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Criminal Procedure - Supreme Court Update on Reasonable Suspicion Analysis: A Review of the Supreme Court Decisions in Illinois v. Wardlow and Florida v. J.L.

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CRIMINAL PROCEDURE—Supreme Court Update on Reasonable Suspicion Analysis: A Review of the Supreme Court Decisions in *Illinois v. Wardlow* and *Florida v. J.L.*

I. INTRODUCTION

Since its decision in *Terry v. Ohio*[1] authorizing brief investigatory stops on less than probable cause and adopting the reasonable suspicion standard for such detentions, the United States Supreme Court has repeatedly examined the sufficiency of articulable facts to meet the reasonable suspicion standard.[2] The *Terry* decision permits a police officer to briefly detain an individual based on reasonable suspicion that he or she is or has been involved in criminal activity. The decision also permits the officer to conduct a limited pat down or "frisk" for the officer's safety, when based on reasonable suspicion that the person may be armed and dangerous. These searches and seizures normally take place in "rapidly unfolding and often dangerous situations"[3] in which it would be impractical for police to obtain a warrant and the risk of bodily injury from concealed weapons makes it too dangerous for police to wait for probable cause to develop.[4] Therefore, the Court in *Terry* adopted a lesser standard of cause, reasonable suspicion, to justify a brief investigatory detention and a limited weapons search. Unfortunately, the test can be difficult to apply when articulable facts do not clearly point to criminal activity. The Court, consequently, has returned to *Terry* on numerous occasions to articulate what does and does not meet the reasonable suspicion standard.

In *Illinois v. Wardlow*[5] and *Florida v. J.L.*[6] the United States Supreme Court once again addressed *Terry* and its progeny. *Wardlow* and *J.L.* presented the Court with ambiguous facts that are at or very near the threshold requirements for investigatory stops. In highly fact-based analyses, the Court discussed articulable facts that may or may not create reasonable suspicion in relation to Fourth Amendment investigatory stops.[7] In *Wardlow*, the Court held that sudden, unprovoked flight in an area of high crime creates the reasonable suspicion required for a police officer to briefly detain an individual.[8] The Court explained that reasonable suspicion must be based on common sense and inferences about human behavior.[9] In *J.L.*, the Court held that an anonymous tip, with minimal corroboration, does *not* meet the reasonable suspicion standard.[10] While the police were able to find individuals to

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1. 392 U.S. 1 (1968).
2. U.S. CONST. amend. IV provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."
3. *Terry*, 392 U.S. at 10.
4. Robert G. Lindauer Jr., State v. Pearson *and* State v. McClendon: *Determining Reasonable, Articulable Suspicion from the Totality of the Circumstances in North Carolina*, 78 N.C. L. REV. 831, 831-32 (Mar. 2000).
5. 528 U.S. 119 (2000).
6. 529 U.S. 266 (2000).
7. U.S. CONST. amend. IV.
8. *See Wardlow*, 528 U.S. at 124-25.
9. *Id.* at 125.
10. *J.L.*, 529 U.S. at 268.

match the description in the tip, the Court reasoned that corroboration based solely on an individual's description does not meet the standard.[11]

This Note analyzes the implications of these two opinions for both law enforcement officials and criminal law attorneys. Part II examines the history of stop and frisk under the Fourth Amendment since the landmark decision of *Terry v. Ohio*.[12] Part III sets out the facts and the reasoning used by the lower courts as well as the rationale of the Supreme Court in *Illinois v. Wardlow*. Part IV sets out the facts and the reasoning used by the lower courts in *Florida v. J.L.* as well as the rationale of the Supreme Court. Finally, part V analyzes the Court's opinion regarding the Fourth Amendment issues in each of the two cases and examines the possible future implications of the decisions.

II. BACKGROUND

The Fourth Amendment requires that every search and seizure by a government official be reasonable.[13] Reasonableness has been interpreted by the United States Supreme Court to mean that an arrest or search must be based on probable cause and/or executed pursuant to a warrant based on probable cause.[14] The Court, however, has noted numerous exceptions to these requirements.[15] Additionally, while detaining an individual has been found to be a "seizure," an officer does not seize a person under the Fourth Amendment by simply approaching an individual in a public place and asking if the person will answer a few questions.[16] Thus,

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11. *See id.* at 272.

12. 392 U.S. 1 (1968).

13. U.S. CONST. amend. IV.

14. *See* Katz v. U.S., 389 U.S. 347, 357 (1967) (explaining that the Fourth Amendment imposes a presumptive warrant requirement for searches and seizures).

15. *See* Audrey Benison, Matthew J. Gardner, Amy S. Manning, *Warrantless Searches and Seizures*, 87 GEO. L.J. 1124, 1124-25 (May 1999). These exceptions include

> investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.

Id.

16. *See* United States v. Mendenhall, 446 U.S. 544, 555 (1980). In *Mendenhall*, two Drug Enforcement Agency (DEA) agents approached the individual/defendant in the Detroit airport after observing behavior characteristic of drug smugglers. *Id.* at 547. The agents asked to see the defendant's identification and airline ticket. *Id.* at 548. After questioning, one of the agents asked if the defendant would accompany him to the airport DEA office. *Id.* The defendant consented. *Id.* The Court found that the defendant voluntarily accompanied the officer to the office and was under no duress in making her decision. *See id.* at 558. The defendant was questioned briefly and her identification and ticket were returned to her before she was asked to accompany the officer. *Id.* at 548. The Court reasoned, therefore, that the defendant was free to decline to go with the officer and was free to leave the area. *See id.* at 554. *Compare with* Florida v. Royer, 460 U.S. 491 (1983). In *Royer*, two plain-clothes detectives at the Miami International Airport approached the defendant. *Id.* 493-94. The detectives believed that the defendant's appearance, mannerisms, luggage, and actions fit the "drug courier profile." *Id.* at 493. The detectives identified themselves to the defendant and asked if he had a moment to speak with them. *Id.* at 494. The defendant responded, "Yes." *Id.* After asking for his ticket and identification, the detectives realized that there was a discrepancy between the name on the ticket and the identification. *Id.* Without returning the ticket or the identification, the detectives then asked the defendant to accompany them to a room approximately forty feet away. *Id.* One of the detectives then retrieved the defendant's luggage. The defendant consented to searches of his two suitcases and drugs were found in both. *Id.* The officers also took possession of his luggage. *Id.* at 503. The Court reasoned that the defendant was not free to leave as the officers had taken possession of his ticket and

because the individual is not "seized," the officer need not justify the approach and question. Also, a person approached in such a manner is under no obligation to answer the officer's questions and may, presumably, walk away from the situation.[17]

