Case Brief: *United States v. Curry*[*]

INTRODUCTION

The Fourth Circuit's en banc review in *United States v. Curry*,[1] which produced a 9–6 split, two forceful dissents, and four concurrences largely attacking those dissents, serves as a reminder that the majority's analysis not only decides the outcome of the case at hand, but has the ability to draw attention to deep-rooted issues that divide our society.[2] In *Curry*, the Fourth Circuit was faced with whether to expand the exigent circumstances doctrine under the Fourth Amendment to justify the suspicionless seizure of Billy Curry, Jr., the defendant.[3] The majority declined to do so by outlining a new rule: officers may conduct suspicionless seizures only when they have specific information regarding a known crime in a controlled geographic area.[4]

FACTS OF THE CASE

In Richmond, Virginia, police officers deemed the Creighton Court public housing community a high-crime area and assigned a team of police officers to patrol the neighborhood.[5] During a patrol, officers heard gunshots and headed in the sounds' direction, toward a field behind one of the housing complexes.[6] The officers spotted five to eight men walking calmly and separately away from the general area where the officers believed the shots had originated.[7] One of the men in the field that night was Billy Curry, Jr.[8] With no suspect description, the police approached some, but not all, of the men and asked them to raise their hands and display their waistbands.[9] During this interaction, Curry did not lift his shirt high enough for the officer to clearly see his waistband—behavior the officer deemed noncompliant.[10] As a result, Curry was frisked by

1. 965 F.3d 313 (2020).
2. *See id.* at 315–31; *id.* at 331– 34 (Gregory, C.J., concurring); *id.* at 334–39 (Wynn, J., concurring); *id.* at 339–43 (Diaz, J., concurring); 343–46 (Thacker, J., concurring); *id.* at 346–50 (Wilkinson, J., dissenting); *id.* at 350–65 (Richardson, J., dissenting).
3. *Id.* at 315 (majority opinion).
4. *Id.* at 325–26.
5. *See id.* at 316.
6. *Id.*
7. *Id.* at 316–17.
8. *Id.* at 317.
9. *Id.*
10. *Id.*

the officer, who, after a struggle, discovered a silver revolver that seemed to have fallen from Curry's body.[11]

Curry was charged under 18 U.S.C. § 922(g)(1) for possession of a firearm as a convicted felon.[12] Curry moved to suppress evidence of the revolver, and the district court granted his motion, concluding that Curry's seizure by the officers was neither a lawful *Terry* stop [13] nor justified by exigent circumstances.[14] On appeal, the government abandoned its *Terry* argument and claimed that the officers' suspicionless seizure of Curry was reasonable under the exigent circumstances doctrine. [15] A three-judge Fourth Circuit panel initially reversed the district court's holding, but the full court later vacated that decision after granting a rehearing en banc.[16]

THE FOURTH CIRCUIT'S DIVIDED DECISION

The court began its analysis by examining whether the initial seizure of Curry—when he was ordered to stop and raise his hands—fit into the exigent circumstances exception to the Fourth Amendment's prohibition of unreasonable searches and seizures.[17] The Supreme Court has recognized three narrow exigencies that justify a suspicionless seizure: "(1) the need to 'pursue a fleeing suspect'; (2) the need to 'protect individuals who are threatened with imminent harm'; and (3) the need to 'prevent imminent destruction of evidence.'"[18] The government relied on the second exigency, requiring the court to determine whether the officer's seizure of Curry was reasonable "based on specific articulable facts and reasonable inferences that could have been drawn therefrom."[19]

Relying on the scant case precedent that recognized scenarios in which exigent circumstances justified suspicionless seizures, the Fourth Circuit first noted that exigent circumstances have typically only been used to justify a warrantless search of private property.[20] Second, the court analogized the facts of *Curry* to cases in which courts have extended the exigent circumstances

11. *Id.*

12. *Id.* at 318.

