In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA	)	Case No. S267522
Plaintiff and Respondent,	)	(2d Crim. B305359)
v.	)	(Sup. Ct. No. BA477784)
MARLON FLORES,	)	
Defendant and Appellant,	)	

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGLES COUNTY
THE HONORABLE MILDRED ESCOBEDO, JUDGE

APPELLANT'S REPLY BRIEF ON THE MERITS

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By appointment of the
Supreme Court

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INTRODUCTION

Just as in the Court of Appeal below, respondent asserts that Flores was properly detained because he was present in an area known for narcotics trafficking and he ducked behind a car after making eye contact with officers. (R.B. p. 10.) Respondent is incorrect. As Justice Stratton found in her dissenting opinion, Flores was not detained because police had a reasonable suspicion that he was engaged in criminal activity, he was detained because he is a young, male Hispanic who tried to avoid a police encounter. (*People v. Flores* (2021) 60 Cal.App.5th 978, 993 - 994 [Stratton, J., dissenting].) And, as Justice Sotomayor has called out, "it is no secret that people of color are disproportionate victims of this type of scrutiny" in suspicionless stops. (*Utah v. Strieff* (2016) 579 U.S. 232, 254 [195 L.Ed.2d 400, 136 S.Ct. 2056, 2700 - 2701] [Sotomayor, J, dissenting].)

After all the unjustified killings and instances of excessive force committed by police against minorities,[1] Flores' act of attempting to avoid a police encounter, by hiding behind his vehicle and remaining perfectly still, was completely rational.

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[1]/Even grandmothers from Las Cruces, New Mexico are not safe from being killed without justification by police. At least not Hispanic grandmothers anyway. On October 3, 2023, "[a] Las Cruces police officer shouted dozens of profanity-laden commands as he threatened to arrest Teresa Gomez, a 45-year-old woman sitting in her car[.] . . . [¶] The officer . . . [then] shot her multiple times at near-point-blank range as she attempted to drive away." (Justin Garcia, *City expecting lawsuit after Las Cruces Police kill Teresa Gomez,* Las Cruces Sun-News (Oct. 17, 2023).)

More importantly, these actions did not create a reasonable suspicion that Flores was presently involved in the commission of a crime. When police approach, any "[m]ovement is incredibly dangerous for anyone because if police deem it sudden, and hence threatening, someone may end up shot." (*People v. Flores, supra,* 60 Cal.App.5th at p. 994 [Stratton, J., dissenting].) Unlike respondent, appellant urges this Court to keep such racial realities in mind as it renders its opinion. (R.B. p. 35, fn. 5; p. 44, fn. 7.)

"If the system turns away from the abuses inflicted on the guilty, then who can be next but the innocents?" (Michael Connelly, The Concrete Blonde, (1994).)

ARGUMENT

Police detained and immediately patted down Flores because he bent down behind his parked car in what officers believed to be an attempt to avoid police. Even in a high crime area, however, police need to have a reasonable suspicion that the particular person is engaged in criminal activity before they detain a citizen on the street. This is true even if that citizen takes lawful measures to attempt to avoid a "consensual" police encounter. Respondent's argument to the contrary notwithstanding, the officers lacked the reasonable suspicion necessary to detain Flores. For this reason, appellant's motion to suppress should have been granted.

A. Appellant Was Detained The Moment The Officers Pulled Behind His Vehicle, Shone Their Spotlight On Him, Blocked His Exit Routes And Quickly Approached Him On Foot.

Even though "Flores's submission to the officers' show of authority was not a focus of the parties' arguments in either of the courts below" (R.B. p. 23, fn. 2), respondent urges this Court to affirm the denial of the motion to suppress because Flores did not submit to the officers' show of authority like a reasonable, non-minority would have done. According to the United States Supreme Court, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (*United States v.*

Mendenhall (1980) 446 U.S. 544 [64 L.Ed.2d 497, 100 S.Ct. 1870].) And this "'reasonable person test presupposes an innocent person'—not a reasonable criminal." (R.B. p. 21, quoting *Florida v. Bostick* (1991) 501 U.S. 429, 437 - 438 [115 L.Ed.2d 389, 111 S.Ct. 2382].) In other words, the reasonable person is a reasonable, middle-age, white person – not a young, male Hispanic.

