WHEN TOO MANY PEOPLE CAN BE STOPPED: THE EROSION OF REASONABLE SUSPICION REQUIRED FOR A *TERRY* STOP

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INTRODUCTION....258
I. LEGAL FRAMEWORK FOR REASONABLE SUSPICION....259
II. DEFINING THE PARTICULARITY REQUIRED TO SUPPORT REASONABLE SUSPICION FOR *TERRY* STOPS FOLLOWING A COMPLETED CRIME IS PROBLEMATIC....264
III. THE ELEVENTH CIRCUIT HAS NOT SPECIFICALLY ADDRESSED THE REASONABLE SUSPICION REQUIRED FOR *TERRY* STOPS FOLLOWING A COMPLETED CRIME....270
A. Precedents Where Police Officers Witness An Ongoing Crime Are Not Informative....272
B. The Eleventh Circuit Defers to Law Enforcement When Assessing a Defendant's Match to a Suspect Description....273
C. The Eleventh Circuit Should Address Reasonable Suspicion in the Context of a Terry Stop Following a Completed Crime....280
CONCLUSION....282

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INTRODUCTION

The Supreme Court and the Eleventh Circuit each acknowledge that the "reasonable suspicion" required by the Fourth Amendment for a warrantless stop is imprecise. Nearly five decades after the Supreme Court's decision in *Terry v. Ohio*, courts find it difficult to explain what level of detail constitutes reasonable suspicion to stop a potential suspect following a completed crime. Given that judicial review of investigatory stops is based upon the totality of the circumstances before a law enforcement officer at a particular time, all relevant legal precedents are highly fact specific, making it difficult to determine the level of detail required to support reasonable. Moreover, some factors that the Supreme Court has found pertinent to assess reasonable suspicion are irrelevant when the warrantless stop occurs following a completed crime.

A review of Eleventh Circuit decisions assessing *Terry* stops following completed crimes reveals the erosion of particularity required to provide reasonable suspicion. These cases show the tendency of courts to provide retroactive justification of a law enforcement officer's particular decision to detain an individual, and don't appropriately distinguish warrantless stops following completed crimes. As others have noted, the ability for highly general suspect descriptions to provide reasonable suspicion for a Terry stop has disproportionately deleterious effects on young minorities in "high crime" communities. Moreover, a cyclical problem has been created in large part by the standard of review, wherein fact specific decisions provide little guidance for law enforcement and the trial courts reviewing their stops, leading to continued erosion of the reasonable suspicion standard.

Most recently, the Eleventh Circuit held, in an unpublished decision, that a particularly vague suspect description was sufficient to stop an individual following a completed crime who barely met even that description. In light of the paucity of published precedent on this issue, and the procedural difficulties with Fourth Amendment doctrine, practitioners must brainstorm methods to halt the erosion of the reasonable suspicion requirement for warrantless *Terry* stops following a completed crime.

This article attempts to explain why, in the context of a completed crime, some of the factors that the Supreme Court has held can support reasonable suspicion are actually irrelevant. Most importantly, once a crime has been completed, an individual's particular location within a "high crime

neighborhood" is not a relevant factor supporting a warrantless stop.[1] Next, in the context of a completed crime, there are two critical questions inadequately answered by the existing precedent: (1) how specific does a tip need to be in order to provide the reasonable suspicion required by the Fourth Amendment; (2) to what degree does an individual need to match that description in order for the officer's *Terry* stop to be constitutional. This article suggests that the answers to these two questions are interrelated with negative correlation: if a description or tip is reliable, and provides a detailed suspect description, then stopping an individual who does not perfectly meet each detail within that description may still comport with the Fourth Amendment.[2] Conversely, when law enforcement possesses merely a vague, general description, it is critical that the person they stop meet that description exactly.[3] In other words, the broader the description, the more critical it is that the individual who is stopped meets that wide, broad description.

I. LEGAL FRAMEWORK FOR REASONABLE SUSPICION

The Supreme Court interprets the Fourth Amendment as permitting law enforcement to detain any individual for an investigatory stop if the officer has a reasonable suspicion, based on objective facts, that the individual has engaged in, or is about to engage in criminal activity.[4] An officer's "reasonable suspicion" must be supported by "articulable facts," and the officer must be able to "articulate more than an 'inchoate and unparticularized suspicion or "hunch" of criminal activity.'"[5] When an investigatory stop—and any evidence obtained from the stop—is challenged, a court determines whether reasonable suspicion existed at the time of the stop by evaluating the totality of circumstances and collective knowledge of

1. Illinois v. Wardlow, 528 U.S. 119, 119 (2000).
2. *See* Part III, B, *infra.*
3. *Id.*
4. Terry v. Ohio, 392 U.S. 1, 21–22, 30 (1968) (holding that reasonable suspicion, a standard lower than probable cause and absent from the text of the constitution, would suffice to permit forcible stops of civilians when law enforcement suspected that "criminal activity . . . [was] afoot").
5. Illinois v. Wardlow, 528 U.S. 119, 123–24 (2000); *see* United States v. Sokolow, 490 U.S. 1, 7 (1989).

the officers.[6] Indeed, "whether reasonable suspicion existed at the time is a question of law to be determined ultimately by judges, not policemen" and the question is not whether the specific officer subjectively had reasonable suspicion, but whether, given the circumstances and knowledge that officer had *at the time of the stop*, reasonable suspicion objectively existed to justify the search.[7]

The Supreme Court recognizes that "[a]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is difficult. They are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[8] Reasonable suspicion is a "fluid concept,"[9] which is "not readily, or even usefully, reduced to a neat set of legal rules."[10] When evaluating the constitutionality of an officer's investigative stop, a trial court is required, under *Terry*, to engage in a two-part inquiry: first, the court examines "whether the officer's action was justified at its inception," which turns on whether the officer had a reasonable suspicion that the defendant had engaged, or was about to engage, in a crime; and second, the court examines whether the stop was reasonably related in scope to the circumstances justifying the stop in the first instance.[11]

Judicial review of investigatory stops employs the "totality of the circumstances" standard, whereby a trial court's review necessarily rests on its determination of the facts before law enforcement at the time of a

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6. *See* Illinois v. Gates, 462 U.S. 213, 230–31 (1983) (explaining, in the context of an informant's tip to law enforcement, that the "totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause" than any rigid test of reliability—and overturning precedent on that basis). This framework also applies to claims of reasonable suspicion.

7. Hicks v. Moore, 422 F.3d 1246, 1252 (11th Cir. 2005).

8. Ornelas v. United States, 517 U.S. 690, 695 (1996) (citing *Gates*, 462 U.S. at 231).

9. *Gates*, 462 U.S. at 232.

