

# NOTES

## Fleeing Time Below the Poverty Line—Is It a Crime? *C.E.L. v. State* and Its Impact on Indigent Defense and Police-Citizen Relations

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*There is a long history in this country of African-Americans  
and Latinos being stopped by law enforcement disproportionately.  
That's just a fact.*

—President Barack Obama<sup>1</sup>

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1. President Barack Obama, News Conference by the President (July 22, 2009) (transcript available at [http://www.whitehouse.gov/the\\_press\\_office/News-Conference-by-the-President-July-22-2009/](http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-July-22-2009/)) (responding to controversy surrounding the arrest of a prominent black Harvard professor in his own home); see also Tracy Jan, *Harvard Professor Gates Arrested at Cambridge Home*, THE BOSTON GLOBE, July 20, 2009, [http://www.boston.com/news/local/breaking\\_news/2009/07/harvard.html](http://www.boston.com/news/local/breaking_news/2009/07/harvard.html).

## I. INTRODUCTION

“‘Young minority males in particular are strongly motivated to avoid [the police]’ and ‘strive to avoid running into the police, believing that such encounters are all too often the prelude to abuse.’”<sup>2</sup> This attitude is likely the result of a “group recognition that the majority society has unfairly used indicators beyond community control, like race as a cue, to identify certain behavior patterns within the community.”<sup>3</sup>

This group recognition makes both police and judicial interpretations of unprovoked flight extremely problematic. United States Supreme Court Justice John Paul Stevens himself wondered what the term “unprovoked” meant in *Illinois v. Wardlow*.<sup>4</sup> Years of police violence, he reasoned, would “provoke” any individual to avoid such contact. Like-minded opponents of *Wardlow* agree:

Where a group of people is subjected to harassment, brutality, and systematic injustice to the point where faith is lost in the people hired to protect them, what amount of narrow arrogance is required to state that a black man, who flees from a white officer, did so unprovoked? The police forces around the country that have practiced biased policing provoke the subjects of their profile to flee their arbitrary and injurious pursuits. The flight of Sam Wardlow was not unprovoked. Instead, it was a justifiable response to an unjust system.<sup>5</sup>

The avoidance of potentially life-changing authority like the police is perhaps more deeply cultural and sociological than the United States Supreme Court will judicially recognize.

In a 2000 study, researchers Tracey Meares and Bernard Harcourt concluded that minority flight is a “poor indicator that crime is afoot.”<sup>6</sup> This conclusion is based on examining data from New York City street stops where Meares and Harcourt found an average of nine stops for every one eventual arrest. This number was twice as high for blacks in New York.<sup>7</sup> More recent 2010 data shows more of the same, that out of

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2. *C.E.L. v. State (C.E.L. II)*, 24 So. 3d 1181, 1191 (Fla. 2009) (Pariente, J., concurring) (quoting MALCOLM D. HOLMES & BRAD W. SMITH, *RACE AND POLICE BRUTALITY: ROOTS OF AN URBAN DILEMMA* 94 (2008)).

3. David Seawell, *Wardlow's Case: A Call to Broaden the Perspective of American Criminal Law*, 78 DENV. U. L. REV. 1119, 1130–31 (2001).

4. *Illinois v. Wardlow*, 528 U.S. 119, 141 n.5 (2000) (Stevens, J., concurring in part and dissenting in part) (“Nowhere in Illinois’ briefs does it specify what it means by ‘unprovoked.’”) (5–4 decision).

5. Seawell, *supra* note 3, at 1135 (citations omitted).

6. Tracey L. Meares & Bernard E. Harcourt, *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 786–92 (2000).

7. *Id.*

137,301 stop and frisks in New York City, 56% of those stopped were black, 31% Hispanic, and only 10% white, while 100,000 (72.8%) of these stops did not lead to an arrest.<sup>8</sup>

The consequences of the criminalization of flight are not solely the conjectural aggravation of police-citizen relations discussed in the form of statistics. Consequences also involve increased violence between officers and those they pursue. Lawmakers should be concerned for those disenfranchised individuals in impoverished, high-crime neighborhoods who do not have the economic or political resources to pursue remedies. This would especially involve illegal noncitizens throughout Florida. The Miami New Times covered a story on Border Patrol abuses including the following excerpt involving noncitizen flight:

Of the deportees he encounters, Diaz Romero [of No More Deaths migrant-aid station] says, “Many people who arrive here have been beaten, have gone days without food.

“Oh, and if they [have] run, that only made the agents angry. The [agents] beat them to punish them.”

Deportee Armando told volunteers that an agent beat him for fleeing. It happened after he had grown too tired to go on. He stopped, turned toward the agent, and threw his hands up in the air. The officer caught up, yanked Armando’s head back, and slammed his fist into the side of the immigrant’s face.<sup>9</sup>

Though Border Patrol officers are only given authority to conduct warrantless *felony* arrests,<sup>10</sup> the excerpt serves as an example of how flight may lead to violence and abuse. Under Florida law, a police officer may arrest without a warrant when there is a misdemeanor being committed in his presence, such as resisting arrest without violence, and may use such force as is necessary to effect the arrest.<sup>11</sup> The officer, for the most part, is his own judge as to the degree of the force to be used.<sup>12</sup>

On the other hand, studies involving data from Florida jurisdictions show the correlation between race and arrests may be more illusory than real.<sup>13</sup> A study aimed at revealing *how* officers form suspicion and make

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8. Sean Gardiner, *NYPD Releases Stop-and-Frisk Data*, METROPOLIS, THE WALL ST. J., Nov. 10, 2010, <http://blogs.wsj.com/metropolis/2010/11/10/nypd-releases-stop-and-frisk-data/>.

9. Monica Alonzo, *Culture of Cruelty: Feds Bury Border Patrol Abuses of Immigrants*, MIAMI NEW TIMES, Dec. 16, 2010, <http://www.miaminewtimes.com/2010-12-16/news/culture-of-cruelty-feds-bury-border-patrol-abuses-of-immigrants/>, at 4–5.

10. 8 U.S.C. § 1357 (2006).

11. *Hutchinson v. Lott*, 110 So. 2d 442 (Fla. Dist. Ct. App. 1st Dist. 1959), *cert. denied*, 115 So. 2d 415 (Fla. 1959).

12. *Id.*

13. Meghan Strohine et al., *The Influence of “Working Rules” on Police Suspicion and Discretionary Decision Making*, 11 POLICE Q. 315, 318 (2008) (study involving data from forty-nine Miami-Dade county police officers, stating “that officers are more likely to form suspicion on minority group members than Whites, but that they are no more likely to take action against them

decisions (rather than subsequent conduct) concluded that “the seriousness of the alleged offense, and the strength of evidence as perceived by the officer, are the most important factors associated with a police officer’s actions.”<sup>14</sup> This stands in contrast to what Alpert, MacDonald, and Dunham call the “less important factors” of race, social class, and demeanor of the suspect.<sup>15</sup>

Is the so-called “group recognition”<sup>16</sup> one of inaccuracy? Studies in urban areas do show that minorities are much more prone to police harassment;<sup>17</sup> therefore, assuming that unprovoked flight from police is indicative of criminal activity is problematic.

