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Search and Seizure: The Erosion of the Fourth Amendment under the Terry-Standard, Creating Suspicion in High Crimes Areas

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CASENOTES

SEARCH AND SEIZURE: THE EROSION OF THE FOURTH AMENDMENT UNDER THE TERRY-STANDARD, CREATING SUSPICION IN HIGH CRIME AREAS—*State v. Andrews*, 57 Ohio St. 3d 86, 565 N.E.2d 1271 (1991), *cert. denied*, 111 S. Ct. 2833 (interim ed. 1991).

I. INTRODUCTION

Over the past thirty years, Ohio cases have played a prominent role in the development of fourth amendment search and seizure law. In 1961, the United States Supreme Court used the Ohio case of *Mapp v. Ohio*[1] to apply the exclusionary rule to the states.[2] In 1968, the Ohio case of *Terry v. Ohio* helped define the authority of police to investigate suspicious activity.[3] Concomitantly, the United States Supreme Court defined the rights of citizens in police encounters.[4]

In *State v. Andrews*,[5] the Ohio Supreme Court revisited *Terry* and the requirements which the United States Supreme Court established regarding when an officer can seize and search an individual on the street.[6] The Ohio court concluded that when a police officer observes a person running through a high crime area at night, that person may reasonably be suspected of criminal activity and, therefore, may be stopped and frisked by the officer.[7] As a result of the *Andrews* decision, there is a drastic reduction both in the necessary factors for an officer to justify an investigatory stop and search, and in the fourth amendment's protections which are offered to the public.

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1. 367 U.S. 643 (1961).

2. *Id.* The exclusionary rule requires that any evidence obtained by police or prosecutors in violation of a constitutionally protected right is inadmissable against the defendant in a criminal proceeding. *Id.*

3. 392 U.S. 1 (1968).

4. *Id.*

5. 57 Ohio St. 3d 86, 565 N.E.2d 1271 (1991), *cert. denied*, 111 S. Ct. 2833 (interim ed. 1991).

6. *Id.* at 87, 565 N.E.2d at 1272. See *infra* notes 48-58 and accompanying text for a discussion on *Terry* and its requirements.

7. *Id.*

This article looks first at the individual factors upon which the Ohio Supreme Court relied in justifying an investigatory stop, and whether the court was correct in using these factors to justify a seizure of an individual.[8] The article then addresses whether the factors, taken together, attained the level of suspicion required by *Terry* to justify the stop. Next, the article examines the separate justification required for the search of the stopped suspect. The article concludes that the Ohio Supreme Court's misapplication of the *Terry* analysis significantly reduces the protections available to citizens by the fourth amendment.

II. FACTS AND HOLDING

On October 18, 1988, at 8:35 p.m., Officer Raymond Martin and his partner were on patrol in the 3800 block of Roland Circle in Dayton, Ohio.[9] The two officers were in separate cruisers and were not responding to any calls, nor were they aware of any criminal activity in the area at the time.[10] Martin was a twelve and one-half year veteran of the Dayton Police Department, but had worked in the Roland Circle area less than two months.[11] He knew, both from responding to calls in the area[12] and from the police department activity reports, that the area had a high rate of drug activity, violence and weapons-related crime.[13] While his partner was questioning an individual, Officer Martin left his cruiser and began walking toward a large grassy courtyard between apartment buildings.[14] Before entering the courtyard, Officer Martin noticed another police cruiser driving down Roland Circle.[15] After entering the dimly lit courtyard,[16] Officer Martin saw the figure of a black male running between the buildings of the apartment complex, away from Roland Circle and in Officer Martin's direction.[17]

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8. An investigatory stop of an individual is a type of seizure implicating the fourth amendment. *See generally infra* notes 59-73 and accompanying text. Likewise, a frisk is a type of search under the fourth amendment. *See generally infra* notes 74-81 and accompanying text.

9. State v. Andrews, 57 Ohio St. 3d 86, 86, 565 N.E.2d 1271, 1272 (1991), *cert. denied*, 111 S. Ct. 2833 (interim ed. 1991).

10. State v. Andrews, No. 11477, at *3 (Montgomery County Ct. App., Nov. 16, 1989) (LEXIS, Ohio library, App file).

11. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1272.

12. Transcript of Motion to Suppress at 5, State v. Andrews, No. 88-CR-2951 (Montgomery County C.P. Ct., Jan. 18, 1989).

13. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1272.

14. *Id.*

15. *Id.*

16. Officer Martin testified that it was "extremely dark" in the courtyard area. *Id.*

17. *Id.* The race of the suspect was not mentioned in either the appellate court's or the Ohio Supreme Court's decisions but was brought up at the motion to suppress proceeding. Motion, *supra* note 12, at 9, 18. On the use of race as a factor to support reasonable suspicion, see generally 3 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT, at 451-52 (2d ed. 1987).

When the man was about ten feet away, Officer Martin shined his flashlight on him.[18] The man threw down a beer can he was carrying in his right hand and stopped running.[19] Officer Martin told the man to put his hands behind his head, drew his gun on the unidentified man, and grabbed him by the chest.[20] Martin told the man to keep his hands up and began to frisk him.[21] Martin felt a hard object in the man's right rear pocket, which the officer discovered to be a handgun.[22] Martin arrested the man, Christopher Andrews, for carrying a concealed weapon.[23]

At the motion to suppress the gun, Officer Martin testified that he found Andrews' conduct suspicious.[24] When Martin saw the police car in the vicinity and saw the man running, he believed that "possibly" the man was running from the police.[25] Martin, however, had received no reports on his shoulder radio about the running man.[26] Officer Martin conceded on cross-examination that he had no information that the man was running from police, and that, for all he knew, the man could have been out jogging.[27] Officer Martin testified that for his own safety, he searched Andrews even though he had no view of Andrews' rear pants pockets which would have indicated to Martin that Andrews was armed.[28]

The Montgomery County Grand Jury indicted Andrews for carrying a concealed weapon.[29] The trial court rejected Andrews' motion to suppress the handgun in which he contended that the gun was obtained through an illegal search in violation of the fourth and fourteenth amendments.[30] Andrews then entered a plea of no contest and appealed the conviction to the Montgomery County Court of Appeals.[31] The

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18. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1272.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. State v. Andrews, No. 11477, at *3 (Montgomery County Ct. App., Nov. 16, 1989) (LEXIS, Ohio library, App file).
26. *Id.*
27. *Id.* Even though Martin admitted under cross examination that he had no information that the suspect was running from the police and the court of appeals stated, in the fact section of its opinion, that he had no information to support his conclusion, the editor's headnotes to the Ohio Supreme Court's opinion state conclusively, that "the suspect was running away from a police officer. . . ." *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1272.
28. State v. Andrews, No. 11477 (Montgomery County Ct. App., Nov. 16, 1989) (LEXIS, Ohio library, App file).
29. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1272.
30. *Id.*
31. *Id.*

court of appeals reversed Andrews' conviction, stating that the facts before Officer Martin at the time of the stop lacked an adequate basis to raise the degree of "reasonable suspicion" required for a *Terry*-type stop.[32]

The Supreme Court of Ohio, while admitting that the case presented "a close question of fact,"[33] reversed the decision of the court of appeals and said that "objective and particularized suspicion" did exist, justifying the stop of Andrews and the limited protective search.[34] The court, in analyzing the totality of circumstances through the eyes of Officer Martin, relied upon five factors: (1) the area had a high crime rate; (2) the encounter occurred at night and in the dark; (3) Martin had twelve years of police experience; (4) Martin was away from his police cruiser at the time of the encounter; and (5) Andrews was running away from an area where there was a police cruiser.[35]

Justice Wright filed a dissenting opinion in which Justice Sweeney concurred.[36] Justice Wright vehemently criticized the use of the "high crime area" factor stating "[a] citizen's Fourth Amendment rights are the same regardless of his residence, station in life or where he happens to be when he encounters a police officer."[37] In reviewing the facts of the case, he argued that it was impossible for Officer Martin to have developed the level of suspicion required under the fourth amendment.[38]

III. BACKGROUND

A. *The Fourth Amendment*

The fourth amendment serves as a protection against unreasonable search and seizure.[39] It is a restraint upon the state and federal govern-

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32. State v. Andrews, No. 11477, at *15-17 (Montgomery County Ct. App., Nov. 16, 1989) (LEXIS, Ohio library, App file). A *Terry*-stop is conducted by an officer when he has reasonable suspicion that a suspect was or is involved in criminal activity. *See infra* notes 55-58 and accompanying text.

33. *Andrews*, 57 Ohio St. 3d at 87, 565 N.E.2d at 1273.

34. *Id.* at 88, 565 N.E.2d at 1273-74.

35. *Id.*

36. *Id.* at 89, 565 N.E.2d at 1275.

37. *Id.* at 89, 565 N.E.2d at 1275 (Wright, J., dissenting).

38. *Id.* at 90, 565 N.E.2d at 1275-76 (Wright, J., dissenting).

39. United States v. Sharpe, 470 U.S. 675, 682 (1985); *see also* Project, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1985-1986*, 75 GEO. L.J. 713, 721 (1987). The fourth amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

ment[40] against actions which may infringe upon a person's reasonable expectation of privacy.[41] In a practical sense, the fourth amendment operates as a limitation on the conduct of police in their dealings with citizens.[42]

The standard of reasonableness for a search or seizure is determined by balancing the governmental interest in effecting the search or seizure against the individual's privacy interest.[43] The general rule is that all restraints on a person must be justified by probable cause,[44] and any search or seizure conducted without a warrant is per se unreasonable.[45] There are, however, a few very narrowly drawn exceptions to the requirement of probable cause.[46] One such exception was articulated in *Terry v. Ohio*.[47]

In *Terry*, a police officer observed two individuals standing a few hundred feet away from the entrance of a store in downtown Cleveland.[48] Each would alternately walk down the street, pause to look in the store's window, then walk on, repeating the procedure on the way back to his companion.[49] After roughly twelve of these trips, the men were joined by a third individual with whom they briefly conferred.[50] The third individual left, and after ten to twelve minutes of the same type of "reconnaissance" of the store, the two men followed in the path of the third.[51] The officer concluded that the three men were casing the

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place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.

40. The protections of the fourth amendment are applied to the state via the Due Process Clause of the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

41. Katz v. United States, 389 U.S. 347, 351, 353 (1967). The courts have used a two part test, requiring both a subjective expectation of privacy as well as an expectation which "society is prepared to accept as reasonable." *Id.* at 361.

42. The exclusionary rule may be used to suppress evidence obtained by police in violation of the fourth amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

43. Project, *supra* note 39, at 721. "The reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1974). A constitutionally valid search occurs when the government's interest in the search or seizure exceeds the privacy interest of the individual. Project, *supra* note 39, at 721.

44. People v. Shabaz, 424 Mich. 42, 52, 378 N.W.2d 451, 455 (1985).

45. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967).

46. *Id.* The prosecution has the burden of showing that the search or seizure fits into one of the exceptions. United States v. Jeffers, 342 U.S. 48, 51 (1951); *see also* Ybarra v. Illinois, 444 U.S. 85, 93 (1979).

47. 392 U.S. 1 (1968).

