No. S267522

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

MARLON FLORES,
Defendant and Appellant.

Second Appellate District, Division Eight, Case No. B305359
Los Angeles County Superior Court, Case No. BA477784
The Honorable Mildred Escobedo, Judge

ANSWER BRIEF ON THE MERITS

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CONSTITUTIONAL PROVISIONS

ISSUE PRESENTED

Was defendant's detention supported by reasonable suspicion that he was engaged in criminal activity?

INTRODUCTION

This case concerns the timing of, and justification for, an investigatory detention under the Fourth Amendment. The Court of Appeal below affirmed the denial of Flores's motion to suppress evidence, holding that police officers did not violate the Fourth Amendment when they detained him. That decision should be affirmed.

The threshold question here is at what point was Flores detained during his encounter with police. Under the Fourth Amendment, a detention ordinarily occurs when police make a show of authority such that, under the totality of the circumstances, a reasonable person would not feel free to leave. But the Constitution protects against actual detentions, not merely attempted detentions. Thus, when a person does not actually submit to the show of authority, no detention has occurred for Fourth Amendment purposes. Here, police officers made a show of authority that would have caused a reasonable person not to feel free to leave when they approached Flores on the street from either side, shined a flashlight on him, and ordered him to stand up. No detention occurred at that point, however, because Flores ignored the officers and remained crouched down, manipulating something near his feet. The detention occurred only when Flores eventually stood up in response to repeated commands.

That detention was supported by reasonable suspicion. In evaluating reasonable suspicion, it is well settled that a person's presence in a high crime area, as well as evasive or unusual behavior, are relevant considerations. Here, the police officers came upon Flores in an area known for narcotics trafficking, and where one of the detaining officers had made a drug arrest the night before. Upon seeing the officers, Flores moved from one side of a parked car to the other side. He then ducked down behind the car before standing up and looking directly at the officers. Flores ducked down again, then stood up, and then ducked down once more, where he remained as the officers approached him. When the officers illuminated Flores with a flashlight, he did not react to their presence; instead, he remained bent down, apparently pretending to tie his shoelace, for more than 25 seconds before finally complying with the officers' repeated commands to stand up. In combination, these factors supplied reasonable suspicion that Flores was possibly involved in drug activity.

To be sure, civilians are free to refuse to engage in, and to affirmatively avoid, consensual contact with police. But Flores's behavior went beyond that. Instead of simply declining to engage with the officers, Flores exhibited evasive and unusual behavior. Even if his conduct could have been innocently explained, that does not vitiate the reasonable suspicion that did exist. As the Court of Appeal below correctly held, the officers were permitted under the Fourth Amendment to briefly detain Flores to resolve any ambiguity.

STATEMENT OF THE CASE

A. Trial court proceedings

Following an encounter with police during which a gun and drugs were found in Flores's car, the Los Angeles County District Attorney charged Flores with possession of a controlled substance with a firearm (Health & Safety Code, § 11370.1, subd. (a)) and carrying a loaded, unregistered firearm (Health & Safety Code, § 25850, subds. (a) & (c)(6)). (CT 31-32.)

Flores filed a motion to suppress the evidence under Penal Code section 1538.5, arguing that the police violated the Fourth Amendment during the encounter. (CT 43-50.) At a hearing on Flores's motion to suppress, the prosecution presented the testimony of Los Angeles Police Officer Daniel Guy (Supp. RT A2-A22), and Flores moved into evidence a recording from Officer Michael Marino's body-worn camera (Supp. RT A14-A15).[1] The evidence showed the following.

At around 10:00 p.m. on May 10, 2019, Officers Guy and Marino were on patrol in an area where they knew illegal drug and gang activity were prevalent. (CT 5; Supp. RT A2, A9-A11.) They were assigned to the Northeast Division Gang Enforcement Detail. (Supp. RT A2.) Officer Guy patrolled the area daily and had made a drug-related arrest there the night before. (Supp. RT A8.) The officers pulled into a cul-de-sac where they saw Flores standing in the street, next to the rear driver's side

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[1] The two-minute bodycam recording lacks audio until roughly halfway through.

panel of a silver Nissan sedan. (Supp. RT A3, A8, A12; *see* Def. Exh. A at 00:01-00:02.) The car was parked next to a painted red curb. (Supp. RT A7-A8.) As the officers drove toward Flores, he looked in their direction, walked to the rear passenger side of the car, by the curb, and ducked down behind it. (Supp. RT A3, A7-A8, A12-A13.) Based on his knowledge that the area was known for narcotics sales and gang activity, Officer Guy suspected that Flores was "loitering for the use or sales of narcotics" and that by crouching down he was "attempting to conceal himself from the police." (Supp. RT A8-A11.)

Officer Marino's bodycam recording showed that, after the patrol car pulled up perpendicular to, and slightly behind, the Nissan, Flores stood up and rotated his arm, as if he was stretching. (Def. Exh. A at 00:15.) Flores looked in the direction of the patrol car and then crouched down again, disappearing behind the Nissan. (Def. Exh. A at 00:15-00:37.) A few seconds later, he stood up, making himself visible to the officers. (Def. Exh. A. at 00:41.) A few seconds after that, he again crouched down out of sight for a third time. (Def. Exh. A. at 00:45.)

After about five more seconds, Officers Guy and Marino stepped out of their patrol car and walked toward Flores, who remained on the sidewalk. (Def. Exh. A at 00:50.) Officer Marino approached from behind Flores, and Officer Guy approached him from the front. (Def. Exh. A at 00:55-1:00, 1:10-1:11.) Officer Marino illuminated Flores with a handheld flashlight as he walked toward him. (Def. Exh. A at 00:56.) Flores was bent over, with his back to Officer Marino, and his hands and right shoe

were concealed by his body. (Def. Exh. A at 00:50-1:00.) Flores did not react to the light or to the sound of Officer Marino's radio, nor did he react when one of the officers said, "Post up real quick man." (Def. Exh. A. at 1:00-1:05.) Flores remained in a crouched position and moved his elbows and arms as though manipulating something near his feet. (Def. Exh. A. at 00:50-1:05.) Officer Guy described the motion as "pretend[ing] to tie his shoe." (Supp. RT A14.) Seven seconds later, one of the officers repeated the instruction to "post up." (Def. Exh. A. at 1:12.) Flores remained crouched until a moment later, when the same officer told him to "hurry up." (Def. Exh. A at 1:14-1:15.)