Whether perception, reality, or both, the recent police shooting death of an unarmed black man during an Overtown traffic stop in Miami continue to breed fear of police in high-crime, low-income areas.<sup>18</sup> “Very seldom do we have these kinds of incidents occurring with African-American officers in African-American communities,” Miami Commissioner Richard Dunn stated in response to the incident.<sup>19</sup> “Not to say they are racist,” he added, “but many times people come in our areas, and *they don’t understand us*.”<sup>20</sup>

This paper discusses the legal basis for the Florida Supreme Court’s decision in *C.E.L. v. State (C.E.L. II)*, which criminalized the act of “continued flight” from law enforcement.<sup>21</sup> The case is controversial in light of the community-police tensions discussed above. This paper

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than against White citizens”) (citing Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decisionmaking During Citizen Stops*, 43 *CRIMINOLOGY* 407 (2005)).

14. Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decisionmaking During Citizen Stops*, 43 *CRIMINOLOGY* 407, 410 (2005).

15. *Id.*

16. Seawell, *supra* note 3, at 1130–31 (2001) (stating there is a “group recognition that the majority society has unfairly used indicators beyond community control, like race, to identify behavior patterns within the community”).

17. *Illinois v. Wardlow*, 528 U.S. 119, 129 n.7 (2000) (Stevens, J., concurring in part and dissenting in part).

18. After a prosecutorial investigation, the officer was deemed justified when victim, DeCarlos Moore was thought to be reaching inside his car for a gun. David Ovalle & Charles Rabin, *Miami Officer Cleared in Fatal Shooting of Unarmed Motorist in Overtown*, *MIAMI HERALD*, May 5, 2011, <http://www.miamiherald.com/2011/05/05/2202930/officer-cleared-in-fatal-shooting.html#ixzz1Nwg8TPxc> (also stating that only two of seven men killed in recent police shootings were actually armed).

19. Kelly House, *Hundreds Mourn Shooting Victim; Leaders Urge Calm*, *MIAMI HERALD*, July 17, 2010, <http://www.miamiherald.com/2010/07/17/1735643/hundreds-mourn-shooting-victim.html#ixzz0utxLPUA8>.

20. *Id.* (emphasis added); see also Charles Rabin & David Ovelle, *Police Shooting in Little Haiti Leaves 1 Dead, 1 Injured*, *MIAMI HERALD*, Feb. 11, 2011, <http://www.miamiherald.com/2011/02/11/2061599/police-involved-shooting-leaves.html#ixzz1NweTHHzI> (community leaders ask for federal investigation of Miami-Dade Police Department).

21. *C.E.L. v. State (C.E.L. II)*, 24 So. 3d 1181, 1181 (Fla. 2009) (per curiam), *cert. denied*, 130 S.Ct. 3290 (2010).

argues the Florida legislature should take steps to protect certain individuals who may unwittingly find themselves caught in the broad net of this crime.<sup>22</sup>

Part II of this paper discusses the statute at issue, found in section 843.02 of the Florida Statutes. This note also discusses basic Fourth Amendment principles, including consensual encounters, the investigatory stop, and probable cause for a lawful arrest. In Part II–A, this paper analyzes the U.S. Supreme Court precedent *Terry v. Ohio*<sup>23</sup> and *Illinois v. Wardlow*,<sup>24</sup> interpreting the reasonableness of warrantless seizures and pat-downs under the Fourth Amendment. Part II–B discusses the conflicting case law in the Florida District Courts of Appeal leading to the decision in *C.E.L. II*, including an in-depth analysis of the lower court *C.E.L. v. State (C.E.L. I)* decision, much of which the Florida Supreme Court adopts.

Part III–A analyzes the *C.E.L. II* decision itself, as its reasoning is constrained by the Florida Constitution. In Part III–B, this paper focuses on Justice Pariente’s concurrence, which highlights surviving defenses in the criminal attorney’s arsenal. These include (1) disputing the existence of reasonable articulable suspicion to justify the investigatory stop, (2) arguing the defendant’s flight was not “unprovoked” or “headlong,” and (3) disputing the site of arrest as a “high-crime area.” Part III–C briefly mentions suppression cases decided after *C.E.L. II* and considers where this area of the law may be heading.

Part IV concludes this note by offering political solutions to the problems presented by the current state of the law, both legislative and executive. This paper recommends adding additional language to section 843.02 in an approach borrowed from the “community caretaking” model. Here, this paper proposes that as a condition to a warrantless arrest under the statute, the officer must have reasonable grounds to believe that some emergency exists. This proposal brings the statute in line with the initial bases for allowing such stops from *Terry v. Ohio* and *Illinois v. Wardlow*. Also, this solution addresses the concerns of the lower district courts of appeal giving rise to the legal conflict.

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22. For public reaction, see *A Troubling Legal Double Standard*, ST. PETERSBURG TIMES, Dec. 20, 2009, <http://www.tampabay.com/opinion/editorials/a-troubling-legal-double-standard/1059899> (stating that decision “greatly shifts the balance of power . . . inviting potential abuse by rogue officers”). *But cf. The Troubling Pro-Criminal Legal Standard of the St. Petersburg Times*, RES PUBLICA (Dec. 21, 2009, 3:21 AM), <http://respublicamyblog.wordpress.com/2009/12/21/the-troubling-pro-criminal-legal-standard-of-the-st-petersburg-times/> (conservative response to St. Petersburg Time article).

23. 392 U.S. 1 (1968).

24. 528 U.S. 119 (2000).

## II. BACKGROUND

Not long ago, the Florida Supreme Court aggravated police-community tensions that exist in high-crime, low-income areas of Florida. The court in *C.E.L. v. State (C.E.L. II)*<sup>25</sup> found that a juvenile's continued act of running from the police after being instructed to stop was a criminal act.<sup>26</sup> Prior to *C.E.L. II*, an officer patrolling a high-crime neighborhood had no right to stop an individual who merely ran away after recognizing the officer's presence. Now in that same situation, the officer may order the individual to stop, pursue them,<sup>27</sup> arrest them,<sup>28</sup> and search that individual incident to a lawful arrest.<sup>29</sup> Essentially, the analysis skips the "stop and inquire" investigatory portion of the police-citizen encounter<sup>30</sup> and immediately matures the individual's actions into probable cause for an arrest. Many judges, scholars, and practitioners already recognize the problems with interpreting the act of flight. These problems are compounded in light of the initial basis for the "reasonable articulable suspicion" standard<sup>31</sup> and the practical consequences of such an interpretation.<sup>32</sup>

The statute at issue in *C.E.L. II*, titled "Resisting [an] officer without violence to his or her person," specifically criminalizes "resist[ing], obstruct[ing], or oppos[ing] any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer."<sup>33</sup> This crime is found in Florida statute section 843.02 within the broad chapter of criminal statutes entitled "Obstructing Justice." Those found guilty of doing so are guilty of a first-degree misdemeanor,<sup>34</sup> and may be sentenced up to a year in prison<sup>35</sup> or given a \$1,000 fine,<sup>36</sup> not including court costs.

This seemingly minor crime has major consequences, including the immediate effect of providing a precipitous doctrinal obstacle for defense attorneys to suppress evidence involving much more serious

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25. *C.E.L. II*, 24 So. 3d at 1181.

