

**IN THE ARIZONA SUPREME COURT**

STATE OF ARIZONA,	)	S.Ct. No. CR-14-0285-PR
	)	
Respondent,	)	
	)	Court of Appeals No.
v.	)	2 CA-CR 2013-0342
	)	
DALE LEE EVANS,	)	Cochise County Superior Court
	)	No. CR2005-00455
Petitioner.	)	
	)	

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**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER**

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## INTRODUCTION

In *State v. Evans*, 235 Ariz. 314, 332 P.3d 61 (App. 2014), a police officer essentially manufactured a possible “rolling domestic violence” from a momentary glimpse of a car that it was passing at 55 miles per hour. The evidentiary hearing transcript reflects the real reason for the stop: “that area is known for illegal immigrant activity as well as other activity.” [9/19/06 RT](#) 9. *Evans* is a perfect storm of unfettered deference to trial court findings unsupported by reasonable evidence that criminal activity is afoot, in such a manner that innocent travelers are inevitably caught in a dragnet across border communities.

*Amicus curiae* Arizona Attorneys for Criminal Justice (“AACJ”) asks this Court to re-affirm core principles that reasonable suspicion for investigatory detentions must be justified by objective criteria suggestive of criminal activity that do not envelop significant percentages of innocent travelers. In the process, AACJ asks this Court to make a clear statement that “abuse of discretion” does not mean “anything goes” when it comes to reviewing trial court findings. Furthermore, AACJ asks this Court to expressly disavow use of “area known for [criminal] activity” as a factor for determining reasonable suspicion. If this is not expressly disavowed, then Arizona police officers will know that they can stop racial minorities with impunity under the guise of “being in a bad neighborhood.”

## **INTERESTS OF *AMICUS CURIAE***

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issue presented concerns the right of citizens to be undisturbed by the police absent a reason to interfere with their daily lives. The Court of Appeals' opinion in this case essentially permits police to conduct dragnet operations whereby innocent travelers may be detained without reason without meaningful judicial review of their actions. Without such review, the inevitable result will be suspicionless roving checkpoints in "areas known for criminal activity," which has historically been code for areas inhabited by racial minorities and the socio-economically disadvantaged. This Court has always required criteria that will reduce the exposure of innocent travelers to stops, particularly those based on improper criteria. This Court must do so again here.

## ARGUMENTS

- I. The Court of Appeals has abdicated its role in reviewing factual findings for abuse of discretion and instead is taking trial court findings at face value regardless of whether such findings are supported by reasonable evidence. Its opinion in *Evans* eliminates any standards for testing the objectivity of officers' suspicions, creating a vacuum of law in which police may operate and stop any innocent traveler for any reason.**

In reviewing whether a law enforcement officer had sufficient reasonable suspicion of criminal activity to justify conducting an investigatory detention, appellate courts defer to the trial court on factual issues but review the legal issues *de novo*. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). “Police officers have specialized training and experience that allows them to make inferences from and deductions about cumulative information that ‘might well elude an untrained person.’” *State v. Woods*, \_\_ Ariz. \_\_, ¶ 13, 342 P.3d 863, \_\_ (App. 2015) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). In deciding whether reasonable suspicion objectively exists, police look at all factors in totality and are not expected to isolate each individual factor, and it is possible that “the conduct justifying the stop was ambiguous and susceptible of an innocent explanation.” *State v. O’Meara*, 198 Ariz. 294, 296 ¶ 10, 9 P.3d 325, 327 (2000) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

While the reasonable suspicion standard affords great flexibility to police officers “engaged in the often competitive enterprise of ferreting out crime,” *State*

*v. Ochoa*, 112 Ariz. 582, 585, 544 P.2d 1097, 1100 (1976) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)), this Court has on numerous occasions held that automobile stops may not be conducted based on information that casts too wide a net over the general public. In *State v. Richcreek*, this Court disapproved prior statements that ““when confronted with strange or unusual activities, a police officer, as the public’s representative delegated with the responsibility of maintaining law and order, should satisfy himself as to the innocence of the activity by all reasonable, lawful means.”” 187 Ariz. 501, 930 P.2d 1304 (1997) (quoting *State v. Jarzab*, 123 Ariz. 308, 311, 599 P.2d 761, 764 (1979)).