Before 1968, the Fourth Amendment was interpreted to require probable cause for any type of governmental search or seizure.[18] The Court took quite a basic approach to the Fourth Amendment.[19] The analysis focused only on whether a certain set of circumstances constituted a "search" or "seizure" and, if so, whether there was probable cause to justify it.[20] If a certain set of facts were determined to be a search or seizure, the absence of probable cause created an automatic violation of the Fourth Amendment.[21] Before *Terry*, there appeared to be no "middle ground" in Fourth Amendment analyses.[22]

The decision in *Terry v. Ohio* produced a narrow exception to the rigid analysis previously applied by the Court and created a middle ground standard of cause—reasonable suspicion—for brief investigatory stops.[23] Such stops would be valid without the requirement of probable cause if supported by a lower standard of reasonable suspicion. In *Terry*, the petitioner and another man were noticed by a police officer in downtown Cleveland, Ohio.[24] The officer observed the two men alternately walk up and down the same street. On each trip, the respective man would peer into the same store window.[25] After approximately a dozen trips, a third man met the two men and the three individuals conversed. The third man subsequently left the area and the two men continued pacing the street.[26] Finally, the two men walked away in the direction the third man had taken. The officer followed the two men and observed them once again meet up with the third man. The officer then decided to approach the individuals. After briefly asking the men their names and receiving a mumbled response, the officer grabbed Terry and patted down the outside of his clothing.[27] Inside Terry's coat pocket the officer found a .38-caliber revolver.[28] Terry was convicted of carrying a concealed weapon.[29]

In *Terry*, the Court's analysis of the Fourth Amendment changed from a two-option approach (probable cause or no probable cause) to a three-option approach (probable cause, reasonable suspicion, or neither). The *Terry* majority, written by Chief Justice Warren, held that the extent of Fourth Amendment protection depends on the specific context of each situation and the reasonableness of the government's

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identification. *Id.* Here, the Court held that the stop went beyond simply approaching the defendant and asking a few investigative questions. *See id.* at 502. Therefore, the stop was a violation of the Fourth Amendment. *See id.* at 502-03.

17. *See Royer*, 460 U.S. at 497-98.

18. *See* Dunaway v. New York, 442 U.S. 200, 207-209 (1979) (discussing the historical development of the Fourth Amendment's guarantee against unreasonable seizures of persons).

19. *See* Lindauer, *supra* note 4, at 839-40.

20. *See id.*

21. *See id.*

22. *See id.*

23. Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

24. *Id.* at 5.

25. *Id.* at 6.

26. *Id.*

27. *Id.* at 6-7.

28. *Id.*

29. Terry v. Ohio, 392 U.S. 1, 4 (1968).

action within that context.[30] Although the opinion focused mainly on the "frisk" aspect of the "stop and frisk,"[31] later Supreme Court cases have viewed *Terry* as requiring a separate analysis for the stop as well as the frisk.[32]

Since the *Terry* decision, the "stop" portion of the analysis has been further explored. The Court continues to articulate what constitutes a reasonable, articulable suspicion for purposes of an investigatory stop. For example, four years after the *Terry* decision, the Court specifically addressed the subject of a "stop" in *Adams v. Williams*.[33] The Court in *Adams* reasoned that a brief stop of a suspicious individual in order to determine his identity or momentarily maintain the status quo while obtaining more information may be the most reasonable alternative in light of the facts known to the officer at the time.[34] However, the officer must have a reasonable, articulable suspicion that criminal activity is afoot in order to make a "stop."[35]

In *Ybarra v. Illinois*,[36] the Court held that suspicion must again be based on specific and articulable facts and added that the suspicion must be associated with the specific individual.[37] The suspicion does not arise merely from the individual's location.[38] Two years later, in *United States v. Cortez*, the Court focused on the necessity of looking to the totality of the circumstances.[39] The Court held that two elements must be present for a permissible investigatory stop. First, a police officer must consider *all* of the surrounding circumstances in analyzing a situation.[40] It is only by looking at the totality of the circumstances that an officer may draw

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30. *See id.* at 9. The Court held that police may frisk a suspect when a reasonably prudent officer would be justified in believing that the suspect is armed. *See id.* at 24.

31. *See id.* at 19, n.16. Justice Warren chose not to address whether investigatory stops made with less than probable cause were, for purposes of detention, constitutional because he was unsure that a "seizure" had happened prior to the officer's initiation of physical contact with Terry. Justices Harlan and White, each writing a concurring opinion, separated the "stop" portion of the analysis from the actual "frisk," asserting that a valid stop is necessary before a valid frisk. *See id.* at 32-33, 34.

32. *See* Adams v. Williams, 407 U.S. 143, 145-146 (1972). Reasonable suspicion to stop an individual should be based on "specific reasonable inferences" that officers are "entitled to draw from the facts in light of [their] experience." *Terry*, 393 U.S. at 27. The test, therefore, is whether a reasonably cautious police officer, based on the totality of the circumstances, has a reasonable, articulable suspicion that criminal activity is afoot. *See id.*

33. *See Adams*, 407 U.S. at 144. In *Adams*, a police officer in an area of high crime was approached by a known individual and told that an individual seated in a nearby car was carrying narcotics and had a gun at his waist. *Id.* at 144-45. The officer approached the car and asked the individual to open the door. *Id.* at 145. When the individual rolled down his window instead, the officer reached into the car and took the gun located in the exact place indicated by the informant. *Id.* The Court held this to be a valid stop. *Id.* at 144.