48. *Id.* at 5.

49. *Id.* at 6.

50. *Id.*

store, and were about to commit a "stick-up" of the store.[52] The officer approached the three men, identified himself as a police officer, and asked for their names.[53] After receiving a mumbled reply, the officer conducted a pat-down search of the three men and found two pistols.[54]

In *Terry*, the United States Supreme Court stated that the police may justify a brief seizure of an individual by pointing to specific articulable facts, taken together with the rational inferences drawn from them, that create a reasonable suspicion of criminal activity.[55] Additionally, if the officer has reason to believe that the person is armed and dangerous, he may conduct a limited search for weapons.[56] The *Terry* investigatory stop created a limited exception to the general requirement of probable cause for detaining an individual against his will.[57]

In determining whether a seizure and search are "reasonable" in the context of a *Terry* investigatory stop, a court must engage in a dual inquiry. First, a court must determine whether the officer had a "reasonable suspicion" that the individual was engaged in criminal activity to justify the stop. Second, provided that the stop was justified, a court must determine whether the officer had a reasonable belief that the individual was armed and dangerous to justify the limited search of the suspect for weapons.[58]

B. The Stop

The protections of the fourth amendment are implicated anytime an officer "seizes" a citizen.[59] The amendment applies to any detention

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52. *Id.*

53. *Id.* at 6-7.

54. *Id.* at 7.

55. *Id.* at 21.

56. *Id.* at 27.

57. Florida v. Royer, 460 U.S. 491 (1983). The result of *Terry* and its progeny has been the creation of a three-tiered system of police-citizen interaction. *Id.* at 499.

1. Consensual encounter: An officer may, without any preconditions, walk up and ask an individual if he is willing to talk to her. The person is at liberty to ignore the officer's inquiries and walk away, and the officer may not attempt to restrain him. *Royer*, 460 U.S. at 497-98. It is not until the person no longer feels free to walk away that the fourth amendment is implicated. Brown v. Texas, 443 U.S. 47, 50 (1979); *see also* Florida v. Bostick, 111 S. Ct. 2382 (interim ed. 1991).

2. Investigatory stop: *Terry* requires that the officer have an articulable suspicion that a person has committed or is about to commit a crime. *Royer*, 460 U.S. at 499; Ybarra v. Illinois, 444 U.S. 85, 93 (1979).

3. An arrest: Probable cause is required to justify an arrest. In this context, probable cause means that the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in believing that the suspect has committed, or is about to commit, an offense. Michigan v. De Fillippo, 443 U.S. 31, 37 (1979).

58. *Terry*, 392 U.S. at 19-20.

59. "An encounter between a police officer and a citizen implicates the fourth amendment only if the officer lays hands on the citizen." Phillips, *supra* note 39, at 742.

by an officer, no matter how brief.[60] In *Terry*, the United States Supreme Court recognized that even a brief detention is a "serious intrusion upon the sanctity of the person."[61] Exactly when a seizure has occurred may, in some cases, be difficult to determine.[62] The Court has applied an objective standard in its analyses, stating that a "seizure" has occurred whenever a police officer accosts an individual and "under the totality of circumstances a reasonable person would believe he is no longer free to leave."[63]

Once it has been determined that a seizure has taken place, the court will look at the facts and circumstances observed by the officer which led to the stop, in order to determine if the stop was based upon a reasonable suspicion.[64] The police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants that intrusion."[65] The standard is an objective one: did the officer have a reasonable suspicion based on objective facts that the individual is, or is about to be, engaged in some type of criminal activity?[66]

Courts must look to the totality of circumstances with which the officer was presented in determining if his suspicion of criminal activity was reasonable.[67] Furthermore, based upon the totality of circum-

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60. "The Fourth Amendment, of course, 'applies to all seizures of the person, including seizures that involve only a brief detention . . . .'" *Brown*, 443 U.S. at 50; *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); People v. Shabaz, 424 Mich. 42, 52, 378 N.W.2d 451, 455 (1985).

61. *Terry*, 392 U.S. at 17; *see also* People v. Aldridge, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984). "The interest at stake is far from insignificant; it is the right of every person to enjoy the use of public streets, buildings, parks and other conveniences without unwarranted interference or harassment by agents of the law." *Aldridge*, 35 Cal. 3d at 478, 674 P.2d at 243, 198 Cal. Rptr. at 541.

62. *E.g.*, Michigan v. Chesternut, 486 U.S. 567 (1988) (officers had not seized an individual by driving along parallel to him as he ran without ordering him to stop).

63. *Id.*; *see also* Project, *supra* note 39, at 742; *Brown*, 443 U.S. at 50. But see *California v. Hodari D.*, 111 S. Ct. 1547 (interim ed. 1991), in which the United States Supreme Court seems to have narrowed this standard, and held that a seizure does not occur until either the application of physical force or the suspect submits to a show of authority. *Id.* at 1551-52.

64. *Terry*, 392 U.S. at 21 (1968).

65. *Id.*

66. *Brown*, 443 U.S. at 51. The *Brown* Court required that the officer have a "reasonable suspicion, based on objective facts, that the suspect is involved in criminal activity." *Id.* The Supreme Court has repeatedly required that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1980) (citing Brown v. Texas, 443 U.S. 47, 51 (1979); Delaware v. Prouse, 440 U.S. 648, 661 (1979); United State v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Adams v. Williams, 407 U.S. 143, 146-49 (1972); Terry v. Ohio, 392 U.S. at 16-19 (1968)).

67. The Supreme Court, summarizing this requirement stated that, "the essence of all that has been written is that the totality of the circumstances - the whole picture - must be taken into account." United States v. Cortez, 449 U.S. 411, 417 (1981).

stances, the suspicion must have been particularized.[68] The officer must have had a reasonable suspicion that this particular individual was associated with the criminal activity.[69] The Court has stated that "this demand for specificity in the information upon which police action is predicated is the central teaching of the Court's fourth amendment jurisprudence."[70]

The source of this information may be from either personal observation by the officer as in *Terry*, or from a police informant.[71] While the experience and training of the police officer may be considered, the police may not rely on good faith or inarticulable hunches to justify the stop.[72] In determining whether a seizure based on personal observations was justified, the focus is on the conduct of the suspect which gives rise to reasonable suspicion.[73]

C. *The Frisk*

Whether a protective search for weapons incident to an investigatory stop was proper must be analyzed separately from the issue of whether it was permissible to stop the suspect.[74] The United States Su-

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> The idea that assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person . . . . The process does not deal with hard certainties but with probabilities.

Id. at 418; *see, e.g., Brown*, 443 U.S. at 51; *Brignoni-Ponce*, 422 U.S. at 884.

68. *Cortez*, 449 U.S. at 417-18. "[T]he detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.*

69. *Id.* at 418. "[T]he second element contained in the idea that assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.*

70. *Id.*; *see also Brown*, 443 U.S. at 51, *Brignoni-Ponce*, 422 U.S. at 884.

71. Adams v. Williams, 407 U.S. 143, 148 (1972); Alabama v. White, 110 S. Ct. 2412 (interim ed. 1990).

72. Terry v. Ohio, 392 U.S. 1, 22 (1968); *Brown*, 443 U.S. at 52.

73. "An investigatory stop must be justified by some objective *manifestation* that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1980) (emphasis added); *see also* Reid v. Georgia, 448 U.S. 438, 441 (1980). The Court stated:

> Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular *conduct*. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.

Reid, 448 U.S. at 441 (emphasis added).

74. Not every detention of an individual will call for a frisk. W. LAFAVE, *supra* note 17, at 505. The protective search permissible under *Terry*, is limited to a "pat down" of the individual's clothing to find concealed weapons. *Terry*, 392 U.S. at 26.

preme Court has stated that, "nothing in *Terry* can be understood to allow a generalized cursory search for weapons or, indeed, any search . . . . The narrow scope of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked . . . ."[75]

In order to conduct the limited protective search for a concealed weapon, the officer must be justified in believing "that the individual whose suspicious behavior [the officer] is investigating at close range is armed and presently dangerous to the officer or to others . . . ."[76] The purpose of the search is to allow the officer to continue his investigation without fear of violence.[77]

The standard for the limited protective search requires two things: first, that the initial stop of the suspect be justified, and second, that the officer believe that the suspect is armed and presently represents a danger either to the officer or to others.[78] Once again, the court must apply an objective standard: whether, under the circumstances, a reasonably prudent man would be warranted in believing his safety or the safety of others was in danger.[79] This belief must be based on specific reasonable inferences, not unparticularized and inchoate hunches.[80] The officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and presently dangerous.[81]

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75. Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). In *Ybarra*, the Court said no frisk was permitted, even where the "person happens to be on premises where an authorized narcotics search is taking place." *Id.*

76. Adams v. Williams, 407 U.S. 143, 146 (1972) (citing Terry v. Ohio, 392 U.S. 1, 24 (1968)); *see also* State v. Bobo, 37 Ohio St. 3d 177, 180, 524 N.E.2d 489, 492 (1988).

77. *Terry*, 392 U.S. at 24.

78. "So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." *Adams*, 407 U.S. at 146 (citing *Terry*, 392 U.S. at 30).

79. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27.

80. "[D]ue weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*

81. "In the case of a self-protective search for weapons, [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." Sibron v. New York, 392 U.S. 40, 64 (1967). "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." State v. Bobo, 37 Ohio St. 3d 177, 180, 524 N.E.2d 489, 492 (1988) (quoting Adams v. Williams, 407 U.S. 143, 146 (1972)).

IV. ANALYSIS

A. *The Stop*

In determining whether, under the totality of circumstances, Officer Martin had the objective and particularized suspicion of criminal activity required for a stop under the fourth amendment, the Ohio Supreme Court considered three facts which arguably related to Andrews' conduct:[82] (1) the suspect's presence in a high crime area; (2) the suspect's presence on the street after dark; and (3) the efforts by the suspect to avoid police contact.[83]

1. Nature of the Area

The Ohio Supreme Court in *Andrews* stated that "[a]n area's reputation for criminal activity is an articulable fact which is part of the totality of circumstances surrounding a stop to investigate suspicious behavior."[84] Courts, however, have struggled with using the nature of an area as a criterion upon which the officer may rely. Most courts consider this as one factor, but it is clear that the suspect's presence in such an area cannot "of itself ever be viewed as a sufficient basis to make an investigatory stop."[85]

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82. In *Andrews*, the timing and existence of the seizure was not questioned. State v. Andrews, 57 Ohio St. 3d 86, 562 N.E.2d 1271 (1991), *cert. denied*, 111 S. Ct. 2833 (interim ed. 1991). When the officer shined the flashlight in Andrews' face and instructed Andrews to place his hands up, it can not be disputed that a reasonable person would not feel free to walk away. *Id.* at 86, 565 N.E.2d at 1272. The analysis must look to the facts leading up to this moment in order to see if the stop was justified. Terry v. Ohio, 392 U.S. 1, 21 (1968); *see also* Chesternut v. Michigan, 486 U.S. 567 (1988).