In *Gonzalez-Gutierrez*, 187 Ariz. at 120, 927 P.2d at 780, this Court found that factors that failed to distinguish between lawful and unlawful activity “did not advance evidence with the degree of particularity needed to create a reasonably articulable suspicion.” Left unchecked, “investigatory stops of substantial numbers of innocent people would be permitted merely on the basis of an intuitive hunch.” *Id.* This Court expressed its concern with overzealous enforcement against drivers:

Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well.... We are confident that substantially all of the traffic in [border] cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.

*Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975)). *See also* *Brown v. Texas*, 443 U.S. 47 (1979) (persons walking away from each other in alley in area with “high incidence of drug traffic” may have “looked suspicious” but did not justify reasonable suspicion of criminal activity warranting a detention).

On the other hand, since 1996, the United States Supreme Court has given police free reign to stop any vehicle for any reason so long as the officer witnesses any traffic violation. *Whren v. United States*, 517 U.S. 806 (1996). Read in conjunction with *Gonzalez-Gutierrez*, officers now understand that circumstances believed to be suspicious might be second-guessed by the courts, but claim of a moving violation will always be upheld because it is not outside the realm of believability that all drivers will commit a moving violation if followed for long enough. The only limitation on *Whren* is that a court may consider the officer’s subjective motivations for the stop as part of a credibility determination as to whether the violation actually occurred. *State v. Livingston*, 206 Ariz. 145, 148 ¶ 13, 75 P.3d 1103, 1106 (App. 2003).

Within this framework, the Court of Appeals has recently trended toward rubber-stamp deference to the testimony of police officers regarding moving violations, no matter how patently absurd the testimony might be, under the mantle of the “abuse of discretion” standard. In *State v. Moran*, 232 Ariz. 528, 531 ¶¶ 3-7, 307 P.3d 95, 98 (App. 2013), an officer claimed that the Oro Valley Police

Department “had trained him to accurately estimate a vehicle’s speed within five miles per hour,” a claim that was upheld on review.

The lengths to which the Court of Appeals goes to affirm trial court rulings is exemplified in *State v. Moreno*, 236 Ariz. 347, 340 P.3d 426 (App. 2014), where the officer actually claimed he could detect with his eye, in a moving vehicle, whether a front windshield had excessive tint, only to be proven wrong upon stopping the vehicle and testing the tint. With clear testimony quoted in the opinion that the officer’s senses are not so infallible, the trial court still denied the suppression motion and the Court of Appeals held the officer’s mistake to be “objectively reasonable.” *Id.* at 352-53 ¶¶ 13-14, 340 P.3d at 431-32. The Court of Appeals did not assess whether the officer’s suspicion that the vehicle was driving in tandem (and thus involved in smuggling), *Id.* at 350 ¶ 2, 340 P.3d at 429, contributed to a finding of reasonable suspicion, because it clearly did not.

Furthermore, in the wake of *Heien v. North Carolina*, 135 S.Ct. 530 (2014), officers may now stop motorists who commit no traffic code violation so long as the statute believed to be violated by the officer has not yet been interpreted and explained by appellate courts in the jurisdiction. *Moreno*, 236 Ariz. at 351-52 ¶ 10, 340 P.3d at 430-31. In a recent memorandum decision,<sup>1</sup> [State v. Lang, 2015 WL](#)

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<sup>1</sup> This memorandum decision, decided after January 1, 2015, is cited pursuant to Ariz. R. Sup. Ct. 111(c)(1)(C). The citation is hyperlinked to the decision on the website of the Arizona Court of Appeals, Division Two. Ariz. R. Sup. Ct. 111(c)(3).

[904118, \\*2-3, ¶¶ 7 & 11-12, \(Ariz. Ct. App., March 4, 2015\)](#), Division Two addressed an argument that police officers unreasonably applied A.R.S. § 28-751(1) to a driver who failed to make a right turn into the nearest lane on account of her preparing to make an immediate left turn at a nearby street by merely holding that police had no binding case law to follow as to this question and thus their conduct was reasonable. The Court of Appeals failed to address the merits of the legal argument concerning the applicability of the statute; thus, successive drivers will also suffer the embarrassment of being detained for an alleged violation that might not be a violation at all. Under the reasoning of *Lang*, officers may now stop drivers who commit no moving violation, based solely on a hunch that the driver is suspicious, so long as the driver is stopped for violating any statute that has not yet been interpreted. This is ripe for abuse.