After Flores stood up, an officer told him to put his hands behind his head and then handcuffed him. (Def. Exh. A at 1:16-1:30.) Officer Marino patted Flores down. (Def. Exh. A at 1:37-2:03.) During the pat-down, Officer Marino touched a key fob, activating the Nissan's interior lights. (Supp. RT A3, A5.) Officer Guy looked through the passenger side window of the car and saw a methamphetamine bong in plain view in the driver's side door pocket. (Supp. RT A3-A4.) He asked Flores if the car was his, and Flores confirmed that it was. (Supp. RT A5.) Officer Guy asked Flores if he had any identification, and Flores directed Officer Guy to his wallet, which was inside the car. (*Ibid.*) Officer Guy opened the wallet to retrieve Flores's identification and found a folded up dollar bill that was "hard to the touch" and contained a crystalline substance resembling methamphetamine. (Supp. RT A5-A6.) Based on these discoveries, Officer Guy believed that there might be additional

drugs or contraband in Flores's car. (Supp. RT A6.) Officer Marino searched the car and found a revolver inside a backpack on the passenger seat. (Supp. RT A6-A7.)

Based on that evidence, and after hearing the arguments of counsel (Supp. RT A22-A27), the trial court denied Flores's motion to suppress. The court stated, "The question here for the Court truly is whether there was specific articulable facts that appear to be enough ground for suspicion." (Supp. RT A27.) It found that Flores "tr[ied] to avoid contact because he [saw] the police officers and he duck[ed]." (Supp. RT A27-A28.) The court observed that it would expect "any normal human being" to stand up and react upon being approached by the police and illuminated by a flashlight. (Supp. RT A29.) Instead, the court noted, Flores did not stand up but continued to crouch down, "toying with his feet." (*Ibid.*) The court further observed that, even as the officers spoke to Flores, commanding him to stand, he remained hunched over and did not respond. (*Ibid.*) The court characterized Flores's behavior as "odd," "not normal," and "suspicious." (*Ibid.*) It found that Flores took "far too long a period of time" to stand up, even if he was trying to tie his shoe. (*Ibid.*) The court concluded: "I think the ducking and remaining hunched over is more than enough for this Court to find that there were articulable facts to find suspicion and enough for the officers to detain him . . . ." (Supp. RT A29-A30.)

Flores subsequently pleaded no contest to carrying a loaded, unregistered handgun (Health & Safety Code, § 25850, subd. (a)).

(RT 2-8.) The trial court suspended imposition of sentence and placed him on probation for three years. (RT 8.)

B. The Court of Appeal's decision

The Court of Appeal affirmed in a published opinion. It agreed with the trial court's express factual findings: that Flores saw police and tried to avoid contact with them by ducking down behind a parked car; that, during his ducking and crouching, Flores toyed with his feet and kept his hands out of sight despite the flashlight illumination and radio noise; and that, as the officers approached Flores "in an obvious way," Flores "persisted in his odd crouch position for 'far too long a period of time.'" (Opn. 13.) The court determined that the detention "began when the officer told Flores to stand and put his hands behind his head." (Opn. 13.) And it concluded that, although there may have been an innocent explanation for Flores's crouching without acknowledging the officers, "in combination with the other factors, a reasonable officer had a reasonable basis for investigating further to resolve this ambiguity, because nervous and evasive behavior is a pertinent factor in determining whether suspicion is reasonable." (Opn. 14.)

One justice dissented, cautioning that the majority's holding threatened to "allow police detention based on commonplace conduct subject to interpretation." (Dis. Opn. 1.) In the dissent's view, Flores was detained when "the officers positioned their marked patrol car a little askew to and behind Flores's car, shined a 'huge' spotlight on him, and converged on him" from opposite sides. (Dis. Opn. 4.) The dissent noted that Flores was

hemmed in at that point by a car and an "iron spiked" fence, with "no escape route." (Dis. Opn. 4.) Given that the detention occurred before Flores bent down for "too long" despite the officers' orders for him to stand, the dissent determined that the two remaining considerations—"that he was standing next to a car in a high crime neighborhood and had moved out of the street to the other side of the car and bent over when [the officers] believed he had seen their patrol car"—did not amount to reasonable suspicion for a detention. (Dis. Opn. 4.) The dissent further concluded that, even under the majority's view that the detention occurred later, the officers still lacked reasonable suspicion because the testifying officer could not articulate what criminal activity he suspected Flores was engaged in. (Dis. Opn. 5.) The dissent also disagreed with the trial court's findings that Flores took too long to stand up and that Flores was trying to avoid police contact by ducking, given that people have a right to avoid police conduct by simply going about their business. (Dis. Opn. 5-7.)

ARGUMENT

FLORES WAS NOT DETAINED UNTIL HE COMPLIED WITH OFFICERS' ORDERS TO STAND, AND HIS EVASIVE AND UNUSUAL BEHAVIOR IN A HIGH-CRIME AREA SUPPLIED REASONABLE SUSPICION JUSTIFYING THE DETENTION

Flores argues that he was detained once officers approached him on foot and that his movement from one side of the car to the other and his presence in a high crime area were insufficient to support the detention. (OBM 18-30.) Flores overlooks that a detention does not occur until an individual submits to a law enforcement officer's show of authority. Here, that did not occur

until Flores finally stood up after several orders to do so. And under longstanding United States Supreme Court precedent, an individual's presence in a high crime area at night, coupled with evasive behavior, can constitute reasonable suspicion. The circumstances of the encounter here supported a reasonable belief that Flores was involved in the sale or use of narcotics, justifying his detention at the time he submitted to the officers' authority.

A. Legal framework

Where a search or seizure is unlawful, the evidence derived from it will ordinarily be excluded from a later criminal prosecution in order to deter unlawful police conduct. (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1220.) In California criminal proceedings, evidence may be suppressed on grounds of unlawful search or seizure only when its admission would violate the federal Constitution's Fourth Amendment, and not where there has been a violation of state law only. (See *In re Lance W.* (1985) 37 Cal.3d 873, 886-887; see also *California v. Greenwood* (1988) 486 U.S. 35, 44-45; *People v. Glaser* (1995) 11 Cal.4th 354, 363.) On appeal from a motion to suppress evidence, the reviewing court will accept the trial court's factual findings—express or implied—when supported by substantial evidence. (*People v. Silveria and Travis* (2020) 10 Cal.5th 195, 232.) The reviewing court will then independently decide whether the search or seizure was reasonable under the Fourth Amendment. (*Id.* at p. 232.)