34. *Id.* at 146.

35. *See id.* at 146-47.

36. 444 U.S. 85 (1979).

37. *See id.* at 91.

38. *See id.* In *Ybarra*, police obtained a search warrant, based on probable cause, for a tavern and the bartender who worked within. *Id.* at 88. The police proceeded to stop and pat down the other tavern patrons for weapons. *Id.* One of the patrons was found in possession of heroin. *Id.* at 89. The Court held that the police were unable to articulate any specific fact that would have created the reasonable suspicion that the patron was armed and dangerous. *Id.* at 91.

39. U.S. v. Cortez, 449 U.S. 411 (1981). In *Cortez*, the border patrol observed distinctive footprints and tire tracks and determined that groups of illegal aliens were receiving help from one or more individuals in a vehicle. *Id.* at 413. Based on the times that they observed the tracks, the border patrol also determined that the individual or individuals also traveled on clear nights, during or near weekends, and between the hours of two A.M. and six A.M. *Id.* at 413-14. The Court found this information created the reasonable suspicion required to make a constitutional stop of Cortez's vehicle. *Id.* at 421-22.

40. *Id.* at 418.

inferences as a trained person in the field of law enforcement.[41] Second, the officer's analysis must generate a "particularized suspicion" that the individual may be involved in some sort of crime in order to stop him or her.[42] The Court affords considerable deference to observations and conclusions of police, reasoning that they are trained in the area of criminal activity and may have more insight than the lay observer.[43]

It is important to note, however, that the Court has been skeptical of certain factors. For instance, an officer may not rely solely on an individual's race to make a stop.[44] In *United States v. Brignoni-Ponce*, Border Patrol agents assigned to a Southern California highway chose to stop vehicles with passengers who appeared to be of Mexican descent.[45] The Court held the stops to be unlawful.[46] While the Court made it clear that race, by itself, does not satisfy the reasonable suspicion standard, it never stated explicitly that race can not be used in combination with other factors to create the requisite reasonable suspicion.[47]

Finally, in relation to anonymous tips, the Court has held that information from an informant that exhibits sufficient indicia of reliability can create the reasonable suspicion for an investigatory stop. This idea was explored in *Alabama v. White*, in which an anonymous informant was correctly able to describe an individual's vehicle, time of departure, and destination.[48] The reliability of the tip in *White* was examined on a sliding scale. The Court determined that a tip containing a greater quantity of corroborative information is more reliable.[49] The Court reasoned that if an informant is unknown or anonymous, greater corroboration might be necessary to create reasonable suspicion.[50] In the same way, a tip with less corroboration but from a known source may also suffice to create reasonable suspicion.[51]

The Supreme Court cases following *Terry* addressed fact situations at or near the threshold for reasonable suspicion. Often, the addition or subtraction of a single fact can make the difference between a lawful and unlawful stop. The *Wardlow* and *J.L.* decisions are two more extremely close cases that required the Supreme Court to once again examine factual circumstances that may or may not rise to reasonable suspicion.

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41. *Id.*
42. *Id.* at 417-18.
43. *Id.* at 418; *see also* Ornelas v. U.S., 517 U.S. 690, 699 (1996).
44. U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975).
45. *Id.* at 876.
46. *Id.*
47. For a more detailed discussion of race and the Fourth Amendment *see* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).
48. 496 U.S. 325, 326-27 (1990).
49. *Id.* at 330.
50. *Id.* at 330-32.
51. *See* Adams v. Williams, 407 U.S. 143, 148 (1972).

III. *ILLINOIS V. WARDLOW*

A. Statement of the Case

On September 9, 1995, Officer Timothy Nolan (Officer Nolan) was traveling in a police caravan in Chicago, Illinois.[52] The purpose of the caravan was to investigate an area known for narcotics activity. Officer Nolan was driving the last car of four and was in uniform. Soon after arriving in the area, the officers spotted forty-four year-old Sam Wardlow (Wardlow). At the time, Wardlow did not appear to be taking part in any unlawful activity. When Wardlow spotted the police caravan, however, he immediately turned and fled. Officer Nolan followed Wardlow and was eventually able to corner him in an alleyway. Officer Nolan observed Wardlow carrying a white, opaque bag. Without announcing himself or giving a warning, Officer Nolan conducted a protective pat down search of Wardlow. Because Officer Nolan was unable to see into the bag, he squeezed it and felt a heavy object that he believed to be a gun. Officer Nolan opened the bag and found a .38-caliber handgun containing five live rounds of ammunition. Based on his discovery, Officer Nolan placed Wardlow under arrest.

At trial, the court denied Wardlow's motion to suppress evidence of the gun, ruling that the search was a lawful stop and frisk. Wardlow was subsequently convicted of the unlawful use of a weapon by a felon and sentenced to a two-year imprisonment. The Illinois Appellate Court reversed the conviction, reasoning that Officer Nolan did not have the reasonable suspicion required to justify the stop.[53] The court based its reversal on the totality of the circumstances test set forth in *Terry v. Ohio*.[54] The court wrote that "to justify an investigatory stop, the police officer must be able to point to specific and articulable facts that reasonably warrant the intrusion."[55] In its *Terry* analysis, however, the appellate court examined only the "sudden flight" factor. It was unable to find support in the record for the contention that Wardlow was in a high crime location.[56] Consequently, because the court looked only at the fact that Wardlow ran from the police, it was unable to determine that Officer Nolan had the requisite reasonable suspicion required to stop Wardlow. The court emphasized its limited holding and declared, "we do not hold that the presence of a suspect in a high crime location, together with his subsequent flight from police, is never grounds for a *Terry* stop."[57]

The Illinois Supreme Court affirmed the decision of the appellate court using the *Terry* test.[58] Unlike the appellate court, however, the Illinois Supreme Court *was* able to conclude that Wardlow was in an area known for heavy crime. The court looked at the downtown Chicago area and the "uncontradicted and undisputed testimony [of Officer Nolan], which was accepted by the trial court, [and found it]

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52. *See* Illinois v. Wardlow, 528 U.S. 119 (2000). Unless otherwise noted, all facts in this section are taken from *Wardlow*, 528 U.S. at 121-22.