10. *Id.*; *see also* Florida v. Harris, 586 U.S. 237, 244 (2013) (explaining that when it comes to assessing probable cause, "[the Court] ha[s] rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach").

11. United States v. Powell, 222 F.3d 913, 917 (11th Cir. 2000) (citing *Terry*, 392 U.S. at 20). This article explores only the first part of this inquiry—that is, when a law enforcement officer has the reasonable suspicion needed for the stop in the first place.

particular stop.[12] Partially as a result of this approach, the doctrine of reasonable suspicion is inexact. In light of the fact specific nature of all existing legal precedent, and the "totality of the circumstances" approach, it is highly difficult for law enforcement, in a particular situation, to predict what level of particularity is required to conduct a *Terry* stop. Subsequently, a trial court reviewing a defendant's challenge to a particular stop will typically, after citing the major Fourth Amendment precedent, rely heavily on the facts and context of that challenged stop and not on any doctrinal constraints.[13]

This cycle of fact specific precedents providing little guidance to law enforcement and trial courts is evident upon reviewing the cases and process of review.[14] A trial court reviewing whether an officer had reasonable suspicion to stop a particular individual first endeavors to define the historical events which led up to the stop.[15] A lower court's finding of these facts is reviewed for clear error.[16] Next, the court must decide whether these facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion.[17] The Supreme Court explains that the "ultimate question" of whether an officer had reasonable suspicion for the stop is reviewed *de novo*, because such independent review is "necessary if appellate courts are to maintain control of, and to clarify, the legal principles."[18] The Supreme Court has explained that *de novo* review of reasonable suspicion would "unify precedent" and "come closer to providing law enforcement officers with a defined 'set of rules which, in most instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"[19]

Nevertheless, an appellate court's review of a lower court's factual findings—which serves as the basis of any legal conclusion—is for clear

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12. *See Powell*, 222 F.3d at 917.
13. *See Ornelas*, 517 U.S. at 696–97; *see also Powell*, 222 F.3d at 917–18.
14. *See, e.g.*, *Powell*, 22 F.3d at 917.
15. *See Ornelas*, 517 U.S. at 696.
16. *Id.* at 696.
17. *Hicks*, 422 F.3d at 1252 ("Whether an officer has a reasonable suspicion is an objective question viewed from the standpoint of a reasonable [] officer at the scene. It is based on the totality of the circumstances, and is a question of law to be reviewed de novo.").
18. *Ornelas*, 517 U.S. at 697.
19. *Id.* at 697–98.

error.[20] In practice, therefore, those factual determinations of the lower court are essentially final. It is the lower court that hears witnesses from a particular stop, including the officer who made the stop, and makes the credibility determinations that serve as the basis of the "totality of the circumstances" approach.[21] Despite the *de novo* review of the ultimate Fourth Amendment determination, the Supreme Court reminds appellate courts to "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[22] As a result of the extreme deference given to trial courts for their factual determinations, combined with the primacy of facts and contexts to the legal analysis, appellate reversal is very difficult.

In practice, there are two primary types of *Terry* stops. The first occurs where an officer "observes unusual conduct" which leads him to believe that "criminal activity may be afoot."[23] The second category occurs where an officer is responding to a dispatch regarding a recently committed crime.[24] In this second situation, a law enforcement officer is informed either by a victim, witness, anonymous tip, or central dispatch that a crime has been

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20. *Id.* at 699.

21. *Id.*

22. *Id.*

23. *Terry*, 392 U.S. at 30–31 ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he 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, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment . . . .").

24. Although, in *Terry*, the stop was based on suspicion that defendant and his colleagues were about to rob a store, the Supreme Court subsequently held that stops based upon suspicion of a prior felony are permissible. United States v. Hensley, 469 U.S. 221, 229 (1985); *see also* Adams v. Williams, 407 U.S. 143, 147 (1972) (holding that an informant's tip may carry sufficient "indicia of reliability" to justify a *Terry* stop even though it may be insufficient to support a search warrant or arrest). *Adams* sustained a *Terry* stop undertaken on the basis of a tip given in person by a known informant who had provided information in the past.

committed, and that officer is provided with a description of the suspect.[25] The officer is then searching for individuals that may match the given description. The Supreme Court has explicitly stated that this second scenario is the even more challenging to limit, finding that "precise limits on investigatory stops to investigate past criminal activity are more difficult to define."[26]

Although the Supreme Court recognizes that this second scenario is distinct,[27] there is little precedent explaining how the reasonable suspicion analysis should differ. In *United States v. Hensley*, the Court further explained that "[t]he factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct."[28] When a *Terry* stop occurs following a completed crime, a law enforcement officer is informed by a victim, witness, anonymous tip, or central dispatch that a crime was committed, and that officer is provided with a description of the suspect. The Court reasoned that "[a] stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity," and recognized that "the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards," and "[p]ublic safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law."[29] Accordingly, the *Hensley* Court implied that the reasonable suspicion needed for a *Terry* stop following a completed crime is more robust than that required to stop a suspect of a crime in progress.[30]

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25. *See Hensley*, 469 U.S. at 229 ("It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion.").
26. *Id.* at 228.
27. *Id.*
28. *Id.* at 228–29.
29. *Id.*
30. *See id.* at 227–29.

II. DEFINING THE PARTICULARITY REQUIRED TO SUPPORT REASONABLE SUSPICION FOR *TERRY* STOPS FOLLOWING A COMPLETED CRIME IS PROBLEMATIC

In *Terry,* the Supreme Court demonstrated an intent to impose a real burden on law enforcement to articulate suspicion before warrantless stops in order to comply with the Fourth Amendment.[31] In the decades since, a series of cases have expanded the factors that can support individualized and reasonable suspicion.[32] As a result, police officers' decisions to stop individuals suspected of a crime have been afforded substantial deference, particularly where the officer can articulate facts providing a "rational inference" for performing the stop.[33]

Critically, the Supreme Court has implied that reasonable suspicion for an investigatory stop following a completed crime is a higher threshold than that required to stop a crime in progress.[34] The Court reasoned that "[t]he factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct."[35] Specifically, "[a] stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity."[36] Therefore, the Court recognized that "the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards," and "public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently

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31. *Terry*, 392 U.S. at 22 ("[S]imple 'good faith on the part of the arresting officer is not enough' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, as the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.") (internal citations omitted).

32. *See e.g., Wardlow*, 528 U.S. at 119; *Hensley*, 469 U.S. at 221; *see also* Sokolow, 490 U.S. at 1.