In this case, Flores contends that the police violated the Fourth Amendment because they unlawfully detained him; he does not challenge the officers' subsequent conduct in patting him down and searching his car or arresting him. The outcome here thus turns on when the encounter between police and Flores became a detention for Fourth Amendment purposes and whether reasonable suspicion to detain Flores existed at the point of detention.

1. The Fourth Amendment permits consensual encounters between law enforcement officers and the public

Under the Fourth Amendment, consensual encounters are interactions between law enforcement officers and the public in which a person's liberty has not been restrained and the person may terminate the encounter at any time. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; *People v. Brown* (2015) 61 Cal.4th 968, 974.) Such an encounter does not constitute a seizure and therefore need not be justified by a showing that an individual has committed, or is about to commit, a crime. (*Manuel G.*, at p. 821.)

Consensual encounters are fundamental to "a wide variety of legitimate law enforcement practices" (*United States v. Mendenhall* (1980) 446 U.S. 544, 554 (lead opn. of Stewart, J.)), "some of which are wholly unrelated to a desire to prosecute for crime" (*Terry v. Ohio* (1968) 392 U.S. 1, 13). For example, consensual encounters allow officers to approach and help stranded motorists, lost children, disoriented or injured civilians, or civilians otherwise in distress in public places. As the high court has held, "law enforcement officers do not violate the

Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." (*Florida v. Royer* (1983) 460 U.S. 491, 497 (lead opn. of White, J.); accord, *Florida v. Bostick* (1991) 501 U.S. 429, 434; see also *People v. Tacardon* (2022) 14 Cal.5th 235, 241 ["An officer may approach a person in a public place and ask if the person is willing to answer questions"].)

2. A detention occurs when a law enforcement officer makes a show of authority over a person and the person submits to the show of authority

An investigatory detention is a seizure for Fourth Amendment purposes and can occur without physical force. (*California v. Hodari D.* (1991) 499 U.S. 621, 626-627.) Such a detention is effected when: (1) an officer, through a "'show of authority, has in some way restrained the liberty of a citizen,'" so that "'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave or otherwise terminate the encounter'"; and (2) "the person actually submits to the show of authority." (*Brown*, *supra*, 61 Cal.4th at p. 974, some internal quotation marks and punctuation omitted.) Where a person does not submit to the show of authority, no Fourth Amendment seizure has occurred; the seizure does not occur until actual submission. (See *Hodari D.*, at pp. 626-627.)

There is no bright-line rule for when a police-civilian interaction progresses beyond a consensual encounter under the free-to-leave standard. (See *Michigan v. Chesternut* (1988) 486 U.S. 567, 572.) Rather, the assessment is made by looking at the totality of the circumstances. (*Tacardon*, *supra*, 14 Cal.5th at p. 241). The totality-of-the-circumstances test "assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation." (*Manuel G.*, *supra*, 16 Cal.4th at p. 821.) As this Court has recognized, relevant circumstances may include "the presence of multiple officers, an officer's display of a weapon, the use of siren or overhead emergency lights, physically touching the person, the use of a patrol car to block movement, or the use of language or of a tone of voice indicating that compliance with the officer's request is compelled." (*Tacardon*, at pp. 241-242, internal citations omitted.) Other relevant factors may include the time and location of the contact and whether the officer accuses the individual of a crime, retains an individual's identification, or uses threatening or intimidating behavior. (See, e.g., *United States v. Drayton* (2002) 536 U.S. 194, 204; *People v. Linn* (2015) 241 Cal.App.4th 46, 58.)

The inquiry, moreover, is an objective one. (*Chesternut*, *supra*, 486 U.S. at p. 574.) This means that the "officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred." (*Manuel G.*, *supra*, 16 Cal.4th at p. 821; accord, *Brigham City,*

Utah v. Stuart (2006) 547 U.S. 398, 404-405.) An objective inquiry ensures "consistent application from one police encounter to the next" and allows "the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." (*Chesternut*, at p. 574.)

Further, the objective "reasonable person test presupposes an *innocent* person"—not a reasonable criminal. (*Bostick*, *supra*, 501 U.S. at p. 438.) And although an officer's approaching an individual might convey a level of official interest in the person, that does not mean that a reasonable, innocent person would not feel free to leave or terminate the encounter. (*Id.* at pp. 434-435.) "People targeted for police questioning rightly might believe themselves the object of official scrutiny. Such directed scrutiny, however, is not a detention." (*People v. Chamagua* (2019) 33 Cal.App.5th 925, 929; *People v. Perez* (1989) 211 Cal.App.3d 1492, 1496; see also *People v. Franklin* (1987) 192 Cal.App.3d 935, 940.) Relatedly, the fact that many civilians will choose to stay and engage with a police officer does not mean that a reasonable, innocent person would not feel free to terminate the encounter. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." (*INS v. Delgado* (1984) 466 U.S. 210, 216.)

3. A detention complies with the Fourth Amendment when supported by reasonable suspicion of criminal activity

A brief investigative detention is reasonable, and therefore lawful under the Fourth Amendment, when supported by

reasonable suspicion of criminal activity. (*People v. Celis* (2004) 33 Cal.4th 667, 674; see also *Terry*, *supra*, 392 U.S. at pp. 6-7; *People v. Fayed* (2020) 9 Cal.5th 147, 182 [essential question in assessing constitutionality of search or seizure under Fourth Amendment is reasonableness].) Reasonable suspicion exists when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." (*Brown*, *supra*, 61 Cal.4th at p. 981, citations and internal quotation marks omitted.) Like the free-to-leave test, reasonable suspicion is measured objectively, "based on the facts and circumstances known to the officer but without regard to the officer's subjective state of mind." (*People v. Flores* (2019) 38 Cal.App.5th 617, 626.) The possibility of an innocent explanation does not undermine reasonable suspicion; what is required are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." (*Id.* at p. 986.) Although a mere hunch does not amount to reasonable suspicion, the standard requires "considerably less than [the] proof of wrongdoing by a preponderance of the evidence" that is necessary to establish probable cause for an arrest. (*United States v. Sokolow* (1989) 490 U.S. 1, 7.) While probable cause to arrest requires a "'fair probability'" or a "'substantial chance'" of criminal activity, reasonable suspicion requires only a "moderate chance." (*Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.)