53. Illinois v. Wardlow, 678 N.E.2d 65, 67-68 (1997).

54. *Id.*

55. *Id.* at 67 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

56. *Id.* at 67.

57. *Id.* at 68.

58. Illinois v. Wardlow, 701 N.E.2d 484 (1998).

sufficient to establish that the incident took place in a high-crime area."[59] Thus, instead of examining only the flight factor, the Illinois Supreme Court also considered the area of heavy crime in reaching its determination. Despite the additional factor, however, the court was still unable to hold that the circumstances rose to a level of reasonable suspicion.[60] The court looked to other jurisdictions for guidance in its decision. In *Nebraska v. Hicks*, for instance, flight from a police officer was sufficient to justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal conduct.[61] The court further examined "specific knowledge" by looking to Michigan case law. In *People v. Mamon*,[62] the court noted "the ambiguous nature of flight as an indicator of guilt" and held that "the act of running at the sight of police patrolling a high-crime area did not provide the particularized grounds necessary to support a reasonable suspicion that criminal activity was afoot."[63]

The Illinois court agreed with the reasoning of the Michigan court and applied it to the facts of *Wardlow*. The court explained that the officers were "operating under a suspicion or hunch" rather than "specific and articulable facts" that would have justified the stop.[64] Therefore, unlike the appellate court, the Illinois Supreme Court chose *not* to limit its holding and ruled that, taken in the totality, sudden flight in an area of high crime does not create reasonable suspicion.

In a five-to-four decision,[65] the United States Supreme Court reversed the Illinois Supreme Court holding that, taken in the totality of the circumstances, sudden flight in an area of high crime creates the requisite reasonable suspicion required for an officer to lawfully stop an individual.[66]

B. Rationale

In an opinion written by Chief Justice Rehnquist, and joined by Justices O'Connor, Scalia, Kennedy, and Thomas, the Court in *Illinois v. Wardlow* held that unprovoked flight in a neighborhood of high crime creates the reasonable suspicion required for an investigatory stop. Using the analysis first applied in *Terry*,[67] the

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59. *Id.* at 486.

60. *Id.* at 489.

61. 488 N.W.2d 359, 363 (1992). In *Hicks*, two police officers stopped a man who ran away from police in an area of Omaha, Nebraska, known for liquor violations and drug trafficking. After further investigation, the officers found the man in possession of a firearm. The man was subsequently charged for being a felon in possession. The court was unable to conclude that flight from police in an area known for crime activity rose to the level of reasonable suspicion. *Id.*

62. 435 N.W.2d 12 (1998), *rev'd on other grounds*, 457 N.W.2d 623 (1990). In *Mamon*, two police officers were driving on routine patrol in an area known for heavy narcotic activity. As they approached the defendant, he turned and ran from the officers. As the officers chased the defendant, he removed a case from his jacket and dropped it. The case was later found to contain cocaine. The trial court, however, chose to quash an information charging the defendant with possession of a controlled substance, and the Michigan appeals court affirmed the trial court decision.

63. Illinois v. Wardlow, 701 N.E.2d 484, 488 (1998).

64. *Id.*

65. The majority decision was written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas. The opinion concurring in part and dissenting in part was written by Justice Stevens and was joined by Justices Souter, Ginsburg, and Breyer. 528 U.S. 119.

66. Illinois v. Wardlow, 528 U.S. 119, 126 (2000).

67. Terry v. Ohio, 392 U.S. 1 (1968).

Court examined the situation faced by Officer Nolan. The opinion acknowledged that reasonable suspicion is less demanding than the probable cause standard and requires considerably less than a preponderance of the evidence.[68] The opinion also acknowledged, however, that the Fourth Amendment requires at least a minimal level of objective justification for making a stop.[69]

The Court concluded that Officer Nolan relied on two factors in his decision to stop Wardlow. First, Officer Nolan was a member of a four-car caravan of policemen in a neighborhood known for heavy drug activity. The officers were aware of the reputation of the area and approached the situation within this context. The Court emphasized that a crime-ridden neighborhood does not, by itself, create a reasonable suspicion to stop an individual.[70] By the same token, however, an officer should not ignore his surroundings when trying to determine whether circumstances deserve further investigation.[71] Consequently, the Court determined that a high-crime area is a part of an officer's surroundings and may be taken into consideration as a factor in a *Terry* analysis.

The second factor that Officer Nolan observed was Wardlow's unprovoked and sudden flight.[72] The Court explained that in the past it had recognized nervous and evasive behavior as a pertinent factor in the determination of reasonable suspicion.[73] "Headlong flight," the Court reasoned, "is the consummate act of evasion" and while not necessarily indicative of wrongdoing, "it is certainly suggestive of such."[74] The Court recognized the imperfection of the *Terry* test in that it tends to be a subjective test applied by a police officer. The Court conceded that reasonable suspicion is ultimately a judgment call based on common sense and inferences about human behavior.[75] Flight does not by itself constitute reasonable suspicion; however, *taken together* with the fact that the flight took place in a high crime neighborhood, the two factors met the totality of the circumstances test. Therefore, Officer Nolan had grounds for reasonable suspicion and the subsequent stop of Wardlow.