33. *Terry*, 392 U.S. at 22–24.

34. *Hensley*, 469 U.S. at 228.

35. *Id.* at 228 ("This is because the governmental interests and the nature of the intrusions involved in the two situations may differ. As we noted in *Terry,* one general interest present in the context of ongoing or imminent criminal activity is 'that of effective crime prevention and detection.'") (citing *Terry,* 392 U.S. at 22).

36. *Id.*

in the process of violating the law."[37] The Supreme Court acknowledged that public safety is less threatened by a suspect of a completed crime,[38] and as a result, courts should be demanding a more robust reasonable suspicion from law enforcement when they stop suspects of a completed crime.

Subsequently, this Court held that an individual's presence in a "high crime area" is among the relevant considerations for establishing reasonable suspicion for a *Terry* stop.[39] The *Wardlow* Court concluded that the type of neighborhood where a *Terry* stop occurs, including its crime rate and reputation for drug abuse, are relevant factors for assessing reasonable suspicion.[40] This was a controversial case. Indeed, many academics have explored the negative consequences of *Wardlow*, permitting a "high crime area" to contribute to a finding of reasonable suspicion, including the resulting disproportionate burden on young men of color in low income communities.[41] These young men suffer from living in high crime areas and then suffer even more from the weaker Fourth Amendment protections as a result of those crimes. Others have explained that the Supreme Court's condoning of "high crime area" as support for a reasonable suspicion finding has directly increased the tension between young men in these communities and the officers who serve them.[42] Critically, *Wardlow* did not define "high crime area" and did not explain how courts are supposed to factor an individual's location in such a community, in relation to other factors, when determining whether a particular officer had reasonable suspicion for a stop.

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37. *Id.*
38. *Id.*
39. *Wardlow,* 528 U.S. at 119.
40. *Id.* at 124.
41. *See, e.g.*, Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L. J. 539, 546 (2016).
42. *Id.* at 567–79. The authors analyzed empirical evidence showing that minorities are stopped and arrested more frequently than similarly situated whites, even when controlling for local social and crime conditions. In a study of the Boston Police Department, these authors confirmed that minority neighborhoods experience higher levels of field interrogation, and African American suspects are more likely to be observed, interrogated, and frisked or searched, controlling for crime and other social factors. The authors in this study found that officers seemed more likely to investigate and frisk or search a minority suspect if the officer's and suspect's race differed.

Later, the Court also held that law enforcement officers' subjective motivations are irrelevant to the constitutionality of a traffic stop where probable cause for the stop exists objectively. [43]

In practice, when an officer conducts a *Terry* stop responding to completed crime, the stop's occurrence in a "high crime area" should not be irrelevant to the existence of reasonable suspicion. Once a crime has been completed, reported, and law enforcement receives a description of the suspect, the officer is looking for a suspect matching the description they have been provided, in close proximity to where the crime occurred. Indeed, the character of the neighborhood in this type of *Terry* stop is irrelevant—the crime has already occurred and so the neighborhood's overall crime rate should be a nonfactor. Accordingly, when a reviewing court determines whether an officer had reasonable suspicion for a stop following a completed crime, reliance on a particular individual's "presence in a high crime area"—as sanctioned by *Wardlow*—cannot meaningfully help the analysis.

Although a particular individual's presence in a "high crime area" is not relevant when law enforcement is looking for a particular suspect following a completed crime, the Supreme Court has held the opposite. Instead, by holding that a suspect's presence in a "high crime area" and also "an area of heavy narcotics trafficking" were "relevant" to the constitutionality of a *Terry* stop,[44] *Wardlow* actually created an incentive for police to make stops in neighborhoods of concentrated poverty.[45] In addition to the compounding negative effects of *Wardlow* on low income communities and young men of color,[46] studies have demonstrated changed

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43. *Whren v. United States*, 517 U.S. 806, 811–13 (1996); *see also Utah v. Streiff*, 136 S. Ct. 2056, 2063 (2016) (holding that even where an officer's initial stop is negligent, a defendant's preexisting arrest warrant is sufficiently attenuated for the evidence obtained to not be excluded). However, recently, some have questioned whether *Whren* and its progeny "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." *District of Columbia v. Wesby,* No. 15-1485, 2018 WL 491521, *15 (January 22, 2018) (Ginsburg, J., concurring in part).

44. *See Wardlow*, 528 U.S. at 124.

45. *Id.* at 124; *see* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1821 (1998). Stunz explains that "policing street markets" thus becomes an easier choice for law enforcement than the indoor, more upscale markets for drugs.

46. Fagan et al., *supra* note 45, at 567–79.

views among law enforcement as well.[47] Specifically, one study shows that law enforcement's perception of the crime rate of a particular neighborhood actually increases along with the proportion of minority residents in that area.[48]

Following *Wardlow*, two decisions further eroded reasonable suspicion by permitting the use of certain profiles in suspect descriptions and explicitly excusing a particular officer's subjective motivations, even when those motivations may be suspect, if a court could find objective reasonable suspicion.

In *United States v. Sokolow*, the Supreme Court held that it was reasonable for the police officer to conclude that defendant's behavior was "consistent with one of the DEA's drug courier profiles."[49] *Sokolow* permitted law enforcement to develop suspicion based on applying a non-particularized profile to a specific individual.[50] In other words, a law enforcement officer is permitted to use a very vague description, such as the behavior typically associated with a drug courier, and apply it to the particular person that he or she wants to stop.[51]

Subsequently, in *Whren v. United States*, the Supreme Court decided that the constitutional reasonableness of a traffic stop does not depend on the actual motivations of the law enforcement officer—those are irrelevant.[52] The Court condoned a purported pretextual stop because probable cause

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47. *See, e.g.*, Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes*, 107 AM. J. SOC. 717, 718 (2001) ("[T]he percentage of a neighborhood's black population, particularly the percentage [of] young black men, is significantly associated with perceptions of the severity of a neighborhood's crime problem."); Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows*," 67 SOC. PSYCHOL. Q. 319, 319–20 (2004) (finding that perceptions of disorder in a neighborhood were better predicted by the racial composition of a neighborhood than by actual disorder).

48. Quillian & Pager, *supra* note 56, at 718; Sampson & Raudenbush, *supra* note 56, at 319–20.

49. *Sokolow*, 490 U.S. at 11 (concluding that the factors relied upon, including the respondent's travel behavior, was consistent with drug couriers, had evidentiary significance, and amounted to reasonable suspicion).