B. Flores was not detained until he complied with the officers' orders to stand up

It is not in dispute that Flores was detained—the question is *when* he was detained. Flores contends he was detained the moment the officers approached him on foot. (OBM 18-22.) But Flores misses a critical part of the detention analysis: A person faced with a show of authority from police is not detained until they actually submit to the show of authority. (*Hodari D.*, *supra*, 499 U.S. at p. 626.) In this case, that occurred when Flores finally stood up in response to the officers' repeated commands.[2]

The following facts bear on the threshold question of when a reasonable person would no longer have felt free to leave the encounter. Flores was standing in the street, next to the rear driver's side panel of the parked Nissan, when the officers pulled into the cul-de-sac. (Supp. RT A3.) Upon seeing the officers, Flores moved from the driver's side of the car to the rear passenger's side panel, which was next to the sidewalk. (Supp. RT A3, A7-A8, A12-A13.) The officers parked their patrol car perpendicular to and behind the Nissan. (Def. Exh. A at 00:06.) Approximately 45 seconds later, the officers got out of the patrol car and Officer Marino pointed his flashlight at Flores,

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[2] Flores's submission to the officers' show of authority was not a focus of the parties' arguments in either of the courts below. Consideration of this part of the Fourth Amendment analysis is appropriate here, however, because "the factual basis for the theory is fully set forth in the record." (*People v. Robles* (2000) 23 Cal.4th 789, 800-801, fn. 7.)

illuminating him. (Def. Exh. A at 00:50-00:56.) The officers walked toward Flores from different sides, one in front of him and one from behind (at that point, the Nissan was to Flores's left, and a metal fence was to his right). (Def. Exh. A at 00:55-1:00, 1:10-1:11.) One officer asked Flores to "post up." (Def. Exh. A at 1:00-1:05.) Almost 10 seconds later, the request was repeated. (Def. Exh. A at 1:12-1:13.) A moment after that, an officer told Flores to "hurry up." (Def. Exh. A at 1:14-1:15.) Flores stood up, and an officer told Flores to put his hands behind his head. Flores complied and was handcuffed. (Def. Exh. A. 1:16-1:30.)[3]

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[3] The bodycam recording that was admitted at the suppression hearing appears to show reflections of possible flashing emergency lights during the encounter. (See Def. Exh. A at 00:52-1:05, 1:28-1:31, 1:55-2:03.) It is unclear when those lights were activated or what their source was. No testimony was given at the hearing about the use of emergency lights, and Flores has made no argument—either in the courts below or in his opening brief here—that this was a relevant factor in the detention. Because the facts on this point are undeveloped, any such argument based on them is forfeited. (*People v. Williams* (1999) 20 Cal.4th 119, 129 [when a defendant moves to suppress pursuant to section 1538.5, he "must inform the prosecution and the court of the specific basis for [his] motion" or risk forfeiting the issue on appeal]; accord, *Silveria*, *supra*, 10 Cal.5th at pp. 235-236 [defendant's suppression motion and argument on the motion failed to "inform the prosecution of the need to adduce greater detail" as to a fact he contended was relevant for the first time on appeal; thus, the issue was forfeited].) If the argument is not forfeited, however, and to the extent that the outcome of the detention analysis may depend on additional facts regarding the possible use of emergency lights, remand would be appropriate for further development of the record. (See *Tacardon*, *supra*, 14

(continued…)

It was not until the officers told Flores to stand up for the first time that a reasonable person would not have felt free to leave or otherwise terminate the encounter. Prior to that point, the officers had only parked their patrol car near the Nissan, shined a flashlight at Flores, and walked at a normal pace in his direction. Although they approached him from opposite sides, they did not block his egress. (See *post*, pp. 26-29.) These factors are all consistent with ordinary encounters between citizens and law enforcement. The directive to stand up, however, cemented the officers' show of authority, as "directives represent a significant exercise of coercive authority." (*Linn*, *supra*, 241 Cal.App.4th at p. 67.)

To be clear, a request from a police officer to step to the side (*Florida v. Rodriguez* (1984) 469 U.S. 1, 5-6) or onto a sidewalk (*People v. Parrott* (2017) 10 Cal.App.5th 485, 494) ordinarily would not, standing alone, cause a reasonable person not to feel free to leave. Indeed, even a potentially more coercive request that a person remove their hands from their pockets may fall within the realm of a consensual encounter. (See *Parrott*, at p. 494; *People v. Ross* (1990) 217 Cal.App.3d 878, 885) But in this case, the officer's instruction to "post up" is not the only relevant factor. The officers had already positioned their patrol car near

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(…continued)

Cal.5th at p. 256 [remanding to allow further factual findings by the trial court].)

Flores and the parked Nissan, approached him from opposite sides, and shined a flashlight at him. When they told him to stand up, these accumulated circumstances then amounted to a show of authority that would have caused a reasonable person not to have felt free to leave. (See *Tacardon*, *supra*, 14 Cal.5th at p. 242 [in determining whether a detention occurred, relevant circumstances may include the use of language or tone of voice indicating that an officer's request must be complied with]; *People v. Aldridge* (1984) 35 Cal.3d 473, 476-477 [officer's order that four individuals put down their packages and stand next to the patrol car constituted a detention]; *Linn*, *supra*, 241 Cal.App.4th at p. 66 [officer's direction to put out cigarette and put down soda "would heighten an objectively reasonable person's suspicion that she was . . . not free to leave"]; *People v Roth* (1990) 219 Cal.App.3d 211, 215, fn. 3 [detention occurred in part because detaining officer "issued a command" to approach him]; *Franklin*, *supra*, 192 Cal.App.3d at p. 940 [no detention in part because, despite scrutiny directed at defendant, officer did not direct any "verbal requests or commands" to him.)

In this particular case, however, a Fourth Amendment detention did not occur at the moment the officers told Flores to stand up. Although that show of authority would have caused a reasonable person not to feel free to leave, the record here establishes that Flores did not submit to the show of authority. And while an "officer may make a seizure by a show of authority and without the use of physical force," there is "no seizure without actual submission." (*Brendlin v. California* (2007) 551

U.S. 249, 254; *Hodari D.*, *supra*, 499 U.S. at p. 628 [not-free-to-leave test "states a *necessary*, but not a *sufficient*, condition for seizure"].) The United States Supreme Court has explained that the Fourth Amendment protects against unlawful actual seizures and does not apply to circumstances involving only an attempted seizure—that is, a situation in which a reasonable person might not have felt free to leave but the target of the seizure still did not submit to the show of authority. (*Hodari D.*, *supra*, at p. 627.) As a matter of deterrence, it is not necessary to extend Fourth Amendment protection to attempted seizures "[s]ince policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun." (*Ibid.*) And as a matter of public policy, the submission requirement promotes public safety, in that it encourages compliance with police orders and reduces the chance of street pursuits. (*Ibid.*)

