Team Number P. 11

Docket No. 14-1107

In the Supreme Court of the United States

October Term 2014

Malik Price; Cedrick R. Jones; and
Ben Carter,
Petitioners,
v.
UNITED STATES of America,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

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BRIEF OF PETITIONERS MALIK PRICE; CEDRICK R. JONES; AND BEN CARTER

ORAL ARGUMENT REQUESTED

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Attorneys for Petitioners Malik Price; Cedrick R. Jones; and Ben Carter

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STATEMENT OF THE ISSUES

A. Under the Fourth Amendment:

1. Did the police seize Ben Carter when they shot him three times in the leg, caused severe injury, and restrained Carter's freedom to terminate the encounter?

2. Did the shooter have probable cause to use deadly force against Carter when there was no evidence Carter had committed a crime, no indication that Carter was armed, and no probable cause to believe that Carter posed a threat to the police or to the public?

3. Did the police discover the contents of Carter's backpack as a direct result of shooting Carter when the police came upon the backpack in Carter's blood-soaked car which Carter wrecked due to the pain and the blood loss he suffered from his gunshot wounds?

B. Under the Fifth Amendment:

1. Did police actions in this case constitute "outrageous conduct" when they targeted suspects based on their poverty and engineered a fictitious stash house robbery with the sole intention of achieving maximum sentences?

STATEMENT OF THE FACTS

A. FACTUAL BACKGROUND

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) began working with local police to orchestrate a series of reverse-sting operations that were supposed to lead to the arrests of individuals intent on robbing drug stash houses. R. at 2–3. An agent would approach suspects to propose the robbery of a particular house, and when the suspects began to carry out the plan, the police would arrest them before they arrived at the house. R. at 2. This was supposed to be a much safer alternative to a traditional undercover operation. R. at 2. The police focused their attention on Green Ridge, Apate—an economically depressed, predominately African-American city. R. at 3. The use of the reverse-sting operations in Apate has had some success in lowering the number of kidnappings and violence associated with stash house robberies; however, it has also resulted in the deaths of suspects, agents, and police, and at times, even innocent bystanders. R. at 3.

The particular reverse-sting operation in this case began with a confidential informant's identification of potential suspects. R. at 4. This informant had never been to Green Ridge before—his only knowledge of the city came from ATF briefings about the city's neighborhoods and demographics. R. at 4. The informant went to block parties in the "worst part of the city" to look for "shady" people. R. at 4, 57. The "worst part of the city" typically meant the most impoverished areas, and the "shady" people happened to be African-Americans. R. at 4, 57.

At one of these block parties, the informant met Mr. Malik Price and asked whether he was "interested in a big payday." R. at 4. Mr. Malik Price replied that he was interested, but walked away after hearing the plan for a potential stash house robbery. R. at 4. A few minutes later, Terrance Price approached the informant and asked about the robbery, and the informant

asked Terrance Price if he wanted to assemble a group to rob a stash house with a $500,000 payout. R. at 5. The informant then set up a meeting between Terrance Price and Agent Miller. R. at 5. Agent Miller met with Terrance Price based entirely on the information provided by the informant—he did not check Terrance Price's criminal history to ensure that Terrance Price posed an actual threat. R. at 58. Had he looked into the criminal history of the Petitioners, he would have found that it consisted of only nonviolent offenses. R. at 33–34.

During their first meeting, Agent Miller posed as a drug courier frustrated with his low pay intending to rob the stash house of his employer. R. at 5. Terrance Price agreed and said he would find a crew to do the robbery. R. at 5. At the next meeting, Terrance Price brought Mr. Cedrick Jones with him and told Agent Miller that the two of them would be the robbery crew. R. at 5. Terrance Price and Mr. Jones then laid out their plans, including plans to simply knock the guards out or take a guard hostage and have him reveal the location of the drugs. R. at 39. Upon hearing these plans, Agent Miller threatened to call the robbery off, insisting that they would die if they did not get better weapons and more participants. R. at 40. Terrance Price and Mr. Jones brought DeAndre Ingram to the third meeting. R. at 6. Ingram insisted that they would need more information about the layout of the house. R. at 6. Agent Miller supplied the address of the house and some details regarding the layout. R. at 6. Ingram then claimed he had a plan for the robbery and that Agent Miller would only need to unlock the door. R. at 6.

On the date of the robbery, Terrance Price and Mr. Malik Price had a discussion about what each would do with the money. R. at 44. During this conversation, Terrance Price relayed that he would use the money to move out of the impoverished area he was in—stating that this money was his only way out. R. at 44. Mr. Malik Price emphatically agreed with this statement. R. at 44. Before the robbery could begin, Terrance Price, Mr. Malik Price, Mr. Jones, Ingram,

and Agent Miller gathered in a white van, discussed the plan, and prepared to drive towards the fictitious stash house. R. at 6. However, when the van stopped approximately five miles from the stash house, police rushed the van, killed Terrance Price and pursued the vehicle until it crashed into a tree killing Ingram. R. at 6. The police arrested Mr. Malik Price and Mr. Jones, who were seriously injured. R. at 7.