50. *Id.*

51. *See Sokolow*, 490 U.S. at 9 ("Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.").

52. *Whren*, 517 U.S. at 813 (1996).

objectively existed and thus the subjective motivations the officer for stopping the defendant did not matter.[53] In *Whren*, two young black males were driving an expensive car with a temporary license plate, and the officers who detained them claimed that their suspicion arose because the defendants "stopped at the intersection for what seemed an usually long time," and then made a "sudden[]" turn while driving at an "unreasonable speed" before stopping at a light.[54] The Court agreed with the appellants that "the Constitution prohibits selective enforcement of the law based on considerations such as race," but concluded that the officers had probable cause to believe defendants violated traffic laws which rendered the stop reasonable and the drugs found in the defendants' car admissible.[55] Accordingly, the Court reasoned that even if a "reasonable officer would not have stopped the motorist absent some additional law enforcement objective," the stop of the driver based on a belief that the driver had committed a traffic violation comported with the Fourth Amendment.[56]

In addition to these important decisions, the most recent Supreme Court decision regarding investigatory *Terry* stops further justifies law enforcement stops at the expense of individual's Fourth Amendment protections. In *Utah v. Strieff*, the Supreme Court concluded that even where the law enforcement officer's initial stop was negligent (a "good faith" error), the defendant's preexisting arrest warrant was "sufficiently attenuated" for the evidence found during the search to not be subject to exclusion.[57] In other words, even when law enforcement's initial stop violates the Fourth Amendment, the existence of an outstanding warrant for that individual when the officer ran his information in the database could "correct" that error. In a forceful dissent, Justice Sotomayor pointed out that "astounding numbers of warrants can be used by police to stop people without cause," and highlighted that precedents forgiving officers for poor police work at the expense of individual freedoms disproportionately impacts racial minorities.[58]

In the decades since deciding *Terry*, the Supreme Court has never specified how to determine reasonable suspicion in the context of an investigatory stop following a completed crime, and thus this doctrine is

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53. *Id.* at 811–13.
54. *Id.* at 808.
55. *Id.* at 813.
56. *Id.*
57. *Strieff*, 136 S. Ct. at 2063 (2016).
58. *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting) ("it is no secret that people of color are disproportionate victims to this type of scrutiny.").

difficult to predict or apply consistently.[59] As discussed, the Supreme Court has condoned reliance on factors that do not seem relevant for *Terry* stops following completed crimes. Also, since *Terry*, the Supreme Court has not provided any objective indicia of how to weigh certain factors against one another, when reasonableness is evaluated based on the totality-of-the-circumstances approach.[60] Some academics have cast doubt on the entire framework of measuring individualized suspicion as a "binary", wherein an officer either has it—and the stop is constitutional—or he lacks it—and the stop violates the Fourth Amendment.[61] For example, Professors Fagan and Geller explain that "[s]uspicion has become the application of ex ante factors of what suspicion *ought* to look like in a particular circumstance."[62] Any court reviewing a defendant's challenge to a law enforcement stop necessarily takes content from the particular stop that it is evaluating when determining whether reasonable suspicion existed.[63] With time, therefore, reasonable suspicion has become a doctrine that is not just "fluid," as the Supreme Court concedes,[64] but precariously undefined. Moreover, the legal precedent since *Terry* trends towards retroactively justifying a police officer's choice to conduct a stop at the expense of an individual's Fourth Amendment rights to be free from warrantless searches.

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59. *See* Jeffrey Fagan, "*Terry's Original Sin*," 2016 U. CHI. LEGAL F. 54, 54 n.72 (2016) (citing Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967)) ("Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."); *see also* Jeffrey Fagan & Amanda Geller*, Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 58 (2015).

60. Fagan, *supra* note 68, at 536–37.

61. *See* Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 811 (2011). Harcourt and Meares posit that suspicion is actually a probabilistic concept, a continuous variable and not a categorical one. These authors believe that "the concept of 'individualized suspicion' is based on a faulty understanding of suspicion, and, as a result, the Fourth Amendment jurisprudence has been constructed using an inaccurate model of suspicion." *Id.*

62. Fagan & Geller, *supra* note 68, at 59; *see also* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop and Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 161, 172–76 (2015).

63. Fagan & Geller, *supra* note 68, at 59; Meares, *supra* note 70, at 172–76.

64. *Gates*, 462 U.S. at 232.

III. THE ELEVENTH CIRCUIT HAS NOT SPECIFICALLY ADDRESSED THE REASONABLE SUSPICION REQUIRED FOR *TERRY* STOPS FOLLOWING A COMPLETED CRIME

The Eleventh Circuit's limited decisions regarding reasonable suspicion required for a *Terry* stop echo the erosion of the reasonable suspicion requirement.

First, it is critical to recall the procedural posture of challenges before the Court of Appeals and the standard of review in order understand the cases issued on reasonable suspicion. Typically, a legal challenge to an investigatory stop grounded in the Fourth Amendment is presented when a criminal defendant appeals the district court's denial of his motion to suppress the evidence obtained from that stop.[65] In order words, a defendant moves the trial court to suppress evidence obtained following a questionable stop, arguing the investigatory stop violated his Fourth Amendment rights because the officer lacked requisite reasonable suspicion.

In the Eleventh Circuit, most cases affirming a district court's decision to deny a defendant's motion to suppress evidence are unpublished and therefore are not binding precedent.[66] These unpublished cases are persuasive only insofar as their legal analysis warrants, and in light of their procedural posture they are always very fact and context specific.[67] Consequently, even after reviewing the cases discussing the level of particularity required for a *Terry* stop, it is difficult to articulate a helpful rule.

A district court's ruling on a motion to suppress presents mixed questions of law and fact.[68] The Eleventh Circuit reviews a district court's factual findings for clear error, and the facts are construed in favor of the party that prevailed before the district court.[69] The Eleventh Circuit

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65. *See, e.g.,* United States v. Cordell Felix, Appeal Number 16-16456-DD (appealing the district court's denial of appellant's motion to suppress in case number 2:15-cr-102).

66. 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent."); *see* United States v. Irey, 612 F.3d 1160, 1215 n.34 (11th Cir. 2010) ("Unpublished opinions are not precedential . . .").

