No. 10-2031

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Ernest R. Snow,
Defendant-Appellant.

Appeal From The United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 1:09-CR-00087
The Honorable Judge Larry McKinney

REPLY BRIEF OF DEFENDANT-APPELLANT ERNEST SNOW

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Table of Contents

Table of Authorities

Cases:

Statutes:

Argument

Rather than squarely address the constitutional violation resulting from the officer's illegal search of Snow, the government sidesteps the issue by denying that a search took place at all, by creating an unprecedented *per se* rule of reasonable suspicion, and, finally, by claiming in the face of all contrary facts that the officers had reasonable suspicion that Snow was armed and presently dangerous. The government asks this Court to eschew the proper Fourth-Amendment analysis and accept the unwarranted suspicions of law enforcement used to justify their intrusion upon Snow's right to be secure in his person against unreasonable searches. This Court should reject the government's approach and reverse Snow's conviction.

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

The government insists—for the first time—that no *Terry* frisk took place because the gun was discovered incident to his alleged resistance and consequently does not implicate the Fourth Amendment at all.[1] But this argument is flatly contradicted by the government's own admission in the district court that "[w]hen the officers stopped *and frisked* Snow, a full and formal arrest had not yet occurred." (R.21 at 4

[1] Although the government's brief makes this assertion more than once, the record is inconclusive regarding whether the officer physically touched Snow before his alleged resistance.

(emphasis added).) Indeed, the government conceded that no arrest took place "until [officers] discovered and then seized the firearm" *Id.* But even if it were true that Officer Andrews did not get around to actually physically patting down Snow, he undoubtedly had initiated the separate frisking process[2]—and its Fourth Amendment search implications—by ordering Snow to exit the truck and to assume a hands-on-the-vehicle position. (A. 27:8-11.) The privacy interest against unreasonable searches implicit in *Terry* and, more importantly, in the Fourth Amendment, is not limited only to physical intrusions upon the person. The Supreme Court in *United States v. Jacobsen* pointed out that "[a] 'search' occurs when an *expectation* of privacy that society is prepared to consider reasonable is infringed." 466 U.S. 109, 113 (1984) (emphasis added); *see also Bond v. United States*, 529 U.S. 334, 337-39 (2000) (recognizing that the Fourth Amendment search analysis centers around an individual's expectation of privacy); *Soldal v. Cook County*, 506 U.S. 56 (1992) (quoting *Jacobsen*, 466 U.S. at 113); *cf. Katz v. United States*, 389 U.S. 347, 353 (1967) (finding electronic surveillance to be a search, even absent any

[2] A *Terry* stop requires only reasonable suspicion that criminal activity is afoot, whereas a *Terry* frisk is justified only upon the separate reasonable suspicion that the person detained is armed and dangerous. *Terry v. Ohio,* 392 U.S. 1, 30 (1968). Thus, the government errs in lumping the concepts together as a single uninterrupted process. In fact, courts often segregate the two portions of a *Terry* stop and search, upholding the initial stop but not the later search, when officers fail to respond to the "emerging tableau" of information that becomes visible as an investigation unfolds. *See, e.g., United States v. Romain*, 393 F.3d 63, 71 (1st Cir. 2004).

physical intrusion, when officers "violated the privacy upon which [the suspect] justifiably relied"); *United States v. Tinnie*, No. 09-4082, slip op. at 22-23 (7th Cir. Jan. 18, 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"). *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 v. Ohio*, 392 U.S. 1, 17 n.15 (1968) (emphasis added).

After Snow turned over his keys and license, Andrews ordered him to exit and place his hands on the vehicle. (A. 27:8-14.) In such close proximity to the officer (no more than arms-length), any reasonable person would have understood this as an order to submit to a search. Such an order puts the reasonable person on notice that physical intrusion is imminent and that he is therefore no longer secure in his person against a search. Thus, at that moment, Snow's reasonable expectation to be free of the "serious intrusion" of a public search at the hands of law enforcement was extinguished. *Id.* at 17.

II. The search of Snow was unreasonable notwithstanding the government's attempt to create a *per se* rule of reasonable suspicion.

A. A *per se* rule of reasonable suspicion would be inconsistent with longstanding Supreme Court precedent requiring an analysis of the totality of the circumstances.

"[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55 (1971) *quoting Katz*, 389 U.S. at 357 (footnote omitted). The well-delineated exception at issue in this case is that an officer may initiate a narrow pat-down search for weapons only if individualized, articulable facts and reasonable inferences from those facts known to the officer at the time would lead a reasonable officer to believe that a suspect is presently armed and dangerous. *Terry*, 392 U.S. at 27.