26. *Id.*

27. FLA. STAT. § 843.02 (2011).

28. FLA. STAT. § 901.15 (2011) ("A law enforcement officer may arrest a person without a warrant when . . . the person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit.").

29. *Chimel v. California*, 395 U.S. 752 (1969) (holding that searches incident to lawful arrests are "reasonable" under the Fourth Amendment).

30. As enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968).

31. *See id.*

32. *See supra* Part I.

33. FLA. STAT. § 843.02 (2011).

34. *Id.*

35. FLA. STAT. § 775.082(4)(a) (2011).

36. FLA. STAT. § 775.083(1)(c) (2011).

crimes. There are also more unforeseen long-term social justice implications involving police-citizen relations, involving juvenile recidivism and the imposition of a criminal history that could interfere with career and educational opportunities for young offenders.

In order for a police officer to lawfully stop an individual under the Fourth Amendment, he or she must have an articulable reasonable suspicion that the individual has committed or is about to commit a crime.<sup>37</sup> A Florida law enforcement officer may, of course, conduct a “field interview,” which is a consensual encounter.<sup>38</sup> “[T]he hallmark of a consensual encounter is the citizen’s right to either voluntarily comply with the officers’ requests or terminate the encounter at any time.”<sup>39</sup> Many individuals, especially adolescents, will choose to exercise this right by running away.<sup>40</sup>

As background, there are three levels of police-citizen encounters. An oft-cited Florida Supreme Court passage reads as follows:

There are essentially three levels of police-citizen encounters.

The first level is considered a consensual encounter and involves only minimal police contact. During a consensual encounter a citizen may either voluntarily comply with a police officer’s requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked.

The second level of police-citizen encounters involves an investigatory stop as enunciated in *Terry v. Ohio*. At this level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. In order not to violate a citizen’s Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop.

. . . .

. . . [T]he third level of police-citizen encounters involves an arrest which must be supported by probable cause that a crime has been or

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37. See *id.* (distinguishing an investigatory stop, requiring a reasonable articulable suspicion that criminal activity is afoot, from an arrest, requiring the facts known to the arresting officer probable cause to believe a crime has been committed); see also FLA. STAT. § 901.151(2) (2011) (known as the Florida Stop and Frisk Law, allows investigatory detentions and pat-downs of suspicious individuals “under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state . . .”).

38. *Yarusso v. State*, 942 So. 2d 939 (Fla. Dist. Ct. App. 2d Dist. 2006) (citing *Terry v. Ohio*, 392 U.S. 1, 31–33 (1968)).

39. *Id.* at 942.

40. *C.E.L. v. State (C.E.L. II)*, 24 So. 3d 1181, 1191 (Pariente, J., concurring) (quoting MALCOLM D. HOLMES & BRAD W. SMITH, RACE AND POLICE BRUTALITY: ROOTS OF AN URBAN DILEMMA 94 (2008)).

is being committed.<sup>41</sup>

The problem with Florida Statute section 843.02 is that “[i]n the span of a few seconds and perhaps seventy-five feet,” individuals are “transformed from free persons protected by the Fourth Amendment into misdemeanants subject to arrest.”<sup>42</sup>

Until *C.E.L. II*, a defendant’s flight at the sight of a police officer did not amount to resisting an officer in the lawful execution of his duties.<sup>43</sup> To show that a defendant’s flight constituted resisting arrest without violence, the State must prove that (1) the officer had an articulable well-founded suspicion of criminal activity and (2) the defendant fled with knowledge that the officer intended to detain him.<sup>44</sup> Mere eye contact with the officer was not knowledge that the officer intended to detain him,<sup>45</sup> and flight alone, even in a high-crime area, was not a basis for an arrest for having resisted arrest under section 843.02.

A. *Fourth Amendment Progeny: Terry v. Ohio and Illinois v. Wardlow*

*C.E.L. II* can only be understood through an examination of decisions relating back to *Terry v. Ohio*. In 1968, the Supreme Court announced that officers have the right, despite the Fourth Amendment’s bar against unreasonable searches and seizures, to stop and frisk individuals based on “specific reasonable inferences he is entitled to draw from the facts in light of his experience.”<sup>46</sup> The Court later determined that flight from the officer was a legitimate factor to infer criminal activity, and under Florida law this would be the basis for both the investigatory stop and the probable cause supporting the arrest.

1. *TERRY V. OHIO*

The Supreme Court decision of *Terry v. Ohio* involved the arrest of two men, Terry and Chilton, at 2:30 P.M. by Detective McFadden. Detective McFadden observed the men exhibiting what McFadden inferred was suspicious behavior. Terry and Chilton were observed walking back and forth from a street corner to a store roughly a dozen times, peering into the window, and returning to the corner to confer. Detective McFadden suspected the men of casing the store for a robbery. At this point, McFadden approached the suspects, identified himself as a

41. *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993) (citations omitted).

42. *C.E.L. v. State (C.E.L. I)*, 995 So. 2d 558, 564 (Fla. Dist. Ct. App. 2d Dist. 2008) (Altenbernd, J., concurring).

43. *M.M.H. v. State*, 929 So. 2d 628 (Fla. Dist. Ct. App. 3d Dist. 2006).

44. *Id.*

45. *Id.*

46. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).



police officer, and asked the suspects to identify themselves. When Terry mumbled something Detective McFadden could not hear, McFadden grabbed the defendant, patted down the outside of the defendant's clothing, felt a pistol in the defendant's pocket, and removed it. Terry was convicted on charges of carrying a concealed weapon.

Justice Warren, for the majority, considered the nature of the governmental interest, which is justified by reasonable, articulable facts that justify the intrusion.<sup>47</sup> The Court found, based on the facts, that the officer was justified in investigating further based on a concern for his own safety and the safety of others, and that a search was necessary to assure the suspect was not armed.<sup>48</sup> Accordingly, the gun and evidence was not suppressed. The concept of the degree of police intrusion was based on the degree of articulable suspicion of a crime being committed. This principle was clear in *Terry*.

The Court recognized that such a reading of the Fourth Amendment could spiral into abuse, and so they included a caveat:

Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the *judiciary* and its fruits must be excluded from evidence in criminal trials.<sup>49</sup>

Unfortunately, decades later, the U.S. Supreme Court would forget this warning.

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47. *Id.* at 20–21. The holding specifically states:

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 with *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 person in an attempt to discover weapons which might be used to assault him.

*Id.* at 30 (emphasis added).

48. The court notes that the reasonableness of the initial search also hinged on the search being limited to the surface of the clothing, not underneath the clothing. The court stated, "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover [weapons]." *Id.*; see, e.g., FLA. STAT. § 901.151(5) (2011) (under the Florida Stop and Frisk Law, an officer must have probable cause to believe that a suspect is armed and dangerous).

49. *Terry*, 392 U.S. at 15 (emphasis added).