Like *Moreno* and *Lang*, *Evans* demonstrates that officers often make pretext stops under the guise of witnessing an offense, and use that as a ruse to get a closer look at the car and its occupants to investigate the real crime (e.g., smuggling). Unlike a traffic offense, however, *Evans* was not witnessed in the act of committing a violation of any law. Rather, he was witnessed in act of lifting his arms in a manner not only consistent with noncriminal activity but also extremely unlikely to be criminal.

The Court of Appeals' reliance on *United States v. Sokolow*, 490 U.S. 1

(1989), is misplaced. That case involved a constellation of factors that in isolation were indicative of innocent activity but when viewed in the aggregate could provide officers with reasonable suspicion. This Court has adopted the reasoning of *Sokolow* (even if uncited) and applied it in several circumstances where reasonable suspicion has been sustained and rejected. Compare, e.g., *Gonzalez-Gutierrez*, with *O'Meara*. *Sokolow* applies when myriad factors exist concurrently; in *Evans*, on the other hand, there is only a single factor, the waving of the arms.

The Court of Appeals' application of the "abuse of discretion" standard in this manner is serving as a rubber-stamp allowing trial courts to reach whatever finding it chooses. The rare reversal of a trial court's determination on reasonable suspicion often cuts in favor of the State, not of the citizen. *Woods*, \_\_ Ariz. \_\_, ¶¶ 14-16, 342 P.3d 863, \_\_ (reversing suppression based on appellate court's favorable view of the investigating officer irrespective of the role of trial judge to determine credibility).<sup>2</sup> Similarly, the Court of Appeals often affirms rulings on legal issues subject to *de novo* review based on the presumption that the trial judge knows the law and applies the law correctly, even where the trial judge's statements on the record unmistakably reflect a misunderstanding of the law. See, e.g., *State v. Vermuele*, 226 Ariz. 399,

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<sup>2</sup> The Court of Appeals reversed in a published opinion despite receiving no appellate brief from the defendant. 342 P.3d 863, \_\_ n.1. Court records reveals that the defendant was unaware of the status of his case; a motion for reconsideration and motion to reopen appeal is pending. *State v. Woods*, [1 CA-CR 13-0655](#) (last visited March 11, 2015).

403-04 ¶ 17, 249 P.3d 1099, 1103-04 (App. 2011) (trial judge stated that he could not consider nonstatutory mitigating factors, but Court of Appeals applied presumption and found that judge “inartfully” explained his understanding of law).

Trial judges, particularly those in the twelve counties that elect Superior Court judges, are susceptible to re-election campaigns in which incumbents are targeted for appearing “soft on crime.”<sup>3</sup> “Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.” *Republican Party of Minn. v. White*, 536 U.S. 765, 788-89 (O’Connor, J., concurring). Granting motions to suppress is never a popular decision in the community, and law enforcement unions will campaign against judges who find that officers lack credibility. Thus, it is particularly incumbent upon the appellate courts to exercise appropriate review of trial court findings that appear absurd on their face and not reflexively affirm factual findings.

The officer in this case made a preposterous assertion that merely waving arms in a split second justified a detention for a “rolling domestic violence situation.” The trial court inexplicably accepted that, and the Court of Appeals’ opinion reveals a policy of accepting such claims at face value. The Court of Appeals has elsewhere challenged such attempts to use standardless profile evidence as the basis for a traffic

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<sup>3</sup> See, e.g., [David Kidwell, “Attack ads target Illinois Supreme Court justice,” \*Chicago Tribune\*, October 21, 2010](#) (last visited March 6, 2015).

stop:

In this case, Officer Craft testified that the absence of luggage in the passenger compartment of Appellant's car caused suspicion, but that the *presence* of luggage also would have caused suspicion. These examples underscore the wisdom of our supreme court's wholesale rejection of profile evidence at trial in *Lee*, and illustrate the danger to nearly every innocent person of unchecked deference to law enforcement's objectively unsupported expressions of suspicion in support of warrantless searches.

We might overlook the objective circumstances revealed by the recording and instead marvel at the acuity of Officer Craft's instincts in identifying Appellant as a likely drug courier on such innocuous facts. But were we to engage in such tautological reasoning, we would render the Fourth Amendment a nullity—the objective (not instinctive) reasonable suspicion must exist *before* the detention, and the ultimate discovery of contraband cannot retroactively justify an otherwise unwarranted detention. We might also wonder after reviewing the recording whether the officer possessed other information that prompted his suspicions, but he testified to none.