A seizure by police may occur by a show of authority alone, without the use of physical force, "but there is no seizure without actual submission." (*Brendlin v. California* (2007) 551 U.S. 249, 254 [168 L.Ed.2d 132, 127 S.Ct. 2400].) Thus, even if a reasonable person would have believed he or she had been seized, the person is not deemed to have been seized until he or she "actually submits to the show of authority." (*People v. Brown* (2015) 61 Cal.4th 968, 974; see also *California v. Hodari D.* (1991) 499 U.S. 621, 624 - 625 [113 L.Ed.2d 690, 111 S.Ct. 1547].) The key question, therefore, is how to determine when a person has submitted to a show of authority by police.

1. How The "Reasonable Officer" Is To Be Defined

"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.)" (R.B. p. 27; see also *Michigan v. Chesternut* (1988) 486 U.S. 567, 572 [100 L.Ed.2d 565, 108 S.Ct. 1975].) Respondent argues that Flores was not detained until he finally stood up and put his hands behind his head. (R.B. p. 27.) In support of this

position, respondent submits that it is not whether a reasonable person in the defendant's position, minority or not, would have reasonably believed he was free to leave that controls the outcome of this case. Rather, it is whether "a reasonable law enforcement officer," under the "totality of the circumstances," would have believed the person had submitted to the show of authority. (R.B. pp. 27 - 28, quoting *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.)

To begin with, the "'[t]otality of the circumstances' is so amorphous as a legal test as to allow a court to find almost anything to be enough to justify a stop and to allow the evidence gained to be used against the defendant." (Erwin Chermerinsky, Presumed Guilty (2021).) Furthermore, how should the term "reasonable officer" be defined? From the point of view of police? The point of view of the white majority on the Supreme Court? Or, just perhaps, from the point of view of society as a whole – you know, the people officers have sworn to serve and protect.[2]

According to respondent, a "reasonable officer" is characterized as "prudent, cautious, and trained." (R.B. p. 28, quoting *United States v. Mosley* (10th Cir. 2014) 743 F.3d 1317, 1326, citing *Salazar, supra*, 609 F.3d at p. 1065.) Such a definition is as amorphous as the "totality of the circumstances"

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[2]/"The police force is supposed to mirror the society it protects. Its officers should exemplify the best in us." (Michael Connelly, The Concrete Blonde, (1994).)

test. One would hope that LAPD officers are trained. And what do the terms prudent and cautious mean in the context of the Fourth Amendment? A truly prudent and cautious officer would draw his firearm every time he detained someone, just to be safe. But, that would clearly violate the Fourth Amendment even if the officer did not shoot anyone. In short, the Tenth Circuit's definition of a "reasonable officer" does not assist this Court in determining at what point Flores was detained.

The determination of when a person is detained should be made on the basis of whether a reasonable person in the defendant's shoes would have believed that they had submitted to the show of authority by police. As Justice Stratton explained, a reasonable person would have believed they were detained when the following occurred:

> The encounter "ripened into a detention when the officers positioned their marked patrol car a little askew to and behind appellant's car, shined a 'huge' spotlight on him, and converged on him, one approaching him from behind (where the patrol car is parked) and the other approaching him on the sidewalk from the other side, having walked around the front of the car in the meantime. The car and an iron spiked fence blocked the other directions. Appellant had no 'escape route' even if he wanted to walk away. At this point appellant was detained." (*People v. Flores, supra,* 60 Cal.App.5th at p. 994 [Stratton, J., dissenting].)

2. When Did Appellant Submit To The Show Of Authority

Respondent, however, asserts that Flores' acts of ducking down and not putting his hands up when commanded to do so by officers demonstrates that he had not submitted to their show of authority. (R.B. p. 28.) So, even though Flores did not run or move at all, respondent asserts that he somehow did not sufficiently submit to the officers show of authority in order to be deemed detained for Fourth Amendment purposes. While respondent cites several federal courts for the proposition that actions short of fleeing can demonstrate that the defendant had not submitted to the police show of authority, respondent failed to mention a recent case from the same Court of Appeal that decided *Flores*.

