ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. ANTHONY BENARD PRIMOUS, Appellant.	))))))))))	No. CR-16-0205-PR Court of Appeals No. 1 CA-CR 15-0181 Maricopa County Superior Court No. CR-2012-005697-001

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ) AND AMERICAN CIVIL LIBERTIES UNION OF ARIZONA (ACLU) IN SUPPORT OF APPELLANT

David J. Euchner, No. 021768
Pima County Public Defender's Office
33 N. Stone Ave. #2100
Tucson, Arizona 85701
(520) 724-6800
David.Euchner@pima.gov
Counsel for AACJ

Josephine Bidwill, No. 031483
The Bidwill Law Firm, PLLC
801 N. 1st Ave.
Phoenix, AZ 85003
(602) 254-5544
josephine@bidwillfirm.com
Counsel for AACJ

Kathleen E. Brody, No. 026331
American Civil Liberties Union Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014
(602) 650-1854
kbrody@acluaz.org
Counsel for ACLU

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INTRODUCTION

The question in this case is whether the police may search a citizen after his companion runs away from the police – merely because the encounter happens to occur in a "bad" neighborhood. In this case, police approached a group of four black men – including defendant Anthony Primous with a young child sitting on his lap – who were talking during daylight hours outside an apartment "in a neighborhood known for violent crimes." *State v. Primous*, 239 Ariz. 394, ¶ 2, 372 P.3d 338, 339 (App. 2016). One of the men ran away, but the others remained calm and did not move. One of Primous's remaining companions was found to have a small bag of marijuana. In light of those facts, the court of appeals held that the officer's search of Primous was constitutional, even though there was no real individualized reasonable suspicion that Primous was engaged in criminal activity or was armed and dangerous. This decision cannot stand.

Amici curiae Arizona Attorneys for Criminal Justice ("AACJ") and the Arizona Civil Liberties Union of Arizona ("ACLU") ask this Court to set straight for the lower courts and for law enforcement throughout Arizona the constitutional standard for reasonable suspicion under these circumstances. Law enforcement should not be emboldened to profile citizens for unjustified stops and searches based on their race, or the neighborhoods where they live, work, or visit. Just because a person's companion flees from the police in a "bad" neighborhood and another

friend has a small amount of marijuana should not subject the person to seizure and search.

The Court should accept review to re-affirm the core principle that reasonable suspicion for investigatory detentions must be justified by objective criteria suggestive of criminal activity that do not envelop significant numbers of innocent people. This Court should also expressly disavow a "bad" neighborhood factor for determining reasonable suspicion. Without such clear direction from this Court, Arizona police officers will perceive that they have permission under the Constitution – which they don't – to stop racial minorities who they find in "bad" neighborhoods.

INTERESTS OF *AMICI CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The American Civil Liberties Union of Arizona is the Arizona state affiliate of the national American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU is committed to defending individual rights in Arizona through litigation, legislation, and public education and regularly advocates against biased policing, which is implicated in this case.

Amici offer this brief in support of Appellant because the issue presented concerns the constitutional right of citizens to remain undisturbed by the police in their daily lives unless there is a good, individualized, and articulable reason. The court of appeals' opinion in this case essentially permits police to conduct dragnet operations whereby innocent people may be detained without reason. Without meaningful judicial review, what happened in this case will be the norm: random searches in areas "known for criminal activity," which has historically been code for areas inhabited by racial minorities and the disadvantaged. This Court has always required criteria that will reduce the exposure of innocent persons to stops, particularly those based on improper criteria. This Court must do so again here.

ARGUMENTS

I. "High-crime area" is code for a neighborhood inhabited by racial and ethnic minorities, and frisking people who are not engaged in criminal activity is commonplace in minority neighborhoods – but should not be.

"Race discrimination is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). And "[a] *Terry*[1] stop says terrible things about its subject; it is the officer's way of telling a person you look wrong and I am going to check out my feelings about you even if it embarrasses you. In big cities, *Terry* is invariably tied to questions of race." James J. Fyfe, "*Terry*: An Ex-Cop's View," 72 *St. John's L. Rev*. 1231, 1243 (1998). The officers in this case were on a neighborhood-enforcement squad that specifically investigates areas of the precinct with high levels of crime reporting. *See* Suppression Hearing Transcript at 6. And the neighborhood targeted by officers in this case also happens to have an estimated 76-90% minority population. *See* **Appendix**. Thus, allowing police to consider the "bad" neighborhood as a factor justifying a frisk is fraught with peril and comes far too close for comfort to racial discrimination.