13. A *Terry* stop refers to the ability of police officers to briefly detain a person based on an officer's reasonable suspicion that the suspect was involved in criminal activity. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (holding that the Fourth Amendment's prohibition on unreasonable searches and seizures is not violated when an officer stops a suspect without probable cause if the officer has a reasonable suspicion that the suspect has committed a crime).

14. *Curry*, 965 F.3d at 318.

15. *Id.*

16. *Id.* at 318–19.

17. *See id.* at 320.

18. *Id.* at 321 (citing Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018)).

19. *Id.* at 322 (citing United States v. Yengel, 711 F.3d 392, 397 (4th Cir. 2013)).

20. *See id.* at 323.

doctrine to justify suspicionless seizures of people.[21] The court cited a line of vehicular checkpoint cases in which the police narrowly targeted their stops to suspected individuals who were leaving the scene of a *known crime*[22] as well as a case in which officers surveilling a club detained 170 men in the location of a *known crime*.[23] Judge Floyd, writing for the majority, noted that in each of these cases, courts "required that officers have specific information about the crime and suspect before engaging in suspicionless seizures."[24] Because the officers in this case did not have a description of the suspect and did not, in fact, know whether a crime had even occurred, the court found no reason to extend the exigent circumstances exception to the facts of *Curry*. After all, the officers "only *suspected* [Curry]to be near the scene of an *unknown* crime."[25]

If no exigent circumstances existed, the government requested the court instead apply a balancing test from *Illinois v. McArthur*[26] to determine whether the stop was reasonable.[27] In *McArthur*, the Supreme Court analyzed whether officers acted reasonably when preventing a man, whom they suspected had hidden marijuana in his home, from entering his house alone for two hours until the police could obtain a search warrant for the property.[28] In concluding that the police officers' actions were justified, the Court emphasized that "the police had probable cause to believe" the defendant had marijuana in his home,[29] that "the police had good reason to fear" the defendant would destroy the drugs if they let him enter his home alone, and that the restraint placed on the defendant's rights were minor because the police did not search his home until obtaining the warrant.[30]

The balancing test developed in *McArthur* requires weighing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[31] But the court deemed *McArthur* and its balancing test inapplicable because (1) the core of *McArthur* is about the seizure of property in order to

21. *See id.* at 324.

22. *See id.*; *see also* United States v. Harper, 617 F.2d 35, 40–41 (4th Cir. 1980) (holding that a suspicionless stop at a vehicle checkpoint was constitutional because the officers reasonably expected the route to be the escape route of suspects of a known crime).

23. *See Curry*, 965 F.3d at 324; *see also* Palacios v. Burge, 589 F.3d 556, 564 (2d Cir. 2009) (holding that reliable eyewitness testimony that the perpetrators of a known crime were inside a building justified the officers suspicionless seizure of a group of people).

24. *Curry*, 965 F.3d at 324

25. *Id.* at 325.

26. 531 U.S. 326 (2001).

27. *Curry*, 965 F.3d at 326.

28. *See McArthur*, 531 U.S. at 328.

29. *Id.* at 331.

30. *Id.* at 332.

31. *Curry*, 965 F.3d at 326 (citing Brief for United States at 31–32, United States v. Curry, 965 F.3d 313 (2020) (No. 18-4233).

prevent destruction of potential evidence[32] and (2) as the government admitted, *McArthur* is "factually distinguishable from this case in almost every respect, especially with regard to suspicion (or lack thereof)."[33]

Instead, the Fourth Circuit found that when dealing with the suspicionless seizure of people, the court and its sister circuits have typically required officers to have knowledge of a suspect and specific information about a crime before engaging in suspicionless seizures.[34] In keeping with case precedent dealing with the search of people rather than the search of property, the Fourth Circuit stated a new rule: "the exigent circumstances exception may permit suspicionless seizures when officers can narrowly target the seizures based on specific information of a known crime and a controlled geographic area."[35]