*State v. Sweeney*, 224 Ariz. 107, 114 ¶¶ 27-28, 227 P.3d 868, 875 (App. 2010).

*Evans* is a perfect storm of improper police tactics. The officer, patrolling on a state highway in an area with a profile, decided to stop Evans based on a momentary glimpse—and the trial court found that the length of time was exaggerated by the officer. “Rolling domestic violence” was an extremely unlikely and improbable reason for the arm-waving. This cannot be how police officers are allowed to apply the Fourth Amendment. An opinion from this Court is required to remind intermediate appellate courts that the “abuse of discretion” standard requires deference to, but not a rubber-stamp for, the trial court's factual findings.

**II. Incorporating “area known for criminal activity” as a factor supporting reasonable suspicion risks permitting racial discrimination. This Court should expressly disapprove use of this factor except when it is relevant to the particular person or criminal activity being investigated.**

The Court of Appeals did not address the statement of the officer that Evans was in an “area known for illegal immigrant activity as well as other activity.” One way of interpreting the lack of comment is that the Court of Appeals merely did not see the need to credit such testimony because it could affirm on narrower grounds.

But the existence of this language in a published opinion that affirms the stop is of grave concern to AACJ. “Area known for [criminal] activity” may mean a number of things. For example, in this Cochise County case it means “entire communities living along the border.” *Brignoni-Ponce; Gonzalez-Gutierrez*. In other parts of the state, however, it will be interpreted to mean something far more insidious; it will be taken as a license to discriminate against racial minorities<sup>4</sup> and others who live in socio-economically disadvantaged neighborhoods.

For example, in *State v. Johnson (Johnson III)*, 220 Ariz. 551, ¶ 4, 207 P.3d 804, 806 (quoting *State v. Johnson (Johnson I)*, 217 Ariz. 58, ¶¶ 2-10, 170 P.3d 667, 668-70 (App. 2007)), the Court of Appeals cited testimony from an Oro Valley police officer on loan to a gang task force that the Sugar Hill neighborhood in Tucson

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<sup>4</sup> Even though Evans is a white male, [ROA 3](#), the language of appellate court opinions will ultimately be interpreted by officers in the field.

is well-known as associated with the Crips street gang. This association between the neighborhood and the Crips gang has now been enshrined in United States Supreme Court jurisprudence. *Arizona v. Johnson (Johnson II)*, 555 U.S. 323, 326 (2009). Prior to *Johnson*, this neighborhood was known only as one that is less affluent than others; now, however, through guilt-by-association, it is a gang neighborhood. It thus becomes a self-fulfilling prophecy. Now, African-Americans can be detained in Sugar Hill based on their race.

On the other hand, the Court of Appeals has elsewhere properly recognized that use of such a neighborhood characteristic runs a high risk of prejudice. *In re Ilono H.*, 210 Ariz. 473, ¶ 2, 113 P.3d 696, 697 (App. 2005), involved officers patrolling “near a park on the south side of Tucson in an area of known drug and gang activity” and approached five youths wearing red clothing (frequently associated with gangs). The Court of Appeals stated that it “cannot authorize officers to conduct investigatory detentions of individuals merely because they have worn the wrong color clothing *in the wrong part of town.*” *Id.* ¶ 6, 113 P.3d at 698 (emphasis added).

In *State v. Maldonado*, the Court of Appeals stated that “a stop based on the officer’s hunch and little more than the person’s race or ethnic background is illegal and unconstitutional.” 164 Ariz. 471, 473, 793 P.2d 1138, 1140 (App. 1990) (quoting *Davis v. Mississippi*, 394 U.S. 721 (1969)). Although the trial court and

Court of Appeals was no doubt guided by the officers' testimony "that this vehicle was a good prospect, a good bet," *id.* at 472, 793 P.2d at 1139, *Maldonado* noted several other cases where driving in the vicinity of the Mexican border carried little or no weight in the analysis. *Maldonado* looked to federal cases that found insufficient objective evidence to support reasonable suspicion and found even less evidence in the case before it. *Id.* at 473-74, 793 P.2d at 1140-41 (citing *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1418-19 (9th Cir. 1989), and *United States v. Escamilla*, 560 F.2d 1229 (5th Cir. 1977)). *Hernandez-Alvarado* involved a factor similar to that offered in *Evans*: "the registered owner of the vehicle lived in an area of Nogales known for drug trafficking." *Id.* at 474, 793 P.2d at 1141. *See also State v. Graciano*, 134 Ariz. 35, 653 P.2d 683 (1982) (person of Mexican ancestry detained while driving eighteen miles north of Mexican border detained on nothing more than a hunch).