83. The Ohio Supreme Court also considered two other factors in the totality of circumstances, the officer's years of experience and the fact that he was alone, away from his cruiser. *Andrews*, 57 Ohio St. 3d at 88, 565 N.E.2d at 1273-74. Neither of these factors, however, deal with the conduct of the suspect; rather, they deal with the conduct or attributes of the officer. As the United States Supreme Court has indicated, the focus must be on the suspect's conduct. Illinois v. Gates, 462 U.S. 213, 244 (1983); Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Cortez, 449 U.S. 411, 417 (1980).

84. *Andrews*, 57 Ohio St. 3d at 88, 565 N.E.2d at 1274 (citing United States v. Magda, 547 F.2d 756, 758 (2d Cir. 1976); State v. Bobo, 37 Ohio St. 3d 177, 179, 524 N.E.2d 489, 491 (1988); State v. Freeman, 64 Ohio St. 2d 291, 295, 414 N.E.2d 1044, 1047 (1980)).

85. W. LAFAVE, *supra* note 17, at 458 (citing Brown v. Texas, 442 U.S. 47 (1979); People v. Aldridge, 35 Cal. 3d 473, 674 P.2d 115, 156 Cal. Rptr. 538 (1984); People v. Loewen, 35 Cal. 3d 117, 672 P.2d 436, 196 Cal. Rptr. 846 (1983); Goldsmith v. State, 405 A.2d 109 (Del. 1979); Williams v. State, 477 N.E.2d 96 (Ind. 1985); State v. Larson, 93 Wash. 2d 638, 611 P.2d 771 (1980); State v. Stroud, 30 Wash. App. 392, 634 P.2d 316 (1981)).

Courts allowing the use of this factor,[86] including Ohio courts,[87] have relied upon the United States Supreme Court case of *United States v. Brignoni-Ponce*.[88] This reliance may be misplaced, however, because the idea has been taken out of the context of that case. The decision in *Brignoni-Ponce* was limited to the context of border patrols searching for illegal aliens.[89] Several courts which have relied upon *Brignoni-Ponce* have quoted the following sentence from the decision: "Officers may consider the characteristics of the area in which they encounter a vehicle."[90] Citation of this isolated statement ignores both the preceding and subsequent sentences which limit the scope of the sentence to border patrol situations:

> Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with the alien traffic are all relevant.[91]

Even in the border patrol context, the Court was hesitant to allow the character of the area to be weighed too heavily:[92]

> To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of the Border Patrol officers.[93]

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86. United States v. White, 655 F.2d 1302 (D.C. Cir. 1981); United States v. Hall, 525 F.2d 857 (D.C. Cir. 1977); United States v. Magda, 547 F.2d 756 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1977); United States v. Thomas, 551 F.2d 347 (D.C. Cir. 1976).

87. *Andrews*, 57 Ohio St. 3d at 88, 565 N.E.2d at 1274 (citing United States v. Magda, 547 F.2d at 758; State v. Bobo, 37 Ohio St. 3d at 179, 524 N.E.2d at 491; State v. Freeman, 64 Ohio St. 2d at 295, 414 N.E.2d at 1047).

88. 422 U.S. 873 (1975).

89. "Our decision in this case takes into account the special function of the Boarder Patrol. . . ." *Brignoni-Ponce*, 422 U.S. at 883 n.8.

90. *Id.* at 884.

91. *Id.* at 884-85.

92. *Id.* at 882.

93. *Id.* In addition to *Brignoni-Ponce*, there have been three other cases before the United States Supreme Court where the character of an area was used by the officer to justify a stop. In *Brown v. Texas*, the Court stated that the fact that the suspect was in a high crime area, standing alone, did not support reasonable suspicion and, therefore, the stop was illegal. 443 U.S. 47 (1978). In *Adams v. Williams*, the Court upheld the search and seizure of an individual in a high crime area, at 2:15 in the morning, after the officer had received a tip from a known informant that the person was armed and carrying drugs. The Court, however, did not explicitly address the weight, if any, that may be given to the suspect's presence in a "high crime area," but rather relied heavily on the tip from the informant in holding that the stop was justified. 407 U.S. 143 (1971). In the recent case of *California v. Hodari D.*, the Supreme Court was once again

Indeed, courts and commentators frequently criticize the use of the high crime area as a consideration of suspicion. They view the use of this factor as a reduction in the constitutional rights of individuals based on where they live.[94] As the Michigan Supreme Court perceptively noted, "[a] high neighborhood crime rate requires the presence of both innocent victims and criminal perpetration in the same neighborhood."[95] Another reason many courts are hesitant to allow the use of this factor is that it is subject to abuse.[96] One problem relates to the evidentiary foundation necessary to determine that an area is a high crime area.[97] Also of concern is how the activity of the suspect relates to the area's criminal activity, and how much crime in an area is required to qualify it as a high crime neighborhood.[98]

Most courts that have considered an area's criminal reputation as a factor have determined it to be of limited probative value. In finding that the seizure in *Brown v. Texas*[99] lacked reasonable suspicion, the United States Supreme Court noted that "the fact the [suspect] was in

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presented with an opportunity to rule conclusively on the permissibility of the use of the high crime area factor. The Court, however, declined, and decided the case exclusively on other grounds. 111 S. Ct. 1547, 1549 n.1 (interim ed. 1991).

94. "[P]ersons may not be subjected to invasions of privacy merely because they are in or passing through a 'high crime area.'. . . A history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality." People v. Aldridge, 35 Cal. 3d 473, 478-79, 674 P.2d 240, 242, 198 Cal. Rptr. 538, 540 (1984); *see also Brown*, 443 U.S. at 52; People v. Bower, 24 Cal. 3d 638, 597 P.2d 115, 156 Cal. Rptr. 856 (1970); People v. Shabaz, 424 Mich. 42, 378 N.W.2d 451 (1980); Schwartz, *Stop & Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 444-52 (1967).

95. People v. Shabaz, 424 Mich. at 61, 378 N.W.2d at 459; *see also* State v. Larson, 93 Wash. 2d 638, 645, 611 P.2d 771, 775 (1980) ("It is beyond dispute that many members of our society live, work and spend their waking hours in high crime areas, a description that can be applied to parts of many of our cities. That does not automatically make those individuals proper subjects of criminal investigation."); People v. Bower, 24 Cal. 3d 638, 645, 597 P.2d 115, 119, 156 Cal. Rptr. 856, 860 (1970) ("Many of 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."); Smith v. United States, 558 A.2d 312, 316 (D.C. 1989). "It is necessary to remind again that thousands of citizens live and go about their legitimate day-to-day activities in area's which surface . . . in court testimony, as being high crime neighborhoods." *Id.* (quoting United States v. Bennett, 514 A.2d 414, 419 n.3 (D.C. 1986) (Mack, J., dissenting)).

96. *Bower*, 156 Cal. 3d at 645, 597 P.2d at 119, 156 Cal. Rptr. at 860; *see also* Schwartz, *supra* note 95, at 444-52 (1967). Police have often utilized street encounters for improper purposes, such as the wholesale harassment of minority groups and blacks in particular. *Id.*

97. For example, courts are often told, in conclusive terms, that an area has a high crime rate without being told of the basis for that conclusion or the types of crime that are prevalent in that area. *Bower*, 24 Cal. 3d at 648 n.8, 597 P.2d at 120 n.8, 156 Cal. Rptr. at 860 n.8. A foundation objection was raised by Andrews' attorney at the trial court level in regards to this factor, but the issue was not brought up on appeal. *See supra* Motion, note 12, at 5.

98. *Bower*, 24 Cal. 3d at 648 n.8, 597 P.2d at 120 n.8, 156 Cal. Rptr. at 860 n.8.

99. 443 U.S. 47 (1979).

a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [the suspect] was engaged in criminal conduct."[100] The mere presence of an individual in a high crime area does nothing to distinguish that person from any other pedestrian in that area, and, therefore, provides no particular reasonable basis as to the activity of the defendant.[101]

The California Supreme Court has been especially hesitant to use this factor, stating that "[t]he high crime area factor is not an activity of an individual . . . . As a result this court has appraised this factor with caution and has been reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circumstances into circumstances justifying the seizure of an individual."[102]

One recent United States Supreme Court case may lend support to the use of the high crime area as one factor in justifying the stop of a suspect.[103] In *United States v. Sokolow*, the Court upheld a *Terry*-type stop based in part upon a "drug courier profile."[104] Among the facts relied upon from the profile was that the suspect was arriving from a trip to a "source city" for drugs.[105] By analogy, if it is permissible to use a person's arrival from a particular city as indicating possible criminal activity, it may also be permissible to use an individual's presence in a certain *part* of a city.

Nonetheless, because this factor is so ambiguous, it may not be considered an activity of the suspect, and because it lacks the required particularized suspicion, courts have generally held that it cannot, "without a great deal more," support reasonable suspicion.[106] The Dis-

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100. *Id.* at 52. "[T]he record suggests an understandable desire to assert a police presence; however, that purpose does not negate Fourth Amendment guarantees." *Id.*; *see also* People v. Shabaz, 424 Mich. 42, 60, 378 N.W.2d 451, 459 (1985). "While the crime rate in a neighborhood may be a valid consideration to be taken into account when assessing reasonable suspicion, that alone would not establish grounds for an investigatory stop." *Id.* (citation omitted).

101. *Shabaz*, 424 Mich. at 60, 378 N.W.2d at 459.

102. *Bower*, 24 Cal. 3d at 645, 597 P.2d at 119, 156 Cal. Rptr. at 860. In the past, the Ohio Supreme Court has looked to California opinions for guidance on search and seizure matters. *E.g.*, State v. Kessler, 53 Ohio St. 2d 204, 373 N.E.2d 1253 (1978).

103. United States v. Sokolow, 490 U.S. 1 (1989).

104. *Id.* at 10. A "drug courier profile" is a list of factors used by drug enforcement agents to detect characteristics found to be common in those transporting drugs. Reid v. Georgia, 448 U.S. 438, 440 (1979).

105. *Sokolow*, 490 U.S. at 9. The Court did say, however, that this fact, "standing alone, is not cause for any sort of suspicion." *Id.*

106. It was stated that:

> The fact that the activity occurred in a high drug trafficking area has, in some of our cases, been taken into account in determining the reasonableness of the officer's suspicion. . . . However, we have been careful to emphasize that this familiar talismanic litany, without a *great deal more*, cannot support an inference that appellant was engaged in criminal conduct.

Smith v. United States, 558 A.2d 312, 316 (D.C. 1989) (emphasis added) (citations omitted).

trict of Columbia Court of Appeals concluded that "[t]he fact that events . . . took place at or near an allegedly high narcotics activity area does not objectively lend any sinister connotation to facts that are innocent on their face."[107]

Otherwise innocent behavior does not rise to the level of reasonable suspicion required by the fourth amendment merely because it is occurring in a high crime area.[108] A clearer and more articulable circumstance is required to raise reasonable suspicion. Therefore, the Ohio Supreme Court's heavy reliance on this factor in *Andrews* is misplaced.