2. *ILLINOIS v. WARDLOW*

Chief U.S. Supreme Court Justice Rehnquist issued a controversial opinion in 2001 that broadened the circumstances justifying the *Terry* stop. One criminal law professor characterized the opinion as a “troubling indication of the court’s obliviousness to what’s really going on in the country.”<sup>50</sup> The issue in *Wardlow* was whether the initial stop of Sam Wardlow was supported by reasonable suspicion required for a lawful investigatory stop.<sup>51</sup> The officers who pursued Wardlow were in the last car in a four-car caravan driving through an “area known for heavy narcotics trafficking.”<sup>52</sup> Upon seeing the procession of police vehicles, Wardlow fled from the area, only later to be cornered by Officers Nolan<sup>53</sup> and Harvey. Officer Nolan “immediately conducted a protective patdown search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions.”<sup>54</sup> In a bag Wardlow was carrying, Officer Nolan discovered a .38-caliber handgun and Wardlow was arrested for its possession.<sup>55</sup>

Chief Justice Rehnquist, for the majority, rejects the *per se* rule supported by Illinois that flight, no matter where, when, or what the circumstances, always amounts to reasonable suspicion for an investigatory stop, but also held that the character of the neighborhood is relevant to a reasonableness analysis of a stop.<sup>56</sup> Bearing in mind *Terry*, which involved innocent conduct that amounted to be suspicious, Rehnquist allows unprovoked flight to be considered as “a *pertinent* factor in determining reasonable suspicion.”<sup>57</sup> In the very next sentence, Rehnquist seems to bolster this proposition, stating that “[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”<sup>58</sup> Thus, the basis for an investigatory seizure by police could be based solely on

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50. Linda Greenhouse, *Supreme Court Roundup; Flight Can Justify Search by Police, High Court Rules*, N.Y. TIMES, Jan. 13, 2000, at A1 (quoting Professor Barry Friedman, New York University Law School).

51. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

52. *Id.* at 121.

53. No relation to the author.

54. *Id.* at 121–22. It is important to note here that the Florida Stop and Frisk Law does not allow routine patdown searches for generalized concerns for officer safety, or based on the notion that narcotics and firearms go hand in hand. Officers must have a particularized concern that a suspect is presently armed and dangerous. *See* D.L.J. v. State, 932 So. 2d 1133 (Fla. Dist. Ct. App. 2d Dist. 2006); Estevez v. State, 915 So. 2d 185 (Fla. Dist. Ct. App. 1st Dist. 2005); L.D.P. v. State, 551 So. 2d 1257 (Fla. Dist. Ct. App. 1st Dist. 1987); Harris v. State, 574 So. 2d 243 (Fla. Dist. Ct. App. 1st Dist. 1991); Winters v. State, 578 So. 2d 5 (Fla. Dist. Ct. App. 2d Dist. 1991).

55. *Wardlow*, 528 U.S. at 122.

56. *Id.* at 124.

57. *Id.* (emphasis added).

58. *Id.*

location (high-crime area) and unprovoked flight of the subject.<sup>59</sup>

Justice Stevens and three other justices recognized the extensive broadening of police authority handed over to the States.<sup>60</sup> Justice Stevens concurred in part, commending the Court for rejecting the Illinois government's argument that a bright-line rule was necessary, one that would authorize investigatory stops of *anyone* who flees at the sight of police.<sup>61</sup>

Justice Stevens, however, dissented because he recognized the *Terry*-stop had officially transformed—from contemplating the temporary detainment of a possibly “armed and dangerous individuals” based on specific suspicion<sup>62</sup>—to taking police action because of behavior “suggestive”<sup>63</sup> of wrongdoing or criminal activity.<sup>64</sup> Justice Stevens discusses the broadening of the *Terry* stop and offers numerous explanations of possible, rational, and perfectly innocent motivations behind flight from police.<sup>65</sup> When Justice Stevens enumerates the possibilities that motivate law-abiding citizens to flee from police, the ever-rational-totality-of-the-circumstances petition by the majority is increasingly called into doubt.

The victimization of poor and ethnic minorities is of particular concern to Justice Stevens, and later to the Florida Supreme Court bench. Justice Stevens states:

. . . [A] reasonable person may conclude that an officer's sudden appearance indicates nearby criminal activity. And where there is criminal activity there is also a substantial element of danger—either from the criminal or from a confrontation between the criminal and the police.

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59. *Id.*

60. *Id.* at 126 (Stevens, J., concurring in part and dissenting in part).

61. *Id.*

62. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

63. *Wardlow*, 528 U.S. at 124 (headlong flight “is not necessarily indicative of *wrongdoing*, but it is certainly *suggestive* of such” and thus a pertinent factor in a *Terry* analysis) (emphasis added).

64. In other words, fleeing from the police after a command to stop.

65. These include fleeing the scene for fear of being wrongfully apprehended as the guilty party and unwillingness to appear as a witness. *Wardlow*, 528 U.S. at 131 (quoting *Alberty v. United States*, 162 U.S. 599, 511 (1896)). Also, Justice Stevens muses:

A pedestrian may break into a run for a variety of reasons—to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest, to avoid contact with a bore or a bully, or simply to answer the call of nature—any of which might coincide with the arrival of an officer in the vicinity. A pedestrian might also run because he or she has just sighted one or more police officers.

*Id.* at 128–29. Other innocent justifications according to Justice Stevens include fear that the officer's presence indicates nearby criminal activity wishing to avoid any violence. *Id.* at 131.

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. . . Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.<sup>66</sup>

This final sentence sums up the recognition that the bar by which we judge the unreasonableness of seizures has shifted in favor of the State in a remarkable way.

### 3. *WARDLOW'S EFFECT ON FLORIDA CASE LAW*

*Wardlow* had an immediate effect on every area of Florida criminal law, not just the crime of resisting arrest without violence. Take for instance two cases dealing with a separate area of search and seizure law, that of confidential informants. These cases also involve the issue of reliable and valid inferences by the police based on suspect or informant behavior. The court appears to assume that police officers are somehow able to infer with accuracy guilty behavior from innocent behavior. Research, however, suggests that this assumption is probably not true.<sup>67</sup> The lawfulness of these stops, like those involving flight and resisting arrest without violence, have crucial consequences on motions to suppress in the Florida criminal justice system.

The veracity of confidential informants can be established by either the informant's prior record of reliability or the wealth of detailed, verifiable information given on the occasion in question.<sup>68</sup> In *Lester v. State*, an officer received a tip from an informant that two persons, one was older, one was younger, and one was wearing black and red shorts, were selling cocaine.<sup>69</sup> The court held that the officer was not justified in making an investigatory stop of two persons who both met the description he had been given and fled at the sight of his presence.<sup>70</sup> The pre-*Wardlow* court held this was insufficient for a stop because the description was in general terms, insufficient to pinpoint any one person, and the officer did not observe the defendant doing anything except fleeing from him and his police dog.<sup>71</sup> Even assuming the informant was relia-

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66. *Id.* at 131–35 (Stevens, J., concurring in part and dissenting in part) (citations and footnotes omitted).

67. See Jennifer Skeem et al., Psychological Science in the Courtroom: Consensus and Controversy 125–29 (2009).

68. *Lester v. State*, 584 So. 2d 652, 652 (Fla. Dist. Ct. App. 2d Dist. 1991).