But police involvement did not end there. R. at 7–9. After receiving an anonymous call several minutes later about two "'suspicious looking'" men standing on a street corner near the fictitious stash house, the police responded by sending two agents to investigate. R. at 7. The two agents approached the men, who the police later learned were Benjamin Carter and Michael Roby. R. at 8–9. The police asked Mr. Carter and Roby: "What's going on today gentlemen?" R. at 7. Both men turned and ran. R. at 7. One agent screamed: "Federal agents! Stop and put your hands up!" R. at 7. When Mr. Carter and Roby continued to run, the agents pursued them. R. at 7. After about 200 yards, Roby stopped and attempted to surrender to the police. R. at 7–8. He pulled what appeared to be a gun out of his pocket, raised it above his head, and yelled: "this is a fake gun, please don't shoot!" R. at 7. The agents drew their weapons and ordered Roby to drop his fake gun. R. at 7. Roby, who was now facing the agents, attempted to comply by lowering the fake gun to the ground. R. at 7–8. However, because Roby was facing the agents when he began to lower the fake gun, the barrel of the fake gun came to point at the officers at one point during that act. R. 7–8. One agent responded by fatally shooting Roby in the chest. R. 8.

Mr. Carter continued to flee after the police shot his companion. R. at 8. The agent that fatally shot Roby continued the chase for another 700 feet when it appeared that Mr. Carter was headed for a car. R. at 8. The agent screamed for Mr. Carter to stop, and when Mr. Carter reached into his pocket to pull out a car key, the agent shot at Mr. Carter three times. R. at 8. Mr.

Carter screamed in pain and began to limp noticeably. R. at 8. However, he was still able to make it into his car and drive away despite two bullet wounds in his leg. R. at 8–9.

The car Mr. Carter drove was not discovered for several hours until a local police officer found it crashed into a ditch about a mile from the fictitious stash house. R. at 8. Both of the car's front seats were drenched in blood. R. at 8, 54; *See also Appendix B*. The vehicle suffered from no apparent engine problems and the gas tank was more than half full. R. at 8. The police later determined that the car was traveling thirty miles per hour when it crashed, that the driver never applied the brakes, and that no swerving occurred to attempt to avoid the crash. R. at 9. The police found a black backpack inside, with "its contents strewn across the backseat floor." R. at 8. Those contents included a small canister of gasoline, a half-full vodka bottle, a butane lighter engrained with the word "Tinderman," and a full vodka bottle. R. at 8.

The police later discovered Mr. Carter in the hospital and arrested him one day after his surgery to remedy the two gunshot wounds to his leg and the severe blood loss that resulted from them. R. at 9. Mr. Carter denied any knowledge about the stash house or the robbery, stated that he was in town on business, and that the police were "'crazy to shoot him.'" R. at 9. Nevertheless, the authorities arrested Mr. Carter and indicted Mr. Carter, Mr. Malik Price, and Mr. Jones for violations "of numerous federal laws" carrying a minimum penalty of fifteen years. R. at 9.

B. PROCEDURAL HISTORY

The district court dismissed the indictment against Mr. Carter on Fourth and Fifth Amendment grounds and dismissed the indictment against Mr. Price and Mr. Jones on Fifth Amendment grounds. R. at 23. The court released all defendants from custody. R. at 23. However, the Thirteenth Circuit reversed, reinstating the indictment and placed the Petitioner's

back in custody. R. at 31. The Petitioners timely petitioned for Certiorari, and this Court granted the petition to resolve the Fourth and Fifth Amendment issues involved. R. at 32.

SUMMARY OF THE ARGUMENT

This Court should reverse the ruling of the Thirteenth Circuit and reinstate the holding of the District Court because: 1.) the police seized Mr. Carter when an agent shot him twice, 2.) there was no probable cause to seize Mr. Carter through the use of deadly force, and 3.) the illegal seizure directly led to the discovery of the contents of the backpack in Mr. Carter's car.

Even the slightest touch or application of force by a police officer is sufficient to constitute a seizure. Any restraint on a person's liberty to walk away constitutes a seizure under this Court's jurisprudence. Under that rule, shooting a person two times in the leg is a restraint on his freedom to depart and therefore constitutes a seizure. Such a seizure is a continuing rather than an attempted seizure even if the wounded person later flees because the bullets fired by government agents still remain in his leg and apply force to restrain his movement.

Furthermore, there was no probable cause to use deadly force to seize Mr. Carter because there was no probable cause to seize Mr. Carter in the first place. The police neither observed nor had any reports that Mr. Carter was engaged in illegal activity. The police merely observed, after responding to an unsubstantiated anonymous tip, that Mr. Carter was standing with a companion on a public sidewalk some distance from a *fictitious* stash house. They never saw Mr. Carter brandish a weapon, take any illegal action, or show any gang affiliation. There was no probable cause for his seizure, but even if one existed, it would not justify seizing Mr. Carter by deadly force. To seize a person by deadly force, police must not only have probable cause to believe that a person has committed a crime but also probable cause to believe that the person poses a danger

to officers or to the public. Nothing about Mr. Carter's actions justified this belief, and therefore his shooting occurred without the required probable cause.

Finally, the illegal shooting of Mr. Carter directly led to the discovery of the contents of the backpack in his car since Mr. Carter crashed that car only a mile from where he was shot due to the pain and blood loss he suffered. The police were only able to determine the contents of the backpack because they found it at the crash site, and the crash occurred as a direct result of the improper seizure carried out by the ATF agents. Therefore, the Fourth Amendment mandates the suppression of that evidence because it was discovered as a direct result of an illegal seizure. Since there is no other evidence against Mr. Carter, the case against him must be dismissed

The ruling of the appellate court should be overturned because the government's actions in the reverse-sting operation were "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011). The role of law enforcement is to target and prevent crimes; however, ATF greatly overstepped its boundaries in this case, manufacturing a fictional stash house robbery solely to convict the defendants and ensure lengthy sentences.