2. Time of Day

The time of day at which a suspect is observed may properly be considered to determine whether reasonable suspicion exists.[109] The emphasis in this factor is not whether it is after dark, but whether it is a time when people are typically out and about on the streets.[110]

In *People v. Bower*,[111] the California Supreme Court stated that "[n]o reasonable suggestion of criminality is added by the fact that it

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"An area's reputation can only be considered when other less ambiguous facts are present which would lead one to suspect criminal activity is afoot." United States v. Magda, 547 F.2d 756, 764 (2d Cir. 1976) (Motley, J., dissenting) (citing United States v. Nicholas, 448 F.2d 622, 624 (8th Cir. 1971)). Likewise, in *Sokolow*, the United States Supreme Court stated that a trip to Miami, a source city for drugs, standing alone, was not cause for any sort of suspicion. 490 U.S. at 9; *see also* State v. Bobo, 37 Ohio St. 3d 177, 182, 524 N.E.2d 489, 494 (1988) (Wright, J., dissenting) (fact that car was in well-known drug selling neighborhood could not be "sole reason" for stop).

107. Smith v. United States, 558 A.2d at 316. In *Smith*, the articulable facts were: (1) suspect was in a high crime area; (2) suspect departed rapidly as police approached; (3) suspect was seen talking with known drug dealers; and (4) officers were experts on identifying "drug teams." *Id.* at 314. The court found these facts insufficient to create reasonable suspicion. *Id.* at 317.

108. "Innocent activities do not become sinister by the mere fact that they take place in one of these [high crime] areas." *In re* D.J., 532 A.2d 138, 143 (D.C. 1987) (citing Brown v. Texas, 443 U.S. 47 (1979)). Likewise, the Montgomery County Ohio Court of Appeals stated: "The Fourth Amendment has no less application to Roland Circle than it does to the City of Oakwood. Pursuit of more aggressive tactics in one place than the other cannot justify different standards for search and seizure." State v. Andrews, No. 11477, at *16 (Montgomery County Ct. App., Nov. 16, 1989) (LEXIS, Ohio library, App file). Oakwood is the most exclusive residential area in Dayton, Ohio.

109. W. LAFAVE, *supra* note 17, at 454. "The widely held attitude of patrol officers is that persons found on the streets late at night are more likely to be guilty of some criminal offense; 'decent' people are in bed, and those remaining on the streets without clear indications of legitimate business are 'up to no good.'" L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME, 21 (1967).

110. "On the one hand those [appellate opinions] finding the circumstances not sufficiently suspicious often note that the 'hour was a reasonable hour for individuals to be abroad in the streets.'" W. LAFAVE, *supra* note 17, at 455; *e.g.*, State v. Colley, 229 N.W.2d 755 (Iowa 1975) (9:30 p.m., reasonable hour); Kenion v. United States, 302 A.2d 723 (D.C. 1973)(3:30 p.m., reasonable hour).

111. People v. Bower, 24 Cal. 3d 638, 597 P.2d 115, 156 Cal. Rptr. 856 (1979).

was dark when the officer observed [the suspect]. Strictly speaking the 'night time' factor is not 'activity by a citizen, and this court has warned that this factor should be appraised with caution.' "[112] In *Bower*, the court found that being out at 8:37 p.m., "while falling during darkness in winter, is simply not a late or unusual hour nor one from which any inference of criminality may be drawn. . . . An individual in public at such times does not reasonably suggest crime is afoot."[113]

Most of the cases where the time of day has been found to contribute to reasonable suspicion involve suspects who are observed on the streets near midnight, and typically much later.[114] Once again, this factor alone will not be enough to justify a stop.[115]

Although it was after dark, Officer Martin observed Andrews at 8:35 p.m., which would not be an unreasonable time for a person to be out in a residential neighborhood.[116] Additionally, the facts of the case suggest that there were other individuals in the area.[117] Because the time of day was not an unusual or uncommon hour for a person to be out, this fact added little or nothing to the creation of reasonable suspicion in *Andrews*.

3. Efforts to Avoid Police Contact

A suspect's flight at the sight of the police may be considered a factor in the totality of circumstances creating suspicion.[118] Flight

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112. *Id.* at 645, 597 P.2d at 119, 156 Cal. Rptr. at 860.

113. *Id.* (citations omitted); *see also* People v. Lathan, 38 Cal. App. 3d 911, 915, 113 Cal. Rptr. 648, 650 (1974) ("10:15 p.m. is hardly a late or unusual hour.").

114. State v. Donnell, 239 N.W.2d 575 (Iowa 1976) (2:00 a.m.); State v. Taylor, 363 So. 2d 699 (La. 1978) (1:15 a.m.); State v. Purnell, 621 S.W.2d 277 (Mo. 1981) (2:00 a.m.); State v. Stark, 502 S.W.2d 261 (Mo. 1973) (1:00 a.m.); State v. Oxley, 127 N.H. 407, 503 A.2d 756 (1985) (2:30 a.m.); State v. Bobo, 37 Ohio St. 3d 177, 425 N.E.2d 489 (1988) (11:20 p.m), State v. Freeman, 63 Ohio St. 2d 291, 414 N.E.2d 1044 (1980) (3:00 a.m.); Commonwealth v. Wascom, 236 Pa. Super. 157, 344 A.2d 620 (1975) (12:30 a.m.); Commonwealth v. Ellis, 233 Pa. Super. 160, 355 A.2d 512 (1975) (2:00 a.m.).

115. W. LAFAVE, *supra* note 17, at 454-56 n.187.

116. State v. Andrews, 57 Ohio St. 3d 86, 565 N.E.2d 1271 (1991), *cert. denied*, 111 S. Ct. 2833 (1991). The sunset on the day of the encounter was at 6:55 p.m., slightly over an hour and a half before Andrews was first observed. DAYTON DAILY NEWS, Oct. 18, 1988, at A-8.

117. The facts of the case stated that Officer Martin's partner was in the process of questioning another individual in the area. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E. at 1272.

118. "It is not to be doubted that [flight] may be taken into account by the police and that together with other suspicious circumstances these reactions may justify a stopping for investigation." W. LAFAVE, *supra* note 17, at 448; *see, e.g.*, Sibron v. New York, 392 U.S. 40 (1968) ("[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea."); United States v. Jones, 759 F.2d 633 (8th Cir. 1985) (suspect was known by police as a burglar, seen at rear of apartment building, began running at sight of officers); United States v. Chamberlin, 644 F.2d 1262 (9th Cir. 1980) (two men with extensive criminal records seen darting between buildings, suspects ran away when officers approached); *see also*

alone, however, is not enough to create reasonable suspicion, and may just indicate a legitimate desire to avoid contact with the police.[119]

Behavior which indicates only that an individual wants to avoid the police[120] cannot give rise to a reasonable suspicion that he is or was engaged in criminal activity.[121] Citizens are under no legal duty to talk with the police,[122] and a refusal to talk with them may be expressed orally or by physical departure.[123] An individual's act of leaving the scene hastily may be inspired by any number of reasons other than guilt,[124] including "innocent fear, or by a legitimate desire not to have

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State v. Jackson, 741 F.2d 223 (8th Cir. 1984); Luker v. State, 358 So. 2d 504 (Ala. Crim. App. 1978); State v. Bell, 382 So. 2d 119 (Fla. Dist. Ct. App. 1980); State v. Belton, 441 So. 2d 1195 (La. 1983); People v. Carter, 96 Mich. App. 694, 293 N.W.2d 681 (1980); Commonwealth v. Moore, 300 Pa. Super. 488, 446 A.2d 960 (1980).

119. McClain v. State, 408 So. 2d 721 (Fla. Dist. Ct. App. 1982); Kearse v. State, 384 So. 2d 272 (Fla. Dist. Ct. App. 1980); People v. Thomas, 660 P.2d 1272 (Colo. 1983); Jefferys v. United States, 312 A.2d 308 (D.C. 1973); State v. Master, 127 Ariz. 210, 619 P.2d 482 (1980). *But see* State v. Anderson, 155 Wis. 2d 77, 454 N.W.2d 763 (1989).

> Because we conclude that flight from the police is a strong indication of 'mens rea,' i.e. a guilty mind or a guilty purpose, we conclude that behavior which evinces in the mind of a reasonable police officer an intent to flee from the police is suspicious behavior sufficient to justify a temporary investigative stop.

Anderson, 155 Wis. 2d at 79, 454 N.W.2d at 764.

120. Citizens of Dayton may have added reason to avoid contact with the Dayton police department. The city's police force has a reputation for its brutal treatment of individuals suspected of criminal activity. Bray, *Scrutinized Newby Defends Moves*, DAYTON DAILY NEWS, January 27, 1991, at 1-B, col. 2. In one incident, two Dayton police officers held a suspect down while a third officer applied a hot clothes iron to the suspect's stomach and chest in order to extract information. *Id.* at 3-B. In another incident, a Dayton police officer was convicted of repeatedly slamming the head of a man into the floor of a courthouse hallway while the man was handcuffed and held down by four other officers. Hill, *Officer Gets Split Verdict*, DAYTON DAILY NEWS, March 28, 1991, at 3-A, col. 1.

121. McClain v. State, 408 So. 2d 721, 722 (Fla. Dist. Ct. App. 1982) (suspects ducked into store when they saw police coming and later left, "briskly walking away").

122. The District of Columbia Court of Appeals in the case of *In re D.J.*, found that an adverse inference cannot be drawn from a simple desire not to talk with police. 532 A.2d 138, 141 (D.C. 1987) (citing Brown v. Texas, 443 U.S. 47 (1979)).

> The person approached [by an officer], however, need not answer any question put to him; indeed he may decline to listen to the questions at all and may go on his way . . . . He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Id. at 141-42 (citing Florida v. Royer, 460 U.S. 491, 497-98 (1983)).

123. "A refusal to listen or answer may take verbal form, or, it may . . . take the form of physical departure." *Id.* at 142. In the case of *In re D.J.*, the encounter was on a rainy night, the suspect made eye contact with the police, put his hands in his pocket, turned, walked quickly away, and repeatedly changed direction to avoid the police. *Id.* at 139. The court held that this was insufficient to justify the stop. *Id.*

124. "[T]here are many reasons other than guilt why an [individual] may not wish himself or others present exposed to the immediate view of a stranger, even if the stranger is a police officer." People v. Bower, 24 Cal. 3d 638, 648, 597 P.2d 115, 121, 156 Cal. Rptr. 856, 862 (1979) (quoting Tompkins v. Superior Court, 59 Cal. 2d 65, 68, 378 P.2d 113, 115, 27 Cal. Rptr. 889, 921 (1963)).

contact with the police."[125] These efforts, without more, cannot justify a detention.[126] An individual's desire to avoid contact with the police is not a reasonable indicator of suspicion without other facts to make the action less ambiguous.[127]

Often, the degree of effort expended in attempting to avoid police contact makes a difference in how suspicious the activity is.[128] The suspect's effort to avoid police contact "must be such as permits a rational conclusion that flight indicated a consciousness of guilt."[129] The difficulty with this, however, is the risk of mistake in interpreting an individual's actions.[130] "[T]he observer may view that context quite otherwise from the actor: not only is his vantage point different, he may even have approached the scene with a preconceived notion - consciously or subconsciously - of what gestures he expected to see and what he expected them to mean."[131] An inchoate and unparticularized hunch or suspicion of evasive conduct based on some action by an individual is not sufficient.[132]

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125. Smith v. United States, 558 A.2d 312, 316 (D.C. 1989). A person is as free to avoid police officers as to avoid any other person. *Bower*, 24 Cal. 3d at 648, 597 P.2d at 121, 156 Cal. Rptr. at 862.