69. *Id.*

70. *Id.*

71. The presence of police dogs offer yet another innocent reason for flight. See *supra* note 65. Dog is not always man's best friend. See Letter from Steven H. Rosenbaum, Chief, Special Litigation Section, Civil Rights Division, U.S. Dept. of Justice, to Alejandro Vilarello, City

ble, the information relayed coupled with the defendant's flight from the police, was not predictive or detailed enough to exhibit sufficient indicia of reliability to provide reasonable suspicion for a legal investigatory stop.<sup>72</sup>

*Mitchell v. State*,<sup>73</sup> decided after *Wardlow*, exemplifies *Wardlow*'s effect on Florida criminal law. In *Mitchell*, the description given by the confidential informant lacked detail and was consistent with innocent conduct, much like in *Lester*. The informant described only the clothing of two suspects and their location and additionally believed that they were selling narcotics. The Second District Court of Appeal ruled that the totality of the circumstances, which involved a high-crime area according to police involving recent drugs sales, a known confidential informant, the verification of information provided by that confidential informant, and the suspect's abbreviated attempt at flight, all supported the officer's investigatory detention of the defendant.<sup>74</sup> A motion to suppress would then solely turn on this question of whether the area in the arrest form was a "high-crime" area, typically a low-income, minority area.<sup>75</sup> The effect of *Wardlow* was to transform what was once an innocent detail (clothing and location of suspects in a high-crime area) of corroborating investigation, into something that automatically equips officers with reasonable suspicion justifying an investigatory stop. *C.E.L. II* would later supply officers with yet another tool, transforming that once innocent detail into full-blown probable cause to arrest.

#### B. Florida Case Law Post-Wardlow, Leading up to C.E.L. II

The Florida courts spent nearly a decade grappling with the consequence *Wardlow* would have on section 843.02. The choice was between strictly construing *Wardlow* to criminalize running from the police, or finding a legislative intent that flight from police should remain the citizen's right under Florida law. Unfortunately, the Florida

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Attorney, Miami City Attorney's Office (Mar. 13, 2003) (available at [http://www.justice.gov/crt/about/spl/documents/miamipd\\_techletter.pdf](http://www.justice.gov/crt/about/spl/documents/miamipd_techletter.pdf)) ("Based on our discussions with canine unit command staff, supervisors, and officers it appears that the [Miami Police Department] actually uses a 'find and bite' policy because *the dog is trained, when off leash, to bite when it encounters a subject*, regardless of whether the subject is actively resisting or attempting to flee.") (Emphasis added).

72. *Id.*; see also *Alabama v. White*, 496 U.S. 325, 327–30 (1990) (discussing that the quality and quantity of information along with subsequent corroboration must be taken into account when determining whether the reliability of information will amount to reasonable suspicion).

73. 787 So. 2d 224 (Fla. Dist. Ct. App. 2d Dist. 2001).

74. *Id.* at 229.

75. See *C.E.L. v. State (C.E.L. I)*, 995 So. 2d 558, 563 (Fla. Dist. Ct. App. 2d Dist. 2008) (Altenbernd, J., concurring) (stressing the racial and socio-economic effects of the "high-crime neighborhood" factor on civil rights).

legislature remained silent on the issue, leaving the courts, unguided, to sort things out. The Third District Court of Appeal chose not to criminalize flight in high-crime areas in both *D.T.B. v. State*<sup>76</sup> and *J.D.H. v. State*.<sup>77</sup> The lower court *C.E.L. v. State* decision (*C.E.L. I*)<sup>78</sup> reached the Second District Court of Appeal, where the court resolved the issue in direct conflict with *D.T.B.* The Florida Supreme Court could no longer ignore the conflict.

### 1. *D.T.B.*

D.T.B., a juvenile, was standing outside his apartment complex one December afternoon, which was in an area known for drug transactions.<sup>79</sup> Two patrolling officers approached D.T.B. in a vehicle to engage in a “voluntary field interview” as they had not witnessed any suspicious behavior of any kind. Seeing the officers approach, D.T.B. fled, at which point the officers yelled at him to stop, informing him that they were police officers. When the officers caught up to him, they charged him with resisting arrest without violence under section 843.02. The question, as framed by the court was:

[W]hether the holding in *Wardlow*, that flight from police in a high crime area creates reasonable suspicion such that the police can stop a citizen without violating the Fourth Amendment to the United States Constitution, transforms the flight into the crime of resisting arrest, sufficient to satisfy the elements of a conviction.<sup>80</sup>

Here, the Third District Court of Appeal refused to criminalize the act of running from the police. The court recognized that criminalizing flight would automatically turn a consensual “field interview” into sufficient probable cause supporting an arrest.<sup>81</sup> The court reasoned, “[A]s there was not going to be an arrest, logically, D.T.B. cannot be charged with having resisted an arrest.”<sup>82</sup> Though sufficient for a *Terry* stop, the court refused to extend the holding of *Wardlow* to support a conviction under the resisting arrest statute. The court specifically stated, “Although D.T.B.’s flight may have given the officers reasonable suspicion to stop D.T.B. under *Wardlow*, *Wardlow* did not create an articulable well founded suspicion of criminal activity sufficient to support an arrest, and justify the charge of resisting.”<sup>83</sup>

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76. *D.T.B. v. State*, 892 So. 2d 522 (Fla. Dist. Ct. App. 3d Dist. 2004).

77. *J.D.H. v. State*, 967 So. 2d 1128 (Fla. Dist. Ct. App. 3d Dist. 2007).

78. 995 So. 2d at 558.

79. *D.T.B.*, 892 So. 2d at 523.

80. *Id.*

81. *See id.* at 524.

82. *Id.* at 525.

83. *Id.* at 524.

## 2. *J.D.H.*<sup>84</sup>

*J.D.H.* was a subsequent Second District Court of Appeal case where the court rejected the criminalization of flight. *J.D.H.* was with a group of teenagers and young adult men on a closed basketball court outside his residence, an area known for marijuana sales, at eleven o'clock at night.<sup>85</sup> Two officers were spotted approaching, and so the group quickly dispersed. One officer pursued *J.D.H.*, ordering him to stop, and eventually caught up with him. He was immediately arrested, rather than questioned as in an investigatory stop, and the ensuing search incident to arrest revealed cocaine.<sup>86</sup>

The court, relying on *D.T.B.*, stated that “an individual is guilty of resisting or obstructing an officer by flight only if he flees while knowing of the officer’s intent to detain him *and* if the officer is justified in detaining the individual *before he flees.*”<sup>87</sup> Because of this temporal element, the court ruled that the officers did not have reasonable suspicion that *J.D.H.* had committed or was about to commit a crime before he fled, thus his resistance could not create the probable cause necessary to support an arrest for resisting an officer without violence.<sup>88</sup> As a result, all contraband seized pursuant to the illegal arrest was suppressed as the “fruit of the poisonous tree” and *J.D.H.*’s withhold of adjudication for possession of cocaine was overturned.<sup>89</sup>

## 3. *C.E.L. I*<sup>90</sup>

Just two years later, the Second District Court of Appeal put the Third District’s logic to the test. The facts of *C.E.L. I* are familiar: two officers were patrolling a high-crime area regarding complaints of drug activity and trespassing.<sup>91</sup> *C.E.L.*, a sixteen-year-old juvenile, was standing with another teenager outside his apartment complex.<sup>92</sup> *C.E.L.* fled at the sight of the police approaching. The Second District, however, structured the issue drastically different from the Third District in *D.T.B.* Judge Canady, for the court in *C.E.L. I*, asked “whether a person who *knowingly* fails to heed a police order to stop is guilty of an offense under section 843.02 *when the order to stop is justified by Illinois v.*

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84. *J.D.H. v. State*, 967 So. 2d 1128 (Fla. Dist. Ct. App. 3d Dist. 2007).