ATF did not infiltrate an ongoing criminal conspiracy or target potential participants based on a previously displayed propensity to commit such a robbery. Rather, participants were approached based on their poverty. In seeking individuals to participate in this operation, ATF relied entirely on the judgment of an informant with no prior knowledge of Green Ridge who merely went to the economically depressed areas of the town and targeted the individuals there.

After initiating the sting, Agent Miller used the Petitioners' impoverished circumstances to pressure the Petitioners into participating in a fictional robbery and played an active role in its planning. The poverty of the defendant provided the driving force behind the defendant's

participation in the fictional stash house robbery, and Agent Miller used the large payout to pressure the defendants to remain involved. Agent Miller played an active role in planning the robbery, offering resources and bullying the defendants into the plans he wanted.

Although stash house robberies are a public risk, the kind of reverse-sting operation used in this case poses significant safety threats but does little to actually alleviate the problem. These ATF operations have resulted in injuries and deaths of agents, suspects, and bystanders—this particular sting being no exception. These stings do little to prevent future stash house robberies, and because the individuals targeted in this case were not determined to have a propensity to commit the robberies without the input of Agent Miller, their targeting by police was outrageous conduct and the case against the Petitioners must be dismissed under the Fifth Amendment.

STANDARD OF REVIEW

Whether a seizure occurred, whether there was probable cause for it, and whether the discovery of evidence was a direct result of the illegal seizure are questions of law that this Court reviews *de novo*. *Ornelas v. United States*, 517 U.S. 690, 696–701 (1996); *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993) (reviewing a trial court's ruling on whether a seizure occurred *de novo*). Whether government actions constitute "outrageous conduct" in violation of the Due Process Clause is also question of law where this Court "accep[ts] findings of facts that are 'not clearly erroneous' but decid[es] questions of law de novo." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995); *United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013).

ARGUMENT

THIS COURT SHOULD REVERSE THE RULING OF THE THIRTEENTH CIRCUIT AND REINSTATE THE HOLDING OF THE DISTRICT COURT.

A. THE POLICE SEIZED MR. CARTER USING DEADLY FORCE WITHOUT PROBABLE CAUSE BY SHOOTING HIM TWICE AS HE TRIED TO ESCAPE AN ILLEGAL ARREST. THIS ILLEGAL SEIZURE DIRECTLY LED TO THE

DISCOVERY OF THE CONTENTS OF THE BACKPACK IN MR. CARTER'S CAR, AND THE FOURTH AMENDMENT MANDATES THE SUPPRESSION OF THAT EVIDENCE AND THE DISMISSAL OF THE CHARGES AGAINST MR. CARTER.

1. The Police Illegally Seized Mr. Carter by Shooting Him Twice.

"The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). A seizure occurs when an officer, "by means of physical force or shot of authority" impresses upon a citizen that he is not free "to terminate the encounter." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *Brendlin v. California*, 551 U.S. 249, 255 (2007). A person can be seized by a mere touch of a policeman, and only the "slightest application of force" is required. *Hodari D.* 499 U.S. at 625. In fact, "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). And when it comes to shooting a fleeing suspect, "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* This is precisely what the police did in this case: they did not merely touch Mr. Carter to restrain his freedom to depart or terminate the encounter, but they used a deadly weapon to shoot Mr. Carter two times in the leg as Mr. Carter was trying to save himself from an illegal arrest unjustified by probable cause. R. at 7–9.

The government may argue, as the Thirteenth Circuit erroneously ruled, that this seizure was only an attempted seizure; that since Mr. Carter fled despite his wounds, he broke free and no seizure actually occurred.[1] That argument may even rely, improperly, on *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989), where this Court used language of "*termination* of [a] suspect's

[1] R. at 26–27. That argument is consistent with the holdings in *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010) and *Cole*, 993 F.2d 1328 (8th Cir. 1993). However, since all three rulings result from a misinterpretation of this Court's jurisprudence in *Brower* and *Hodari D.*, and since this Court owes these lower courts no deference, this Court should reverse.

freedom of movement" to describe a seizure (emphasis added). Yet that language, in its proper context, still qualifies the shooting of a citizen by law enforcement as a seizure. Three circuit courts of appeals have held just that. *Rodriguez v. Passinault*, 637 F.3d 675 (6th Cir. 2011) (holding that *even if a person is not hit* when police fire bullets to detain her, she is still seized under the Fourth Amendment); *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012) (a citizen struck in the eye by a pepper spray bullet was seized even though police never took him into custody and he was free to leave with another individual to go to the hospital); *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003) (holding that a citizen struck by a bullet is seized even if he is able to escape).

Although the movement of a wounded citizen may not be completely terminated, the Fourth Amendment does not require complete termination for a seizure to occur. After all, if the slightest touch is sufficient, a person so slightly touched is not completely restrained: he might still break free. *Hodari D.*, 499 U.S. at 625–26. Yet, that still means that his freedom of movement has been restrained in some way. Even *Brower*, the case the Thirteenth Circuit erroneously relied on to rule against Mr. Carter, offers an illustration that the "termination of . . . freedom of movement" language used by this Court does not entail *complete* termination of movement. *Brower*, 489 U.S. at 596–597. In that case, this Court stated that a police cruiser sideswiping a fleeing car and causing it to crash is a "termination of the suspect's freedom of movement" and a seizure. *Id.* However, a suspect may continue to flee on foot even when law enforcement has disabled his vehicle. Nevertheless, this Court stated that the disabling of the vehicle is enough to be a seizure, thereby recognizing that a complete termination of a person's ability to move is far from necessary to constitute a seizure. *Id.* A partial restraint on movement is sufficient. *See id.*

There is an important distinction between a police officer grabbing or tackling a suspect and that same officer using two bullets fired from his sidearm to grievously wound a citizen. Both are seizures, but one is far easier to escape than the other: after all, a suspect grabbed or tackled by an officer of the peace might evade the grasp or regain his footing and be no less restrained than he had been before. He might continue his flight unimpeded, which would make that police action merely an attempted seizure. Yet a man shot twice in the leg cannot continue his flight unimpeded. He is crippled, even if reversibly, by government-issued metal lodged in his very flesh. Even if this man escapes by way of a vehicle or with the help of his friends, his ability to walk away is restrained, and that is precisely what qualifies as a seizure under the Fourth Amendment. Therefore, the fact that Carter continued his escape from an illegal arrest after he was shot does not terminate his seizure by the government or classify the government action as merely an attempted seizure.

