No. 10-2031

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERNEST SNOW, Defendant-Appellant.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division Case No. 09 – CR – 87 Hon. Judge Larry J. McKinney, Presiding Judge.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Ernest Snow, furnish the following list in compliance with Fed. R. App. R. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:
Ernest R. Snow.

2. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O'Rourke Schrup (attorney of record), John MacIver (law graduate) of the Bluhm Legal Clinic at the Northwestern University School of Law.

The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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3. Said party is not a corporation.

Attorney's Signature: s/ Sarah O. Schrup Date: September 6, 2011

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes X** **No**

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FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT REGARDING REASONS FOR REHEARING

The panel unreasonably expanded the precedents in *United States v. Barnett*, 505 F.3d 637 (7th Cir. 2007) and *United States v. Drake*, 456 F.3d 771 (7th Cir. 2006) and established a per se rule that eliminates the longstanding requirement that police must rely on specific and articulable facts to form the particularized suspicion that a suspect be armed and dangerous before conducting a frisk for weapons. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *United States v. Soklow*, 490 U.S. 1, 7 (1989); *United States v. Booker*, 579 F.3d 835, 838 (7th Cir.2009); *Jewett v. Anders*, 521 F.3d 818, 823 (7th Cir. 2008); *United States v. Lawshea*, 461 F.3d 857, 859 (7th Cir. 2006). While the panel expressly does not reach the question, the panel's opinion further suggests that the law of this circuit is that a Fourth-Amendment search does not occur unless and until an officer physically places his hands on a suspect.

BACKGROUND

On the afternoon of January 16, 2009, Indianapolis police received a report from a 911 caller that "somebody was trying to get into a house [across the street] through the windows." (A. 58:3-5.)[1] The police operator dispatched the call as a burglary in progress. (A. 64:2-5.) The caller also gave a description of the individual, the house and the vehicle that was parked in front of the house. (A. 58:7-8, 59:6-7, 59:19-22, 60:3-4.) The caller reported that the individual briefly went around to the back of the house then returned to his vehicle for a moment before driving away. (A. 58:12-14, 60:12-15, 62:4-6.) Other than reporting that the individual appeared to be texting on a cell phone while returning to his vehicle, the caller gave no further description of the individual's activities while at the residence across the street. *Id*. Specifically, the caller never elaborated on what precisely led her to believe that the individual was trying to get in through the windows. (A. 58-62.) The caller did not describe an attempt to open any windows, to break and windows or to actually make entrance through any window. *Id*. The police operator made no inquiry about what observable facts led to the caller's conclusion. *Id*.

Moments after the individual drove away, officer Nicholas Andrews observed a vehicle similar to the caller's description approximately two blocks from the reported residence. (A. 23: 4-8.) Officer Andrews stopped the vehicle and approached the driver-side door. (A. 25:18-19, 26:1-4.) When Andrews came abreast of the driver's window he saw the appellant, Ernest Snow. (A 26:1-4). Snow was dressed similarly to the description provided by the caller. *Id*. Andrews asked Snow for his driver's license. Snow cooperated, handing Andrews both his license and his

[1] Citations to documents contained within the initial brief's attached appendix are designated (A. #). Citations to documents not in the appendix are cited to the district court docket number (Doc. #).

keys. (A 26:11-14, 30:4-6.) Two additional officers arrived on the scene at about this time. (A. 26:24-27:9.)

Andrews next ordered Snow from the vehicle with the intention of performing a pat down for weapons. (A. 27:8-14.) Andrews told Snow to face and place his hands upon his vehicle. (A. 27:8-11.) Andrews later testified at Snow's suppression hearing that he had done so for officer safety because Snow was a burglary suspect. (A. 27:12-14.) Andrews did not testify regarding any direct observations of Snow's appearance (other than his clothing description) or behavior that would otherwise indicate a likelihood that he was either armed or dangerous. (A. 27:15-17.) Andrews also made no inquiry into Snow's undertakings that afternoon. (A. 27.) Relying only on the 911 caller's assertion that an individual had tried to get into a house through the windows, and the operator's characterization of that assertion as burglary in progress, Officer Andrews initiated a frisk for weapons. (A. 26:24-17:9, 35:8-14, 42:4-9.)