85. *Id.* at 1129–30.

86. *Id.* at 1130.

87. *Id.* (citing *Yarusso v. State*, 942 So. 2d 939, 943 (Fla. Dist. Ct. App. 2d Dist. 2006)) (second emphasis added).

88. *Id.* at 1132.

89. *Id.*

90. *C.E.L. v. State (C.E.L. I)*, 995 So. 2d 558 (Fla. Dist. Ct. App. 2d Dist. 2008).

91. *Id.* at 558.

92. *Id.* at 563.

Wardlow.”<sup>93</sup> C.E.L. argued that the officer did not have the legal authority to demand that he stop, relying on *D.T.B.* and *J.D.H.*, because flight cannot be the basis for both the investigatory detention and the probable cause supporting the arrest itself.<sup>94</sup>

The shaky foundation supporting *D.T.B.* and *J.D.H.* finally crumbled. The court stated that “the evidence against C.E.L. was sufficient because the police command to stop was issued in the lawful performance of a legal duty and C.E.L.’s knowing defiance to the command was an act of resisting, obstructing, or opposing an officer.”<sup>95</sup> This is the unfortunate truth; the plain language of the statute, *Terry v. Ohio*, and its progeny, can logically lead to no other conclusion. Under the statute, knowingly disobeying a lawful police order to stop is a crime.<sup>96</sup> A lawful police order to stop may be based on flight from a high-crime area.<sup>97</sup> The court essentially refused to uphold the policy-minded exception that had been carved out in *D.T.B.*

In a brief, yet powerful, concurrence, Judge Altenbernd advanced the frightening tensions inherent in the court’s holding. “Although I cannot refute the logic of our decision today,” he begins, “experience suggests to me that the United States Supreme Court did not envision the circumstances of this case when it decided *Illinois v. Wardlow*.”<sup>98</sup> He recognizes many of the problems that Justice Stevens foresaw, but brings up issues specific to section 843.02 and high-crime, minority communities in Florida.

Important considerations to Judge Altenbernd are the particular facts involved in the case. He mentions that C.E.L. is only sixteen years old, and that he was only about a mile from his home when he was arrested.<sup>99</sup> “In other words,” he says, “[C.E.L.] was in a ‘high-crime neighborhood’ because it is his home.”<sup>100</sup> Judge Altenbernd finds it regrettable that individuals living in these neighborhoods are subject to lower Fourth Amendment rights than citizens living in more well-to-do neighborhoods, and worries that police tactics will aim at arresting teens almost at will for fleeing when they approach.<sup>101</sup> Explicitly bringing up the legal-political dichotomy that pulls judges in different directions, he states:

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93. *Id.* (emphasis added) (citation omitted).

94. *Id.* at 560.

95. *Id.*

96. FLA. STAT. § 843.02 (2011).

97. *Illinois v. Wardlow*, 528 U.S. 119, 119 (2000).

98. *C.E.L. I*, 995 So. 2d at 563 (Altenbernd, J., concurring) (citation omitted).

99. *Id.*

100. *Id.*

101. *See id.* at 564.



From a legal perspective, it may be of no consequence that the officer had no basis to detain these teenagers until they ran, but I fear there are consequences for our communities if we allow the sale of drugs in poor and ethnic minority neighborhoods into ‘high-crime neighborhoods’ where the Bill of Rights means something less than what the original framers intended it to mean for all free people.<sup>102</sup>

### III. ANALYSIS

#### A. *The Florida Supreme Court’s Resolution in C.E.L. II*

Based on the conflict between *C.E.L. I* and *D.T.B.*, the Florida Supreme Court was essentially presented the question as to whether or not section 843.02 should criminalize flight by people who live in these impoverished, crime-ridden areas.<sup>103</sup> The court specifically considered whether there should be a rule that reasonable suspicion exist before the individual flees.<sup>104</sup> *C.E.L. I* is affirmed, but the court does emphasize that flight alone is not a criminal offense, but rather, “an individual who flees *must know* of the officer’s intent to detain him, and the officer must *be justified* in making the stop at the point *when the command to stop is issued*.”<sup>105</sup> It seems that the court is searching for a limitation on the holding that flight in subjectively determined high-crime areas is a crime. But in consideration of an allegiance to *stare decisis* and the plain meaning rule of statutory construction, the court can only take this limitation so far. It may be that flight is an improper vehicle for charging an individual with obstruction,<sup>106</sup> but this determination is for the political branches and not for the courts.<sup>107</sup>

Indeed, the court is expressly constrained by the U.S. Supreme Court’s interpretation of the Fourth Amendment in the Florida state constitution. The Florida constitutional amendment reads:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *This right shall be construed in conformity*

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102. *Id.*

103. See *C.E.L. v. State (C.E.L. II)*, 24 So. 3d 1181, 1181 (Fla. 2009).

104. See *id.* at 1184.

105. *Id.* at 1186 (emphasis added).

106. See *D.T.B. v. State*, 892 So. 2d 522, 524 (Fla. Dist. Ct. App. 3d Dist. 2004).

107. See *infra* Part IV; see generally Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002) (discussing the relationship between the judicial and political branches).

*with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*<sup>108</sup>

Commentary to the amendment indicates that the language was added as a result of Florida courts holding that the Florida constitution affords citizens greater protection from police intrusion.<sup>109</sup>

Some argue that when the Fourth Amendment doesn't provide a remedy, the Equal Protection Clause can fill the gap. Judge Altenbernd made the point that in high-crime, low-income neighborhoods, "the Bill of Rights means something less than what the original framers intended it to mean for all free people."<sup>110</sup> Additionally, "[t]here are no signs telling these teenagers that the neighborhood is a region with reduced Fourth Amendment rights."<sup>111</sup> Judge Altenbernd raises important points, highlighting how section 843.02 can lead to discriminatory enforcement.<sup>112</sup> Here, the state of Florida arguably has a statute that criminalizes flight in some areas and not others. In other words, there are areas in Florida with reduced constitutional rights. This arguably justifies exclusion of evidence gathered as a result of the discriminatory practices of law enforcement.<sup>113</sup>

### B. *Remaining Defenses after C.E.L. II*

Justice Pariente, following in the footsteps of Justice Stevens and Judge Altenbernd, wrote separately to address her concern for future cases and the adverse impact of the court's holding on disenfranchised communities in Florida. Not only does she address the public policy concerns involved, but also she highlights arguments that remain at the disposal of attorneys after *C.E.L. II*.

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108. FLA. CONST. art. I, § 12 (emphasis added).

