No. 10-1273

IN THE

Supreme Court of the United States

STATE OF ARKANSAS,

Petitioner,

v.

ANTWAN LEVAN FOWLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether in the absence of any objective evidence of criminal activity, do individuals have a constitutional right to avoid the police, and can such avoidance be used as a pretext to justify an investigative detention?

II. Whether this Court's decision in *Illinois v. Wardlow*, 528 U.S. 119 (2000), allows police officers who have a reasonable suspicion that an individual is involved in criminality, to arrest the individual instead of carrying out a brief investigative stop to determine the nature of the persons conduct?

III. Whether the Arkansas Supreme Court's decision conflicts with a decision of this Court or a Court of Appeals or raises an important federal question that has not been settled by this Court?

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Contained herein is the respondent's response in opposition to the petition for writ of certiorari submitted by the State of Arkansas.

STATEMENT OF THE CASE

The respondent, Antwan Lavon Fowler, was arrested in Conway, Arkansas on October 22, 2007, after being observed by Conway Police Officers Shawn Schichtl and Paul Burnett, walking through a backyard in a residential area. (R 229-30) Upon coming into contact with the respondent, the officers asked him to approach the patrol unit and asked him his name. According to the officers, the respondent was doing nothing illegal, nor acting suspiciously when he was asked to come to their vehicle. Further, officer Schichtl testified that at that time the officer did not know whether the respondent had committed a criminal offense prior to running, and he did not believe he had committed an offense and did not believe he was going to commit an offense. (R 239, App. 2-3)

After being summoned by the officers, the respondent approached the patrol car, intoned an unintelligible name, and then ran from the officers. (R 230, 231, 233, 236, 237, 267) After a brief chase, the respondent was apprehended by the officers and arrested for misdemeanor fleeing and obstruction of justice. Once the respondent was in custody, the police ascertained his name and learned that he was on parole. Rather than question the respondent, the officers called parole officer Kelly Brock who advised the officers to place a parole hold on the respondent. (R 255)

Parole officer Brock immediately went to the police station where she questioned the respondent about

his encounter with the officers. (R 310) Although the respondent was in custody, he was never Mirandized by the police officers or the parole officer and not represented by counsel at the time those statements were made. (R 245, 250, 257, 279, 280, 324) During the interview, the respondent informed the parole officer that he was living in Conway without having the necessary travel documentation, that he avoided contact with the officers by running from them, and that he had a firearm and illicit drugs in his residence. Subsequently, the police officers and the parole officer searched the respondent's residence. They seized a firearm, drugs, and drug paraphernalia from respondent's apartment. The resultant of the seizure was that the respondent was charged with six (6) felony counts and two misdemeanors – fleeing and obstruction of justice. (R 6,7)

The respondent filed a motion to suppress the statements he made to the parole officer and all of the evidence that was discovered as a result of his statements and the illegal warrantless search of his apartment. After the trial court denied his motion to suppress, the respondent then entered a conditional guilty plea. The Arkansas Court of Appeals reversed the trial court, and the Arkansas Supreme Court reversed and remanded the circuit court's decision denying respondent's motion to suppress. The State's petition for rehearing was denied on December 16, 2010. The Arkansas Supreme Court recalled its mandate on April 7, 2011, pending disposition of the petition herein.

REASONS FOR DENYING THE PETITION

The Supreme Court of Arkansas arrived at the proper decision when it concluded that this Court's decision in *Illinois v. Wardlow*, 528 U.S. 119 (2000), mandates that police officers who have a reasonable suspicion to stop an individual for being involved in criminality, must first carry out a brief investigative stop to determine the nature of the persons conduct before they execute an arrest.

When the officers first encountered the respondent, he was doing nothing illegal, nor acting suspiciously. The officer testified that they did not believe the respondent had commited any crime, was committing any crime or was going to commit any crime. Nevertheless, the officers summoned the respondent to their patrol unit, and asked him his name because he seemed suspicious to them. In the absence of any "specific or articulable" information justifying the initial stop-the respondent could have lawfully disregarded the officers' requests and continued on his way. However, rather than disregard the officers' inquiry, the respondent approached the patrol unit, intoned an unintelligible name, and then ran from the officers.