Ascertaining when, if at all, an individual submits to an official show of authority "can be a difficult, fact-intensive inquiry." (*United States v. Cloud* (4th Cir. 2021) 994 F.3d 233, 244.) For that reason, it is useful to consult federal court decisions evaluating the Fourth Amendment submission requirement in various factual scenarios. (See, e.g., *Tacardon*, *supra*, 14 Cal.5th at p. 244 [surveying "federal and sister-state authorities" as to Fourth Amendment detention question].) Federal appellate courts have held that whether a person has submitted to a show of authority is assessed based on "the view of a reasonable law enforcement officer" under "the totality of the circumstances." (*United States v. Roberson* (10th Cir. 2017) 864

F.3d 1118, 1122, citing *United States v. Salazar* (10th Cir. 2010) 609 F.3d 1059, 1064-1065; see also *United States v. Cardoza* (1st Cir. 1997) 129 F.3d 6, 14, fn. 4 ["given the generally objective standards employed in Fourth Amendment seizure analysis, we would see little reason to inquire into the subjective intent of the detainee in making the determination whether or not he or she has 'submitted to' a show of authority"].) In determining whether a person submits to an officer's show of authority, courts have characterized the "reasonable officer" as "prudent, cautious, and trained." (*United States v. Mosley* (10th Cir. 2014) 743 F.3d 1317, 1326, citing *Salazar*, *supra*, 609 F.3d at p. 1065.) Submission requires, "at minimum, that a suspect manifest compliance with police orders." (*Roberson*, *supra*, at p. 1122, citing *Mosley*, *supra*, at p. 1326; see also *United States v. Waterman* (3d Cir. 2009) 569 F.3d 144, 146 fn. 3 [collecting cases].)

There is a wide range of possible conduct in response to a show of authority between the flight in *Hodari D.* and the passive acquiescence described in *Brendlin*, and the same facts can have varying legal significance based on the context. (*Cloud*, *supra*, 994 F.3d at p. 244.) While flight is the most obvious example of a failure to submit to a show of authority, actual flight is not a requirement of non-submission. For example, in *United States v. Johnson* (D.C. Cir. 2000) 212 F.3d 1313, the court held that the driver of a parked vehicle did not submit to a show of authority—an order to put his hands up—when he made "continued furtive gestures" including "shoving down" motions that were "suggestive of hiding (or retrieving) a gun." (*Id.* at pp. 1316-

1317.) Similarly, when a suspect responded to armed officers' orders to put his "hands up" by making furtive gestures consistent with hiding or retrieving a gun, he did not submit to the show of authority until he later put his hands up. (*Mosley*, *supra*, 743 F.3d at p. 1327; see also *United States v. Stover* (4th Cir. 2015) 808 F.3d 991, 999 [driver who got out of car and continued walking to front of car after being ordered to get back in by officers who parked behind him did not submit until he got back into car]; *United States v. Lender* (4th Cir. 1993) 985 F.2d 151, 153-155 [no submission where defendant walked away from approaching officers, ignoring their orders, "fumbling with something" at his waist, and halting just before his gun fell out of his pants].)

Flores's conduct is consistent with the behavior at issue in the decisions holding that there was no submission to a show of police authority. Given that Flores remained in a crouched position for more than 20 seconds after being ordered to "post up," Flores did not immediately manifest compliance with the officers' orders. Furthermore, he was not simply frozen but continued to "toy" with his feet. (See *Roberson*, *supra*, 864 F.3d at p. 1125; *Mosley*, *supra*, 743 F.3d at p. 1327.) As a result, Flores did not submit to the show of authority, and therefore was not actually detained, until he objectively manifested compliance with the officers' orders by standing up. (See *Roberson*, *supra*, at p. 1125 ["whether and when an individual submits to a show of authority turns on the perception of a reasonable officer"].)

This is not a case in which a seizure occurred by virtue of passive acquiescence to a show of authority. (See *Brendlin*, *supra*, 551 U.S. at p. 262 [explaining that passenger in car "had no effective way to signal submission while the car was still moving, but once it came to a stop he could, and apparently did, by staying inside"].) Passive acquiescence can occur, for example, "when a stationary suspect reacts to a show of authority by not fleeing, making no threatening movement or gesture, and remaining stationary." (*United States v. Lowe* (3d Cir. 2015) 791 F.3d 424. 433-434]; see also *United States v. Black* (4th Cir. 2013) 707 F.3d 531, 536, fn. 3.)

Here, while Flores did not take flight, he also did not remain still or respond to the officers' commands to stand up, but instead continued to appear to manipulate something near his feet. Flores could have indicated his submission by standing up, as directed by the officers, or even by simply raising his head and looking at them. (Compare *Lowe*, *supra*, 791 F.3d at p. 433 [passive acquiescence where Lowe was "frozen" and "shocked" and did not "move[] his hands or arms in any way" or "otherwise act[] to rebuff the officers' authority"], with *Roberson*, *supra*, 864 F.3d at pp. 1126-1127 [no passive acquiescence where Roberson did not merely remain seated like Brendlin, but also immediately made furtive gestures inconsistent with submission to authority].)

Nor is this a case in which the officers put the suspect in a situation where he could not effectively leave, such as by confiscating his identification, so that to remain stationary was

his only option. (See *Black*, *supra*, 707 F.3d at p. 538 & fn. 3 [defendant passively acquiesced to officers' show of authority by remaining at scene after his ID was taken and pinned to the uniform of one of the many police officers while officers frisked other individuals].) Instead, Flores ignored the officers' orders to stand up, remained bent over, and continued to move his hands near his feet, out of the view of the officers, "without restraint, hinderance, or regard to the officers' presence." (*Cloud*, *supra*, 994 F.3d at p. 246.) Under the circumstances of this case, while there may have been an *attempted* seizure when the officers approached Flores from either side behind the car and ordered him to stand, there was no *actual* seizure until Flores finally stood up in response to the officers' commands. (See *Hodari D.*, *supra*, at p. 627.)

Flores argues that the detention happened earlier—when the officers first approached him from either side, and before they issued any command to stand up, because a reasonable person would not have felt free to leave at that point. (OBM 18-22.) Flores, however, fails to address the rule that a Fourth Amendment detention is not accomplished until a person submits to the show of authority. Thus, regardless of when a reasonable person would not have felt free to leave, the detention in this case still did not occur until the point when Flores finally submitted to the show of authority by standing up.