109. WILLIAM A. BUZZETT & DEBORAH. K. KEARNEY, 1982 AMENDMENT, 1982 HOUSE J. RES. 31-H (explaining that the Amendment addresses the Florida judiciary's refusal in the late 1970's and early 1980's to apply the U.S. Supreme Court's good faith exception to the exclusionary rule).

110. *C.E.L. v. State (C.E.L. I)*, 995 So. 2d 558, 564 (Fla. Dist. Ct. App. 2d Dist. 2008) (Altenbernd, J., concurring).

111. *Id.*

112. *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the proper "constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.") *But see* Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 56 (2003) (arguing that the Equal Protection Clause "may well require the use of non-uniform law enforcement techniques in order to provide effectively equal protection from the threat of crime").

113. *See* Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107 (2000).

First, Justice Pariente stresses that there is no *per se* rule that reasonable suspicion exists at the time the officer commands a suspect to stop.<sup>114</sup> “[O]ther factors, when present, could affect whether a person’s flight in a high-crime area provides reasonable suspicion to justify a *Terry* stop.”<sup>115</sup> Justice Pariente urges attorneys to use other factors from Justice Stevens’ concurrence to suggest that flight in a high-crime area alone did not rise to the level of reasonable suspicion, on the basis that Chief Justice Rehnquist uses a totality-of-the-circumstances rationale in *Wardlow*.<sup>116</sup> Attorneys should argue that other factors were present to make the suspicion unreasonable, such as “time of day, the number of people in the area, the character of the neighborhood, whether the officer was in uniform, the way the runner was dressed, the direction and speed of the flight, and whether the person’s behavior was otherwise unusual.”<sup>117</sup> Attorneys could use these factors to explain the circumstances surrounding the individual’s flight.<sup>118</sup>

Second, there is the argument that the defendant’s flight was neither “unprovoked” nor “headlong.”<sup>119</sup> As Justice Stevens wondered himself what exactly “unprovoked” flight is,<sup>120</sup> Justice Pariente instructs the reader that this lack of clear guidance is an opportunity for defenses.<sup>121</sup> This argument could be utilized post-*C.E.L. II* for obstruction cases arising out of flight in a car from officers approaching, as a previous exception used was that “flight” in a car is not indicative of “nervous, evasive behavior,” or intent to engage in “headlong flight” in order to elude an officer.<sup>122</sup> This argument seems most useful if there were credible witnesses around to observe the behavior and demeanor of the actors (i.e., defendant and law enforcement). A court may imply the individual was provoked, based on, for example, a show of force by the officer,<sup>123</sup> the presence of a police dog,<sup>124</sup> or the appearance and

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114. See *C.E.L. v. State (C.E.L. II)*, 24 So. 2d 1181, 1192 (Fla. 2009) (Pariente, J., concurring).

115. *Id.* at 1193.

116. See *id.* at 1193 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 129–30 (2000) (Stevens, J., concurring in part and dissenting in part)).

117. *Id.*

118. See, e.g., *supra* note 65.

119. See *C.E.L. II*, 24 So. 3d at 1193.

120. See *Wardlow*, 528 U.S. at 141 n.5 (Stevens, J., concurring in part and dissenting in part) (“Nowhere in Illinois’ briefs does it specify what it means by ‘unprovoked.’”).

121. See *C.E.L. II*, 24 So. 3d at 1193.

122. See, e.g., *Doe v. State*, 973 So. 2d 682 (Fla. Dist. Ct. App. 4th Dist. 2008) (holding that the defendant’s act of driving away from foot patrol officers in an area known for drug deals did not raise reasonable suspicion for a *Terry* stop but is merely the “motor vehicle equivalent of a person who simply walks away from an officer on foot”); *Paff v. State*, 884 So. 2d 271 (Fla. Dist. Ct. App. 2d Dist. 2004) (holding that a car parked in a high-crime area which exited quickly upon seeing officer and no traffic violation was observed was an illegal stop).

123. E.g., brandishing a weapon, running toward the individual.

124. See *supra* note 71.

demeanor of the officer.

Lastly, there is the question as to whether the police order to stop occurred in a high-crime area.<sup>125</sup> The State has the burden of establishing that the area in question is a high-crime area.<sup>126</sup> The officer must provide specific details regarding the number of arrests in the neighborhood and testify as to the character of the neighborhood.<sup>127</sup>

These arguments legally fit squarely within *Wardlow*, the plain language of the statute, and *C.E.L. II*, but allow room for the courts to have a role in limiting the number of convictions for resisting or obstructing an officer in the execution of a legal duty. At the time of Justice Pariente's writing, the question seemed open as to whether *Wardlow* and *C.E.L. II* will breed "unintended results" by "criminalizing otherwise innocent conduct."<sup>128</sup>

### C. *Post-C.E.L. II Cases*

*O.B. v. State*<sup>129</sup> and *Hunter v. State*<sup>130</sup> indicate a reluctance to extend the Florida Supreme Court's holding in *C.E.L. II*. Both cases interpret section 843.02 and conclude that there is no reasonable suspicion of criminal activity because the flight occurs in a location not legally established to be a "high-crime" area.

The Eleventh Circuit also displays this same reluctance. In *Jessup v. Miami-Dade County*,<sup>131</sup> a civil case, the court found sufficient evidence that the officers were no longer engaged in a lawful *Terry* stop at the time Jessup was arrested. "Even if we assume that the officers initially had reasonable suspicion to stop Jessup . . . [once] there was no further basis for suspecting any criminal activity and, thus, no lawful reason to continue any detention[,] . . . any *Terry* stop should have ceased at that point."<sup>132</sup> This opinion illustrates the very important point that a suspect may flee from police in a high-crime area, giving reasonable suspicion for a *Terry* stop, but—if he or she stops and talks to police and reasonable suspicion is mitigated during that stop—the fleeing suspect must be free to leave.<sup>133</sup>

One federal case, on the other hand, shows that the court is willing to forego the high-crime area requirement thus apparently broadening

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125. See *C.E.L. II*, 24 So. 3d at 1194 (Pariente, J., concurring).

126. See *id.* at 1195.

127. See *id.* (discussing *D.R. v. State*, 941 So. 2d 536 (Fla. Dist. Ct. App. 2d Dist. 2006)).

128. *Id.* at 1196 (Pariente, J., concurring).

129. 36 So. 3d 784 (Fla. Dist. Ct. App. 3d Dist. 2010).

130. 32 So. 3d 170 (Fla. Dist. Ct. App. 4th Dist. 2010).

131. No. 10–11519, 2011 WL 3861690, at \*3 (11th Cir. Sept. 1, 2011) (unpublished opinion).

132. *Id.*

133. *But see supra* Part I.