In *People v. Cuadra* (2021) 71 Cal.App.5th 348, the People argued there was no submission because defendant raised his arms and stepped back when commanded to walk over to the police car and place his hands on the hood. (*Id.,* at p. 352.) According to the Court of Appeal, "[r]aising one's hands and stepping back is a universally acknowledged submission to authority. It is an accepted way to reassure someone who is armed and confronting you that you pose no threat because you have no weapon in hand, your arms are not poised to attack, and you are not advancing in a menacing way." (*Id.,* at p. 353.) As such, complying with the exact commands given by police is not necessarily a prerequisite to establishing the defendant submitted to their show of authority.

Likewise, freezing in place has been found to be a

submission to police authority even if the person does not otherwise comply with police commands. (See e.g., *Johnson v. Campbell* (3rd Cir. 2003) 332 F.3d 199, 206 [holding that the defendant submitted to a show of authority by remaining in place even though he declined the police officer's initial request to roll down his window and refused to provide the officer with his identification]; *United States v. Lowe* (3rd Cir. 2015) 791 F.3d 424, 433 [the court rejected the Government's contention that, because Lowe, who froze in place, did not comply with the officers' order to show his hands, he failed to 'submit' for Fourth Amendment purposes].) Freezing in place, even when officers have commanded otherwise, is a submission to authority and completely reasonable as any "[m]ovement is incredibly dangerous for anyone because if police deem it sudden, and hence threatening, someone may end up shot." (*People v. Flores, supra,* 60 Cal.App.5th at p. 994 [Stratton, J., dissenting].)

Furthermore, the fact Flores continued to tie, or pretend to tie, his shoe is not a furtive gesture. Nor did this action indicate Flores was not submitting to the show of authority. In the federal cases cited by respondent (R.B. pp. 28 - 29), the courts made much of the fact the defendant made furtive gestures consistent with having a firearm as a basis for finding that the defendant did not submit to a show of authority until he put his hands up as ordered. "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.)" (R.B. pp. 28 - 29.) Respondent also cites two Fourth Circuit opinions for the same proposition. "(*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].)" (R.B. p. 29.) Conversely, in this case, there was no testimony that Flores made gestures indicating that he had a firearm or any other weapon. He was just tying or faking tying his shoe.

3. No Minority Would Have Felt Free To Leave

Respondent also submits that a reasonable, innocent person in appellant's shoes would have felt free to leave or terminate a consensual encounter with these officers. (R.B. p. 21, citing *Florida v. Bostick, supra,* 501 U.S. at p. 438 [the "reasonable person test presupposes an innocent person].) "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 [80 L.Ed.2d 247, 104 S.Ct. 1758].)

With all due respect to the reasonable white person

standard first formulated more than 50 years ago, most minorities, even the law abiding ones, would not have felt free to leave in Flores' situation. "The average person encountered [by police] will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer." (*Illinois Migrant Council v. Pilliod* (N.D. Ill. 1975) 398 F.Supp. 882, 899.) Indeed, "[i]t appears that any interaction with a police officer, even at the lowest level of intrusiveness, makes most citizens feel that they are not free to leave[.]" (*Casual or Coercive? Retention of Identification in Police-Citizen Encounters*, 113 Colum. L.Rev. 1283, 1313 (2013).) And, many minorities "feel lucky to survive [any] police encounter[]." (Ibram X. Kendi, *Compliance Will Not Save Me*, The Atlantic (April 19, 2021).) In short, a reasonable minority in Flores' shoes, even an innocent one, would not have felt free to leave from the moment the officers parked their vehicle and got out.