Such a concern is hardly unrealistic. Recent experiences in our nation, notably in Ferguson, Missouri,[2] and in our own state, *see Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013), show that entire police departments are engaging in rampant

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

2 *See, e.g.*, U.S. Department of Justice, "Investigation of the Ferguson Police Department," March 4, 2015 (last visited September 26, 2016).

racial prejudice. While some examples involve clear racial animus and intentional discrimination, many involve implicit bias or policing of particular neighborhoods more aggressively, resulting in selective enforcement and prosecution of criminal laws against persons of color.

In its well-known and highly-publicized opinion on the "Stop and Frisk" policy of the New York Police Department, the Southern District of New York concluded that "[w]hether through the use of a facially neutral policy applied in a discriminatory manner, or through express racial profiling, targeting young black and Hispanic men for stops based on the alleged criminal conduct of other young black or Hispanic men violates bedrock principles of equality." *Floyd v. City of New York*, 959 F. Supp. 2d 540, 664 (S.D.N.Y. 2013). *Floyd* held that "it is impermissible for a police department to target its general enforcement practices against racially defined groups based on crime suspect data." *Id*. at 662. *Floyd* further pointed out that "[a] police department that has a practice of targeting blacks and Hispanics for pedestrian stops cannot defend itself by showing that all the stopped pedestrians were displaying suspicious behavior." *Id*. at 667. Because that rationale relies on a self-perpetuating cycle of stopping and searching minorities more often than non-minorities, the incidence of weapons or contraband reported by law enforcement will be higher for minorities because they are searched more often.

Similarly, just last week, the Supreme Judicial Court of Massachusetts recognized that there is a problem with treating flight from police as generating reasonable suspicion when the person fleeing is black. *Commonwealth v. Warren*, __ N.E.3d __, 2016 WL 5084242 (Mass., Sept. 20, 2016). An officer searching for burglary suspects saw two men who he believed matched the vague description of the suspects, but other than general proximity to the burglary location, the only factors that would give rise to reasonable suspicion were that the men were black and that they fled when they saw police. The court cited a recent internal report of the Boston Police Department documenting racial profiling by the department and suggested that flight from the police was a reasonable response to a pattern of discrimination:

> According to the study, ... black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. Black men were also disproportionally targeted for repeat police encounters. We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, in such circumstances, flight is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for . . . encounters suggests a reason for flight totally unrelated to consciousness of guilt. ***Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity***.

Id. at *6 (emphasis added). As the Massachusetts Supreme Court recognized, people living in communities that feel preyed upon by police are likely to be less interested

in a "consensual" encounter with the police, particularly because they are more likely to be detained and searched without cause.

The United States Supreme Court has upheld the consideration of a "high-crime area" as a factor in the reasonable-suspicion calculus, but its jurisprudence on the subject reflects the danger of doing so. According to the Court, being in a high-crime neighborhood itself is not sufficient for reasonable suspicion, but being in a high-crime neighborhood and then running away from a police encounter is sufficient. *Compare Brown v. Texas*, 443 U.S. 47, 52 (1979), *with Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). *See also State v. Ramsey*, 223 Ariz. 480, ¶ 26, 224 P.3d 977, 982 (App. 2010) (relying on *Wardlow* and distinguishing *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996), based on the "high-crime area" factor). But that is not what happened in *Primous*. Primous did not run away; someone nearby did. Primous continued to sit, with a child on his lap, as police approached.

AACJ and ACLU ask this Court to send a clear message to law enforcement and lower courts: neighborhood characteristics are not to be used as factors in determining reasonable suspicion unless officers can point to a specific attribute of the neighborhood relevant to the particular person and criminal activity under investigation. Furthermore, because black people in cities wrongly continue to be more susceptible to being labeled "suspicious," judges must listen to the officers'

testimony, but when the story is hard to swallow, they should look beyond the story for the real reason why the stop was made, and be vigilant in screening that testimony for unlawful racial profiling. *See State v. Maldonado*, 164 Ariz. 471, 473, 793 P.2d 1138, 1140 (App. 1990) (quoting *Davis v. Mississippi*, 394 U.S. 721 (1969)) ("a stop based on the officer's hunch and little more than the person's race or ethnic background is illegal and unconstitutional"). The ability of law enforcement to avoid using the obviously-disallowed factor of race and to instead select more creative criteria, such as "area known for criminal activity," should be seen for what it is.[3]

II. Under the correct standard articulated by this Court, the totality of the circumstances in this case did not provide individualized reasonable suspicion to detain Primous, much less to frisk him.

In concluding that reasonable suspicion existed for an officer's frisk of Primous, the court of appeals relied heavily on the officers' knowledge that they encountered Primous and his friends "in a neighborhood known for violent crimes." *Primous*, 239 Ariz. 394, ¶¶ 2-3, 372 P.3d at 339. In this context, this means only one thing: it is a license to discriminate against racial minorities and others who live in high-crime neighborhoods.