The government's claim that the officers possessed reasonable suspicion to search Snow lacks any such factual basis, relying not on reasonable inferences, but on bare assumptions. As an initial matter, despite the government's unsupported claim to the contrary, (Appellee Br. 12), the district court never addressed whether Andrews was authorized to conduct a *Terry* pat-down of Snow. Rather, the district

court focused exclusively on whether the officers had reasonable suspicion to stop the truck. (A. 12:1-15:19.) "The 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 subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search . . . in light of the particular circumstances." *Terry*, 392 U.S. at 21. Here, however, the district court provided no such safeguard.

Even if the district court had considered the question, the government cannot successfully defend the search with the three arguments raised in its brief, which are nothing more than an attempt to inject a *per se* rule into this Fourth Amendment inquiry. First, the government wrongly portrays *Terry* as holding that reasonable suspicion is fulfilled whenever anyone, including untrained lay persons making 911 calls, police dispatchers, or the police officers on the beat utters the word "burglary," regardless of the actual facts and circumstances of the case. (Appellee Br. 12 (citing *Terry* for the contention that "[t]he right to frisk is automatic" upon suspicion of burglary).) But *Terry* contains no such holding. In support of this nearly unfettered authority to search, the government cites (without noting the weight of authority) Justice Harlan's *concurrence* in *Terry*. *Id.* In that concurrence, Justice Harlan observed "gaps" in the

majority opinion and expressed his belief that a constitutionally reasonable search for weapons should "be immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence." *Terry*, 392 U.S. at 33 (Harlan, J., concurring). But this normative, aspirational language was neither the holding nor even the dicta of *Terry*, and subsequent Courts have never adopted Justice Harlan's gap-filler approach. On the contrary, the Supreme Court and this Court have consistently held that the reasonableness of a search or seizure is determined on a case-by-case basis only after a consideration of the totality of the circumstances. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("In applying [the totality of the circumstances] test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."); *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (adopting the totality-of-circumstances test and noting that "the assessment of probabilities in particular factual contexts [is] not readily, or even usefully, reduced to a neat set of legal rules"); *United States v. Johnson*, 170 F.3d 708, 714-15 (7th Cir. 1999) ("[R]easonable suspicion is to be determined in light of the totality of the circumstances . . . focus[ing] on the events which occurred leading up to the stop or search . . . .") (internal quotations and citations omitted). Contrary to the government's reliance on a fictional *per se* rule that invocation of

the word "burglary" creates reasonable suspicion, the binding precedents teach that reasonable suspicion may only be found after considering all the relevant facts known to the officer.

Second, in addition to its misreading of Justice Harlan's concurrence, the government relies on *United States v. Barnett*, 505 F.3d 637 (7th Cir. 2007), for the proposition that the investigation of certain crimes creates a *per se* rule of reasonable suspicion. (Appellee Br. 12.) In doing so, the government stretches factually distinguishable precedent in a way that permits the narrow exception carved out in *Terry* to swallow the long-standing and fundamental rule embodied in cases like *Coolidge*, *Gates*, and *Katz*, *supra*, that warrantless searches are presumed unreasonable. Consistent with these cases, however, *Barnett*'s holding must be read in light of the totality of its facts, which are clearly distinguishable from this case. The suspicion in *Barnett* did not arise from a lay 911 call, but rather from direct police observation. 505 F.3d at 638. Police encountered Barnett in a dark, empty parking lot near closed or soon-to-close businesses. *Id.* As they approached, Barnett appeared "'nervous, startled' and 'hurried.'" *Id.* Even given these facially suspicious observations, the officers did not immediately resort to a search; rather, the officers developed and confirmed their reasonable suspicion by investigating further and questioning *Barnett*. *Id.* It was only after

he gave clearly false information about his address and activities that the officers initiated a *Terry* search. *Id.* In any event, expanding *Barnett's* reasoning in a case like Snow's would eviscerate the requirement of *individualized* suspicion for a *Terry* frisk in direct conflict with *Terry* and the many cases in its wake that proscribe police practices treading anywhere close to automatic frisks. *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (stating that "[t]he '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*.") (emphasis added); *Sibron v. New York*, 392 U.S. 40, 59 (1968) ("The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case."); *Terry*, 392 U.S. at 27; *Tinnie*, No. 09-4082, slip op. at 27 (Hamilton, J., dissenting).