Judge Richardson's dissent provided an alternative legal framework that would have permitted a conclusion that Curry's seizure was reasonable. After reframing the facts to paint Creighton Court as "beset by repeated violence" and needing to be "safeguard[ed]," Judge Richardson ignored the key fact that the officers did not have a suspect description when they ordered a select few of the men present that night to stop.[36] Rather, Judge Richardson hinged his legal analysis on whether "an officer would reasonably suspect the conditions create[d] a need to act 'now or never' to protect an important public interest."[37] Maintaining that a determination of "reasonableness" is "context specific," Richardson applied the approach used in *McArthur*, asking: (1) "whether officers could reasonably suspect a legitimate exigency" and if so, (2) "whether officers responded to the exigency in a reasonable manner."[38]

Applying the facts to this framework, Judge Richardson quickly determined that hearing gunshots in a "community[] with six shootings and two homicides in the last three months" was enough to determine that a reasonable expectation of a legitimate exigency existed.[39] Next, Judge Richardson found the seizure of Curry reasonable by considering the balancing test from *McArthur* that the majority deemed inappropriate.[40] He argued that the officers were in a "potential active-shooter situation" which "required the officers to act now . . . to do what they could to protect the Creighton Court community."[41] He found the officers' "chosen steps were not just a reasonable approach, but seemingly

32. *See id.* at 327–28.
33. *Id.* at 328.
34. *Id.* at 324.
35. *Id.* at 325–26.
36. *See id.* at 351, 356 (Richardson, J., dissenting).
37. *See id.* at 354.
38. *Id.* (first citing Missouri v. McNeely, 569 U.S. 141, 149 (2013); and then citing Brigham City v. Stuart, 547 U.S. 398 (2006)).
39. *See id.* at 356.
40. *See id.* at 357.
41. *Id.* at 360.

the best available" and that the intrusion on Curry's Fourth Amendment rights was "minimal in both time and scope."[42]

RELEVANT LAW AND CONTEXT

The majority and Judge Richardson's dissent produce two different outcomes largely because of their differing opinions on *McArthur*'s relevance. The majority found *McArthur* irrelevant to its analysis because the case only dealt with searches of *property*, rather than suspicionless seizure of *people*.[43] In contrast, Judge Richardson embraced *McArthur* and readily borrowed its framework.[44]

What may be even more relevant than the legal precedent used by each side of the court is the timing of this decision. The Black Lives Matter movement in America sparked renewed attention in the summer of 2020 after a series of high-profile killings of Black people by police.[45] While America was wrestling with the reality of its systemic racism, *Curry* presented the Fourth Circuit with its own opportunity to address racist realities embedded in the criminal justice system and its regular reliance on predictive policing. Predictive policing algorithms are largely based on historical crime data which is directly tied to racist policing practices.[46] The continued use of predictive policing tends to "fray community relations, undermine the legitimacy of the police, and lead to disproportionate exposure to police violence."[47] Recognizing that Curry's own situation arose because of heightened police monitoring of a predominantly Black neighborhood, the separate opinions highlighting the effects of heightened police monitoring of specific groups of people seem to indicate that the decision here was not just about Curry—it was also about what message the decision would send about Black lives and constitutional rights.

42. *Id.*

43. *Id.* at 323–24 (majority opinion) ("Thus, applying *Brigham City*—or any exigency case, for that matter—proves challenging here. While some of the abstract principles articulated in the home-entry cases may be relevant to our inquiry, we have little guidance on when and how the exigent circumstances exception may apply to a suspicionless, investigatory seizure.").

44. *See id.* at 354–55 (Richardson, J., dissenting).

45. *See* Jose A. Del Real, Robert Samuels & Tim Craig, *How the Black Lives Matter Movement Went Mainstream*, WASH. POST (June 9, 2020, 4:36 PM), https://www.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html [https://perma.cc/Q6EY-CVE6 (dark archive)].