[3] Establishing an individual claim of racial profiling is extremely difficult, bordering on insurmountable, in the absence of incriminating statements by the officer. *See United States v. Armstrong*, 517 U.S. 456 (1996); *Jones v. Sterling*, 210 Ariz. 308, ¶¶ 28-31, 110 P.3d 1271, 1278 (2005).

In *Wardlow*, the Supreme Court held that officers may have reasonable suspicion when, in a high-crime area, a person sees police and runs away. *Primous* extends *Wardlow* to a new scenario: it allows stops and frisks of people who exhibit no suspicious conduct whatsoever, if ***someone else*** runs away. This is the first time that a court has endorsed the concept of guilt-by-association.[4]

On the other hand, the court of appeals has elsewhere properly recognized that use of neighborhood characteristics runs a high risk of prejudice. *In re Ilono H.*, 210 Ariz. 473, ¶ 2, 113 P.3d 696, 697 (App. 2005), involved officers patrolling "near a park on the south side of Tucson in an area of known drug and gang activity," who approached five youths wearing red clothing (frequently associated with gangs). The court of appeals stated that it "cannot authorize officers to conduct investigatory detentions of individuals merely because they have worn the wrong color clothing ***in the wrong part of town***." *Id*. ¶ 6, 113 P.3d at 698 (emphasis added).

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4 This dangerous concept has been creeping into Fourth Amendment jurisprudence for a generation, however. For example, in *State v. Johnson (Johnson III)*, 220 Ariz. 551, ¶ 4, 207 P.3d 804, 806 (quoting *State v. Johnson (Johnson I)*, 217 Ariz. 58, ¶¶ 2-10, 170 P.3d 667, 668-70 (App. 2007)), the court of appeals cited testimony from an Oro Valley police officer on loan to a gang task force that the Sugar Hill neighborhood in Tucson is well-known as associated with the Crips street gang. This association between the neighborhood and the Crips gang has now been enshrined in United States Supreme Court jurisprudence. *Arizona v. Johnson (Johnson II)*, 555 U.S. 323, 326 (2009). Before *Johnson*, this neighborhood was known only as one that is less affluent than others; now, however, through guilt-by-association, it is a gang neighborhood. It thus becomes a self-fulfilling prophecy.

In *Primous*, Officer Ohland inquired whether the men had weapons because of his experience that violent encounters have occurred in that neighborhood in the past, rendering it "inherently . . . dangerous." Suppression Hearing Transcript at 10. The court of appeals adopted this reasoning, which has the practical effect of turning dangerous all people in a high-crime neighborhood simply because they are present there. Thus, under the court of appeals' opinion, an officer seemingly may rely on crime-suspect data for a general area to conclude that all individuals in that area can be searched for weapons without any individualized reasonable suspicion.

None of the factors supporting reasonable suspicion cited by the court of appeals were individualized to Primous; rather they were all environmental factors over which Primous had no control: (1) he was in a dangerous neighborhood; (2) officers were looking for an allegedly dangerous individual, who did not match the description of Primous or his companions; (3) Primous was talking to a group of people, one of whom fled when officers approached from different directions; (4) another person in the group had a small amount of marijuana; (5) there were cameras outside the residence, making the officers nervous that they were being watched; and (6) there were three individuals stopped and only two police officers. Detaining Primous on such flimsy information was bad enough, but the *Primous* opinion goes further and endorses subjecting people to suffer the indignity of a pat-down on this basis as well.

In reaching its conclusion, the court of appeals ignored this Court's recent decision in *State v. Serna*, which held that a frisk is permissible only when two conditions are met: (1) the stop must be lawful, meaning that the officer "reasonably suspects that the person apprehended is committing or has committed a criminal offense," and (2) "to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." 235 Ariz. 270, ¶¶ 20-22, 331 P.3d 405, 410 (2014) (quoting *Johnson II*, 555 U.S. at 326-27). *Primous* impliedly does away with the first requirement altogether by holding that the totality of the circumstances can allow a frisk without any individualized reasonable suspicion that a person is engaged in criminal activity.

Also contrary to this Court's holding in *Serna*, *Primous* does not appear to require any objective basis in fact that the person subject to search is armed, let alone dangerous. In Arizona, in order to be considered armed and dangerous for purposes of a frisk, "mere knowledge or suspicion that a person is carrying a firearm" is not enough because this state "freely permits citizens to carry weapons, both visible and concealed, [and thus] the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous." *Serna*, 235 Ariz. 270, ¶ 22, 331 P.3d at 410.

The Court should make clear to Arizona law enforcement and the lower courts that the Constitution does not permit the police to detain and search an individual just because he happens to be in a "bad" neighborhood.