126. Florida v. Royer, 460 U.S. 491, 498 (1983).

127. "[F]light is not 'a reliable indicator of guilt without other circumstances to make its import less ambiguous.' " *In re D.J.*, 532 A.2d at 141 (quoting Hinton v. United States, 424 F.2d 876, 879 (D.C. Cir. 1969)). Flight alone is inherently ambiguous. People v. Shabaz, 424 Mich. 42, 62, 478 N.W.2d 451, 460 (1985).

128. *See, e.g.*, State v. Jackson, 741 F.2d 223 (8th Cir. 1984) (suspect ran through yards, jumping over fences at two in the morning); State v. Anderson, 155 Wis. 2d 77, 454 N.W.2d 763 (1990) (suspect's car sped away at velocity that exceeded the speed limit); State v. Johnson, 444 N.W.2d 824 (Minn. 1989) (suspect pulled off highway, then off secondary road, turned into driveway, shut off his lights, and pulled back onto highway a minute later).

129. *Smith*, 558 A.2d at 316 (quoting *In re D.J.*, 532 A.2d at 41).

130. The California Supreme Court stated that:

> The difficulty is that from the viewpoint of the *observer*, an innocent gesture can often be mistaken for a guilty movement. He must not only perceive the gesture accurately, he must also interpret it in accordance with the actor's true intent. But if words are not infrequently ambiguous, gestures are even more so.

People v. Bower, 24 Cal. 3d 638, 647, 597 P.2d 115, 120, 156 Cal. Rptr. 856, 862 (1979) (quoting People v. Superior Court, 3 Cal. 3d 807, 818, 478 P.2d 449, 455, 91 Cal. Rptr. 729, 735 (1970)).

131. *Id.* at 121.

132. Reid v. Georgia, 448 U.S. 438, 441 (1980).

> The agent's belief that the [suspect] and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an 'inchoate and unparticularized suspicion or hunch,' than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.

Id. (quoting Terry v. Ohio, 392 U.S. at 27); *see also* McClain v. State, 408 So. 2d 721, 721 (Fla. Dist. Ct. App. 1982) (officer's statements that the suspects "gave [him] the impression they were trying to avoid [him]" when they ducked into a store at the sight of the police and later briskly walked out, found to be insufficient); People v. Shabaz, 424 Mich. 42, 61, 378 N.W.2d 451, 460 (1985). "Because the police could only guess about what defendant was seeking to hide, their speculation did not provide a particularized suspicion of possessory wrongdoing, but only a generalized one." *Id.*

In *Andrews*, Officer Martin stated that he thought "possibly" Andrews was running from the police.[133] The Ohio Supreme Court, in analyzing the facts, said it must review the circumstances through Officer Martin's eyes.[134] The court, however, failed to apply the required objective standard to those facts.[135] Specifically, was Martin's belief reasonable in light of the fact that he had received no reports of a man running from the other cruiser?[136]

Where it is unclear whether the suspect was fleeing from the police, or where it is unclear whether the suspect knew that it was the police from whom he was fleeing, courts have generally found flight insufficient for a stop.[137] It must be clear that the suspect "knew that the police were present and reacted by immediately running from the scene of the alleged crime."[138]

In *Andrews*, it was unclear whether the defendant was, in fact, running from the police or running for some other purpose.[139] Officer Martin admitted that, for all he knew, the suspect could have been out jogging.[140] The record only indicated that there were police "in the vicinity" at the time Andrews was observed.[141]

Because flight as a lone factor is so ambiguous, courts require the presence of additional circumstances to justify a stop.[142] This is espe-

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133. *See supra* Motion, note 12, at 18.

134. *Andrews*, 57 Ohio St. 3d 86, 565 N.E.2d 1271 (1991), *cert. denied*, 111 S. Ct. 2833 (interim ed. 1991).

135. *Terry*, 392 U.S. at 21.

136. State v. Andrews, No. 11477, at *8 (Montgomery County Ct. App., Nov. 16, 1989) (LEXIS, Ohio library, App file).

137. W. LAFAVE, *supra* note 17, at 448; United States v. Jones, 619 F.2d 494 (5th Cir. 1980) (flight of the suspect at the sight of two strange men, in an unmarked car, was a natural reaction); People v. Shabaz, 424 Mich. 42, 378 N.W.2d 451 (1985) (suspect fleeing from unmarked police cruiser too "ambiguous"); People v. Towers, 49 A.D.2d 839, 373 N.Y.S.2d 593 (1975) (suspect began rapidly walking away at sight of unidentified strangers).

138. Smith v. United States, 558 A.2d 312, 316-17 (D.C. 1989). "However some actions which may fairly be said to be in response to an awareness that police are in the vicinity are not of that type [grounds for suspicion] and may be out of a desire to avoid some minor misstep . . . . " W. LAFAVE, *supra* note 17, at 450.

139. State v. Andrews, No. 11477, at *9 (Montgomery County Ct. App., Nov. 16, 1989) (LEXIS, Ohio library, App file).

140. *Id.*

141. *Id.* Interestingly the editor's headnotes to the *Andrews'* opinion are misleading because they seem to imply conclusively that Andrews was running from the police. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1272.

142. "[F]light alone is not a reliable indicator of guilt without other circumstances to make its import less ambiguous." People v. Shabaz, 424 Mich. 42, 62, 378 N.W.2d 451, 460 (1985). "[C]ircumstances of the suspect's efforts to avoid the police must be such as permit[] a rational conclusion that flight indicated a consciousness of guilt and the evasive action must be accompanied by other factors warranting an intrusion . . . . " *In re* D.J., 532 A.2d 138 (D.C. 1987) (alteration in original) (citation omitted). "While in isolation such activity is not sufficient for an

cially true when the suspect's flight is not from the site of a known crime.[143] As the Michigan Supreme Court stated: "[H]eightened general suspicion occasioned by the flight of a surveillance subject does not alone supply the particularized, reasoned, articulable basis to conclude that criminal activity was afoot that is required to justify the temporary seizure approved in *Terry*."[144]

Because conduct which a police officer could perceive as flight is so inherently ambiguous, courts require the presence of other less ambiguous factors in order to find reasonable suspicion.[145] This is especially important when it is not even clear that the suspect is running from the police.[146] This approach has been followed by the Ohio courts.[147] In *Andrews,* however, this was not the case. The other two factors relating to the Andrews' conduct, namely the high crime area and the time of day, were themselves also ambiguous and unparticularized.[148]

4. Totality

The majority in *Andrews* conceded that none of the facts discussed above individually justified reasonable suspicion on the part of Officer

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arrest, when coupled with other inculpatory circumstances, such information is relevant to a finding of probable cause." Commonwealth v. Ellis, 233 Pa. Super. 169, 173, 335 A.2d 512, 514 (1975). "[W]here furtive movement has been made by the occupants of a vehicle in response to the approach of police officers, the addition of other factors may give rise to a finding of probable cause to search the vehicle." State v. Kessler, 53 Ohio St. 2d 204, 208, 373 N.E.2d 1252, 1256 (1978).

143. One court has stated that:

> Flight alone does not justify an arrest, particularly when, as here, [the suspect's] running is not flight from the scene of a reported crime. The police must positively relate the flight to commission of a crime . . . . The officers were not investigating a particular crime; they were not aware of any crime which had just been committed from which [the suspect] could have been fleeing.

People v. Tebedo, 81 Mich. App. 529, 539-40, 265 N.W.2d 406, 408 (1978).

144. *Shabaz*, 424 Mich. at 63, 378 N.W.2d at 460.

145. *Id.* at 62, 378 N.W.2d at 460; *In re* D.J., 532 A.2d 138 (D.C. 1987); Commonwealth v. Ellis, 233 Pa. Super. 169, 173, 335 A.2d 512 (1975).

146. United States v. Jones, 619 F.2d 494 (5th Cir. 1980); *Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985); People v. Towers, 49 A.D.2d 839, 373 N.Y.S.2d 593 (1975).

147. In *State v. Bobo*, the Ohio Supreme Court stated that "[a] mere furtive gesture, standing alone, does not create probable cause to stop and search a vehicle without a warrant." 27 Ohio St. 3d at 181, 524 N.E.2d at 492. Although *Bobo* was used by the court in other parts of the *Andrews* opinion, the court did not use this, and in fact cited to nothing when discussing Andrews' flight. *See also* State v. Kessler, 53 Ohio St. 2d 204, 373 N.E.2d 1252 (1978). In *Kessler*, the Ohio Supreme Court found that where the suspect ducked down at the sight of the police car approaching, his car matched one described in association with robberies in the area, the driver had been previously arrested for burglaries, and the driver ran a red light, police had probable cause to search the vehicle. *Id.* The court stated: "[f]urtive movements alone are not sufficient to justify the search of an automobile without a warrant." *Id.* at 207, 373 N.E.2d at 1256.

148. For a discussion of the high crime area as a factor, see *supra* notes 84-101, and for a discussion of the time of day as a factor, see *supra* notes 84-108.

Martin.[149] In determining whether reasonable suspicion exists, however, it is important that the facts be considered collectively.[150] Even innocent acts, when considered together, may be so suspicious as to justify an investigatory stop.[151] The United States Supreme Court stated in *Terry v. Ohio*[152] that the analysis must look at the "facts, which taken together with rational inferences from these facts, reasonably warrant that intrusion."[153] The facts and circumstances with which the officer was presented should not be dissected and viewed individually, but must be viewed as a whole.[154]

Whether reasonable suspicion existed can only be determined by evaluating the totality of facts and "whether collectively [the facts] are greater than the sum of their parts . . . . "[155] The inquiry is whether the individual facts build to form the requisite objective basis for the particularized suspicion required to justify a *Terry*-stop.[156] The United States Supreme Court has been hesitant to allow facts, innocent in themselves, to be combined too quickly to create the required degree of reasonable suspicion.[157] In *Reid v. Georgia*,[158] the Court analyzed the use of drug courier profiles to establish reasonable suspicion from otherwise innocent facts.[159] In *Reid*, the suspect: (1) arrived from Ft. Lauderdale, a target city for drug distribution; (2) arrived early in the morning; (3) had no luggage other then a shoulder carry on; and (4) engaged in conduct which the drug enforcement agents interpreted as an attempt to conceal that he was traveling with someone else.[160] The Court concluded as a matter of law that the agents could not have had reasonable suspicion of criminal activity from what they had observed.[161] The Court stated that although in certain circumstances

149. "This case cannot be resolved on the basis of any one of the factors we have enumerated." State v. Andrews, 57 Ohio St. 3d 86, 88, 565 N.E.2d 1271, 1274 (1991), *cert. denied*, 111 S. Ct. 2833 (interim ed. 1991).

150. United States v. Cortez, 449 U.S. 411, 417 (1981). *See generally supra* notes 67-70 and accompanying text.

151. United States v. Sokolow, 490 U.S. 1 (1989); Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980).

152. 392 U.S. 1 (1968).