This Court made that point even clearer in *Hodari D.* when it stated that even the slightest touch is sufficient to be a seizure without any mention that complete termination of movement was required. *Hodari D.*, 499 U.S. at 625. If even the slightest touch by a government agent is a seizure, then surely shooting a person with two government-issued bullets from a government-issued gun by a government agent constitutes a seizure. And since seizure is continuing so long as the slightest touching is occurring, it must undoubtedly be continuing when the government-issued bullets remain lodged in Mr. Carter's leg.

2. Law Enforcement Improperly Used Deadly Force without Probable Cause by Shooting Mr. Carter Two Times.

The Fourth Amendment does not merely govern whether the government can use force to restrain a citizen; it also governs what force is appropriate under the reasonableness standard. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (*citing Graham v. Connor*, 490 U.S. 386

(1989)). In *Garner*, this Court held that the use of deadly force is only constitutionally appropriate where probable cause exists to believe that the suspect "poses a threat of serious physical harm . . . to the officer or to others." 471 U.S. at 11–12. Echoing *Garner*, the Eleventh Circuit has held that unless a suspect threatens an officer with a weapon or unless there was probable cause to believe that the suspect had committed a crime involving a weapon, shooting that suspect is an improper seizure. *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985). Other circuit courts have come to similar determinations regarding the lack of probable cause for a seizure of nonthreatening suspects through the use of deadly force.[2] In this case, however, there was no probable cause for a seizure of *any* kind, and therefore no probable cause to use deadly force to achieve it.

To justify any seizure, a police officer must have "'probable cause' to believe that the individual *has committed a crime*." *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013) (emphasis added). Yet nothing in the record of this case shows probable cause to believe that Mr. Carter had done that. The police merely relied on an unsubstantiated anonymous tip that Mr. Carter and his companion were standing outside a *fictitious* stash house. R. at 7. Mr. Carter was standing on a public sidewalk and he bore no weapons, exhibited no signs of violence, and was not exchanging drugs or money. R. at 7–9. Although Mr. Carter and his companion might have appeared "suspicious" to an anonymous caller, that determination is at best speculative, as are

[2] *Floyd v. City of Detroit*, 518 F.3d 398, 407 (6th Cir. 2008) ("As a matter of law, an unarmed and nondangerous suspect has a constitutional right not to be shot by police officers."); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 525–26 (7th Cir. 2012) (when a suspect was inside her car but not yet in a position to drive, there was no probable cause to seize her by shooting her); *Moore v. Indehar*, 514 F.3d 756, 762 (8th Cir. 2008) (stating that no probable cause existed to seize an unarmed man by deadly force when *his companion* had a gun); *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) (the fact that a person was behaving erratically and had suicidal tendencies did not create probable cause to seize the person by shooting him even with *non-lethal* beanbag ammunition).

many determinations that involve unsubstantiated anonymous tips. R. at 7; *Illinois v. Gates*, 462 U.S. 213, 230–32 (1983). And even if Mr. Carter and his friend did look suspicious, looking suspicious is not a crime.

The police still undoubtedly had the right to approach Mr. Carter, but Mr. Carter, having committed no crime, did not have to remain in place and talk to the officers. In fact, the officers had no right to order him to stop as they had no probable cause whatsoever for apprehending him. Mr. Carter had every right to leave at whatever speed he saw fit, and the officers' instructions to halt did not have to be followed: those instructions were not based on probable cause, and therefore the flight itself does not qualify as a criminal act akin to resisting arrest.

Flight alone is not enough to justify a seizure. *Sibron v. New York*, 392 U.S. 40, 66–67 (1968). "[S]pecific knowledge on the part of the officer relating the suspect to the evidence of crime" is required, and here it was lacking since no evidence existed that Mr. Carter committed any crime at all. *Id.* at 66. Although a person's flight from police may appear suspicious, it is not in itself a crime and does not necessarily suggest that a crime has been committed. That is especially true in neighborhoods such as this one, where citizens may have cause to fear the police because of dangerous law enforcement practices in the past. *See* R. at 3. Since flight is insufficient to justify a seizure of a person and since no other evidence of criminal activity by Mr. Carter existed, any police seizure would have been improper. *Sibron*, 392 U.S. at 66–67. Thus, when the officers used deadly force to stop Mr. Carter from escaping an illegal arrest, they stepped grossly over the line of probable cause that the Fourth Amendment has drawn.