Third, and finally, the government attempts to bolster the claim that "burglary" alone can create reasonable suspicion that a suspect is armed by referencing the Armed Career Criminal Act ("ACCA"), which includes burglary in a list of "violent felon[ies]." (Appellee Br. 12 (referencing 18 U.S.C. § 924(e)(2)(B)(ii) (2006)).) The ACCA subsection the government relies on creates a category of "violent" felonies for the sole purpose of determining the mandatory sentence for a felon found in unlawful possession of a firearm. 18 U.S.C. § 924(e)(1). The label

simply identifies past felony convictions, the existence of which increase the punishment for being a felon-in-possession of a firearm under the Act. Congress would have achieved the same goal by using the label "aggravated felony" or "class X felony" rather than "violent felony," so the actual terminology was irrelevant to the functional purpose of the statute. *See*, *e.g.,* 8 U.S.C. § 1101(a)(43)(F) & (G) (2006) (categorizing "burglary" as an "aggravated felony" distinct from a "crime of violence").[3] The government employs an unwarranted leap of logic in concluding that the limited-purpose use of the term "burglary" in ACCA means for purposes of the constitutional inquiry that every burglary suspect in a *Terry* stop is armed and presently dangerous so as to justify a search.[4] In short, the ACCA's sentencing provisions cannot be read as a constitutionally-mandated permission slip for officers to search anyone hastily labeled as a burglar.

Even if there were a logical way to create and apply a bright-line *per se* rule of reasonable suspicion that certain suspects were armed and presently dangerous, such a method would be in direct conflict with the body of Supreme Court jurisprudence surrounding the Fourth Amendment's proscription of unreasonable searches. Thus, the

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[3] Aliens convicted of "aggravated" felonies are deportable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).

[4] The absurdity of such a *per se* suspicion may be illustrated by a suspect found empty-handed and walking down the street wearing only skin-tight undergarments. No reasonably prudent officer could believe that the suspect was armed no matter how presumptively violent his suspected crime.

question of whether the officer's search of Snow was reasonable must be determined in light of the specific facts known by Andrews at the time he initiated the search.

B. The totality of circumstances known to Officer Andrews at the time he ordered Snow from his vehicle was insufficient for an objective officer to reasonably suspect that Snow was armed and presently dangerous.

When the proper totality-of-the-circumstances test is applied, it is clear that the officers lacked reasonable suspicion to initiate a search of Snow. Andrews was investigating nothing more than a report of an individual who appeared to have "tr[ied] to get into the windows" of a house but did not make entry, who then returned to his truck for a period of time, and who, rather than racing from the scene, was reported as simply driving off. (A. 64:4-65:11.) Although the police dispatcher ultimately labeled this activity as a "burglary in progress," every other fact that Andrews received or observed could only diminish a reasonable officer's suspicion that Snow was in flight from a burglary, much less that he was armed and presently dangerous. For instance, Andrews knew that Snow never entered the house and that he sat in his (very recognizable two-tone) vehicle in broad daylight in front of the residence before leaving the scene. *Id.* When he left, he was not hurried, was not observed breaking any traffic laws, and immediately surrendered his license and keys upon being stopped. (A.

26:13, 30:4-6.) Andrews did not testify that the neighborhood was high-crime or that there had been any recent burglaries in the area, nor did he give any testimony that Snow appeared nervous, evasive, shifty, furtive, startled, hurried, or that he showed any other indication that he may have been dangerous. *Contrast Tinnie*, No. 09-4082, slip op. at 6-7 (noting that facts supporting reasonable suspicion included a stop late at night in a dimly lit area of a high crime neighborhood by an officer familiar with the high-risk of gun possession in the area and a suspect who moved around nervously as officers approached, gave conflicting answers about identification, and misstated his age); *Barnett*, 505 F.3d at 640 ("The testimony showing Barnett's high degree of nervousness and indirectness . . . kept the suspicion of his involvement in a robbery alive during the questioning."). Unlike *Barnett*, where the officers' interactions did nothing to dispel the suspicious nature of the defendant's activities, everything Andrews learned after the initial report subtracted from the likely accuracy of the original dispatch.

In contrast to the many facts casting doubt upon the reported activity, the single circumstance relied upon by Andrews to indicate that Snow might be armed and presently dangerous was the initial invocation of the phrase "burglary in progress" that the dispatcher added to the description of the events relayed by the caller. (*Compare*

A. 58:3-5 *with* A. 64:17-25.) As noted in Section II.A above, the mere utterance of a label[5] cannot be the sole justification for extinguishing a citizen's reasonable expectation of privacy.

Just as the mere utterance of the term "burglary" does not establish *per se* reasonable suspicion, the presumed reliability of a 911 caller or the maxim of "officer safety" does not obviate an officer's duty to ascertain, through observation and questioning, facts to corroborate a reported account that fails on its own to establish that the subject of a *Terry* stop is armed and dangerous. But the government relies on such inapposite platitudes to circumvent the obvious need for further investigation in this case and gives short shrift to the Fourth Amendment in the process. (*See* Appellee Br. 13 (pointing to the "particular duty of police officers to respond to emergency situations reported by individuals through the 911 system" *citing United States v. Drake*, 456 F.3d 771, 774 (7th Cir. 2006).); *see also Drake*, 456 F.3d at 775 (stating that courts should "presume the reliability of an eyewitness 911 call[er] . . . for purposes of establishing reasonable suspicion, particularly when the caller identifies herself").