"Race discrimination is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Establishing an individual claim of racial profiling, however, is extremely difficult, bordering on insurmountable, in the absence of incriminating statements by the officer. In *Jones v. Sterling*, 210 Ariz. 308, ¶¶ 28-31, 110 P.3d 1271, 1278 (2005), this Court held that selective enforcement could be raised as a defense to criminal prosecution but also recognized the "demanding standard" set by the United States Supreme Court in *United States*

*v. Armstrong*, 517 U.S. 456 (1996), to raising such a claim under the Fourteenth Amendment. While the *Armstrong* standard for proving selective enforcement and selective prosecution is not “impossible,” 517 U.S. at 466, it is extremely unlikely to be achieved in the context of a single defendant. The ability of law enforcement to avoid using the obviously-disallowed factor of race and to instead select more creative criteria, such as “area known for criminal activity,” should be seen for what it is.

The Supreme Court has upheld use of the location as a “high crime area” as a factor in the reasonable suspicion calculus, but its jurisprudence on the subject reflects the danger of doing so. Being in a high crime neighborhood by itself is not sufficient to satisfy an objective finding of reasonable suspicion, but being in a high crime neighborhood and then running away from an expected encounter with police is sufficient. *Compare Brown*, 443 U.S. at 52, *with Wardlow*, 528 U.S. at 124. *See also State v. Ramsey*, 223 Ariz. 480, 485, 224 P.3d 977, 982 (App. 2010) (relying on *Wardlow* and distinguishing *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996), based on the “high crime area” factor). Yet using the flight or evasiveness of the “suspect” as a factor is also a self-fulfilling prophecy. Those living in communities that feel preyed upon by police are likely to be less interested in a “consensual” encounter with the police, particularly since they are more likely

to be detained without cause. “A *Terry*<sup>5</sup> stop says terrible things about its subject; it is the officer’s way of telling a person you look wrong and I am going to check out my feelings about you even if it embarrasses you. In big cities, *Terry* is invariably tied to questions of race.” James J. Fyfe, “*Terry*: An Ex-Cop’s View,” *72 St. John’s L. Rev.* 1231, 1243 (1998). Thus, consideration of a “bad neighborhood” factor is fraught with peril and comes too close for comfort to racial discrimination.

Such a concern is hardly unrealistic. Recent experiences in our nation, most notably in Ferguson, Missouri,<sup>6</sup> as well as in our own state, *see Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013), inform that entire police departments have been discovered to be engaging in rampant racial prejudice even in the present. While some examples involve clear racial animus, most others involve policing of particular neighborhoods in a more vigorous manner that indirectly results in selective enforcement and prosecution of criminal laws against persons of color.

AACJ asks this Court to send a clear message to courts reviewing officers’ reasons for investigatory detentions that using characteristics of the neighborhood as a factor in determining reasonable suspicion should be rejected out of hand unless officers can point to a specific attribute of the neighborhood relevant to the particular person and criminal activity being investigated. In border communities, if the police

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<sup>5</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>6</sup> *See, e.g., U.S. Department of Justice, “Investigation of the Ferguson Police Department,” March 4, 2015* (last visited March 10, 2015).

can use criteria to establish reasonable suspicion that do not eliminate the bulk of innocent travelers, then everyone—particularly Hispanics—driving a pickup truck is a potential smuggler. Police could engage in whatever profiling they choose, and use arm-waving as the basis for the stop. Judges must listen to the officers’ testimony, but when the story is hard to swallow, they should look beyond the story for the real reason why the stop was made, and be vigilant in screening that testimony for potentially unlawful racial profiling.

## **CONCLUSION**

AACJ asks this Court to hold that the officers’ detention of Evans violated the Fourth and Fourteenth Amendments to the United States Constitution. In so holding, AACJ asks this Court to call for greater judicial oversight over police justifications for stops, and to state in no uncertain language that officers may not include the “bad neighborhood” factor in the reasonable suspicion calculus unless there is a particular fact or characteristic of the neighborhood that is relevant to the particular person and criminal activity being investigated.

RESPECTFULLY SUBMITTED this 12th day of March, 2015.

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