The Court distinguished its holding in *Wardlow* from previous cases that have held a refusal to cooperate with police does not rise to the level of reasonable suspicion. Specifically, the Court noted that it concluded in *Florida v. Royer* that when an officer approaches an individual without probable cause or reasonable suspicion, "the individual has a right to ignore the police and go about his business."[76] In *Wardlow*, however, Rehnquist distinguished flight by explaining that flight, by its very nature, is the opposite of "going about one's business."[77] An officer confronted with the flight of an individual may choose to briefly stop the

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68. *Wardlow*, 528 U.S. at 123.
69. *Id.*
70. *Id.* at 124.
71. *Id.*
72. *Id.*
73. *Id.* (citing United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1995); Florida v. Rodriguez, 469 U.S. 1, 6 (1984); United States v. Sokolow, 490 U.S. 1, 8-9 (1989)).
74. Illinois v. Wardlow, 528 U.S. 119, 124 (2000).
75. *Id.* at 125 (citing United States v. Cortez, 449 U.S. 411 (1981)).
76. *Id.* at 125 (citing Florida v. Royer, 460 U.S. 491 (1983)).
77. *Id.*

person. The act of stopping the individual, the Court contended, is completely consistent with a citizen's right to go about his business or to refuse to answer a police officer's questions.[78]

In his brief, the Respondent Wardlow argued that flight is not necessarily indicative of criminal activity. He explained that without corroborating circumstances that an individual is involved in criminal activity prior to flight, an officer's observation of flight creates nothing more than a hunch.[79] Rehnquist acknowledged and agreed with this point. He observed, however, that just because flight may be ambiguous and susceptible to innocent explanation, the *Terry* case established that officers might detain an individual to resolve the ambiguity.[80] The Court chose to accept the risk that officers may stop innocent people.[81] It also contended that compared to a full arrest, a *Terry* stop is a minimal intrusion on an individual's liberty.[82] Consequently, after a person has been subject to a *Terry* stop, he is free to leave unless an officer can show the requisite probable cause to arrest.[83]

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote a longer and more detailed discussion of the "stop and frisk" analysis in his dissenting opinion. Stevens began by addressing the two proposed rules set out by the petitioner and respondent. In its brief, the Petitioner State of Illinois proposed a "bright-line rule" that would authorize the temporary detention of anyone who chooses to flee at the mere sight of a police officer.[84] On the other hand, the respondent suggested a rule proposing that flight upon seeing an officer can never, by itself, justify a temporary investigative stop under *Terry*.[85] Stevens rejected both of the proposed rules and concurred with the totality of the circumstances test used by the majority. He was, however, unable to agree that the facts of the *Wardlow* case rose to the level of reasonable suspicion. Before explaining his disagreement with the majority's ultimate conclusion, Stevens first analyzed the two proposed rules set forth by the petitioner and respondent.

Stevens first recognized that in *Terry v. Ohio* the Court held that, in appropriate circumstances, a police officer may approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.[86] He explained that in "conducting an investigatory stop [an officer] must articulate 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'"[87] The question in this case, Stevens pointed out, was what kind of suspicion attaches to a person's flight—or, more precisely, what commonsense conclusions can be drawn respecting the motives behind that flight.[88] The dissent explained its rejection of the petitioner and respondent's proposed per

78. *Id.*
79. Respondent's Brief at 29, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036).
80. *Wardlow*, 528 U.S. at 125.
81. *Id.* at 126.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. Illinois v. Wardlow, 528 U.S. 119, 127 (2000).
87. *Id.* at 128 (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)).
88. *Id.*

se rules by looking to the different and many possible motivations for flight.[89] From catching up with a friend a few blocks away to seeking shelter from a storm to "answer[ing] the call of nature," the dissent suggested a number of innocent reasons people tend to run.[90] The dissent explained that flight must also be judged in connection with other factors including "the time of day, the number of people in the area, the character of the neighborhood, whether the officer was in uniform, the way the runner was dressed, the direction and speed of the flight, and whether the person's behavior was otherwise unusual."[91]

The dissent rejected the petitioner's per se rule regarding "unprovoked flight upon seeing a clearly identifiable police officer," explaining that the inferences may still vary from case to case.[92] The Respondent's per se rule was also dismissed by the dissent. The dissent found that inferences taken from flight are a function of the varied circumstances that surround it.[93] Stevens explained that "[s]ometimes those inferences are entirely consistent with the presumption of innocence, sometimes they justify further investigation, and sometimes they justify an immediate stop and search for weapons."[94] The dissent pointed out that in any circumstance, unprovoked flight describes a category of activity too broad and varied to permit a per se reasonable inference regarding the motivation for the activity.[95] Consequently, like the majority, the dissent rejected the proposed per se rules of both the petitioner and respondent.

The second portion of the dissent addressed the majority's analysis under the totality of the circumstances test. Stevens found the facts of the *Wardlow* case insufficient to meet the reasonable suspicion standard. He focused on the troublesome and brief testimony of Officer Nolan and what it failed to reveal.[96] First, Officer Nolan could not remember whether the cars in the caravan were marked or whether there were other people near Wardlow when the caravan drove by.[97] Second, the officers were on their way to an unidentified location and were apparently not planning to stop in the area where Wardlow was first spotted.[98] Third, the record did not indicate how fast the caravan was traveling.[99] Additionally, the record did not indicate whether some of the caravan had passed Wardlow before he began running.[100] The only inference that the majority relied upon, contended the dissent, was Officer Nolan's statement that "[h]e looked in our direction and began fleeing."[101] Stevens found this statement insufficient at best. He also looked to the "high-crime area" factor and found it simply "too generic and susceptible to

89. *Id.* at 128-29.
90. *Id.*
91. *Id.* at 129-30.
92. Illinois v. Wardlow, 528 U.S. 119, 129-30 (2000).
93. *Id.* at 135.
94. *Id.*
95. *Id.* at 136.
96. *Id.* at 137.
97. *Id.* at 138.
98. Illinois v. Wardlow, 528 U.S. 119, 129-30 (2000).
99. *Id.*
100. *Id.*
101. *Id.* at 138-39.

innocent explanation to satisfy the reasonable suspicion inquiry."[102] Consequently, the dissent found the facts of *Wardlow* did not meet the reasonable suspicion standard.