After Andrew's ordered Snow to assume the frisk position but apparently before he actually touched him, Snow turned to face Andrews. (A. 36:2-4.) Andrews interpreted this as aggression, grabbed Snow's left, arm and forced it behind his back. (A. 27:18-28:6.) A short struggle ensued, during which Snow's waistline was exposed, revealing a concealed firearm. (A. 41:16-22, 43:4-6.) Another officer saw the gun and removed it. (A. 29:11-12, 43:8-14.) Snow was placed under arrest and subsequently indicted for knowingly possessing a firearm as a prior convicted felon.

Snow moved to suppress all evidence relating to the firearm, which the district court denied. (A. 9.) Snow then pled guilty to the charge, but reserved his right to appeal the denial of his suppression. During his appeal Snow asserted that Officer Andrews lacked the reasonable suspicion that he was armed and dangerous necessary to compel a search.

DISCUSSION

I. The precedents in *Barnett* and *Drake* have been interpreted too broadly and combined to eliminate the requirement for articulable supporting facts to establish the individualized reasonable suspicion that a suspect is armed and dangerous.

The panel decision erroneously allows law enforcement to search for weapons based upon less than reasonable suspicion. Reasonable suspicion must rely on specific articulable facts not on a mere hunch. *Booker*, 579 F.3d at 838. In this case, the only available fact was that a caller had made a conclusory assertion about an individual "trying to get in through a window," which the police operator then hastily labeled as a "burglary in progress." Sanctioning the search in this case thus departs from the longstanding requirement that there be an adequate factual basis supporting reasonable suspicion for a search. *Terry*, 392 U.S at 27. The panel relies on the holding in *Barnett* that "reasonable suspicion that someone has committed a burglary typically gives rise to a reasonable suspicion that the person might be armed." 505 F.3d at 640-41. But to divorce this holding from the very different facts in Barnett, which indicated that the defendant was indeed about to engage in burglary, creates precedent for a per se rule that the label rather than the facts can substantiate the required reasonable suspicion for a search. Unlike the officers in *Barnett* Officer Andrews asserted no independent observations and made no attempt to assess the likelihood that Snow was armed or dangerous, as the panel expressly acknowledged. *United States v. Snow*, 2011 WL 3792340 at *8 (7th Cir. 2011) (stating "[w]hen Andrews stopped Snow, neither he nor his fellow officers had any information apart from his status as a burglary suspect, that Snow might pose a danger to the officers."). And although the panel relies on the compelling admonishment from Justice Harlan's *Terry* concurrence that "there is no reason why an officer, confronting a person suspected of a serious crime, should have to ask one question

and take the risk that the answer might be a bullet," such a maxim only holds true where the officer presents articulable facts to support the suspicion of the serious crime. *Terry*, 392 U.S. at 33. In that regard, not every stop requires a frisk. *Barnett*, 505 F.3d at 640. Any contrary rule would be in direct conflict with the holdings of this Circuit and the Supreme Court requiring that an officer must rely on specific, articulable facts instead of inchoate and unparticularized suspicion or a mere hunch. *Terry*, 392 U.S. at 27; *Soklow*, 490 U.S. at 7; *Booker*, 579 F.3d at 838; *Jewett*, 521 F.3d at 823; *Lawshea*, 461 F.3d at 859.

Consistent with that requirement, where the reason for the stop is, as here, an assertion unsupported by observable and articulated facts, then officers cannot proceed to a frisk without first developing the requisite reasonable suspicion that an individual is armed and dangerous. An officer may develop that suspicion independent of the reason for the stop or may corroborate the caller's description by direct observation or questioning. Here none of these things happened. Instead, the label burglary was reflexively applied to whatever suspicious activity the caller had actually observed.