In any event, Flores's argument about the timing of when a reasonable person would not have felt free to leave is unpersuasive. He emphasizes in particular that, as the officers

got out of their patrol car and approached him, they shined a "spotlight" at him. (OBM 20-22; see also Dis. Opn. 4 [stating that the officers "shined a 'huge' spotlight" on Flores].) There is no evidence in the record, however, that the officers used their patrol car's spotlight.[4] While one officer used a handheld flashlight to illuminate Flores, there is little reason to treat the use of a handheld flashlight as similar to the use of a spotlight, which is generally understood to be brighter and more powerful than a flashlight and therefore of greater potential coercive force. And even if the use of a flashlight could be considered similar to the use of a spotlight for Fourth Amendment purposes, this Court in *Tacardon* made clear that the use of a spotlight is not determinative but is simply part of all the relevant circumstances that inform whether a detention occurred. (*Tacardon*, *supra*, 14 Cal.5th at pp. 247-248.) Were that not the case, law enforcement officers would be greatly hampered in engaging in the same sorts of consensual encounters after sundown that would plainly be permissible during the daytime. (See *id.*, at pp. 246-247 & fn. 1.)

Like the spotlight in *Tacardon*, the officer's use of the flashlight here was not particularly coercive. The officer appeared to use the flashlight as "a matter of course" for a

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[4] As shown in the bodycam recording, the fence surrounding the residence at the end of the cul-de-sac cast a shadow away from the residence, indicating that the primary sources of light were those attached to the building. (Def. Exh. A at 00:55-00:57, 1:14-1:20.)

nighttime encounter, and there was no evidence that it was "unusually bright or flashing" or that Flores was "blinded or overwhelmed by the light," especially given that the light illuminated his back. (*Tacardon*, *supra*, 14 Cal.5th at p. 248.) In fact, Flores seemed to ignore it entirely. Certainly, the flashlight would have been noticeable and might have prompted a reasonable person to react—a point the trial court made in observing that the officers directed a "huge light" at Flores (Supp. RT A29)—but it was not so coercive as to convert the encounter into a detention. (*See Tacardon*, *supra*, 14 Cal.5th at p. 248 ["Certainly, a reasonable person would notice the deputy's use of a spotlight, and depending on how it is used, a spotlight may contribute to the coerciveness of a police encounter. But under the totality of the circumstances here, Tacardon was not detained"].)

Flores also argues that, in addition to using the flashlight, the officers "'converged' on him from both directions" so that he "had no escape route." (OBM 22.) As the bodycam recording shows, the officers did approach Flores from opposite sides—one from behind him and one from in front. (Def. Exh. A at 00:50-00:57.) Nevertheless, there was ample space for Flores to get up and walk away. Officer Marino, who was wearing the bodycam, stood several feet behind Flores, who was kneeling close to the rear right bumper of the parked Nissan. (Def. Exh. A at 00:58-1:00.) Flores had an open path into the street by walking behind the parked car. Indeed, he could have also gotten into the parked car—which belonged to him—and driven away, as the patrol car

was not parked in front of the Nissan. (See Def. Exh. A at 00:57-1:00; *Franklin*, *supra*, 192 Cal.App.3d at p. 940 ["Certainly, an officer's parking behind an ordinary pedestrian reasonably would not be construed as a detention. No attempt is made to block the way"]; *United States v. Summers* (9th Cir. 2001) 268 F.3d 683, 687 [interaction did not rise to level of investigatory stop where defendant's car was only partially blocked by patrol car and "[n]othing prevented him from leaving the scene on foot"].) Similarly, Flores could have walked forward, as the sidewalk was wide enough for at least two individuals to comfortably pass and Officer Guy was several feet, if not yards, away. (Def. Exh. A at 00:58-1:07.)

In light of Flores's ability to walk away, the officers' physical positions, along with their use of a flashlight, would not have caused a reasonable person to feel not free to leave. (See *People v. Coulombe* (2000) 86 Cal.App.4th 52, 55, 57, fn. 3 [no detention of person who was seated in a wheelchair until he was patted down, despite the fact that one "officer approached defendant from his left side and the other from his right side"]; cf. *In re Edgerrin J.* (2020) 57 Cal.App.5th 752, 760 [detention "plainly occurred . . . when four officers stepped out of their vehicles after parking and walked to each door of the sedan for the admitted purpose of preventing its occupants from leaving"].) Some further conduct

or other indication on the part of the officers—such as the commands that they eventually issued—was required.[5]

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[5] Flores additionally suggests that his race should weigh into whether a reasonable person would have felt free to leave or otherwise terminate the encounter. (OBM 19-20.) It cannot be gainsaid that some individuals' reactions to police contact might be influenced in ways that correlate with race. (See, e.g., *Tacardon*, *supra*, 14 Cal.5th at p. 264 (dis. opn. of Liu, J.).) But the Fourth Amendment test for when a seizure occurs is an objective one that does not change based on such classifications. (See *Chesternut, supra,* 486 U.S. at p. 574 ["This 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."]; see also *United States v. Knights* (11th Cir. 2021) 989 F.3d 1281, 1289 ["we may not consider race in deciding whether a seizure has occurred, and the objective circumstances of Knights's encounter with the police remain dispositive"].) A test that varied according to particular racial or other categories, however those might be determined for Fourth Amendment purposes, would, at a minimum, seriously complicate this area of the law as well as real world police-citizen encounters. (See *United States v. Easley* (10th Cir. 2018) 911 F.3d 1074, 1082 ["Requiring officers to determine how an individual's race affects her reaction to a police request would seriously complicate Fourth Amendment seizure law. . . . There is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population. Thus, there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures"].)

C. Flores's evasive and unusual behavior in an area known for narcotics and gang activity justified the investigative stop

Flores's detention at the point when he complied with the officers' commands was supported by reasonable suspicion. Not only was Flores present in an area known for narcotics trafficking and gang activity—and where Officer Guy had made a narcotics arrest the night before—but he also engaged in evasive and unusual conduct. He repeatedly ducked and then stood up behind a parked car after seeing the officers and then failed to react to the officers when they approached him and illuminated him with a flashlight. And he continued to manipulate something near his feet as the officers asked him to "post up," finally standing only after repeated commands to do so. While each of those facts individually might not necessarily amount to reasonable suspicion, together they justified the detention in this case.

The prevalence of crime in a particular area "is a factor that can lend meaning to [a] person's behavior" (*People v. Limon* (1993) 17 Cal.App.4th 524, 532) and is a well-established ingredient of reasonable suspicion (see *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [that stop occurred in a "high crime area" is one of the "relevant contextual considerations"]; *People v. Souza* (1994) 9 Cal.4th 224, 241 ["An area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under the Fourth Amendment"]). While the prevalence of crime in an area does not by itself justify a detention (*Wardlow*, at p. 124; *People v. Casares* (2016) 62 Cal.4th 808, 838, overruled on another ground by *People v.*

Dalton (2019) 7 Cal.5th 166, 263), this Court has stated that it would be "the height of naiveté not to recognize that the frequency and intensity [of criminal activities] are greater in certain quarters than in others" (*Souza*, at p. 241).