153. *Id.* at 21.

154. United States v. Magda, 547 F.2d 756, 758 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1977); State v. Freeman, 64 Ohio St. 2d 291, 414 N.E.2d 1044, 1047 (1980).

155. People v. Shabaz, 424 Mich. 42, 60, 378 N.W.2d 451, 459 (1985).

156. *Id.* at 64, 378 N.W.2d at 460. For an example of skillful police work in adding the facts together to establish reasonable suspicion of smuggling of illegal aliens, see United States v. Cortez, 449 U.S. 411, 413-16 (1980).

157. *E.g.*, Reid v. Georgia, 448 U.S. 438 (1979); Brown v. Texas, 443 U.S. 47 (1978).

158. 448 U.S. 438 (1979).

159. *Id.* at 440.

160. *Id.* at 441.

161. *Id.* at 441. The Court stated:

wholly lawful conduct might justify the suspicion that criminal activity was afoot, this was not such a case.[162]

What makes the analysis of *Andrews* so problematic is the ambiguity of the factors relied upon to create reasonable suspicion. Neither the character of the area,[163] nor the time of day,[164] nor the perceived flight of Andrews,[165] immediately create particularized, objective suspicion.

In *Brown v. Texas*, the United States Supreme Court provided further guidance as to what facts are *not* sufficient to create reasonable suspicion.[166] In *Brown*, the Court found the following set of facts insufficient to create reasonable suspicion: (1) the suspect was in a high crime area in which heavy drug activity occurred; (2) the suspect sought to avoid police contact because the suspect and another man began walking away from each other at the sight of the police cruiser; and (3) the incident occurred in daylight.[167] The time of day is the only factor different from the circumstances in *Andrews*, and because the time in *Andrews* (8:35 p.m.) was not an unusual hour to be outdoors,[168] the cases are actually indistinguishable. Also, as in *Andrews*, the officers in *Brown* did not claim to suspect any specific misconduct, nor did they have any reason to believe the individual was armed.[169]

Other jurisdictions have had occasion to address virtually the identical combination of facts as those in *Andrews*, and have held them to be insufficient to create reasonable suspicion of criminal activity.[170] In

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> Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.

Id.

162. *Id. Compare Reid*, 448 U.S. 438, *with* United States v. Sokolow, 490 U.S. 1 (1989), where a more unusual combination of otherwise innocent conduct was found to establish reasonable suspicion. In *Sokolow*, the suspect purchased $2,100 worth of plane tickets in cash to a "source city", acted nervously, and stayed in Miami only 48 hours despite the fact that the round trip flight took 20 hours. *Sokolow*, 490 U.S. at 1.

163. *See supra* notes 84-108 and accompanying text.

164. *See supra* notes 109-117 and accompanying text.

165. *See supra* notes 118-48 and accompanying text.

166. "Although *Brown* does not tell us what constitutes a reasonable suspicion sufficient to justify stopping an individual, it does indicate a set of facts that *do not* meet the constitutional test for detaining an individual." State v. Larson, 93 Wash. 2d 638, 645, 611 P.2d 771, 775 (1980).

167. *Brown*, 443 U.S. at 48-49, 53.

168. *See supra* notes 109-117 and accompanying text.

169. *Brown*, 443 U.S. at 49.

170. People v. Aldridge, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984); People v. Bower, 24 Cal. 3d 638, 597 P.2d 115, 156 Cal. Rptr. 856 (1979); People v. Wilkins, 186 Cal. App. 3d 804, 231 Cal Rptr. 1 (1986); *In re* D.J., 532 A.2d 138 (D.C. 1987); People v. Shabaz, 424 Mich. 42, 378 N.W.2d 451 (1985); State v. Larson, 93 Wash. 2d 638, 611 P.2d 771 (1980).

State v. Larson,[171] the police officer made three observations: (1) the suspect was in a high crime area; (2) the time of day was 3:00 a.m.; and (3) the suspect sought to avoid police contact by taking flight upon the approach of the police.[172] Additionally, the suspect was in a car which was illegally parked next to a closed park.[173] The Washington Supreme Court found, however, that when considered in their totality, these circumstances failed to give rise to a reasonable and articulable suspicion that the individual was engaged in criminal conduct.[174] The court found that, at best, this set of facts amounted to "nothing more substantial than an inarticulable hunch."[175] The court concluded that the suspect was detained "because of his presence in a particular location even though he had a legal right to be there."[176] Another similarity is that in *Larson*, the court found that for all the officer knew, the suspect could have been waiting to discharge passengers.[177] This is similar to *Andrews* in that Officer Martin admitted that for all he knew, Andrews could have been out jogging.[178]

In *People v. Shabaz*,[179] the Michigan Supreme Court found that the officer did not have the required particularized suspicion needed for a stop under the following facts: (1) the suspect was in a high crime area; (2) it was nighttime; and (3) the suspect sought to avoid police contact by running as the police approached.[180] The defendant also had been seen leaving an apartment building where there was known drug

171. 93 Wash. 2d 638, 611 P.2d 771 (1980).

172. *Id.* at 639-40, 611 P.2d at 772.

173. *Id.*

174. *Id.* at 643, 611 P.2d at 774.

175. *Id.* (quoting *Terry*, 392 U.S. at 22).

176. *Larson*, at 645, 611 P.2d at 775; *see also In re* D.J., 532 A.2d 138 (D.C. 1987) (court found no reasonable suspicion where: (1) high crime area; (2) rainy night (no time given); and (3) conduct to avoid police contact); Commonwealth v. Thibeau, 384 Mass. 762, 429 N.E.2d 1009 (1981) (the court found no reasonable suspicion where: (1) 10 p.m.; (2) sudden left turn at sight of police; and (3) use of bikes, which the suspect was on, were known by officers to be used for drugs deals). But see *State v. Taylor*, 363 So. 2d 699 (La. 1978), in which the court upheld the stop and frisk of suspects where the stop occurred in a high crime area at 1:15 a.m. and the suspect attempted to avoid police contact. *Id.* This case is distinguishable, however, in the degree of effort the suspects expended to avoid police contact. Initially, the suspects were observed running and then stopped at the sight of a police officer. One of the two individuals then ducked out of sight, only to reappear at the corner with his companion. The court held that this conduct was consistent with that of someone who had just committed a crime, and was sufficient to justify a stop under a Louisiana statute. *Id.* at 702-03.

177. *Larson*, 93 Wash. 2d at 643, 611 P.2d at 774.

178. State v. Andrews, No. 11477, at *9 (Montgomery County Ct. App., Nov. 16, 1989) (LEXIS, Ohio library, App file). If anything, the case for reasonable suspicion is stronger in *Larson* than in *Andrews*, because *Larson* involved an unusual hour, 3:00 a.m. *Larson*, 93 Wash. at 639, 611 P.2d at 772.

179. 424 Mich. 42, 378 N.W.2d 451 (1985).

180. *Id.* at 60, 378 N.W.2d at 459.

activity.[181] Additionally, the suspect started stuffing a small paper bag under his vest after looking in the direction of the police.[182] Even with these additional circumstances, the court found that collectively the factors did not form the requisite objective basis for the particularized suspicion required for a *Terry*-stop.[183]

Two California Supreme Court cases have addressed sets of circumstances similar to those presented in *Andrews*.[184] In both cases, the court found the particular combination of facts insufficient to create the particularized reasonable suspicion required for the detention.

In *People v. Bower*,[185] the officer observed the following facts: (1) the suspect was in a high crime area; (2) the encounter occurred during the nighttime; and (3) the suspect sought to avoid police contact since a group of people, including the suspect, disbanded as police approached and the suspect exited down an alley.[186] Additionally, the suspect was racially out of place in the neighborhood.[187] The California Supreme Court concluded that these facts did not qualify as the "specialized knowledge" needed to convert otherwise innocent facts into criminal ones.[188]

In *People v. Aldridge*,[189] the California Supreme Court found the following facts insufficient to justify detention: (1) the suspect was in a high crime area, known for its drug activity; (2) the time of day was 10:15 p.m.; and (3) the suspect sought to avoid police contact by first walking, then running, at the sight of the police.[190] Even though the court conceded that the officers had extensive experience and knowledge of the area's criminal activity, that individuals in the area were frequently armed, and that one of the officers had made more than 200 arrests in the area, including three earlier that night, the court stated

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181. *Id.*

182. *Id.*

183. *Id.* at 64, 378 N.W.2d at 461.

184. People v. Aldridge, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984); People v. Bower, 24 Cal. 3d 638, 597 P.2d 115, 156 Cal. Rptr. 856 (1979); *see also* People v. Wilkins, 186 Cal. App. 3d 804, 231 Cal. Rptr. 1 (1986). In the past the Ohio Supreme Court has looked to California opinions in search and seizure cases. State v. Kessler, 53 Ohio St. 3d 204, 373 N.E.2d 1252 (1978).

185. 24 Cal. 3d 638, 597 P.2d 115, 156 Cal. Rptr. 856 (1979).

186. *Id.* at 645, 597 P.2d at 117, 156 Cal. Rptr 858.

187. *Id.* at 644, 597 P.2d at 119, 156 Cal. Rptr. at 860 (suspect was a white male in a predominately black neighborhood).

188. *Id.* at 646, 597 P.2d at 121, 156 Cal. Rptr. at 861.

189. 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984).

190. *Id.* at 476, 674 P.2d at 241, 198 Cal. Rptr. 539. Like *Andrews*, the suspect was ultimately found to be armed. *Id.*

that "[w]hether considered separately or together, these factors do not justify the detention."[191]

Earlier Ohio cases in which reasonable suspicion was found to exist are distinguishable from *Andrews* because the actual conduct of the individuals in these earlier cases was more suspicious and more particularized.[192] In *State v. Freeman*,[193] the Ohio Supreme Court found that there were specific articulable facts to create reasonable suspicion where the suspect was observed sitting in a parked car at 3:00 a.m. for over twenty minutes in a parking lot which had a history of drug activity.[194] In *State v. Bobo*,[195] reasonable suspicion was found to exist where the suspect sat in a car, disappeared from view as the police car approached, then looked directly at the officers and bent down as if to hide something under the seat.[196] The officer had frequently seen the same type of bending gesture in cars when suspects were trying to hide drugs and weapons.[197]

Another problem with *Andrews* is that the Ohio Supreme Court's analysis never suggests the criminal activity of which Andrews was suspected.[198] The activities of the person being observed, when combined with the surrounding circumstances, must affirmatively suggest some particular criminal activity, either completed, current or intended.[199] In *Terry*, it was clear that the suspects were casing the store for an impending "stick-up,"[200] thus creating the "particularized and articulable suspicion of imminent criminal activity that justified the stop and frisk."[201] Yet, the appeals court in *Andrews* recognized that while presence in a high crime area combined with a suspect's furtive conduct may sometimes create reasonable suspicion, the conduct on the part of Andrews was too ambiguous to seriously suggest that Andrews was seeking to avoid the police or had committed a crime.[202] The appellate

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191. *Id.* at 478, 674 P.2d at 252, 198 Cal. Rptr. at 540.