*Wardlow*'s holding.<sup>134</sup> In *Williams v. State*, the government did not offer any evidence whatsoever as to whether or not Williams was arrested in a high-crime area. The court concluded that the lack of testimony regarding high-crime area was “amply overcome by the anonymous tip, the description, the concealment, and the second flight [of the defendant].”<sup>135</sup>

The practical result of *C.E.L. II* essentially adopts the same bright-line rule opposed by both the majority and dissent in *Wardlow*. Illinois pushed for a *per se* rule authorizing detention of anyone who flees at the mere sight of a police officer.<sup>136</sup> The Fourth Amendment doctrine, in combination with section 843.02, has essentially the same effect—if the individual flees in one of these neighborhoods, the police may arrest. All the officer has to do in order to detain the individual is go through the formality of ordering the individual to stop.<sup>137</sup>

#### IV. CONCLUSION

The solution to the issues presented by *C.E.L. II* must come from the legislative and executive branches. The courts, as discussed above, can have but a very restricted and imperfect role in limiting the case's impact. The *C.E.L. II* court's hands were tied, so to speak. “Through their 1982 amendment of Article I, Section 12 of our state constitution, the citizens of Florida have delegated their authority for defining the contours of their right to freedom from unreasonable searches and seizures to the United States Supreme Court.”<sup>138</sup> The state legislature, on the other hand, is free to impose higher search and seizure standards than the Fourth Amendment.<sup>139</sup>

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134. *Williams v. State*, Nos. 3D09-1434, 3D09-2043, 2010 WL 5373155, at \*1 (S.D. Fla. Dec. 29, 2010) (applying Florida criminal law).

135. *Id.* at \*2.

136. *Illinois v. Wardlow*, 528 U.S. 118, 126 (2000) (Stevens, J., concurring in part and dissenting in part.)

137. Whether or not that individual heard the officer seems to have no bearing on the lawfulness of the stop. Thus it is not legally relevant whether the individual does not understand the order to stop because the individual does not understand English. This is of particular consequence for non-immigrant tourists and immigrants with lawful status. Basic knowledge of the English language is only a requirement of administrative naturalization, but not for lawful permanent residency or other visas. Immigration and Nationality Act of 1952 § 312; 8 U.S.C. § 1423 (2006); see also *supra* note 9.

138. FLA. CONST. art. I, § 12.

139. *State v. Langsford*, 816 So. 2d 136, 138 (Fla. Dist. Ct. App. 4th Dist. 2002) (stating that the state constitution “‘shall be construed’ as the Fourth Amendment is interpreted by the United States Supreme Court . . . does not prohibit the legislature from passing statutes which give Florida citizens greater protections than the Fourth Amendment”).

### A. *Legislative Recommendations*

The Florida legislature should amend section 843.02. A recent proposal by Representative Perry E. Thurston was introduced on March 8, 2011 but quickly died on May 7, 2011 in the Criminal Justice Subcommittee.<sup>140</sup> Representative Thurston added the following language to the end of section 843.02 in his proposed bill: “For such purposes of this section, resistance, obstruction, or opposition *must be based on factors other than mere flight* from an officer or other person to whom this section applies.”<sup>141</sup>

This language, practically speaking, does nothing to assuage the concerns of Justice Stevens, Judge Alterbernd, and Justice Pariente. *C.E.L. II* did not hold that flight, standing alone, constituted resisting arrest without violence under section 843.02. *C.E.L. II* criminalized the act of “continued flight.”<sup>142</sup> The Florida Supreme Court specifically stated flight alone is not a criminal offense, but rather, “an individual who flees *must know* of the officer’s intent to detain him, and the officer *must be justified* in making the stop at the point *when the command to stop is issued*.”<sup>143</sup>

To have a real impact on police-citizen relations, the legislature must impose a higher standard of suspicion on law enforcement officers patrolling high-crime areas. Mimicking the warrantless arrest statute,<sup>144</sup> the legislature could add this additional language:

A law enforcement officer may arrest a person under this section when:

- (1) probable cause for some other crime exists; or
- (2) the officer has reasonable grounds to believe that an emergency exists that presents an imminent and serious threat to life or property.

This approach is similar to the “community caretaking” model used during storms and post-natural disasters.<sup>145</sup> Because police have broad authority under their community caretaking functions, a central condition for a lawful arrest is that the officer must have reasonable grounds to believe that an emergency exists that presents an “*imminent and seri-*

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140. *HB 203 - Resisting an Officer or Other Specified Person Without Violence*, FLORIDA HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/sections/Bills/billsdetail.aspx?BillId=45070> (last visited Nov. 21, 2011).

141. H.B. 203, Fla. 113th Reg. Sess. (Fla. 2011) (emphasis added).

142. *C.E.L. v. State (C.E.L. II)*, 24 So. 3d 1181, 1181 (Fla. 2009) (per curiam), *cert. denied*, 130 S.Ct. 3290 (2010).

143. *Id.* at 1186 (emphasis added).

144. FLA. STAT. § 901.15 (2011).

145. See generally Michael R. Domino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485 (2009) (discussing the reasonableness of caretaking searches).

ous threat to life or property.”<sup>146</sup> This policy would return to the basis of *Terry* and *Wardlow*, where the basis for the stop and frisk was both investigatory and protective, only leading to arrest after discovery of dangerous firearms.<sup>147</sup>

This additional requirement also takes into account the concerns of the Third District Court of Appeal in *D.T.B.* Flight in high-crime areas should give officers suspicion to stop individuals, but *Wardlow* did not mean to create a sufficient basis to both support an investigatory stop and an arrest for a charge of resisting.<sup>148</sup>

### B. Executive Recommendations

A more immediate approach could come from within local police departments. To improve police-citizen relations, Florida police departments should implement internal standards to view high-crime areas as “crisis” areas where police accomplish such “community caretaking” functions. These high-crime areas in cities have boundaries and do present to police departments a wide range of special problems consistent with community caretaking during natural disasters and emergencies. Police could thus engage in consensual encounters with youth and others in high-crime areas without it being a crime, even if the youth ran away. The police could obtain brief in service training in crisis intervention techniques and debriefing and what has been referred to as “defusing.”<sup>149</sup> These kinds of solutions would result in better community relations without abandoning the mandate to uphold the law and keep the community safe.

The obstruction statute encompasses a myriad of scenarios, ranging from fleeing and eluding during a traffic stop, hit and runs, and so on. But in a so-called consensual encounter, the individual should remain free to leave.<sup>150</sup> Presence in the high-crime area you call home should not reduce or alter this constitutional right. The Florida legislature and

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146. See generally *Mincey v. Arizona*, 437 U.S. 385 (1978); Memorandum by Kurt N. Schwartz, Assistant Attorney Gen., Mass., Police Powers During Public Emergencies: Police Authority to Act Without a Warrant or Court Order Under the Community Caretaking Doctrine, (Dec. 9, 2003) (<http://www.mass.gov/eohhs/docs/dph/cdc/reporting/iq-community-caretaking-function.pdf>).

147. The basis for both searches was protective and both searches revealed firearms. *Terry v. Ohio*, 392 U.S. 1, 6 (1968); *Illinois v. Wardlow*, 528 U.S. 119, 122 (2000).

148. *D.T.B. v. State*, 892 So. 2d 522, 524 (Fla. Dist. Ct. App. 2004).

149. See Gilbert Reyes & Jon D. Elhai, *Psychosocial Interventions in the Early Phases of Disasters*, 41 PSYCHOTHERAPY THEORY RES. & PRAC. 399 (2004).

150. *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993) (“During a consensual encounter a citizen may either voluntarily comply with a police officer’s requests or choose to ignore them.”).

community leaders should take immediate action to prevent the unintended and unforeseen consequences of the U.S. Supreme Court's broadening of the *Terry* stop in *Wardlow*.