Here, undisputed evidence was presented at the suppression hearing that crime was prevalent in the area in which the officers came upon Flores: Officer Guy testified that the area was known for gang activity and narcotics trafficking. (Supp. RT A9-A11.) As an officer with the LAPD's Gang Enforcement Detail, he conducted daily patrols in the area and was familiar with the particular cul-de-sac where Flores was ultimately detained, as it was a known gang hangout. (Supp. RT A2, A8-A10.) Furthermore, Officer Guy had personally made several arrests in the area and had aided other officers in making arrests there; in fact, Officer Guy had made a narcotics arrest in the same location the night before he encountered Flores. (Supp. RT A8.)

Law enforcement officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." (*United States v. Arvizu* (2002) 534 U.S. 266, 273; see also *People v. Superior Court* (*Kiefer*) (1970) 3 Cal.3d 807, 827 [training and experience of officers is appropriate consideration].) Because the officers in this case knew about the prevalence of gang and drug crime in the area where they encountered Flores, that was a proper consideration supporting reasonable suspicion to detain him. (See *Flores*, *supra*, 38 Cal.App.5th at p. 626 [assessment of reasonable suspicion is

"based on the facts and circumstances known to the officer"]; see also *Mosley*, *supra*, 743 U.S. at p. 1328 [reasonable suspicion properly based in part on officer's testimony about his familiarity with criminal activity in the area where the defendant was detained].)

That the officers encountered Flores in a high-crime area gives context and significance to what is the most prominent factor here: Flores's unusual and evasive behavior after seeing the police. Courts have routinely deemed nervous and evasive conduct to be pertinent to the assessment of reasonable suspicion. (See *Wardlow*, *supra*, 528 U.S. at p. 124; *In re H.M.* (2008) 167 Cal.App.4th 136, 144.) Although flight is the "consummate act of evasion" (*Wardlow*, *supra*, at p. 124), evasiveness encompasses a wide variety of conduct, including: bending down upon being seen by the police (*Souza*, *supra*, 9 Cal.4th at p. 241); fidgeting in a vehicle stopped by police (*People v. Fews* (2018) 27 Cal.App.5th 553, 560); keeping one's hands out of view (*ibid.*); making frightened, confused, or nervous facial expressions (*In re H.M.*, *supra*, 167 Cal.App.3d at p. 144); looking over one's shoulder (*ibid.*); and reaching for something out of view of police officers (*People v. King* (1989) 216 Cal.App.3d 1237, 1239-1240).

Flores's conduct here was, as the trial court properly observed, "odd," "not normal," and "suspicious." (Supp. RT A29.) As the officers pulled into the cul-de-sac, Flores moved from the rear driver's side panel of the parked Nissan, which was in the street, to the rear passenger's side panel of the car, which was next to the sidewalk. (Supp. RT A3.) He then ducked down

behind the car. (*Ibid.*) When he stood up, the officers had already stopped their patrol vehicle behind, and perpendicular to, the Nissan. (Def. Exh. A at 00:14-00:15.) Flores looked directly at the patrol car before bending down again and disappearing from view. (Def. Exh. A at 00:15-00:37.) Seconds later, Flores stood up again—this time for just a few seconds—before he again bent down out of view. (Def. Exh. A at 00:40-00:45.)

As the officers approached, Flores remained in a crouched position with his hands moving by his feet. (Def. Exh. A at 00:55-1:00.) He did not react to the flashlight that illuminated him, nor did he react to the sounds of the officers' radios. (Def. Exh. A at 00:55-1:00.) Flores also did not react to the officer appearing in front of him. (Def. Exh. A at 00:57-1:14.) And Flores did not comply with—or even acknowledge—the officers' instructions to "post up." (Def. Exh. A at 1:00-1:05, 1:10-1:14.) Instead, for a period that lasted roughly 25 seconds from the time the officers first got out of their patrol car to when one officer told him to "hurry up," Flores remained in a crouched position and continued "toying with his feet." (Supp. RT A29; see Def. Exh. A at 00:50-1:14.) This was evasive and unusual behavior that was sufficient, under the totality of the circumstances, to support a reasonable suspicion that Flores was "loitering for the use or sales of narcotics" (Supp. RT A8), permitting the officers to detain him.[6]

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[6] Flores is mistaken in arguing that the testifying officer was unable to "articulate what criminal activity he suspected (continued…)

But even if the detention occurred as early as Flores contends—when the officers approached him on foot and before they issued any commands—there was still reasonable suspicion to detain him at that point. Prior to their approach on foot, the officers already knew that crime was prevalent in the area in which they encountered Flores. (See *ante*, pp. 31-32.) And although some of Flores's evasive and unusual behavior occurred in the interval between when the officers walked up to him on the sidewalk next to the Nissan and when he finally stood up in response to their commands, Flores had already exhibited suspicious behavior before the officers approached. Prior to that point, the officers had seen Flores walk behind the parked car and duck out of view three times. (Supp. RT A3; Def. Exh. A at 00:07-00:45.)

This was not "commonplace conduct" under the circumstances. (See Dis. Opn. 1.) Indeed, standing and ducking three times is generally inconsistent with the commonplace act of

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(…continued)

Flores was engaged in." (OBM 24, 30; see also Dis. Opn. 5.) Officer Guy was quite clear in his testimony about Flores's suspected conduct: "[I] believed that [Flores] was there loitering for the use or sales of narcotics." (Supp. RT A8.) In any event, Officer Guy's subjective belief is irrelevant because the reasonable suspicion test is an objective one. (*Edgerrin J.*, *supra*, 57 Cal.App.5th at p. 762, citing *Flores*, *supra*, 28 Cal.App.5th at p. 262 ["The reasonable suspicion standard is objective in nature, 'based on the facts and circumstances known to the officer but without regard to the officer's subjective state of mind'"].)

tying shoelaces. Even if Flores truly was tying his shoes, or was engaged in some other innocent act, the behavior was, at the very least, ambiguous. Law enforcement officers are permitted to make "commonsense judgments and inferences about human behavior." (*Kansas v. Glover* (2020) 589 U.S. ___, 140 S.Ct. 1183, 1188, citations and internal quotation marks omitted.) And as the high court has noted, even in *Terry*, "the conduct justifying the stop was ambiguous and susceptible of an innocent explanation . . . [but] *Terry* recognized that the officers could detain the individuals to resolve the ambiguity." (*Wardlow*, *supra*, 528 U.S. at p. 125; see also *Royer*, 460 U.S. at p. 498 [reasonable suspicion warrants temporary detention "to verify or dispel" the suspicion].) Here, a reasonable inference from Flores's suspicious behavior and his presence in a high crime area is that criminal activity was afoot, and the officers were entitled to resolve any ambiguity.