Since the seizure that did occur involved the use of deadly force, its impropriety was at its highest. Even if some sort of seizure would have been constitutionally acceptable, the totality of the circumstances standard applies to analyze whether the use of deadly force was reasonable,

and the circumstances here fall well short of justifying such force. *Garner*, 471 U.S. at 9. When no probable cause exists to believe that the suspect is a threat to the officers or to the public, his apprehension by deadly force is improper. *Id.* at 11. *See Brosseau v. Haugen*, 543 U.S. 194, 197–98 (2004) (internal citations omitted). In *Garner*, this Court considered whether shooting an unarmed suspect who fled after committing burglary violated that suspect's Fourth Amendment rights. *Garner*, 471 U.S. at 3. In deciding that a Fourth Amendment violation had occurred, the Court focused on the fact that the police officer in that case could see no weapon in the suspect's possession. *Id.* at 3–22. Even though the suspect was committing a nighttime burglary, that alone did not justify the use of deadly force to apprehend him without other indications that he was indeed dangerous. *Id.* at 21. Thus, *Garner* illustrates the concept that mere suspicions that a citizen might be dangerous are not sufficient to justify shooting that citizen. *See id.*

But in this case, there was even less evidence than there was in *Garner* that Mr. Carter endangered the lives of the police or the public. Mr. Carter carried no weapon, made no threats, and was merely running away on foot. R. at 7–9. There was no evidence that Mr. Carter had committed a crime or was in any way involved with the sting operation, and he was not being apprehended for something so alarming as a nighttime burglary. R. at 7–9. No injury was probable as a result of Mr. Carter's actions, and the officers had no probable cause to suspect otherwise. R. at 7–9. The circumstances of this case are far less indicative of Mr. Carter's dangerousness than the circumstances in *Garner*, and since the police actions in *Garner* violated the Fourth Amendment, the actions of the police in this case must also violate it.

The government may argue that probable cause appeared after the pursuing agent shot Mr. Carter's companion and Mr. Carter, after further flight, reached swiftly inside his pocket. R. at 8. The first flaw in this argument comes from the fact that the police officer had no reason to

suspect that Mr. Carter was pulling a weapon out of his pocket. Perhaps if the police had seen Mr. Carter wield a weapon earlier, or if the anonymous tip the police received complained of a weapon in Mr. Carter's possession, the shooting might have been justified. If there was some reasonable indication that Mr. Carter (rather than his companion) was armed, perhaps the use of deadly force would have been permissible. *Moore*, 514 F.3d 756, 762 (8th Cir. 2008). No such evidence existed, however, and the pursuing agent had no justification to shoot Mr. Carter.

But even if this Court holds that Mr. Carter's reach inside his pocket constituted a dangerous act, that still does not suffice as probable cause for shooting Mr. Carter. *See Garner*, 471 U.S. at 11. The context of the probable cause standard articulated in *Garner* is that the suspect must pose the danger to the police or others *without justification*: that no legal reason exists for the suspect to draw a weapon or otherwise endanger the officer or another person. *See id.* Surely *Garner* does not suggest that an officer can shoot a person who is using a weapon in self-defense against an assailant. There may be reason to believe that the armed person poses a threat to his assailant in that situation, but because that threat is justified, there is no probable cause to shoot the armed person acting in justified self-defense.

Under that legal maxim, there was no probable cause for the agent to shoot Mr. Carter even if he had seen Mr. Carter pull a weapon from his pocket because Mr. Carter would have been acting in justified self-defense. That conclusion flows directly from this Court's jurisprudence concerning citizens defending themselves from police during an illegal arrest. *United States v. Di Re*, 332 U.S. 581, 594 (1948) ("One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases."). This right to self-defense against improper police actions has been recognized for well over a century. *John Bad Elk v. United States*, 177 U.S. 529, 537–38 (1900). Even when a citizen kills an officer to

protect himself from an arrest, "the facts might show that no offense had been committed" if the citizen was justified in believing that his life was threatened without probable cause by the arresting officer. *Id.* The Sixth Circuit recognized the same principle, holding that when a police officer unjustly puts a citizen's life in danger, the citizen can kill the officer to prevent death or great bodily harm. *Reichman v. Harris*, 252 F. 371, 381–82 (6th Cir. 1918). Therefore, if the agent in this case had "so far forgotten his duties as an officer, and had gone beyond the force necessary to arrest [the] defendant," Mr. Carter's actions would have been justified and legal even if Mr. Carter had tried to produce a weapon from his pocket to protect himself. *John Bad Elk*, 177 U.S. at 534. Thus, no probable cause would have existed for police to open fire.

The agent in this case had forgotten his duties as an officer when he shot and killed Mr. Carter's companion in the act of surrender and continued to pursue Mr. Carter with his weapon drawn. R. at 7–8. The victim, Mr. Carter's companion, had attempted to turn himself in to the agents: he stopped, warned the agents that he had a fake gun, and attempted to place himself under their control. R. at 7–8. He even followed their instructions to lower his fake weapon to the ground, and it was in the midst of this act of surrender that he was fatally shot in the chest by the same agent who later continued to chase Mr. Carter.[3] R. at 7–8.

Once the pursuing policeman fired the fatal shot into the victim's chest, Mr. Carter was on notice that these agents were willing to kill him *even if he tried to surrender like his friend did*. This was despite the fact that the agents had no probable cause to suspect Mr. Carter of a

[3] The government may seek to justify this shooting by stating that the victim pointed his fake weapon, which the police could not be certain was fake, at the officers. R. at 7–8. Yet that argument ignores the reality that the officers' instructions to the victim were wholly responsible for that act. R. at 7–8. The victim was facing the police officers when they instructed him to lower his weapon, and the natural act of lowering the fake gun from that position would have pointed the barrel of the fake gun towards the officers at least at some point during that act. R. at 7–8. The officers should have anticipated this and given different orders rather than shooting the victim as he was trying to comply.

crime. Any reasonable person would have felt his life threatened under those circumstances, and therefore the law would have permitted the use of deadly force in self-defense. *See Di Re*, 332 U.S. 581; *See also John Bad Elk*, 177 U.S. 529. Thus, Mr. Carter had a right to pull out a weapon in self-defense if he had one, and *Garner* does not justify the agent shooting Mr. Carter to prevent that from happening. Therefore, the agent's act of shooting Mr. Carter without probable cause to use deadly force is an illegal seizure.