4. No Minority Could Have Reasonably Expected To Try To Leave Without Being Arrested Or Worse.

Finally, appellant is not trying to relitigate the holding in *People v. Tacardon* (2022) 14 Cal.5th 235, as respondent implies. (R.B. p. 32.) Appellant agrees that use of a flashlight or spotlight is just one factor to consider when determining if and when a person was detained. (R.B. pp. 32 - 33.) While the majority opinion below did not mention the use of the patrol car's spotlight, the dissenting opinion stated that the body camera video shows the officers using the patrol car's

spotlight to illuminate Flores as he couched behind his car. (*People v. Flores, supra,* 60 Cal.App.5th at p. 991 [Stratton, J., dissenting].) While the use of the spotlight weighs in favor of finding an immediate detention, what's most important is that the officers converged on Flores' location in such a manner as to block any escape route. (*Ibid.*) And, to confirm the fact that appellant was detained, all the Court need do is note that Flores froze in place and did not even attempt to flee.

Respondent's claim that Flores had the "ability to walk away" (R.B. p. 34), in no way comports with today's reality. And, respondent's assertion that the video shows Flores could have gotten into his parked car and driven away demonstrates that Flores was not detained is ludicrous. (R.B. pp. 33 - 34.) "The reality is that there is no such thing as 'asking' when it comes to police officer encounters. A refusal to comply with any request easily becomes a disobeyed order used to justify an arrest." (Bianca M. Forde, Prosecuted Prosecutor, (2020).) Here, any attempt by Flores to escape the situation would have likely resulted in his immediate arrest or maybe even his being shot like Ricky Cobb III – who was killed by police as he tried to drive away from a traffic stop for broken taillights.[3] Again, freezing in place at the sight of police is a rational and entirely reasonable response.

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[3]/https://abcnews.go.com/US/wireStory/family-black-man-killed-minnesota-traffic-stop-asks-101967894

5. Race Is An Important Factor In Determining When And If A Detention Has Occurred.

As the events of 2020 make clear, "'neither society nor our enforcement of the laws is yet color-blind,'" and the resulting "uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement." (*United States v. Brown* (9th Cir. 2019) 925 F.3d 1150, 1156.) Respondent, however, asserts that race is irrelevant to Fourth Amendment analysis, which is based on objective reasonableness. (R.B. p. 5, fn. 5.) This is exactly the problem Justice Stratton identified in her dissent. Who is the reasonable person standard to be based upon in this context? An old, Harvard Educated justice sitting on the High Court 3,000 miles away? Gang unit officers on their nightly patrol? Some average, middle-aged person who has never been stopped by police? If this country truly is a melting pot, shouldn't our legal definition of a reasonable person reflect as much?

"Legal opinions too often whitewash race. They get away with it because race is often relegated to the shadows." (Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of The Roberts Court's Criminal Jurisprudence*, Cal. L. Rev., Vol. 110, No. 3 (June, 2022).) By ignoring race, courts have long "crafted doctrine[s] that benefit[] White people while burdening people of color, expanding police power over Black and Brown communities, and fueling our carceral state." (*Ibid.*) In passing the Racial Justice Act, the California Legislature acknowledged that "no degree or amount of racial bias is tolerable in a fair and

just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised." (Stats. 2020, ch. 310 § 2, subd. (h).)

For these reasons, appellant asserts that his being Hispanic is relevant to the determination of both whether there was reasonable suspicion to detain him and at what point he was actually detained in this case. As to the latter, he further submits that Justice Stratton's finding as to when he was detained is correct – he was detained once the officers began approaching in such a manner as to block his reasonable, non-violent, escape from an encounter with police.

B. The Detention In This Case, Whenever It Occurred, Violated The General Principles Of Terry v. Ohio.

Respondent contends that Flores's evasive and unusual behavior gave police the reasonable suspicion necessary to detain him. (R.B. pp. 36 - 43.) Respondent is wrong. Reasonable suspicion exists only where an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion. (*United States v. Cortez* (1981) 449 U.S. 411, 418 [66 L.Ed.2d 621, 101 S.Ct. 690]; *People v. Souza* (1994) 9 Cal.4th 224, 230.)

If the detention occurred before police ordered appellant to stand up, as the dissent maintains, then the officers lacked the reasonable suspicion necessary to detain Flores. As Justice Stratton pointed out in her dissenting opinion: "At the

point when appellant was detained under the spotlight, all the officers knew was 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 they believed he had seen their patrol car. These are not articulable facts supporting reasonable suspicion." (*People v. Flores, supra,* 60 Cal.App.5th at p. 992 [Stratton, J. dissenting].)