67. Bonilla v. Baker Concrete Constr. Inc., 487 F.3d 1340, 1345 n.7 (11th Cir. 2007).

68. United States v. Ramirez-Chilel, 289 F.3d 744, 748 (11th Cir. 2002).

69. United States v. Matchett, 802 F.3d 1185, 1191 (11th Cir. 2015); United States v. Perkins, 348 F.3d 965, 969 (11th Cir. 2003).

emphasizes that it "afford[s] substantial deference to the factfinder's credibility determinations, both explicit and implicit."[70] As discussed, the fact specific nature of reasonable suspicion challenges means that the deference afforded the trial court to decide historical facts is extremely powerful.[71] Typically, when a defendant presents a strong motion to suppress evidence stemming from an investigatory stop or search, the trial court will hold a suppression hearing to review the challenged *Terry* stop.[72] The hearing will include the live testimony of the law enforcement officer who made the stop and often any witnesses to the event.[73] The district court's credibility determinations at that hearing are paramount, and, because of the deference afforded on standard of review, its findings are rarely disturbed.[74]

While the Eleventh Circuit applies the law to the facts *de novo*, the appellate court adopts the district court's findings with respect to credibility and historical events of the stop.[75] Moreover, the Eleventh Circuit can affirm the denial of a motion to suppress on any ground supported by the record.[76] This means that the appellate court can rely upon facts found by the district court or not contested by the parties before the district court, even if those facts did not support the legal finding of the lower court.[77] For these reasons, the Eleventh Circuit's *de novo*review of investigatory stops is procedurally wired to be highly deferential to the trial court's findings.[78]

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70. United States v. Lewis, 674 F.3d 1298, 1303 (11th Cir. 2012) (reversing the district court's decision to grant a defendant's motion to suppress because the district court "made two fundamental and related legal errors in concluding that the officers lacked reasonable suspicion to detain any of the four men.").

71. *Id.*

72. *Id.*

73. *Id.*

74. *Ornelas*, 517 U.S. at 699.

75. *Matchett*, 802 F.3d at 1192; United States v. Yeary, 740 F.3d 569, 579 n.25 (11th Cir. 2014).

76. *Matchett*, 802 F.3d at 1191 (citing United States v. Caraballo, 595 F.3d 1214, 1222 (11th Cir. 2010)).

77. *Id.*

78. *Gates*, 462 U.S. at 232.

A. Precedents Where Police Officers Witness an Ongoing Crime Are Not Informative

The Supreme Court has indicated that courts should require a more robust "reasonable suspicion" when law enforcement officers are stopping suspects of a completed crime as opposed to when they are responding to an ongoing crime.[79] However, an individual's presence in a "high crime area," although sanctioned as a relevant factor in *Wardlow*, should not be a relevant factor when assessing a *Terry* stop following a completed crime.[80] The Eleventh Circuit's cases dealing with officers responding to ongoing crimes are not helpful for evaluating reasonable suspicion for the *Terry* stops following completed crimes.

For example, in *United States v. Hunter*, three officers approached a convenience store where they observed men engaged in illegal gambling and the defendant was standing with those men.[81] The officers exited their car, the defendant walked away "very quickly," and one officer noticed a bulge in his waistband.[82] The Eleventh Circuit determined that the defendant's presence in a high crime area generally, proximity to ongoing illegal activity (gambling), his flight from officers, and the presence of a "visible, suspicious bulge" could be considered in the totality of circumstances.[83] The Court concluded that the officers had "reasonable suspicion" required for a *Terry* stop.[84] In *Hunter*, the Eleventh Circuit applied what the Supreme Court condoned in *Wardlow,* inclusion of a defendant's presence in a "high crime area", as a relevant factor in establishing reasonable suspicion for a *Terry* stop.[85] Because law enforcement officers in *Hunter* were responding to what

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79. *See Hensley*, 469 U.S. at 228–29 (1985) (citing *Terry,* 392 U.S. at 22).

80. *See* Section II *supra*; *see Wardlow*, 528 U.S. at 124. Once a crime has occurred, law enforcement officers are looking for suspects matching the description they have been provided in proximity to the crime, wherever it has occurred. Post *Wardlow*, the character of the neighborhood, "standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."

81. United States v. Hunter, 291 F.3d 1302, 1306 (11th Cir. 2002).

82. *Id.*

83. *Id.*

84. *Id.* at 1307.

85. *See Wardlow*, 528 U.S. at 124.

they believed was ongoing criminal activity, this case does not provide guidance for what constitutes reasonable suspicion for stopping a potential suspect after a completed crime.

Similarly, in *United States v. Williams*, a police officer was parked outside a public housing project when he heard a gunshot at 1:30 in the morning, and "[w]ithin a few seconds, a car quickly pulled out of one of the housing project's two exits and headed down the road."[86] With respect to the officer's reasonable suspicion to stop that car, the Eleventh Circuit found that "[w]hen Officer Hunt saw a lone vehicle hurriedly pulling out of a high-crime housing project in the middle of the night within seconds of a gunshot, it was eminently reasonable of him to suspect that the car's occupants might have committed a crime."[87] Indeed, the officer who hears a gunshot and sees a car race out of the area immediately is reacting to a likely ongoing crime and must act quickly to stop the suspected criminals. The reasonable suspicion required for the stop in *Williams* should be less robust than that required by an officer who has been given a description of a suspect of a completed crime and is searching for individuals that match that description. The Supreme Court has recognized that there is a greater urgency "in the context of ongoing or imminent criminal activity."[88]

The Eleventh Circuit's decisions in *Hunter* and *Williams*, and others like them where law enforcement is responding to an ongoing crime, do not provide guidance for law enforcement officers or district courts regarding *Terry* stops following completed crimes. The critical questions remain: how specific a suspect description must be, and how much any individual must match that description, in order to support reasonable suspicion for a *Terry* stop following a completed crime.

B. The Eleventh Circuit Defers to Law Enforcement When Assessing a Defendant's Match to a Suspect Description

In the few cases where it reviews *Terry* stops following a completed crime, the Eleventh Circuit shows deference to law enforcement to decide

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86. United States v. Williams, 619 F.3d 1269, 1270 (11th Cir. 2010).

87. *Id.* at 1271 (citing United States v. Bolden, 508 F.3d 204, 206 (5th Cir. 2007) ("[W]hen an officer sees a solitary vehicle . . . leaving the precise spot where that officer has good reason to believe that multiple persons were shooting less than a minute before, it is more than a 'hunch' that those in the vehicle may be involved in the shooting.")).

88. *See Hensley*, 469 U.S. at 228 (citing *Terry,* 392 U.S. at 22).

whether any particular individual sufficiently meets a suspect's description.[89] The rule for qualified immunity in Eleventh Circuit parallels this deference.[90] Indeed, any law enforcement official who reasonably, but mistakenly, concludes that reasonable suspicion is present is still entitled to qualified immunity.[91] Additionally, the Eleventh Circuit seems disinclined to ask law enforcement to take an additional step or acquire more detailed descriptions before making a *Terry* stop. Finally, the Court seems to rely on a defendant's post-seizure behavior, if suspicious, as bolstering a finding of reasonable suspicion. However, any post-seizure behavior should not be relevant to the constitutional analysis.