3. The Illegal Seizure Led Directly to the Discovery of the Contents of Mr. Carter's Backpack.

Any evidence obtained directly from a Fourth Amendment violation must be suppressed. *United States v. Crews*, 445 U.S. 463, 470 (1980). To determine if evidence is obtained directly from such a violation, this Court considers what part the defendant's free will had to play in the discovery of the evidence, how proximate the illegality was to the discovery of the evidence, whether any intervening circumstances existed, what purpose the government agents had, and how flagrant the violation was. *Brown v. Illinois*, 422 U.S. 59, 603–04 (1975). Consideration of these factors can lead to only one result in this case: the evidence against Mr. Carter seized from his backpack must be suppressed because it was the direct result of Mr. Carter's illegal seizure.

In this case, the defendant's free will and intervening circumstances played almost no part in the equation. Although Mr. Carter did lead the police to his car by running to it while fearing for his life, that can hardly be an act of free will: Mr. Carter was trying to escape the fate that had befallen his companion just moments earlier. Mr. Carter's decision to try to drive the car in spite of his wounds was likewise a matter of necessity because Mr. Carter was trying to escape violent police officers. Finally, Mr. Carter's crash, which occurred only a mile away from where Mr. Carter was wounded, does not serve as an intervening circumstance. R. at 8–9. Everything about that accident indicates that Mr. Carter crashed the car *as a direct result* of his dangerous and

illegal seizure by law enforcement. R. at 8–9. After all, a further inspection of the car showed no engine trouble, no lack of gas, and no other problems. R. at 8–9. The inspection revealed that Mr. Carter must have been in so much pain that he could not even turn the steering wheel or apply the brakes before the wreck occurred. R. at 8–9. All of the evidence points to the fact that this crash, and the search of the crashed vehicle that followed, resulted directly from the illegal law enforcement actions described above.

The proximity factor also points towards this discovery of evidence in Mr. Carter's backpack: it fell into police hands solely as a result of the crash. It would not have been inevitably discovered, and so no grounds exist for admitting the evidence under the inevitable discovery rule outlined in *Nix v. Williams*, 467 U.S. 431, 443–44 (1984). All of the factors point towards the search of the backpack being a direct result of Mr. Carter's illegal seizure, and therefore, the contents found within that backpack should be excluded. Because that is the only evidence that connects Mr. Carter with the charges brought against him, no evidence remains to substantiate the charges, and the case against Mr. Carter must be dismissed.

B. THE RULING OF THE APPELLATE COURT SHOULD BE REVERSED BECAUSE THE CONDUCT OF THE GOVERNMENT WAS SO OUTRAGEOUS THAT IT OFFENDS DUE PROCESS.

In addition to the outrageous police actions that led to the shooting of Mr. Carter, the actions taken by the ATF agents in targeting poor African-American males in this reverse-sting operation are "so grossly shocking and so outrageous as to violate the universal sense of justice." *Stinson*, 647 F.3d at 1209. In *United States v. Russell*, 411 U.S. 423, 431–32 (1973), this Court noted that there could be government involvement in a crime that was so outrageous the very notion of Due Process would prevent prosecution of the individuals involved. Though this Court has never ruled explicitly regarding this defense, it is widely recognized among the Circuit

Courts. *See, e.g.*, *United States v. Mosley*, 965 F.2d 906 (10th Cir. 1992); *United States v. Hunt*, 749 F.2d 1078 (4th Cir. 1984); *United States v. Twigg*, 588 F.2d 373 (3d. Cir. 1978); *United States v. Smith*, 538 F.2d 1359 (9th Cir. 1976). While the required showing that government actions are so outrageous they violate fundamental notions of fairness is a very high standard, it has previously been used to overturn convictions. *Twigg*, 588 F.2d 373 (finding outrageous conduct where a government agent provided the supplies, location, and direction for manufacturing speed); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (finding outrageous conduct where a government agent offered to supply the equipment to make a still and acted as the sole customer for illegal alcohol sales).

Government conduct is the focus in the determining "outrageous conduct." *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991). There is no "bright line" test for outrageous conduct; rather, each case must be determined on its own factual basis. *Black*, 733 F.3d at 302 (*quoting United States v. Bogart*, 783 F.2d 1428, 1438 (9th Cir. 1986)). The Ninth Circuit recently laid out a series of factors to be used in determining whether government conduct rises to the level of outrageousness required. *Black*, 733 F.3d at 303–04. These six factors included:

> (1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendants to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

Id. The district court applied a condensed version of this test, focusing on the three main underlying factors in *Black*: the government's initiation of the sting, the government's role in the sting after its initiation, and the nature of the crime being investigated. R. at 17. While the Thirteenth Circuit chose not to strictly adhere to these factors but instead chose to look at the totality of the circumstances, the result should be the same under both tests as both focus on the

reasonableness of the government's actions. R. at 29. The *Black* factors merely provide a series of elements to look to in evaluating the totality of the circumstances and therefore properly guide the analysis. Under either test, the government's actions constitute "outrageous conduct."