IV. *FLORIDA V. J.L.*

A. *Statement of the Case*

On October 13, 1995, the Miami-Dade police received an anonymous tip concerning a young African-American male.[103] The tip explained that the boy would be found standing at a specific bus stop wearing a plaid shirt and carrying a gun. After receiving the tip, the police arrived at the specified bus stop to find a group of three African-American males. The individuals were not engaged in illegal activity or any other suspicious behavior; however, one of the officers immediately told J.L., a fifteen year-old male wearing a plaid shirt, to place his hands on the bus stop.[104] The officer then frisked J.L. and found a gun in his left pocket. Another officer frisked the two other males but found nothing. The officers proceeded to arrest J.L. J.L. was charged with carrying a concealed firearm without a license and with possessing a firearm while under the age of eighteen. At trial, he moved to suppress the gun as the fruit of an unlawful search and the court granted the motion. The appellate court reversed the trial court, holding that verification of the description in the anonymous tip was enough to create reasonable suspicion.[105] The Florida Supreme Court, however, quashed the appellate decision.

To reach its decision, the Florida Supreme Court looked to the Supreme Court decision in *Alabama v. White*.[106] There, the Court determined that an anonymous tip could create reasonable suspicion if the tip, itself, could be found reliable. The Florida court acknowledged that "innocent details of identification" may be reliable and consequently may be the foundation for reasonable suspicion.[107] In *J.L.*, however, the "tip did not involve suspicious behavior that the police could have verified as suspicious upon arrival; rather, the tip involved innocent details, none of which involved incriminating or criminal behavior."[108] The court also took issue with the fact that "the innocent details provided in the tip did not involve future action for which the police could verify whether or not such future action would occur; rather the tip involved present action which could have been provided by any pilgrim on the roadway."[109] Finally, the court noted that the tip was not corroborated in any way by independent police investigation.[110] Based on this reasoning, the court was unable to conclude that the tip in *J.L.* exhibited the "sufficient 'indicia of

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102. *Id.* at 139.

103. *See* Florida v. J.L., 529 U.S. 266, 268 (2000). Unless otherwise noted, all facts in this section are taken from *J.L.*, 529 U.S. at 268-69.

104. At the time of his arrest, J.L. was fifteen years old. As a minor, his name was, therefore, withheld. *Id.* at 268.

105. Florida v. J.L, 689 So. 2d 1116 (Fla. Dist. Ct. App. 1997).

106. 496 U.S. 325 (1990).

107. Florida v. J.L., 727 So.2d 204, 207 (Fla. 1998).

108. *Id.*

109. *Id.* (quoting Butts v. State, 644 So.2d 605, 606 (1994)).

110. *J.L.*, 727 So.2d at 207.

reliability'" to create the requisite reasonable suspicion for a *Terry* stop.[111] Consequently, the Florida Supreme Court found the search was a violation of J.L.'s Fourth Amendment rights.

In a unanimous decision, the United States Supreme Court affirmed the Florida Supreme Court's reasoning that an anonymous tip, with only the corroboration of innocent details, does not rise to the reasonable suspicion standard required for a lawful stop and frisk.

B. Rationale

Justice Ginsburg wrote the opinion, holding that when an anonymous tip with minimal corroboration is the only piece of information the police have to support their reasonable suspicion and subsequent stop, the Fourth Amendment has been violated.

Justice Ginsburg began her analysis by presenting the question of whether an anonymous tip that a person is carrying a gun is, without more information, sufficient to justify a police officer's stop and frisk.[112] Similar to the opinion in *Wardlow*, the *J.L.* opinion first outlined the history of "stop and frisk" cases beginning with *Terry v. Ohio*. Ginsburg focused on the circumstances of *Terry* and how the police officer observed unusual conduct that led him to reasonably conclude, in light of his experience, that criminal activity may have been afoot.[113] Unlike *Terry*, however, the officers' suspicion in *J.L.* did not arise from any of their own observations but solely from a call made from an unknown location by an unknown caller.[114] The Court looked to *Alabama v. White*[115] and acknowledged that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."[116] There are, however, some situations where the tip "exhibits sufficient indicia of reliability to provide [the requisite] reasonable suspicion."[117]

Ginsburg analyzed the facts of the *White* case, in which the police received an anonymous tip about a woman who was carrying cocaine and predicted that she would leave a particular apartment building at a particular time, get into a specific car, and drive to a named motel.[118] It was only after the police observed the woman and found that the tipster accurately predicted the woman's movements that the Court found it reasonable to credit the assertion regarding the cocaine.[119] The *J.L.* Court found the *White* case, however, to be very near, if not at, the reasonable suspicion threshold.[120] Therefore, in comparing the circumstances of *White* to those of *J.L.*, the Court found that the tip in *J.L.* "lacked the moderate indicia of reliability" needed to rise to the level of reasonable suspicion.[121] The tip provided

111. *Id.* at 208 (quoting Alabama v. White, 496 U.S. at 328).
112. *J.L.*, 529 U.S. at 268.
113. *Id.* at 269-70.
114. *Id.* at 270.
115. 496 U.S. 325 (1990).
116. *J.L.*, 529 U.S. at 270 (quoting White, 496 U.S. at 329).
117. *Id.* (quoting *White*, 496 U.S. at 327).
118. *White*, 496 U.S. at 329.
119. *Id.* at 332.
120. *J.L.*, 529 U.S. at 271.
121. *Id.*

no predictive information that would have permitted the police to test the reliability and credibility of the information.[122] Additionally, the fact that the subsequent frisk of J.L. yielded the discovery of a firearm was insufficient to create reasonable suspicion. It is the knowledge of the officers before the stop that determines whether there was reasonable suspicion to stop the individual.[123]

Justice Ginsburg rejected the idea submitted by the Petitioner, the State of Florida, that the identification of J.L. constituted corroboration of the tip. In its brief, the State of Florida argued that a stop should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cause doubt in the reliability of the tip."[124] The Court asserted, however, that the Petitioner's proposal was incorrect. The tip must be "reliable in its assertion of illegality, not just its tendency to identify a determinate person."[125]