Even assuming arguendo, as the dissent did below, that the detention occurred when Flores finally stood up and raised his hands, the officers still did not have the reasonable suspicion necessary to detain him. "The testifying officer could not articulate what criminal activity he suspected appellant was engaged in. He just thought it was suspicious when appellant moved from one side of the car to another and then bent over." (*Id.,* at p. 993.) That a minority was "acting shady" is not grounds for a detention. (*In re Edgerrin* (2020) 57 Cal.App.5th 752, 765.)

1. Flores' Act Of Bending Down Behind His Vehicle Did Not Give Police Reasonable Suspicion To Detain Him.

Respondent characterizes Flores' behavior as "unusual and evasive." (R.B. p. 39.) Flores submits that his behavior evidences his fear, as a minority, of being confronted by Los Angeles Police Department Gang Unit Officers, after dark, on a secluded street. Running or hiding "from the police is the last thing many Americans would ever do, but for young [minorities] -- for whom the threat and fear of harassment, capture, and incarceration is ever present -- it can be a basic instinct, learned

as a kid. There is no expectation that things will work out, that you'll get a fair shake, that you can trust in the police and the system."[4] (Adam Benforado, Unfair: The New Science Of Criminal Injustice, (2015).) Most minorities know the reality that virtually any police encounter, for them, can turn deadly.[5] (Ibram X. Kendi, *Compliance Will Not Save Me*, The Atlantic.)

In 2023, it is clear that racialized experiences of policing affect an individual's behavior in response to police presence and, therefore, a person's anxious, unusual or evasive behavior should not be permitted to establish the reasonable suspicion required for a constitutional detention. (See Terrence Scudieri, *Fleeing While Black: How Massachusetts Reshaped the Contours of the Terry Stop*, 54 Am. Crim. L. Rev. Online 42, 44, 49 (2017); *People v. Horton* (Ill. App. Ct. 2019) 142 N.E.3d 854, 868 [concluding empirical data offered an "eminently reasonable and noncriminal reason" for Black man's flight]; *Mayo v. United*

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[4]/"Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither 'aberrant' nor 'abnormal.'" (*Illinois v. Wardlow* (2000) 528 U.S. 119, 132 - 133 [145 L.Ed.2d 570, 120 S.Ct. 673].)

[5]/"Some police stops turn violent and even deadly, as they did for Walter Scott and Eric Garner and George Floyd. They can all be traced in a straight line back to the Supreme Court decisions that have relaxed the requirements of the Fourth Amendment and empowered the police." (Erwin Chermerinsky, Presumed Guilty, at p.230.)

States (D.C. 2022) 266 A.3d 244, 260-261[recognizing empirical data provided "myriad reasons" that "undermine[d] the reasonableness of an inference of criminal activity from all instances of flight" and discounting relevance of flight in reasonable suspicion analysis].) In short, nothing criminal can or should be readily inferred from a minority simply trying to avoid police contact by ducking or crouching or even hiding – it is neither unusual nor unreasonable.

2. The Nature Of The Area Did Not Create A Reasonable Suspicion To Detain.

Respondent notes that "[t]he 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, supra,* 528 U.S. at p. 124 [that stop occurred in a "high crime area" is one of the "relevant contextual considerations"]; *People v. Souza, supra,* 9 Cal.4th at p. 241 ["An area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under the Fourth Amendment"])." (R.B. p. 36.)

Respondent admits, as it must, that "the prevalence of crime in an area does not by itself justify a detention[.]" (R.B. p. 36, citing *Wardlow*, at p. 124; *People v. Casares* (2016) 62 Cal.4th 808, 838.) Indeed, "[a]n officer's assertion that the location lay in a 'high crime' area does not elevate . . . facts into reasonable suspicion of criminality. The 'high crime area' factor

is not an 'activity' of an individual." (*People v. Loewen* (1983) 35 Cal.3d 117, 124.) "Many citizens of this state are forced to live in areas that have 'high crime' rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas.'" (*Ibid.*) Nevertheless, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." (*Katz v. United States* (1967) 389 U.S. 347, 359 [19 L.Ed.2d 576, 88 S.Ct. 507].)