1. At the Initiation of the Sting, the Government Targeted Suspects Based on their Economic Circumstances.

In addressing the government's initiation of the reverse-sting, this Court should look to the defendants' criminal backgrounds or propensity to commit the crime and whether the government joined an ongoing scheme or proposed a new criminal enterprise. *See Black*, 733 F.3d at 304–05. In this case, both factors weigh heavily against the government.

The manner in which the government sought out potential participants in this reverse-sting is repugnant to notions of fairness. The government argues that this reverse-sting was created in order to prevent dangerous stash house robberies. R. at 2. While the government is entitled to "infiltrate a criminal organization" or target an already ongoing conspiracy to prevent crime, nothing of the sort was occurring here. *United States v. So*, 755 F.2d 1350 1353 (9th Cir. 1985). The government sent a confidential informant to determine who would be a willing participant, and on the suggestion of the informant alone targeted individuals. The informant had no prior knowledge of Green Ridge and received no instruction from ATF on what individuals to target. In determining who would be a potential target, the informant did not seek individuals that had already been involved in these crimes, but instead merely went to the "worst part of the city" to look for "shady" individuals. R. at 4. Unfortunately, the "worst part of the city" translated to the impoverished area of town and the "shady" individuals turned out to be young African-American males. R. at 4, 57. There was no individualized suspicion surrounding any of the defendants— they were targeted simply on the basis of their socio-economic status.

The circuit courts have previously held that individualized suspicion is not required for the government to target an individual through an undercover investigation; however, in instances where the court has upheld such activity without individualized suspicion, there were other indications that the defendants were properly targeted. *See United States v. Luttrell*, 923 F.2d 764, 764 (9th Cir. 1991) (en banc). Courts have upheld the targeting of persons without individualized suspicion in instances where there was an identifiable group law enforcement believed to be violating the law or the defendant had otherwise demonstrated propensity to commit the crime. *See United States v. Emmert*, 829 F2d 805, 807 (9th Cir. 1987) (upholding a conviction of a defendant initially targeted based on his attendance of a party where cocaine was present). The defendants here had not participated in such a suspicious activity though; they were targeted solely because they were in the "worst part of the city." R. at 4.

Further, the statements made to the agents after the defendants had already been targeted are insufficient to mitigate the total lack of suspicion present. Terrance Price did tell the agent that he and his associates had previously perpetrated crimes of a similar nature; however, it was only stated in response to Agent Miller's repeated goading questions regarding whether he and the defendants were brave enough to "ride into a firefight." R. at 37. Terrance vaguely claimed that "people in my crew have done stuff like this too. I have been locked up a couple of times for dealing. Also one time for carrying a stolen piece." R. at 37. While the Ninth Circuit in *Black* found statements of past criminal activity to strengthen the government's claim, it should not be the case here. 733 F.3d at 307. In *Black*, the defendants asserted that they had previously been involved in multiple felonies involving drugs and guns and some had even perpetrated previous stash house robberies. *Id.* When speaking with the agents, Terrance Price's discussion of previous robberies was clearly bravado, meant solely to preserve a potential economic

opportunity desperately needed by these young men. Nothing in the criminal history of any of the defendants suggests that they would be involved in a criminal operation involving violence on the level of what was expected here. For the most part, the criminal records for the defendants show mainly misdemeanors consisting of theft or possession of a controlled substance—Mr. Malik Price had no prior criminal history at all. R. at 34. But ATF never checked the criminal history of the defendants.

2. After the Initiation of the Sting, Agent Miller was an Active Participant in the Robbery and Pressured the Defendants to Carry Out the Fictitious Robbery.

In targeting individuals from the poorest areas of an economically depressed city, the government created significant pressure for the defendants in this case to commit the crime, even absent threats from government agents. The Thirteenth Circuit noted that "mere encouragement [is] of less concern than pressure or coercion" and altogether rejected the notion that the depressed economic status of the individuals involved here could constitute coercion. R. at 30. However, the government agents offered a $500,000 reward to the defendants in this case, inducing them to agree to commit the stash house robbery. Agent Miller knew that this economic opportunity was exceedingly rare for many in the lower-income area of the town. He heard Terrance Price tell Mr. Malik Price what such a large payout would mean to him, noting that he would use the money not to engage in illegal activity, but to get out of the town—that this money was his only way out. R. at 44. His younger brother Mr. Malik Price emphatically agreed with this statement. R. at 44. The willingness of the defendants to participate in this fictional robbery is indicative of economic need rather than a violent propensity.

The Thirteenth Circuit noted that Agent Miller actually threatened to withdraw from the operation to show that the defendants were not coerced; however, the timing of these threats reveals that Agent Miller's threats were themselves meant to create pressure. R. at 40. Agent

Miller only threatened to withdraw when the defendants when the plan did not conform to his wishes because they did not involve enough participants and guns. R. at 40.

Allowing the government to continue to use this method sets a dangerous precedent for law enforcement tactics. This would allow law enforcement to continue to seek out potential defendants in economically depressed areas— targeting largely poor minorities— and with no further suspicion use their depressed economic circumstances to ensnare the poor and minorities to commit crimes for the sole purpose of obtaining a conviction. Agent Miller was an active participant in the proposed robbery from its inception to the botched finale. Where the government interaction with the defendants is of longer duration, the likelihood of outrageous conduct increases. *See Greene,* 454 F.2d at 786–87. In *Green,* the 9th Circuit struck down the convictions of two defendants where a government agent provided substantial assistance in operating a still by acting as a partner. 454 F.2d at 786. The agent provided the Petitioners with sugar at a whole sale price and offered to provide other supplies. *Id*. Agent Miller also acted as a partner here. The appellate court claimed that Agent Miller offered no assistance in planning or gaining resources; however, this is untrue. He offered to find a safe house and a getaway car for the Petitioners, although they did not ultimately use the car offered. R. at 38. Further, Agent Miller obtained the address of the house and provided the Petitioners notice of the obstacles they would face in the robbery to help them prepare. R. at 43. Unlike the agent in *Black,* who provided no "weapons, plans, manpower, or direction about how to perform the robbery, even when the defendants sought his advice," 733 F.3d at 309, Agent Miller directed the planning of the robbery in this case.