In one seminal decision, the Eleventh Circuit reversed a lower court and found that a warrantless search of a car, even following a legitimate traffic violation, lacked the particularized suspicion followed by the Fourth Amendment.[92] In *United States v. Tapia*, the court held that marijuana seized during a warrantless search of defendant's car had to be suppressed and reversed defendants' convictions.[93] When the police officer stopped defendants' vehicle for speeding, the Eleventh Circuit disagreed with the lower court that there were circumstances present that provided a reasonable basis and cause for further search of the vehicle.[94] As the Supreme Court held in *Sokolow*, the Eleventh Circuit concluded that factors "not in themselves proof of illicit conduct and/or consistent with innocent travel can, when taken together, give rise to reasonable suspicion of criminal or drug activity."[95]

However, the appellate court found that the factors cited by the district court did not, taken together, result in reasonable suspicion.[96] The factors that the lower court had relied upon were: that the defendants were

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89. United States v. Wright, 2017 WL 4679571, at *2 (11th Cir. Oct. 18, 2017) (finding that officers had reasonable suspicion to detain the defendant based on the description given by the victim of a black, heavyset man, in his 30s, with a white shirt, black cargo shorts, and a lowboy haircut and tattoos); United States v. Gibson, 64 F.3d 617, 620 (11th Cir. 1995) (holding that officers had reasonable suspicion after receiving description of suspect of same race and wearing a long blank trench coat which the defendant matched).

90. Jackson v. Sauls, 206 F.3d 1156, 1166 (11th Cir. 2000).

91. *Id.*

92. United States v. Tapia, 912 F.2d 1367, 1370 (11th Cir. 1990).

93. *Id.*

94. *Id.*

95. *Id.* (citing *Sokolow*, 109 S. Ct. at 1587).

96. *Id.*

Mexican, had few pieces of luggage, were visibly nervous during their confrontation with the state trooper, and were traveling on the interstate with Texas license plates, which was not a crime at that point.[97] Recognizing that the validity of a *Terry* stop was difficult to determine, it was evident that "neither police officers nor courts should sanction as 'reasonably suspicious' a combination of factors that could plausibly describe the behavior of a large portion of the motorists engaged in travel upon our interstate highways."[98] Following *Tapia*, the Eleventh Circuit has occasionally reversed convictions where it determines that officers did not have reasonable suspicion of any crime other than traffic violations and that they thus lacked any constitutional basis to conduct a further search following a traffic stop.[99] Indeed, the Court of Appeals has even expressed its concern that some of these *Terry* stops were race motivated.[100]

Nevertheless, in the specific context of *Terry* stops of individuals suspected of having committed a completed crime, the Eleventh Circuit has shown extreme deference to law enforcement.

United States v. Webster is a perfect example.[101] There, the Montgomery Police department issued a BOLO[102] for a dark-colored car with something to the effect of "Down South Customs" written on the rear window, which had been allegedly involved in a shooting earlier that day.[103] Officer Manora began following Mr. Webster's car, although he did not know exactly where the shooting had occurred, pulled him over, and, during

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97. *Id.* at 1371. The Eleventh Circuit also rejected the other allegedly suspicious facts posited by the government, including that Mr. Tapia looked away quickly form law enforcement when he passed him on the highway or the fact that the car was insured by a third party. *Id.*

98. *Id.*

99. *See, e.g.*, United States v. Pruitt, 174 F.3d 1215, 1221 (11th Cir. 1999) ("Our viewing of the police videotape leaves us with the impression that Moore was acting on an unsupported hunch instead of a reasonable suspicion that [Defendants] had broken anything other than the speeding laws.").

100. *Pruitt*, 174 F.3d at 1221 ("Although we resist the temptation to read an improper motive into [Officer's] conduct, we are concerned that this appears to be yet another case in which a driver, once stopped, is unreasonably detained because of his/her race or national origin . . . or because the driver is from out-of-state . . .").

101. United States v. Webster, 314 F. App'x 226, 227 (11th Cir. 2008).

102. "BOLO" stands for "Be on (the) lookout for": An all points police bulletin.

103. *Webster*, 314 F. App'x at 227.

a pat-down, recovered a weapon.[104] Following Mr. Webster's arrest, dispatch provided an updated BOLO description and told the officer that Mr. Webster's car was not a match.[105]

Mr. Webster moved to suppress the weapon, arguing that the initial stop violated his Fourth Amendment rights and Officer Manora lacked any reasonable individualized suspicion that he had been involved the earlier crime.[106] Following a suppression hearing, the trial court denied Mr. Webster's Fourth Amendment claim.[107] On appeal, Mr. Webster reiterated the information that Officer Manora had available to him at the time of the stop was not sufficient to support a reasonable suspicion that the vehicle Mr. Webster was driving was the subject of the BOLO from one to two hours prior.[108]

The Eleventh Circuit issued an unpublished opinion affirming the district court's decision.[109] After reviewing the applicable legal framework, the panel confirmed that a law enforcement officer can rely on information from a "police bulletin" to support reasonable suspicion.[110] Although the

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104. *Id.* at 227.

105. *Id.*

106. *Id.*

107. *Id.* at 228.

108. Brief of Defendant-Appellant John Webster at 6, United States v. Webster, 314 F. App'x. 226 (July 17, 2008). Mr. Webster insisted that the vehicle description in the BOLO was too vague to support his stop because there are "simply too many vehicles which could have fit this description. The lower court should have found that, based upon the totality of the circumstances, Officer Manora did not articulate a minimal objective justification for his stop of Mr. Webster." *Id.* at 7–8 (internal citations omitted).

109. *Webster*, 314 F. App'x at 227.