But the government's focus on the reliability of 911 callers is a red herring because Snow does not challenge the reliability of the caller to

[5] Significantly, the activity actually described by the 911 caller—what she believed from afar was a man trying to get into a window—could just as easily have been dispatched as criminal trespass, attempted unauthorized entry, or mere suspicious activity.

have reported what she believed was suspicious-looking activity.[6] He instead argues that the facts the caller reported did not amount to a reasonable suspicion that he was armed. More importantly, the dispatcher's erroneous labeling of those activities as "burglary" was also insufficient to create reasonable suspicion that he was armed. Unlike *Drake*, the caller here did not see a gun or any other violent activity. Also unlike *Drake*, Snow's interaction with police when he was stopped affirmatively undercut the suspicion that he was either a burglar or dangerous. He was not rapidly fleeing the scene, he did not appear furtive or suspicious, and he voluntarily surrendered his license and car keys.

As for the facts of *Drake,* the government zeroes in on the irrelevant fact that Snow's caller identified herself but ignores the patent and dispositive differences between the two cases. In *Drake*, the caller not only identified herself but also reported actually seeing the suspect point a gun at another person. *Drake*, 456 F.3d at 772; s*ee also United States v. Hampton*, 585 F.3d 1033, 1036-37 (7th Cir. 2009) (reasonable suspicion that suspect was armed after multiple 911 callers reported shots fired); *United States v. Whitaker*, 546 F.3d 902, 903, 911 (7th Cir. 2008) (information obtained by officers after arriving on scene

[6] Here, the 911 caller herself did *not* report a burglary as the government asserts. (*See* Appellee Br. 3 ("911 caller reporting a residential burglary in progress"), 4 (referring to caller as an "eyewitness to the reported burglary in progress"), & 7 ("911 call reporting and describing Snow as the perpetrator of an ongoing residential burglary").)

corroborated callers initial report of a firearm); *but see, generally, Florida v. J.L.*, 529 U.S. 266 (2000) (officers *lacked* reasonable suspicion that a 15-year-old child was armed despite a caller's tip that he was carrying a gun because the tip had no indicia of reliability and no emergency was ongoing).[7] Furthermore, this Court emphasized in *Drake* that the police were not confronted with any facts that undercut the radioed report. *Drake*, 456 F.3d at 775.

While acknowledging that a police officer's actions must be evaluated in light of the information known at the time, (Appellee Br. 13), the government urges this Court instead to encourage officers to *ignore* what was known to them and instead rely unquestioningly upon whatever label a dispatcher might attribute to suspicious activity. It is one thing for an officer to rely on a 911 dispatch to initiate an investigatory stop, but it is entirely another to ignore all contradictory information and continue to rely on those initial speculations throughout an entire encounter to justify a search.

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[7] The government attempts to distinguish *J.L.* from the present case based on the fact that the caller in this case was not anonymous. (Appellee Br. 14.) But the parallels in this case to *J.L.* outnumber the distinctions. It was significant to the *J.L.* Court that officers did not see a firearm, that J.L. made no threatening or otherwise unusual movements, and that the caller was not reporting an ongoing emergency. *J.L.*, 529 U.S. at 268. In this case too, before Snow was ordered to be searched, officers did not see a gun, they did not observe any threatening or otherwise unusual movements, and there was no ongoing emergency that would justify "a lower level of corroboration" for the officer's suspicion. *Whitaker*, 546 F.3d at 910 *quoting United States v. Hicks*, 531 F.3d 555, 559-60 (7th Cir. 2008).

Especially troubling is the government's highly abstracted contention that the government's "interest in officer safety clearly outweighed the minimal intrusion of requiring Snow to exit his vehicle." (Appellee Br. 14.) This statement ignores the language of *Terry* that such searches are *not* a minimal intrusion. 392 U.S. at 16-17 ("[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.'"). Such an intrusion cannot be outweighed simply by an abstract appeal to officer safety. Rather, the legitimacy of a stop or frisk must be considered on a case-by-case basis by weighing the scope of an immediate intrusion against the articulable facts that undergird the officer's rationale—in this case, whether an officer may reasonably suspect that Snow was armed and presently dangerous. *Id.* at 21, 30. The totality of the facts in Snow's case does not support the officer's actions.

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court's order, vacate the guilty plea, and grant Snow's motion to suppress.

Respectfully Submitted,

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Certificate of Service

I, the undersigned, counsel for Ernest Snow hereby certify that I served two copies of this reply brief and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 375 East Chicago Ave., Chicago, Illinois on January 19, 2011.

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Certificate of Compliance with Circuit Rule 31(E)

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

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Certificate of Compliance with Fed. R. App. P. 32(A)(7)

I, the undersigned, counsel for the Petitioner-Appellant, Ernest R. Snow, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 3664 words.

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