While Agent Miller claimed that it was up to the defendants to create a plan for the robbery, he guided the decisions made through insisting that the defendants were not taking this

seriously. R. at 40. When the defendants created a plan involving fewer participants, Agent Miller insisted they find more. R. at 4. The defendants developed a plan that would not involve killing the stash house guards, saying that they could simply knock the guards out or take one of the guards hostage and have him show them the location of the drugs. R. at 39–40. Agent Miller insisted that this was not enough, that this plan would get them killed. R. at 39–40. Agent Miller repeatedly insisted that the defendants would need substantial firepower to get out of this operation alive. R. at 39–40. While the Thirteenth Circuit claimed that the assertions made by Agent Miller were solely used to ensure that the defendants were individuals that would be willing to "risk their lives to participate in a home invasion robbery," his actions are more indicative of an agent attempting to garner the largest possible number of defendants and secure substantial sentences. R. at 31. This stands in stark contrast to the agent in *Black*, who said that decisions on whether anyone would be murdered during the robbery were up to the defendants. 733 F.3d at 300. Agent Miller insisted that these steps be followed, and rather than allowing the defendants to fully plan a robbery themselves. R. at 40. Agent Miller bullied the defendants until the crime was of sufficient magnitude to provide substantial charges and sentencing enhancements. R. at 40.

In *Black*, the Ninth Circuit voiced serious concern about a reverse-sting operation similar to the one at issue here. *Black*, 733 F.3d at 303. As noted by the court, such operations allow the government "unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant." *United States v. Briggs*, 623 F.3d 724, 729–30 (9th Cir. 2010). This type of arbitrariness runs afoul of the Due Process rights of the defendants. *See Collins v. City of Harker Heights*, 503 U.S. 115, 127 n.10 (1992). This Court has long viewed the Fifth Amendment as a protection for citizens against arbitrary exercises of

government power. *See Hurtado v. California*, 110 U.S. 516, 527 (1884). Agent Miller noted that he did not know precisely why the amount of drugs in the fictional stash house was set at twenty-five kilograms. R. at 58. The amount asserted could have just as easily been ten, thirty, or fifty kilograms of cocaine, incorporating a myriad of sentencing options. This allows law enforcement agents to dictate a sentence for an individual with virtually no check on that power.

3. Although Stash House Robberies May Pose Unique Challenges to Law Enforcement, the Actions Taken Here Vastly Overstep Constitutional Boundaries.

Court's must also look to the "nature of the crime and the tools available to law enforcement agencies to combat it" in determining whether government conduct is outrageous. *Twigg*, 588 F.2d at 378 n.6. The government may point to the nature of stash-house robberies to argue that the tactics used in the reverse-sting operation are warranted. The appellate court in *Black* noted that stash house robberies are a largely unreported crime that tends to happen in a residential area and because of this they are typically very dangerous. 733 F.3d at 309. The government may assert that reverse-sting operations, such as the operation employed here, provide a safer option to prevent these robberies. R. at 2. Courts generally hesitate to disturb the decisions of law enforcement agencies in carrying out their executive function; however, where, as here, the government has clearly overstepped constitutional boundaries, courts will step in. While the government should attempt to prevent stash house robberies, the method used here was so egregious it must be prohibited.

Stash house robberies can be dangerous—"many home invasions related to drug deals involve disputes between rival gangs, and trying to arrest one gang in the act of robbing another can lead to shoot-outs and hostage taking." *Black*, 733 F.3d at 309. While this does pose a significant threat, the government's actions in this reverse-sting operation did very little to alleviate any real potential threat. Rather than targeting actual gang members or individuals

associated with organizations that seemed likely to commit these robberies, ATF relied solely on the suggestion of an informant who targeted impoverished neighborhoods. R. at 58.

ATF's operation in this case amounted to little more than manufacturing a crime that would not have otherwise occurred. Nothing in the facts suggests that these defendants are part of an organization that is likely to commit such a crime, or that any of them would have later conducted such a criminal enterprise. The burden of a criminal conviction and the minimum sentence of fifteen years in prison that would accompany it is an unjust burden to impose in a case where there is no evidence that the defendants would have ever been involved in a violent crime without the influence of the government agents. R. at 9.

Further, in light of the circumstances in this case, it is difficult to argue that this reverse-sting operation is significantly safer than any other undercover operation. While the idea behind this may be to prevent the actual robbery from occurring, and thereby avoid any potential safety issues, there are still substantial risks. In this case, three participants were killed, another participant shot and injured, and an ATF agent paralyzed. Given the number of casualties in this case, and those in other reverse-sting operations in this area, this is not a safer option than other law enforcement means.

CONCLUSION

For the reasons set above, the Petitioners request that this Court reverse the ruling of the Thirteenth Circuit and reinstate the holding of the district court. The charges against Mr. Carter should be dismissed on Fourth and Fifth Amendment grounds and the charges against Mr. Price and Mr. Jones should be dismissed on Fifth Amendment grounds.

Appendix A

Relevant Provisions of the United States Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

The Interior of Mr. Carter's Wrecked Car after the Police Shot Him