The United States Supreme Court's analysis in *Wardlow* is instructive, as it is based on facts similar to the ones in this case. There, two officers were driving the last police car of a "four car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions." (*Wardlow*, *supra*, 528 U.S. at p. 121.) As the caravan passed by a building, one of the two officers noticed the defendant, who was holding an opaque bag. The defendant looked in the direction of the officers and fled. The officers pursued the defendant and then stopped and frisked him, after which they arrested him for possession of a handgun. (*Id.* at p. 122.) In analyzing whether the police had

violated the Fourth Amendment, the Supreme Court highlighted two factors: that the defendant was present in an area of heavy narcotics trafficking and that he fled without being provoked. Based on these two factors, the Court held that the officers were justified in stopping the defendant. (*Id.* at p. 125.)

Like the defendant in *Wardlow*, Flores was present in an area known for crime—specifically, narcotics trafficking and gang activity. Although Flores did not flee, he did engage in evasive and unusual conduct upon seeing the officers. Together, these factors support a finding of reasonable suspicion here, as they did in *Wardlow*. It is true that in *Wardlow* the defendant was holding an opaque bag and he fled unprovoked from the officers, whereas, here, Flores ducked behind a parked car multiple times and stayed crouched behind it when the officers approached him and repeatedly ordered him to stand. (See *Wardlow*, *supra*, 528 U.S. at pp. 121-122.) Neither of those differences distinguishes the outcome in *Wardlow*. Although the court there noted the opaque bag in its summary of the facts, it did not enter into the court's analysis, which highlighted only the defendant's presence in the high-crime area and his unprovoked flight. (*Id.* at pp. 124-125.) As to the defendant's flight, the *Wardlow* court did not indicate that only actual flight would be relevant to the analysis. To the contrary, it highlighted that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (*Id.* at p. 124.) Fundamentally, the same two principal considerations present here—the prevalence of crime in the area, coupled with evasive behavior—are the same as those that led the *Wardlow*

court to conclude that reasonable suspicion supported the detention in that case.

People, of course, have a right to avoid consensual police contact. (See OBM 24 [noting right to avoid a consensual encounter with police]; Dis. Opn. 5 [same].) A person who is approached by a police officer, "may decline to listen to the [officer's] question" and "may go on his way." (*Royer*, *supra*, 460 U.S. at p. 497-498.) But this case does not involve any difficult question about whether the mere exercise of that right can furnish reasonable suspicion for a detention. Here, Flores did not simply decline to engage with the officers. He could have, for example, gone about his business by walking (or even driving) away when officers first approached, or told the officers that he did not want to talk to them. That would not have amounted to evasive or unusual behavior. Instead, after moving to the opposite side of the car upon seeing police and ducking down behind it, Flores stood up and looked in the officers' direction, and then ducked down again, stood up, and ducked down once again before remaining crouched. Furthermore, he twice ignored the officers' instructions to stand up, instead continuing to "toy[] with his feet." (Supp. RT A29.)

Under the objective reasonable suspicion standard, that conduct is properly considered to be evasive and unusual. Even if it might *also* have been consistent with the behavior of a person who simply wished to tie their shoelace rather than engage in consensual police contact, the officers were entitled to resolve the ambiguity. Peace officers are not required to ignore the type of

conduct at issue in this case. (See *Aldridge*, *supra*, 35 Cal.3d at p. 477 ["experienced police officers develop an ability to perceive the unusual and suspicious," and there is a "right and duty of officers to make reasonable investigation of such activities"].) And under such circumstances, further investigation "is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." (*Wardlow*, *supra*, 528 U.S. at p. 125.)[7]

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[7] Like his argument about the free-to-leave test (see *ante*, fn. 5), Flores suggests that his race was a factor that improperly motivated the detention—that is, he was detained "because he is a young, male Hispanic who tried to avoid a police encounter." (OBM 10-12, 17, 24-30.) But nothing in the record indicates that Flores's race played any part in the detention. Officer Guy did not reference Flores's race during his testimony. Nor was there any other indication that the officers might have detained Flores because of his race. In any event, the argument is misplaced here. It is improper, of course, for police to target individuals based on race, and such targeting may violate the law in other ways. (See, e.g., *People v. Lomax* (2010) 49 Cal.4th 530, 564-565 [considering, and rejecting, claim that officer committed racial profiling in violation of equal protection clause of the Fourteenth Amendment and Penal Code section 13519.4, subdivision (f), which prohibits law enforcement officers from engaging in racial profiling]; *Young v. Superior Court* (2022) 79 Cal.App.5th 138, 161-162 ["racial profiling . . . is now cognizable under section 745, subdivision (a)(1) of the Racial Justice Act"].) For purposes of the Fourth Amendment, however, the reasonable suspicion standard remains an objective one. (See *Chesternut*, *supra*, 486 U.S. at p. 574 [objective test "calls for consistent application from one police encounter to the next"].) The facts and circumstances known to the officers in this case objectively supported a reasonable suspicion that Flores was engaged in criminal activity, without

(continued…)

Because reasonable suspicion supported the detention, Flores's motion to suppress was properly denied.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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October 31, 2023

(…continued)

regard to race, which complied with the Fourth Amendment. (See *Lomax*, at p. 564 ["If there is a legitimate reason for the stop, the subjective motivation of the officers is irrelevant"].)

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 8,724 words.

ROB BONTA
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/s/ *Shezad H. Thakor*

SHEZAD H. THAKOR
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October 31, 2023

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***People v. Marlon Flores***

No.: **S267522**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. On October 31, 2023, I electronically served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via this Court's TrueFiling system and by electronic mail.

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Court of Appeal of the State of California
Second Appellate District, Division Eight

I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on October 31, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, addressed as follows:

The Honorable Mildred Escobedo, Judge
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Department 126
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 31, 2023, at Los Angeles, California.

Virginia Gow	/s/ *Virginia Gow*
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. FLORES**
Case Number: **S267522**
Lower Court Case Number: **B305359**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **shezad.thakor@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

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