The Court further rejected a firearm exception to the standard *Terry* analysis as requested by the petitioners. Under the proposed exception, any tip regarding a firearm would create reasonable suspicion. Justice Ginsburg explained that an exception for tips concerning firearms would simply open too many doors for law enforcement officers. Not only could an individual subject another to an unreasonable search simply by placing an anonymous call, but, additionally, such an exception could not be securely confined to firearms.[126]

Finally, Justice Ginsburg noted that a tip concerning immediate dangers such as bombs might not require the "indicia of reliability" that other tips require. She also in no way minimized a police officer's choice, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped.[127]

Justice Kennedy, joined by Chief Justice Rehnquist, wrote a short concurrence that expanded on the kind of situation that might constitute corroboration of a tip. He noted that there are "many indicia of reliability" that have yet to be explored by the Court. He suggested that a documented tip, through recording or otherwise, might be better evidence for corroboration. Additionally, he presented a hypothetical in which a caller with a similar voice calls the police two nights in a row and accurately predicts criminal activity. Justice Kennedy suggested that on the third night the caller "ought not be treated automatically like the tip" in *J.L.*[128] He explained that under such circumstances, a "plausible argument that experience cures some of the uncertainty surrounding the anonymity" could be made.[129] Justice Kennedy also suggested that a face-to-face, yet anonymous citizen-tip might have some indicia of reliability as opposed to a phone call.[130] Nonetheless, despite Justice

122. *Id.*
123. *Id.*
124. Petitioners brief at 16.
125. *J.L.*, 529 U.S. at 272.
126. *Id.* at 272-73.
127. *Id.* at 274.
128. *Id.* at 275.
129. *Id.*
130. *Id.* at 276.

Kennedy's hypothetical situations, he explained that "these matters...must await discussion in other cases, where the issues are presented by the record."[131]

V. IMPLICATIONS

Since the decision in *Terry v. Ohio*, the United States Supreme Court has had many opportunities to examine what articulable facts meet the reasonable suspicion standard. The inquiry, however, is highly fact specific. Consequently, the Supreme Court has revisited the issue on a fairly regular basis. Each time, the Court is faced with a certain set of facts and must determine whether or not the reasonable suspicion standard has been met. *Wardlow* and *J.L.* are two of the latest cases that attempt to discern what facts may legitimately be considered in satisfying the reasonable suspicion standard. In examining post-*Terry* cases and the *Wardlow* and *J.L* decisions, it is apparent that the Court is still defining the threshold requirements for the reasonable suspicion standard.

A. Illinois v. Wardlow

The five-to-four decision in *Wardlow* illustrates how the Supreme Court continues to grapple with ambiguous circumstances and the reasonable suspicion standard. In *Wardlow* the Court worked with two factors, Wardlow's flight from the officers and Wardlow's presence in a high-crime area of downtown Chicago. Of the two factors, the unprovoked flight seemed to be the focus of the majority opinion.[132] In fact, the Court paid very little attention to the element of Wardlow's presence in a neighborhood known for its high crime.[133] Instead, the Court focused on unprovoked flight and how it is suggestive of wrongdoing.[134] In its reasoning, the Court relied on other cases that recognized nervous and evasive behavior as a pertinent factor in the determination of reasonable suspicion.[135]

The Court's emphasis on unprovoked flight was notable. Despite the fact that numerous state cases have found flight alone insufficient to meet the reasonable suspicion standard,[136] the tone of the *Wardlow* opinion seems to imply that unprovoked flight, on its own, may someday create the required reasonable suspicion for a stop. Justice Rehnquist wrote that "[h]eadlong flight...is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[137] And while the Court did not explicitly state that flight, alone, would create reasonable suspicion, the notion logically follows the majority's willingness to accept the risk of detaining innocent individuals. Justice Rehnquist recognized that certain behavior, by itself, might be lawful. The same

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131. *Id.*

132. *Wardlow*, 528 U.S. at 124-25.

133. Indeed the Court has specifically held that presence of a suspect in a high crime neighborhood known for drug activity, standing alone, does not justify seizure. *See* Brown v. Texas, 443 U.S. 47, 52 (1979) (no reasonable suspicion to stop person based solely on presence in area known for drug activity).

134. *Wardlow*, 528 U.S. at 124.

135. *Id.*

136. *See* Dimascio v. Municipality of Anchorage, 813 P.2d 696 (Alaska App. 1991); People v. Mamon, 435 N.W.2d 12, *overruled by* People v. Mamon, 457 N.W. 2d 623 (1990); State v. Hicks, 488 N.W.2d 359 (1992); People v. Aldridge, 674 P.2d 240 (1984).

137. *Wardlow*, 528 U.S. at 124.

behavior, however, might also suggest unlawful activity.[138] Consequently, an officer may detain an individual in order to resolve the ambiguity.[139] The Fourth Amendment, the Court explained, accepts the risk of arresting an individual, based on probable cause, who may later turn out to be innocent.[140] The Court made clear that the minimal intrusion involved in a short detention is better than permitting unlawful activities to go unchecked. A brief stop, as opposed to an arrest, is substantially less intrusive to an individual's privacy. Therefore, the Court did not foreclose the possibility that unprovoked flight, by itself, could meet the reasonable suspicion standard.

The Court in *Wardlow* minimized the intrusiveness of a brief stop and also found unprovoked flight to be indicative of criminal activity. These two points seem to indicate that unprovoked flight alone could justify a brief investigatory stop. Of course, the more interesting and telling situation would be the one in which an individual suddenly took flight from an officer in an affluent neighborhood. From the reasoning in *Wardlow*, a justification could be made for a brief detention in such a case. The *Wardlow* majority made clear that the "minimal intrusion" of a *Terry* stop is worth the prevention of criminal activity. This presumption should hold true in any neighborhood, not simply one known for it's prevalent crime.