Appellant acknowledges that he was in a high crime area, known for drugs. Merely being a Hispanic male in a bad neighborhood, however, does not give rise to a reasonable suspicion that a particular individual is engaged in criminal activity. Under the Constitution, a detention simply cannot be justified solely on stereotypical, racial grounds. (See *People v. Durazo* (2004) 124 Cal.App.4th 728, 735 - 736 [being a male Hispanic is not enough to warrant a detention].)

3. Flores' Case Is Not On Par With The Facts In *Wardlow.*

Respondent compares the facts of this case to those in *Wardlow* and concludes that appellant's acts are on par with those of *Wardlow* that justified his detention. (R.B. p. 41.) In that case, 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 saw Wardlow, who was holding an opaque bag, look in the direction of the officers and run. Police pursued and then stopped Wardlow. In analyzing whether police had violated Wardlow's Fourth Amendment rights, 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 upheld the warrantless detention. (*Id.*, at p. 125.)

As respondent acknowledges (R.B. p. 42), Flores was not holding an opaque bag and he did not attempt to flee the scene like Wardlow. Further, there was no testimony that the officers reasonably believed Flores to be a gang member or that he was involved in narcotic-related activity. All the officers knew was that this male Hispanic tried to avoid police contact by bending down by the side of his car and pretending to tie his shoe.

Respondent asserts that the Court in *Wardlow* made "nervous, evasive behavior . . . a pertinent factor in determining reasonable suspicion." (*Wardlow, supra,* 528 U.S. at p. 124.) In 2019, however, the Ninth Circuit recognized that the increase of data on racially disparate policing, since the opinion in *Wardlow,* "can inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise." (*United States v. Brown, supra,* 925 F.3d at p. 1156.) Other courts have similarly concluded that "the weight of the defendant's nervous and evasive behavior should be significantly discount[ed] in assessing whether police had reasonable suspicion for a stop." (*Commonwealth v. Evelyn*

(Mass. 2020) 152 N.E.3d 108, 121-122; see also *United States v. McKoy* (1st Cir. 2005) 428 F.3d 38, 40 ["Nervousness is a common and entirely natural reaction to police presence . . . "]; *United States v. Richardson* (6th Cir. 2004) 385 F.3d 625, 630-631 ["although nervousness has been considered in finding reasonable suspicion in conjunction with other factors, it is an unreliable indicator, especially in the context of a traffic stop. Any citizen [may] become nervous during a traffic stop, even when they have nothing to hide or fear."]; *State v. Andrade-Reyes* (Kan. 2019) 442 P.3d 111, 115, 119 [rejecting a finding of reasonable suspicion where lower courts inappropriately relied upon the defendant "appear[ing] startled" when approached by an officer in a high-crime area.) Appellant asks this Court to do the same – reject the People's assertion that his "unusual and evasive" behavior created a basis for a detention for which officers were unaware of specific and articulable facts giving rise to a reasonable suspicion that he was presently engaged in or about to become engaged in criminal activity.

4. Respondent's Advice.

Lastly, respondent tells appellant what he could have, should have done instead of crouching down beside his car and pretending to tie his shoe. (R.B. pp. 43 - 44.) Specifically, respondent suggests that Flores, a young Hispanic man, could have simply declined to engaged with the officers; he could have gone about his business and walked (or even driven) away when officers approached; or he could have told officers he did not wish

to speak with them. (R.B. pp. 43 - 44.) Clearly, respondent does not frequent East Los Angeles or any other minority community on a regular basis. Respondent's comments ignore reality.

Appellant acknowledges that, in theory, citizens are free to avoid a consensual encounter with police.[6] (*Florida v. Royer* (1983) 460 U.S. 491, 497 - 498 [75 L.Ed.2d 229, 103 S.Ct. 1319]; *People v. Souza, supra,* 9 Cal.4th at p. 230.) What happens in the real world, however, is something entirely different. Again, "any interaction with a police officer, even at the lowest level of intrusiveness, makes most citizens feel that they are not free to leave[.]" (*Casual or Coercive? Retention of Identification in Police-Citizen Encounters,* 113 Colum. L.Rev. At p. 1313.) "Common sense teaches that most of us do not have the chutzpah or stupidity to tell a police officer to 'get lost' after he has stopped us and asked us for identification or questioned us about possible criminal conduct." (Tracy Maclin, *Black and Blue Encounters -- Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, Valparaiso University Law Review 26 (1991), 249 - 250.)