192. State v. Bobo, 37 Ohio St. 3d 177, 524 N.E.2d 489 (1988); State v. Freeman, 64 Ohio St. 2d 291, 414 N.E.2d 1044 (1980).

193. 64 Ohio St. 2d 291, 414 N.E.2d 1044 (1980).

194. *Id.* Although the case was never appealed, the result in *Freeman* is itself questionable. Further, as Justice Wright pointed out in his dissent in *Andrews*, 57 Ohio St. 3d at 90, 565 N.E.2d at 1275 (Wright, J., dissenting), the Ohio Supreme Court was recently criticized for its approach to the search and seizure issue and summarily reversed in *Smith v. Ohio*, 494 U.S. 541 (1990).

195. 37 Ohio St. 3d 177, 524 N.E.2d 489 (1988). *Bobo* was relied upon heavily by the court in *Andrews*. *Andrews*, 57 Ohio St. 3d at 87-88, 565 N.E.2d at 1273-74.

196. *Bobo*, 37 Ohio St. 3d at 177-78, 524 N.E.2d at 489.

197. *Id.*

198. *See Andrews*, 57 Ohio St. 3d 86, 565 N.E.2d 1271 (1988).

199. Sibron v. New York, 392 U.S. 40, 73 (Harlan, J., concurring); People v. Shabaz, 424 Mich. 42, 63, 378 N.W.2d 451, 460 (1985).

200. *Terry*, 392 U.S. at 6.

201. People v. Shabaz, 424 Mich. at 65-66, 378 N.W.2d at 461.

202. State v. Andrews, No. 11477, at 9 (Montgomery County Ct. App., Nov. 16, 1989)

court found that this was nothing more than an "inarticulate hunch."[203]

5. Subjective Standard

Perhaps the biggest problem with the Ohio Supreme Court's analysis in *Andrews* is the apparent use of a subjective standard in analyzing the stop. *Terry* and its progeny have insisted upon an objective "reasonable police officer" standard in analyzing the facts.[204] In *Terry*, the United States Supreme Court made clear that,

> [t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subject to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search and seizure in light of the particular circumstances . . . . It is imperative that the facts be judged by an objective standard: Would the facts available to the officer at the moment of the seizure warrant a man of reasonable caution . . . in the belief that the action taken was appropriate. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . simple good faith on the part of the arresting officer is not enough.[205]

The fourth amendment requires that the detaining officer have a reasonable suspicion based upon objective observations.[206]

Ohio courts have repeatedly upheld the objective standard requirement.[207] In *State v. Bobo*,[208] the Ohio Supreme Court stated "it is imperative that the facts be judged by an objective standard: would the

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(LEXIS, Ohio library, App file). "The degree of suspicion that attached to his acts did not warrant the stop: The officer had no information from radio calls or reports that the officers in the police vehicle on Roland Circle were seeking Appellant." *Id.*

203. *Id.*

204. Terry, 392 U.S. at 16-19. "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1980).

205. *Terry*, 392 U.S. at 21; *see also* Brown v. Texas, 443 U.S. 47, 47 (1978).

> [A]n individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field . . . . [A] seizure must be based on specific, *objective* facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, *neutral* limitations on the conduct of individual officers.

Id. at 51 (emphasis added).

206. United States v. Cortez 449 U.S., 411, 418 (1980). "[W]e have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown*, 443 U.S. at 51.

207. State v. Bobo, 37 Ohio St. 3d 177, 524 N.E.2d 489 (1988); State v. Freeman, 64 Ohio St. 2d 291, 414 N.E.2d 1044 (1980); State v. Kessler, 53 Ohio St. 2d 204, 373 N.E.2d 1252 (1978).

208. 37 Ohio St. 3d 177, 524 N.E.2d 489 (1988).

facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?"[209] In *State v. Freeman*,[210] the Ohio Supreme Court stated that "[t]he mood of the precinct and the circumbient activities are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training."[211] In *Andrews* the Ohio Supreme Court cited *Freeman* and *United States v. Hall*,[212] but altered the wording used in those opinions. In speaking of the standard governing the court's analysis of Martin's observations, the court stated that it must "view the circumstances through *his* eyes. *He* was the 'reasonable and cautious police officer on the scene.' "[213] Once again, the Ohio Supreme Court has taken wording out of its original context.[214] In this instance, it has switched the phrasing around to mean the exact opposite of what the standard was supposed to be. Under this wording, the objective "reasonableness standard" effectively becomes a subjective one.

This switch to a subjective standard has an effect not only on the view relating to "adding up" the totality of circumstances, but on the individual factors as well. This is especially true of the flight factor in this case. If a court looks at the situation only through the eyes of the police officer and determines conclusively that "he is the reasonable police officer," then the conclusion as to whether Andrews was running from the police is not made in accordance with *Terry's* objective standard which requires "detached" and "neutral scrutiny."[215] A subjective

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209. *Id.* at 178-79, 524 N.E.2d at 491.

210. 64 Ohio St. 2d 291, 414 N.E.2d 1044 (1980).

211. *Id.* at 295, 414 N.E.2d at 1047 (emphasis added) (quoting United States v. Hall, 525 F.2d 857, 859 (D.C. Cir. 1976)).

212. 525 F.2d 857 (D.C. Cir. 1976).

213. *Andrews*, 57 Ohio St. 3d at 88, 565 N.E.2d at 1274 (emphasis added). In its entirety, the paragraph states:

> We believe that the facts support a reasonable suspicion by Martin that Andrews was engaged in criminal activity. Martin was an experienced police officer with twelve and a half years on the force and was familiar with the Roland Circle area. We must view the circumstances of the stop through his eyes. He was the 'reasonable and cautious police officer on the scene' who is guided by his own experience and training.

Id. (quoting State v. Freeman, 64 Ohio St. 2d 291, 294, 414 N.E. 1044, 1047 (1980); *Hall*, 525 F.2d at 859).

214. While in its analysis of the high crime area factor, see *supra* note 91 and accompanying text, the court only took a sentence selectively out of the context of the original paragraph, here the court has dissected the words themselves out of the original sentence.

215. *Terry*, 392 U.S. at 21. An example of the application of this objective, detached scrutiny can be found in *Reid v. Georgia*, 448 U.S. 438 (1980), where the United States Supreme Court found that an officer's belief that two individuals were attempting to conceal the fact that they were traveling together did not adequately meet this objective standard. *Id.* at 441. The Court stated that "a belief that was more of an inchoate and unparticularized suspicion or hunch, than a fair inference in the light of his experience, is simply too slender a reed to support the

standard essentially eliminates the detached, neutral scrutiny of the court, and for all practical purposes, eliminates the restraints the fourth amendment provides against potentially abusive police conduct.[216]

In summary, none of the factors upon which the *Andrews* court relied, taken either individually or as a whole, are sufficient to form the reasonable and particularized suspicion *Terry* requires to justify the seizure. Numerous courts of other states have dealt with cases involving high crime areas, night encounters, and flight from police, and have found the factual combination insufficient.[217] What is most remarkable in *Andrews* is that it is not even clear that Andrews was running from the police, only that there were police in the vicinity. If the "avoidance of police" factor is to be used at all, it should be used with great caution, otherwise individuals in high crime areas in which there is a high probability of police presence will be subject to virtually random police stops. Furthermore, a court's use of a subjective standard in analyzing the circumstances is clearly counter to the fundamental requirements and purposes of the *Terry* decision.

B. The Frisk

There are basically two ways in which an officer may acquire the required reasonable suspicion that a stopped individual is armed and presently dangerous. First, the nature of the crime which the suspect is believed to be contemplating may lead to a police officer's reasonable suspicion. Second, some surrounding circumstances or action on the part of the suspect may reasonably indicate that he is armed.[218] Neither of these were established in the *Andrews* case.

1. The Nature of the Crime

In *Terry,* the United State Supreme Court indicated that an of-

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seizure in this case." *Id.* Likewise, the California Supreme Court said of this objective, detached analysis: "Not only must [the officer] subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so; the facts must be such as would cause any reasonable police officer in a like position . . . to suspect the same criminal activity and same involvement by the person in question." People v. Aldridge, 35 Cal. 3d 473, 478, 674 P.2d 240, 242, 198 Cal. Rptr. 538, 540 (1984) (citations omitted). The court found a subjective but not an objective belief in the existence of criminal activity. *Id.* The court stated that "mere subjective speculation as to the mens' purported motives . . . carries no weight." *Id.* at 479, 674 P.2d at 243, 198 Cal. Rptr. at 541; *see supra* notes 189-191 and accompanying text.

216. *Cf. Terry*, 392 U.S. at 21. *See generally* note 120 and accompanying text on incidents of police abuse in Dayton.

217. *See, e.g.*, People v. Aldridge, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984); People v. Bower, 24 Cal. 3d 638, 597 P.2d 115, 156 Cal. Rptr. 856 (1979); People v. Wilkins, 186 Cal. App. 3d 804, 231 Cal. Rptr. 1 (1986); *In re* D.J., 532 A.2d 138 (D.C. 1987); People v. Shabaz, 424 Mich. 42, 378 N.W.2d 451 (1985); State v. Larson, 93 Wash. 2d 638, 611 P.2d 771 (1980).

218. W. LaFave, *supra* note 17, at 505-09.

ficer was required to conduct some type of inquiry upon the suspect before the officer could justify the frisk.[219] This requirement seems to have eroded. A frisk is now immediately permissible if the facts leading to the stop also give the officer reasonable suspicion that the suspect is armed and dangerous.[220]

This ability to conduct an immediate search, however, does not justify a search of every individual stopped. The right to conduct an immediate frisk must be based on the reasonable suspicion that the individual "has committed, was committing, or was about to commit a type of crime for which the offender would likely be armed."[221] Examples of crimes where the suspect would likely be armed include robbery, burglary, rape, assault with weapons, homicide and dealing or possession of large quantities of drugs.[222] Where the individual is suspected of a crime that does not typically involve use of a weapon, other circumstances are required to justify the search.[223] Examples of these types of crimes include trafficking in small quantities of narcotics, possession of marijuana, illegal possession of liquor, prostitution, bookmaking, shoplifting, underage drinking, minor assault with a weapon, or vagrancy.[224]

This part of the analysis becomes problematic because in *Andrews* it is never made clear exactly what Officer Martin suspected Andrews of doing. It has been stated that this was an area of drug activity,[225] yet even where a small amount of narcotics is believed to be present, no frisk is justified.[226] As the dissent in *Andrews* points out, it is inconceiv-

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219. The United States Supreme Court, in *Terry*, said that a frisk was justified "where in the course of investigating this behavior [the officer] identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety." *Terry*, 392 U.S. at 30. The purpose for the *Terry* stop is to allow the officer to "maintain the status quo" in order to further assess the situation. State v. Freeman, 64 Ohio St. 2d 291, 296, 414 N.E.2d 1044, 1047 (1980). "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Adams v. Williams, 407 U.S. 143, 146 (1972).

220. *Williams*, 407 U.S. at 143 (if at the time of the stop a police officer has reasonable suspicion that an individual is armed and dangerous, he or she may immediately frisk the suspect); *see also* U.S. v. Wheeler, 800 F.2d 100 (7th Cir. 1986).