110. *Id.* at 228. ("The Supreme Court has established that police officers may conduct warrantless investigatory searches without violating the Fourth Amendment where there is a reasonable suspicion of criminal wrongdoing. This includes the right to stop a moving vehicle and also includes investigations of past crimes. In our review of whether there was reasonable suspicion, we look at the totality of the circumstances. Reasonable suspicion is a somewhat abstract standard that 'is not readily, or even usefully, reduced to a neat set of legal rules.' What we do know are the bounds. Reasonable suspicion demands 'considerably less' than probable cause, but 'the police are required to articulate some minimal, objective justification for the stop.' That justification may be based on the information available to the officer at the time. In forming reasonable suspicion, an officer may

Court acknowledged that "it might have been better for Officer Manora to call in to confirm the BOLO before stopping Webster," it ultimately determined that he had reasonable suspicion required by the Fourth Amendment.[111]

Notably, *Webster* shows a presumption of police expertise, what some academics have described as "the notion that trained, experienced officers develop insight into crime sufficiently rarefied and reliable to justify deference from courts."[112] In the context of a *Terry* stop following a completed crime, a presumption of police expertise will always trend toward condoning the stop. That is, if the court assumes that police officers are typically trained to determine when any individual is likely enough to be the suspect of a completed crime, it is essentially abdicating its role as a stop gap for the Fourth Amendment. In *Webster*, the Court declined to require law enforcement to take an additional step, such as calling central dispatch for any updated description details, before concluding that the officer had reasonable suspicion.[113] To the contrary, the Eleventh Circuit relies on Supreme Court precedent that "reasonable suspicion is based on the information available to the officer at the time of the stop, and Officer Manora was not aware of the updated BOLO description when he stopped Webster."[114]

In *United States v. Akinlade*, the Eleventh Circuit found reasonable suspicion existed to stop the defendant following a more descriptive BOLO, issued in for an unidentified male suspected of bank fraud.[115] In that case, the

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rely on information provided by a police bulletin to justify a *Terry* stop. (internal citations and parentheticals omitted)).

111. *Webster*, 314 F. App'x at 229.

112. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2016 (2017). In her comprehensive article, Ms. Lvovsky describes how courts began to see police work as producing expert knowledge and how viewing police's claims as expert opinions has troubling consequences for the entire criminal justice system, not just the Fourth Amendment.

113. *Webster*, 314 F. App'x at 229.

114. *Id.* (citing United States v. Arvizu, 534 U.S. 266, 273 (2002)) (internal citations omitted). The court concluded that "[a]lthough it might have been better for Officer Manora to call in to confirm the BOLO before stopping Webster, we cannot say that it was unreasonable for him not to do so. Under the totality of the circumstances, the similarity of Webster's car to the BOLO description provided a minimal, objective justification to establish reasonable suspicion to justify an investigatory stop of Webster's car."

115. United States v. Akinlade, 519 F. App'x 529, 534 (11th Cir. 2013).

BOLO contained a surveillance photograph of the suspect, a written description including his height, build, age range, the vehicle he was suspected to be driving including its license plate number, and surveillance photographs of the vehicle as well.[116] When a person resembling the BOLO attempted to open accounts in a bank, the manager called the U.S. Postal Inspector who had issued the BOLO, and, pursuant to his advice, contacted the local police department.[117] When the local law enforcement officer received the dispatch, she arrived at the bank, observed a man that she determined was "extremely similar" to the man in the BOLO photograph, confirmed her conclusions with a bank employee who agreed, and then entered the bank where the defendant was asked if he would allow a pat down for officer safety.[118] This interaction became hostile, and Mr. Akinlade was eventually subdued and arrest.[119]

Prior to his trial for aggravated identity theft, bank fraud, and other economic crimes, Mr. Akinlade moved to suppress the statements he made to law enforcement and the evidence seized from his vehicle, arguing that they were the fruits of an unlawful stop, in violation of the Fourth Amendment.[120] After the district court denied his motion to suppress, Mr. Akinlade appealed, arguing that the police officers lacked reasonable suspicion.[121] The Eleventh Circuit relied on *Hensley*, explaining that because Mr. Akinlade "matched the description of the suspect in the BOLO," the officers were permitted to question and briefly detain him to get more information.[122]

However, the Eleventh Circuit seems to have bolstered its determination of reasonable suspicion by relying on Mr. Akinlade's post-seizure behavior. Specifically, the Court explained that Mr. Akinlade's

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116. *Id.* at 531.

117. *Id.*

118. In connection with a *Terry* stop, an officer may conduct a pat-down search if he has reason to believe his own safety of the safety of others is at risk. United States v. White, 593 F.3d 1199, 1202 (11th Cir. 2002).

119. *Akinlade*, 519 F. App'x at 534.

120. *Id.* at 532.

121. *Id.* at 531.

122. *Id.* at 534 (citing *Hensley*, 469 U.S. at 232 ("if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information.")).

"fidgety" behavior during the pat down by law enforcement was a factor which contributed to the "totality of circumstances" that provided the officers with "reasonable suspicion that Mr. Akinlade had engaged in the fraudulent identity theft scheme described in the BOLO and had the right to momentarily detain him so they could complete their investigation."[123]

However, a defendant's post seizure behavior is irrelevant to the question of whether law enforcement had reasonable suspicion to stop him in the first instance. The Eleventh Circuit has confirmed that post-seizure behavior cannot justify a finding of reasonable suspicion: law enforcement must have a particularized basis for the stop "at the time of the detention."[124] To be sure, the point in time at which an individual is seized for the purposes of Fourth Amendment analysis is itself a complex multi-factor determination.[125] Nevertheless, the only relevant time frame for evaluating the propriety of the *Terry* stop is prior to the stop, and "furtive behavior occurring *after* the stop cannot retroactively justify the stop for which the officers otherwise had no indicia of illegal activity."[126] Moreover, the Supreme Court has held that an individual's refusal to cooperate does not independently create the reasonable suspicion required to justify a *Terry* stop.[127] Accordingly, a court should never rely on an individual's refusal to immediately cooperate with law enforcement as a circumstance supporting reasonable suspicion.

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123. *Akinlade*, 519 F. App'x at 534.

124. United States v. Smith, 201 F.3d 1317, 1323 (11th Cir. 2000) (finding reasonable suspicion existed to stop defendant where he appeared nervous at the bus terminal, was clearly traveling with another individual holding a different suitcase but they pretended that they were not associated, and "left their new, expensive suitcases unattended until immediately before boarding . . . a common practice among drug couriers.").

125. *See* United States v. Jordan, 635 F.3d 1181, 1186 (11th Cir. 2011) (determining that whether a seizure occurred is an inquiry requiring the court to consider several factors, none of which is dispositive) *See also* United States v. Drayton, 536 U.S. 194, 201 (2002) ("If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.").

126. United States v. Lewis, 674 F.3d 1298, 1314 (Wilson, J., dissenting in part) (citing United States v. Cruz, 909 F.3d 422, 424 (11th Cir. 1989) (per curiam) (explaining that we consider the "totality of the circumstances as they existed at the time of the stop").

