392 U.S. at 29, to keep the interests in balance. *See Atwater*, 532 U.S. 347 n. 4. As the Court said there, “*Terry* certainly supports a more finely tuned approach to the Fourth Amendment without the traditional justification that . . . probable cause . . . provides, but in the absence of extraordinary circumstances, there is no comparable

cause for finicking when police act with such justification.” *Id.* (internal quotation marks omitted); *New Jersey v. T.L.O.*, 469 U.S. 325, 351-52 (1985) (Blackmun, J., concurring) (explaining that a new balance of the interests is necessary only in special needs cases, like *Terry*, in which the probable-cause requirement is impracticable). Respondent’s arrest for fleeing, therefore, was reasonable under the Fourth Amendment without respect to whether the police, upon arresting him, investigated their initial suspicions that he was trespassing or truant.

2. Contrary to the Supreme Court of Arkansas’s judgment, *Wardlow* does not modify these settled principles governing arrests in cases in which a suspect’s flight from police is a criminal offense under state law. In *Wardlow*, this Court addressed only whether a suspect’s spontaneous “unprovoked flight upon noticing the police,” may raise reasonable suspicion justifying a brief investigative stop under *Terry*; *id.*, 528 U.S. at 123, 124, it did not address the reasonableness of an arrest when a suspect’s flight from an attempted detention, like respondent’s flight here, is itself a criminal offense under state law. Necessarily, then, *Wardlow* does not, as the Supreme Court of Arkansas would have it, circumscribe a police officer’s authority to arrest for a fleeing offense committed in his presence; nor does it impose the limits of a *Terry* stop on such an arrest. *Cf. id.*, 528 U.S. 126 (“No question of the propriety of the arrest itself is before us”). The Supreme Court of Arkansas’s misapplication of *Wardlow* to invalidate

the respondent's arrest for violating Arkansas's fleeing statute, therefore, conflicts with this Court's precedent establishing that police officers may reasonably arrest for crimes committed in their presence, and that those arrests are reasonable without the scope limitations imposed on seizures based on justification less than probable cause. For that reason, this Court should grant the petition for certiorari and summarily reverse the Supreme Court of Arkansas's judgment.

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CONCLUSION

For the reasons and authorities set forth above, the State of Arkansas respectfully requests that the petition for a writ of certiorari be granted and that the decision of the Supreme Court of Arkansas be summarily reversed.

Respectfully submitted,

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