The four dissenters, including Justices Stevens, Souter, Ginsburg, and Breyer, also focused on the unprovoked flight aspect of this case; however, the dissent took a closer look at the fact that Wardlow was in an area of high crime. According to the dissent, even a brief detention is a serious intrusion and, unlike the position taken in the majority opinion, should be seriously considered. The dissenters feared that the factors the majority relied upon are simply "too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry."[141] The dissent appeared to be looking for more specific factors that indicate possible criminal activity in a police officer's determination of reasonable suspicion. Many times, an officer's determination that a neighborhood has a crime problem is subjective. Despite the majority's focus on Wardlow's sudden flight, this factor troubled the dissent. People can run for innocent as well as guilty reasons, even from the police. Finally, the dissent also expressed concern about the fact that the foundation for reasonable suspicion was based primarily on the somewhat "weak" testimony of Officer Nolan. Instead, the dissent argued that the testimony of Officer Nolan lacked sufficient details needed to establish reasonable suspicion. The dissent would have required additional, specific facts that were more indicative of criminal behavior before it would be willing to conclude that the situation in *Wardlow* rose to the level of reasonable suspicion. As such, the dissent recognized the subjective nature of reasonable suspicion analysis.

While the majority opinion in *Wardlow* seems to suggest that unprovoked flight, on its own, could meet the reasonable suspicion standard, it is unlikely that the Court will create such a precedent if faced with the situation. In view of the five-to-four split, it is unclear as to whether some of the Justices would have still been

138. *Id.* at 125.
139. *Id.*
140. *Id.* at 126.
141. *Id.* at 139.

willing to join the majority opinion had the "high crime" neighborhood not been a factor. *Wardlow* is a case very near the reasonable suspicion threshold. The case helps to once again illustrate the importance of articulating as many facts as possible when making a stop in order to avoid issues regarding reasonable suspicion.

B. Florida v. J.L.

The unanimous decision in *Florida v. J.L.* clearly holds that an anonymous tip, without more, will never rise to the level of reasonable suspicion. While the Court in *Wardlow* wrote of its willingness to accept the risk of briefly detaining an innocent individual, it noted in *J.L* that there are certainly minimum elements required to meet the reasonable suspicion standard. In a telling line of the *J.L.* opinion the Court writes, "If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line."[142] The Court appears wary of anonymous tips and points to two specific problems in permitting them to serve as the basis for a *Terry* stop. First, anonymous tips alone "seldom demonstrate the informant's basis of knowledge or veracity."[143] Second, since anonymous tipsters cannot be held responsible for fabricated allegations, permitting such tips to result in a *Terry* stop would increase the potential for harassment through false accusation.[144] A desire to ensure the informants' credibility and accountability underlies the Court's concern with anonymous tips.

The Court looked at the single anonymous tip and determined that it was simply too unreliable to permit an investigatory stop. The Court looked to the "assertion of illegality" in the tip and not just its tendency to identify a particular person.[145] In this case, the tipster merely gave a description of a group of individuals. It is less clear, however, as to whether the Court would have found reasonable suspicion had the police, after receiving the anonymous tip, pursued further investigation disclosing facts indicative of criminal activity. While the majority did not make such a suggestion, further investigation may have changed the outcome of the opinion. For instance, had the police set up surveillance to observe the three young men, it is possible that the police could have observed more facts that would have contributed to meeting the reasonable suspicion standard. In his concurrence, Justice Kennedy seems to have suggested that, had the police chosen to investigate further, they may have learned additional facts that would have risen to reasonable suspicion and justified a lawful stop.

The Court also rejected a firearm exception, in which a tip alleging an individual is in possession of an illegal gun would justify a stop and frisk. The risk of infringing on individual rights by acting on numerous false tips involving firearms is simply too high. This rejection plainly illustrates the importance of the rights guaranteed by the Fourth Amendment.

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142. Florida v. J.L., 529 U.S. 266, 271 (2000).
143. *Id.* at 270 (quoting Alabama v. White, 496 U.S. 325, 329 (1990)).
144. *Id.*
145. *Id.* at 272.

In view of *Florida v. J.L.* and its predecessor *Alabama v. White*, the Supreme Court has offered considerable guidance regarding anonymous tips and the reasonable suspicion standard. Together, the two cases suggest at least three rules of guidance. First, both cases make clear that an anonymous tip, without any type of corroboration, will not meet the reasonable suspicion standard. Second, *J.L.* provides that an anonymous tip plus the simple corroboration of a person's clothing or description will also not create reasonable suspicion. Finally, *Alabama v. White* holds that reasonable suspicion is met when an anonymous tip predicts events that, after police observation, eventually occur. With its opinion in *J.L.*, the Court has taken a somewhat stronger, less equivocal position with regard to anonymous tips and reasonable suspicion.

VI. CONCLUSION

The two cases described in this Note are but two in a continuing line of cases that apply the *Terry* analysis to specific fact situations. In *Illinois v. Wardlow* and *Florida v. J.L.*, the Court examined factors that are at or very near the threshold of the reasonable suspicion standard. In both cases, the Court was forced to examine some of the more troublesome aspects of the application of the *Terry* test. The *Wardlow* court held that sudden flight in a high crime area, considered in context, creates the requisite reasonable suspicion required to temporarily detain an individual. In its conclusion, the Court permitted two arguably ambiguous factors to meet the reasonable suspicion standard. Unfortunately, *Wardlow* may have left more questions than it answered. For instance, with the Court's emphasis on unprovoked flight, it is unclear whether flight on its own could ever create reasonable suspicion.

In *J.L.*, the Court held that an anonymous tip, on its face, does not create the reasonable suspicion required to stop an individual. *J.L.*, in combination with *Alabama v. White*, has clarified the reasonable suspicion standard with respect to anonymous tips. It is now unequivocal that an anonymous tip, with only minimal descriptive corroboration does not meet the reasonable suspicion standard. Given other evidence, however, such as the corroboration of future events predicted in the tip in *Alabama v. White*, it is possible to establish reasonable suspicion.

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