221. W. LAFAVE, *supra* note 17, at 506.

222. *Id.* In *Terry*, the officer's observation of the suspects' conduct lead him to believe the suspects were contemplating a daylight robbery, a crime which typically involves the use of a weapon. *Terry*, 392 U.S. at 28. In *Terry*, however, the officer, in fact, did not frisk until after making an initial inquiry of the suspects. *Id.* It appears under the current analysis, that inquiry would no longer be necessary to justify the frisk. *Williams*, 407 U.S. at 143.

223. W. LAFAVE, *supra* note 17, at 507.

224. *Id.*

225. *Andrews*, 57 Ohio St. 3d at 89, 565 N.E.2d at 1273.

226. Sibron v. New York, 392 U.S. 40 (1968); Gibbs v. State, 18 Md. App. 230, 306 A.2d 587 (1973); State v. Duvernoy, 156 W.Va. 383, 195 S.E.2d 631 (1973).

able, based on these facts and such a brief observation of Andrews, that Officer Martin could have had any suspicion of criminal activity, much less the specific suspicion of an act involving a weapon.[227]

2. Other Circumstances or Gestures

Even where the suspect has not been stopped for suspicion of a crime likely to involve the use of a weapon, the officer may still frisk the suspect if the surrounding circumstances or some action on the part of the suspect indicates that he may be armed.[228] Once again, however, this is dependent on there having been reasonable suspicion to have stopped the individual in the first place.[229]

In *Andrews*, the frisk came almost immediately after the stop.[230] The suspect's only conduct between the time he was stopped and the time he was frisked was throwing down a can of beer.[231] The court must look to the facts which justified the stop, and determine if these facts also justified a belief that the suspect was armed and presently dangerous.[232] The Ohio Supreme Court's apparent use of a subjective standard, as discussed previously, again runs counter to this standard.[233] In order to justify the search, the belief that the suspect is armed and presently dangerous must be objectively reasonable.[234] The officer must be "aware of specific facts which would warrant a reasonable person to believe he was in danger."[235] A mere subjective belief on the part of the officer is not sufficient.[236]

The following conduct has been found to indicate that the suspect is armed and dangerous: a characteristic bulge in the pocket;[237] an observation of an object in the pocket that may be a weapon,[238] and an

227. *Id.* at 90, 565 N.E.2d at 1276 (Wright, J., dissenting).

228. W. LAFAVE, *supra* note 17, at 507. *C.f.* Adams v. Williams, 407 U.S. 143 (1972); Ybarra v. New York, 444 U.S. 85 (1979); State v. Bobo, 37 Ohio St. 3d 177, 524 N.E.2d at 489 (1988).

229. *Adams*, 407 U.S. at 146; *Terry*, 392 U.S. at 30.

230. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1272.

231. *Id.*

232. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." W. LAFAVE, *supra* note 17, at 502. The mere fact that an individual is suspected of being armed is not sufficient to justify a frisk. The officer must believe the suspect is armed and presently dangerous to him. *Id.*

233. *See supra* notes 204-215 and accompanying text.

234. United States v. Tharpe, 536 F.2d 1098, 1100 (5th Cir. 1976); *see also Terry*, 392 U.S. at 27.

235. *Tharpe*, 536 F.2d at 1101.

236. "The test is an objective one rather then a subjective one . . . . " W. LAFAVE, *supra* note 17, at 504.

237. *E.g.*, People v. Allen, 50 Cal. App. 3d 896, 123 Cal Rptr. 80 (1975); State v. Allen, 93 Wash.2d 170, 606 P.2d 1235 (1980).

238. Commonwealth v. Wascom, 236 Pa. Super. 157, 344 A.2d 630 (1975).

otherwise inexplicable sudden movement towards a pocket or other place where a weapon might be.[239]

In *Adams v. Williams*,[240] the United States Supreme Court found that a frisk was permissible where the officer had received a tip from a reliable, known informant that the suspect was armed, the suspect was sitting in his car in a high crime area at 2:15 a.m., and, when the officer approached the suspect and asked him to step out of the car, the suspect responded by rolling down his window.[241] The Court stated that the officer had "ample reason to fear for his safety" because of this non-responsive gesture and the officer's inability to see the suspect's hand movements in the car.[242]

In *Ybarra v. New York*,[243] however, the United States Supreme Court found that the officer did not have a reasonable belief that the suspect was armed and presently dangerous where the officer did not recognize the suspect as a person with a criminal history, the suspect's hands were empty, the suspect gave no indication of possessing a weapon, the suspect made no move or gesture that might indicate an intent to assault the officer, and the suspect acted in a non-threatening manner. The Court said "[t]he state is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous."[244]

One fact upon which the Ohio Supreme Court relied heavily in justifying the search in *Andrews* was that the officer was away from his cruiser and alone at the time of the encounter.[245] The Ohio Supreme Court had used this factor previously to justify a search of a suspect in *State v. Bobo*.[246] In *Bobo*, however, there was the additional fact of the type of gesture made by the suspect. The suspect in *Bobo* was seen bending down as if to place something under the seat.[247] The court found that this movement warranted a belief on the part of the officer that the suspect might have access to weapons.[248] By comparison, in *Andrews*, the court never explained how the gesture of throwing down a can of beer after a police officer startled him indicated that Andrews

239. United States v. Walker, 576 F.2d 253 (9th Cir. 1978); United States v. Vincent, 395 F. Supp. 1072 (S.D.N.Y. 1973); State v. Joao, 56 Haw. 216, 533 P.2d 270 (1975).

240. 407 U.S. 143 (1972).

241. *Id.* at 144-45.

242. *Id.* at 147-48.

243. 444 U.S. 85 (1979).

244. *Id.* at 93.

245. *Andrews*, 57 Ohio St. 3d at 89, 565 N.E.2d at 1274.

246. 37 Ohio St. 3d 177, 524 N.E.2d 489 (1988). This opinion was relied on heavily in *Andrews*.

247. *Id.* at 180, 524 N.E.2d at 492.

248. *Id.* at 179, 524 N.E.2d at 492.

had access to a weapon.[249] Additionally, the Ohio Supreme Court's reliance on the fact that Martin was alone and away from his cruiser at the time of the encounter is misplaced because the focus must be on the conduct of the suspect not on that of the officer.[250] Justification for a frisk cannot be established by the fact that the "officer has unnecessarily put himself in a position of danger by not avoiding the individual in question."[251]

A final factor to which the Ohio Supreme Court attached great significance in justifying Officer Martin's belief that the suspect was armed is that the encounter was in a high crime area.[252] This factor, however, lacks the "particularized suspicion" required by *Terry*.[253] In *Maryland v. Buie*,[254] the United State Supreme Court stated that "[e]ven in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted."[255] It appears from the *Andrews* decision, however, that any person stopped in a police-designated high crime area is presumed to be armed and dangerous.[256]

The Ohio Supreme Court justified the frisk on the facts that Officer Martin accosted Andrews in a dark area away from Martin's cruiser, Andrews threw a beer can to the ground in a sudden motion, and Officer Martin knew the area was a high crime area.[257] The court appears to have ignored the second step of the *Terry* analysis, stating that Martin's "suspicion that Andrews was engaged in criminal activity also warranted a belief that Andrews might be armed and dangerous."[258] As legal support for this statement, the Ohio Supreme Court can cite only to the fact mentioned in *Terry* that American criminals

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249. *Andrews*, 57 Ohio St. 3d at 89, 565 N.E.2d at 1274.

250. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980).

251. W. LAFAVE, *supra* note 17, at 499.

252. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1272.

253. The California Supreme Court stated:

> To hold that police officers should in the proper discharge of their duties detain and question all persons in that location or all those who act nervous at the approach of officers would for practical purposes involve an abrogation of the rule requiring substantial circumstances to justify the detention and questioning of persons on the street.

People v. Aldridge, 35 Cal. 3d 473, 479, 674 P.2d 240, 243, 198 Cal. Rptr. 538, 541 (1984). In *United States v. Magda*, the court said that the stop of an individual in a high crime area was permissible where the stop was limited in scope and involved no intrusion of personal security. 547 F.2d 756 (2d Cir. 1976). A stop to ask questions is permissible. *Id.* In *Andrews*, however, the officer went directly to the frisk. *Andrews*, 57 Ohio St. 3d at 86, 565 N.E.2d at 1274.

254. 110 S. Ct. 1093 (1990)

255. *Id.*

256. *Andrews*, 57 Ohio St. 3d at 89, 565 N.E.2d at 1274.

257. *Id.*

258. *Id.*

have a long history of using weapons.[259] *Terry* and the cases following, however, have consistently required something more to justify the frisk.[260] The officer must not only suspect that the individual was involved in criminal activity, but also that the individual is armed and presently dangerous to the officer or to others.[261] Although a weapon was ultimately discovered by Officer Martin, "a search is not made legal by what it turns up, in law it is good or bad when it starts and does not change character from its success."[262]

V. CONCLUSION

State v. Andrews represents a further reduction of the protection of the fourth amendment. This is especially true for those citizens who must live or work in areas of high crime. Any person seen running through a high crime area at night when a police cruiser is in the area, which in such an area is probably quite often, is not only reasonably suspected of criminal activity, but may, upon those facts, be considered armed and potentially dangerous.

The Ohio Supreme Court's decision to legitimize the stop and frisk of Christopher Andrews based upon these facts has the effect of strengthening the weight each of those factors carries within the analysis. The use of the high crime area factor is especially bolstered by this decision because so little is now required in addition to that fact to justify a seizure and search of a citizen.[263] When this lowered standard is combined with the court's apparent use of a subjective standard in analyzing the individual facts and the totality of circumstances, the fourth amendment's protections become meaningless. The United States Supreme Court's denial of certiorari to *Andrews* further erodes these protections since the case will now serve as unchallenged precedent.[264]

Only when the objective scrutiny of the courts checks the conduct of officers in the field can the protections of privacy and personal security, ensured by the fourth amendment, be realized. By narrowly defining the scope of these protections, the Ohio Supreme Court increased the opportunity for abuse of those rights by those acting under color of

259. *Terry*, 392 U.S. at 23.

260. Adams v. Williams, 407 U.S. 143, 146 (1972); *Terry*, 392 U.S. at 24 (1968).

261. *Id.*

262. United States v. Di Re 332 U.S. 581, 595 (1948).

263. The only two other factors required in *Andrews* are the appearance of flight and the time of day. *See supra* notes 137-148, 109-117 and accompanying text.

264. The United States Supreme Court's decision not to review *Andrews* is another example of the Court's recent trend in contracting the coverage of the fourth amendment. *See, e.g.*, California v. Hodari D., 111 S. Ct. 1547 (interim ed. 1991); Florida v. Bostick, 111 S. Ct. 2382 (interim ed. 1991); United States v. Sokolow, 490 U.S. 1 (1989).

law. In the words of Justice Wright, "[i]f . . . those circumstances are to become the bases for analyzing the reasonableness of future searches, of what value is the Fourth Amendment? Little, I think."[265]

Brian J. O'Connell

[265] *Andrews*, 57 Ohio St. 3d at 91, 565 N.E.2d at 1276 (Wright, J., dissenting).