Respondent's first contention is clearly supported in *Terry v. Ohio*, 392 U.S. 1, (1968), where the Supreme Court fashioned an exception to the established probable cause law. This Court held that, if a law enforcement officer reasonably believes that criminal activity "may be afoot" and that a suspect "may be armed and presently dangerous," he may frisk the suspect for weapons. *Terry*, 392 U.S. at 31. Although the decision was a clear increase

of police authority, the Court emphasized that it was not diminishing the constitutional right of citizens to move about without government restraint or intrusion, unless objective evidence warranted a police intervention. *Id.* at 21-22.

Terry and its progeny have consistently recognized that without reasonable suspicion, the Fourth Amendment provides individuals a constitutional right to steer clear of police encounters and move on. Additionally, the choice to avoid police contact cannot be used as a pretext to validate a *Terry* stop and frisk. *Brown v. Texas*, 443 U.S. 47 (1979).

In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court held that individuals are not obligated to endure inquiries from law enforcement officers and maintain the right to decline assistance with lawful law enforcement practices. The Court categorically held in *Bostick* that a citizen cannot be penalized for refusing to cooperate with the police. Specifically, the Court held: "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id.* at 437 (citations omitted).

Indeed, *Terry* and its progeny allow Terry stops of individuals where reasonable suspicion of criminal activity exists. However, where the evidence of criminal activity is nonexistent, the exception shaped for *Terry* stops was not intended to dislodge or defy the fundamental constitutional right of citizens to circumvent police contact. It is submitted that the exercise of a person's constitutional right to evade police contact, by itself, does not rationalize an investigative detention.

A. Even if the respondent's flight caused the officers to have a reasonable suspicion that he was involved in criminality, they still had a constitutional obligation to perform an investigative detention before they executed the arrest of the respondent.

Assuming arguendo that the respondent's flight provided the officers with reasonable suspicion that he was involved in criminal activity, they should have then stopped the respondent for a brief period of time to investigate the matter before they initiated an arrest. In *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 185 (2004), this Court held that when police have reasonable suspicion that criminal activity is afoot, they may "stop the person for a brief time and take additional steps to investigate further." Here, when the respondent was apprehended, the officers failed to engage in any type of investigative detention, which would have allowed them to properly determine the true and accurate nature of the respondent's conduct.

Pursuant to Arkansas Rule of Criminal Procedure Rule 3.1. A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such

period the person detained shall be released without further restraint, or arrested and charged with an offense. However in this matter the officers did not perform an investigative detention, but rather executed an arrest after respondent's flight.

In *Illinois v. Wardlow,* 528 U.S. 119 (2000), the Court held that flight was not necessarily indicative of criminal activity. While running from the police may be suggestive of one's involvement in illegal activity, an investigative detention of the individual is required in order to determine the true and accurate nature of the subject's conduct. In the instant matter, the Petitioner erroneously asserts that the officers had a right to arrest the respondent for fleeing prior to ascertaining if he was involved in any illegal activity. Such a finding would contravene *Terry* and its progeny, which, firmly stand for the proposition that where there is a reasonable suspicion to stop an individual who is believed to be engaged in criminal activity, the police must then carry out a brief investigative search in order to determine if the individual was actually involved in any illegal conduct. To do otherwise would cause police officers to circumvent the Court's rational outlined in *Wardlow.*

In sum, the Petitioners have not presented a compelling reason to grant the Petition; the Arkansas Supreme Court's decision does not conflict with a decision of this Court or a Court of Appeals, nor does Petitioner claim that the Arkansas Supreme Court's ruling implicate an important federal question that has not been settled by this Court.

CONCLUSION

For the forgoing reasons, the respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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