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[6]/In theory the right to avoid a consensual police encounter applies to all citizens. In practice, however, it does not apply to many minorities. For example, in September of 2020, Orange County Sheriff's Deputies physically tackled Kurt Reinhold, a homeless black man in San Clemente, when he refused to submit to a detention over his alleged jaywalking. While the two deputies wrestled with Reinhold, one said that Reinhold had a hold of his gun. Reinhold was then shot twice at point blank range and killed. (Peter Nikeas, California sheriff's department releases video from fatal shooting, CNN.com (Feb. 19, 2021).)

"A person who reasonably is apprehensive that walking away, ignoring police presence, or refusing to answer police questions or requests might lead to detention and, possibly, more aggressive police action, is not truly free to exercise a constitutional prerogative[.] . . . [Courts] cannot turn a blind eye to the reality that not all encounters with the police proceed from the same footing, but are based on experiences and expectations, including stereotypical impressions, on both sides." (*Dozier v. United States* (D.C. 2019) 220 A.3d 933, 944 - 945.) Thus, as Justice Stratton suggested below, freezing in place may have been Flores' best, safest option. (*People v. Flores, supra*, 60 Cal.App.5th at p. 974.)

Just bending down beside a vehicle in order to avoid a "consensual" police encounter is not a crime and, therefore, does not create the reasonable suspicion necessary for a constitutional detention and an immediate patdown. Again, being a male Hispanic in a bad neighborhood does not and should not alter this conclusion. (*People v. Durazo, supra,* 124 Cal.App.4th at pp. 735 - 736.)

C. The Evidence Found In Appellant's Vehicle Must Be Suppressed As Fruit Of The Poisonous Tree.

As all of the officers' subsequent observations, as well as their recovery of the narcotics and the revolver, flowed directly from Flores' illegal detention, this evidence should have been excluded. (*People v. Mayfield* (1997) 14 Cal.4th 668, 760 [facts officers learn after the detention cannot be used to justify the

detention itself].) The revolver and the methamphetamine constitute "fruit of the poisonous tree" and should have been suppressed in accordance with the exclusionary rule. (*Wong Sun v. United States* (1963) 371 U.S. 471, 485 - 488 [9 L.Ed.2d 441, 83 S.Ct. 407].) The Superior Court's failure to do so constitutes reversible error. When the reviewing court finds the search to be illegal, the judgment must be reversed and the cause remanded so that the defendant can be given the opportunity to withdraw his plea. (*People v. Ruggles* (1985) 39 Cal.3d 1, 13; *People v. Miller* (1983) 33 Cal.3d 545, 566.)

CONCLUSION

Because police did not have the reasonable suspicion necessary to constitutionally detain Flores, appellant respectfully requests this Court to reverse the denial of his motion to suppress.

DATED: December 8, 2023

Respectfully submitted,

Richard L. Fitzer

RICHARD L. FITZER
Attorney for Appellant

WORD COUNT CERTIFICATION

People v. Marlon Flores

Supreme Court No. S267522

I, Richard Fitzer, certify that this petition was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 5,465 words.

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I am a citizen of the United States, over the age of 18 years, employed in Los Angeles County with my business address as stated above. I am not a party to this case. On December 8, 2023 , I served the **appellant's reply brief on the merits,** a copy of which is attached, by mailing a copy to each addressee named below by regular United States mail at Long Beach, California.

Marlon Flores
(address unknown)

Hon. Mildred Escobedo
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210 West Temple Street
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Executed December 8, 2023, at Long Beach, California.

Richard L. Fitzer
Richard L. Fitzer

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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/s/Richard Fitzer

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Fitzer, Richard (156904)

Last Name, First Name (PNum)

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