This lack of corroboration is excused by the panel's broad reading of the holding in *Drake*. *Drake* states that officers may rely on information provided by identified 911 callers who are reporting an ongoing emergency when conducting a Terry stop. 456 F.3d at 774-75. Indeed, Snow concedes that Officer Andrews was entitled to rely on the 911 caller's information to conduct an investigatory stop. However the panel goes further, expressly holding that "Andrews was entitled to rely on the information relayed to him by the 911 dispatcher in making not only the decision to stop Snow for investigative purposes, but also the decision to frisk him for weapons." *United States v. Snow*, 2011 WL 3792340 at *11-12 (7th Cir. 2011). But Snow's case is akin to *Florida v. J.L.* where the Supreme Court held that, although an "accurate description of

the suspect's readily observable location and appearance" is reliable in a "limited sense: It will help the police correctly identify the person whom the tipster means to accuse," the search was not justified because the tip did not "show that the tipster ha[d] knowledge of concealed criminal activity." 529 U.S. 266, 272 (2000). In Snow's case the caller also provided a description but gave no support for her assertion that she was witnessing criminal conduct. The panel erred in accepting the government's argument that this case, like *Drake*, is distinguishable from *J.L* because the caller was not anonymous and therefore requires no further corroboration. *Snow*, 2011 WL 3792340 at *9-11. *Drake*, however, challenged only the Terry stop, not a frisk, and the firearm that provided reasonable suspicion was found in plain view at the suspect's feet. 456 F.3d 771-73. While the identity of the caller certainly gives support to the caller's veracity it bears no logical connection to the reliability of the caller's unsupported assumptions. In this regard there is no distinction from concerns expressed in *J.L.* and no cause to expand the holding of *Drake* beyond justifying the initial stop.

When taken together the unwarranted expansion of these two cases has effectively eliminated the requirement of individualized suspicion for a *Terry* frisk in direct conflict with *Terry*.

II. The search of Snow began when the officer extinguished Snow's legitimate expectation of privacy.

Although the panel declined to reach the question of when Snow's frisk actually began, *Snow*, 2011 WL 3792340 at *6, n.1, that issue was squarely presented and integral to Snow's argument that he was searched without reasonable suspicion. Moreover, the panel's treatment of this Court's recent decision in *United States v. Tinnie*, 629 F.3d 749, 759 (7th Cir. 2011) could be misinterpreted by courts and parties as broadening the holding of that case. This Court should

clarify that the *Tinnie* court merely concluded that the district court did not commit clear error in its decision and that any narrow reading of the term frisk to only what takes place after the officer physically contacts the suspect would be in direct conflict with the Supreme Court's definition. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("[a] 'search' occurs when an *expectation* of privacy that society is prepared to consider reasonable is infringed.") (emphasis added); *cf. Katz v. United States*, 389 U.S. 347, 353 (1967) (finding electronic surveillance to be a search, even absent any physical intrusion, when officers "violated the privacy upon which [the suspect] justifiably relied"); *United States v. Tinnie*, 629 F.3d 749, 759 (7th Cir. 2011) (Hamilton, J., dissenting) (recognizing that a narrow reading the term frisk, limited to only moments of physical contact, "would require [the Court] to close [its] eyes to reality and would encourage aggressive and intrusive police tactics").[2] *Terry* itself instructs that "the Fourth Amendment governs *all intrusions* by agents of the public upon personal security" and declared that a public search "while the citizen stands helpless, perhaps facing a wall with his hands raised" is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and [which] is not to be undertaken lightly." *Terry* 392 U.S. at 17 n.15 (1968) (emphasis added). Because the protections of the Fourth Amendment are not so harshly restricted, the violation of the Fourth Amendment right to be free from an unreasonable search occurs when an individual's expectation of that right is extinguished.

[2] In *Tinnie* the majority held that a district court did not commit clear error by considering facts learned after an order to submit to a frisk but before an officer's physical contact. Combined with the other facts articulated by the officers the Court found reasonable suspicion for a search. *Tinnie*, 629 F.3d at 753, n.3.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant rehearing or rehearing *en banc* in this case and remand for a new trial on the grounds presented here.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) and 40 and SEVENTH CIRCUIT RULES 32 and 40

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(b) and Circuit Rule 40 because:

X this petition contains 8 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because:

X this petition has been prepared in a proportionally-spaced typeface using Microsoft Word 2007, Version 11.0, in 12-point Times New Roman font with footnotes in 11-point Times New Roman font.

_____

s/ SARAH O. SCHRUP

Dated: September 6, 2011

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CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, Ernest R. Snow, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of this petition in non-scanned PDF format.

_____

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Dated: September 6, 2011

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CERTIFICATE OF SERVICE

I certify that I served electronically this petition for rehearing through the Court's electronic filing system on September 6, 2011

Respectfully submitted,

_____

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Dated: September 6, 2011