CONCLUSION

For these reasons, AACJ and ACLU request that this Court recognize that people should not be treated as criminal suspects merely because they live in dangerous neighborhoods and know someone who runs away from the police. This Court should note, as did the Supreme Judicial Court of Massachusetts, that racial minorities have suffered the indignity of being detained by police in far greater numbers, and that this should be considered when deciding whether officers had reasonable suspicion to detain a person.

For these reasons, this Court should grant review of Primous's petition for review.

RESPECTFULLY SUBMITTED this 30th day of September, 2016

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ David J. Euchner

David J. Euchner
Pima County Public Defender's Office
33 N. Stone Ave. #2100
Tucson, AZ 85701

Josephine Bidwill
The Bidwill Law Firm PLLC
801 N. 1st Ave.
Phoenix, AZ 85003

Attorneys for
Arizona Attorneys for Criminal Justice

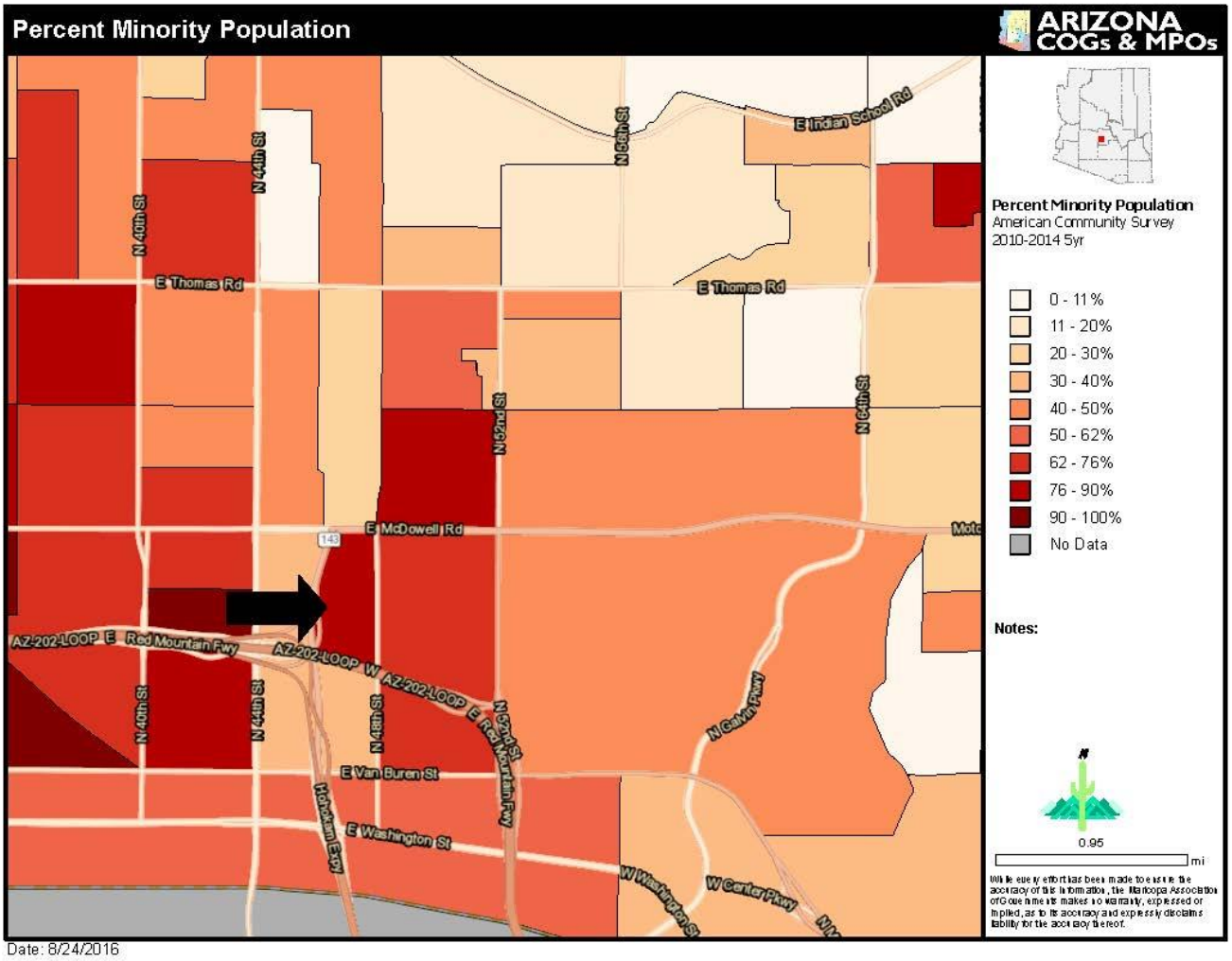
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

By /s/ Kathleen E. Brody

Kathleen E. Brody
American Civil Liberties Union Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014

Attorney for
American Civil Liberties Union of Arizona

APPENDIX



Date: 8/24/2016