46. Renata M. O'Donnell, *Challenging Racist Predictive Policing Algorithms Under the Equal Protection Clause*, 94 N.Y.U. L. REV. 544, 554 (2019).

47. Robin Smyton, *How Racial Segregation and Policing Intersect in America*, TUFTSNOW (June 17, 2020), https://now.tufts.edu/articles/how-racial-segregation-and-policing-intersect-america [https://perma.cc/US5F-N336] (quoting Daanika Gordon, assistant professor of sociology at Tufts University).

POTENTIAL IMPACT

The *Curry* majority explicitly rejected the idea that its holding would prevent police from being able to respond to emergencies, such as an active shooter situation, when there is reasonable belief such circumstances exist.[48] The elephant in the room, as the majority pointed out, was that the government heavily relied on the fact that Creighton Court had a recent history of shootings. The majority refused to "deem residents of Creighton Court—or any other high-crime area—less worthy of Fourth Amendment protection by making them more susceptible to search and seizure by virtue of where they live."[49]

But in another dissent, Judge Wilkinson worried the implications of the holding were detrimental to the safety of those who live in high-crime areas. Finding the majority opinion to be a "gut-punch to predictive policing,"[50] he wrote in his dissent that the court's holding will make it impossible for police to protect "disadvantaged" and "vulnerable" Americans.[51] He warned that, "police officers on the scene of an unfolding emergency must [now] *sit and wait* for identifying information, rather than use discretion and judgment to get control of a possibly deadly event, lest the prevention of a homicide violate the Constitution."[52]

Yet the very facts of *Curry* showed the inherent flaws in predictive policing: it did not even work in this case. As Judge Gregory's concurrence noted, Curry was not the one who fired the gunshots. In fact, Curry tried to aid the police by pointing toward where the gunshots came from, and "one would think that the officers' best hope for finding the shooter was to accept the guidance offered by community members."[53]

Judge Wilkinson missed the mark. His argument that the *Curry* decision effectively ended the possibility of predictive policing was entirely based on social science studies,[54] offered no legal rationale[55] protecting predictive policing, and failed to recognize that the practice comes with a price: lesser Fourth Amendment protection for those people—often racial minorities—who live in communities designated as high-crime areas.

Judge Gregory's concurrence not only countered Judge Wilkinson's dissent but also offered a reminder about the implications of a decision going the other way: "My colleague insists on a Hobson's choice for these

48. United States v. Curry, 965 F.3d 313, 330 (4th Cir. 2020).
49. *See id.* at 331.
50. *Id.* at 350 (Wilkinson, J., dissenting).
51. *See id.* at 346.
52. *Id.* at 348.
53. *See id.* at 333 (Gregory, C.J., concurring).
54. *See id.* at 335 (Wynn, J., concurring).
55. *Id.* at 336 ("It is worth pointing out that Judge Wilkinson's reliance on sociological studies simply substitutes policy considerations for legal analysis.").

communities: decide between their constitutional rights against unwarranted searches and seizures or forgo governmental protection that is readily afforded to other communities."[56]

At the same time, Judge Richardson's warning still rings true. Police officers in the Fourth Circuit must now abide by a formalized rule: there must be a known crime in a controlled geographic area to warrant a suspicionless seizure of a person.[57] Stringent as it may appear, a safer guard on everyone's Fourth Amendment rights is preferable to an America where "the police may conduct wholly discretionary stops of individuals merely because they live in high crime areas or happen to be in the vicinity of gunshots."[58] After all, the Fourth Amendment is not "reserved only for a certain race or class of people."[59]

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56. *Id.* at 332–33 (Gregory, C.J., concurring).

57. *See id.* at 361 (Richardson, J., dissenting).

58. *Id.* at 338 (Wynn, J., concurring).

59. United States v. Black, 707 F.3d 531, 542 (4th Cir. 2013).

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