127. Florida v. Bostick, 501 U.S. 429, 437 (1991) ("[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.").

A review of limited precedents involving *Terry* stops following a completed crime reveals that the Eleventh Circuit has simply not addressed this different type of investigatory stop and its implications for the reasonable suspicion analysis. Although the Supreme Court recognizes that the exigencies facing law enforcement are likely reduced for a *Terry* stop following a completed crime,[128] the differences are not apparent in the legal precedent of the Eleventh Circuit. Instead, the Eleventh Circuit precedent reveals two concerning trends. First, although the Supreme Court has permitted reliance on "presence in an area of expected criminal activity" to support reasonable suspicion for a *Terry* stop,[129] that factor should be totally excluded when police are searching for the suspect of a completed crime. The crime has occurred; the character of neighborhood where it occurred is irrelevant. Second, the Eleventh Circuit seems to rely upon the expertise of law enforcement to match individuals to suspect descriptions and not expressly prohibit reliance on post seizure behavior to bolster reasonable suspicion determinations.[130] Both trends, if accurate, will further cement deference to law enforcement on all investigatory stops and erode the concept of reasonable suspicion in *Terry*.

C. The Eleventh Circuit Should Address Reasonable Suspicion in the Context of a Terry Stop Following a Completed Crime

In November 2017, the Eleventh Circuit declined the opportunity to address this lacuna in its jurisprudence on *Terry* stops following completed crimes. In *United States v. Felix*, the Court issued an unpublished decision, without the benefit of oral argument, affirming the district court's denial of appellant's motion to suppress evidence following a *Terry* stop and search.[131] With respect to reasonable suspicion of the law enforcement officer searching for the suspect of a completed crime, the Court relied on the defendant's proximity to the illegal activity, citing *Hunter*, in which an

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128. *Hensley*, 469 U.S. at 228.

129. *Wardlow*, 528 U.S. at 124–25.

130. *See, e.g.*, *Lewis*, 674 F.3d at 1313–14. (Wilson, J., dissenting in part) (arguing the majority ignored that "[t]he only 'specific and articulable' facts the Government offers to establish reasonable suspicion involve Lewis's conduct after the police officers had effectuated the stop.").

131. United States v. Felix, No. 16-16457, 2017 WL 5176219, at *4 (11th Cir. November 8, 2017). Mr. Felix's Petition for Certiorari was denied by the Supreme Court on May 1, 2018 (Case Number 17-8318).

officer stops defendant after witnessing the illegal activity himself.[132] As discussed, however, once a crime has been completed, a defendant's distance from that crime is relevant but his or her presence in a high crime neighborhood should not be relevant. The Court did not address these specific arguments or engage with Mr. Felix's argument that presence in a "high crime" area should not contribute to reasonable suspicion in this context. The Court also declined to address Mr. Felix's argument that the district court had legally erred by relying on his post seizure behavior to bolster the finding of reasonable suspicion for the *Terry* stop.[133] Finally, the Court did not address the argument on appeal that such a vague description, which permitted the officer to stop any young black man in proximity to the completed crime, could support reasonable suspicion for a stop.[134] Instead, the Court affirmed by repeating the district court's conclusion that Mr. Felix had matched the description, and the stop did not violate the Fourth Amendment.[135]

The Eleventh Circuit, in *Felix*, rejected an opportunity to hold that, consistent with Supreme Court precedent, certain descriptions are simply too vague to support reasonable suspicion following a completed crime. In doing so, the court missed an opportunity to provide law enforcement and trial courts with the desperately needed guidance for warrantless stops under these circumstances.

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132. *Id.* at *2 (citing *Hunter*, 291 F.3d at 1306).

133. *Id.* at *4 ("And although Defendant argues that his nervous behavior after Officer Ursitti approached him is irrelevant to the reasonable-suspicion analysis because he had already been seized at that point, we do not reach that argument because we conclude that—even leaving aside subsequent behavior preceding the frisk which behavior the Government characterizes as quite suspicious and provocative—Officer Ursitti had reasonable suspicion to engage in a brief investigatory stop of Defendant at the outset.").

134. *Id.* at *2–4.

135. *Id.* at *4 ("As the district court noted, '[s]topping an individual who matches the description of an armed robber in relative close proximity to the crime scene, within ten minutes of the crime occurring, and patting them down for weapons is well within the bounds of the Fourth Amendment and *Terry*.' Accordingly, we affirm the district court's order denying Defendant's motion to suppress.").

CONCLUSION

In the context of the Fourth Amendment, the Supreme Court informs citizens that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."[136] Consistent with this general requirement, warrantless searches are supposed to be permitted only in limited circumstances, where the public interest is stronger than the individual's right to personal security free from arbitrary interference by law officers.[137] The Eleventh Circuit has, in published decisions, echoed the Supreme Court's requirement for reasonable suspicion to be individualized, and more than an "unparticularized suspicion or hunch" on numerous occasions.[138]

In practice, however, there is a dearth of precedent requiring law enforcement to take extra steps to ensure reasonable suspicion when conducting a *Terry* stop following a completed crime.[139] Instead, the case law reveals deference to the expertise of law enforcement above all individual liberty concerns and then further deference to the trial court's determinations that law enforcement determined a particular individual matched a description sufficiently to be stopped. Despite the Supreme Court's recognition that the balance of interests is different, there is insufficient precedent regarding a *Terry* stop following a completed crime. In this scenario, the dangers law enforcement faces are reduced and therefore the requirements for reasonable suspicion comporting with the Fourth Amendment should be more robust. Moreover, when a crime has been committed, the crime rate of the neighborhood where the *Terry* stop occurs is simply not relevant to the reasonable suspicion analysis.

The Court should acknowledge the Fourth Amendment dangers in this situation and its own lack of guidance in this area. When a case presents the opportunity to offer guidance, the Court should not avoid the opportunity

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136. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

137. Maryland v. Wilson, 519 U.S. 408, 411 (1997) (citing Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)).

138. *See, e.g.*, United States v. Lindsay, 482 F.3d 1285, 1290 (11th Cir. 2007); United States v. Powell, 222 F.3d 913, 917 (11th Cir. 2000).

139. *See* Fern L. Kletter, Annotation, *Permissibility Under Fourth Amendment of Terry Stop to Investigate Completed Misdemeanor*, 78 A.L.R. Fed. 6th 599 (2012) (showing no federal cases from the Eleventh Circuit explaining under what circumstances a *Terry* stop is permissible to investigate a completed misdemeanor).

to address reasonable suspicion as it did in *Felix* but offer parameters for evaluating suspicious behavior in the context of a *Terry* stop. Until then, the Fourth Amendment rights of those detained by *Terry* stops remain vulnerable.