Judged by the Sum of Our Actions? The Relevance of Non-Party Behavior in *State v. Mello*[*]

INTRODUCTION

As Officer Pritchard drove slowly on a Winston-Salem street during his routine patrol, he saw an all too familiar scene on the notorious corner of Chandler and Amanda Place[1]: a man stopped his car, and two men reached into the driver's side window.[2] Officer Pritchard's suspicions were piqued.[3] This residential corner was known for drug activity, and Officer Pritchard's training and experience in drug interdiction led him to believe that he was witnessing an active drug deal.[4] He made a U-turn and, seeing this, the two pedestrians who had leaned into the car quickly fled.[5] The driver, likewise, made a U-turn and drove away, in the opposite direction of Officer Pritchard.[6] The officer activated his blue lights and the car stopped after a quarter of a mile.[7] While the officer spoke with the driver, he noticed the driver was holding a white, rock-like substance, which was later discovered to be cocaine base.[8]

Without the gloss of context, Gary Frances Mello's actions that day were unremarkable: he drove down a street, stopped at a corner, spoke with two people, and drove away.[9] When Officer Pritchard observed these events, however, he attached to them a criminal purpose.[10] Officer

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1. Brief for the State at 2–3, State v. Mello, 200 N.C. App. 437, 684 S.E.2d 483 (2009) (No. COA08-1052) (noting that the officer had patrolled the immediate area on previous occasions, made numerous drug-related arrests there, and assisted other officers in making arrests at that location).

2. *Id.* at 3.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 4.

8. State v. Mello, 200 N.C. App. 437, 438, 684 S.E.2d 483, 485 (2009), *aff'd* 364 N.C. 421, 700 S.E.2d 224 (2010).

9. *See id.* at 455, 684 S.E.2d at 495 (Hunter, J., dissenting).

10. *See* Brief for the State, *supra* note 1, at 3–4 (describing how Officer Pritchard initiated a traffic stop after he saw the behavior of the driver and the two pedestrians). The reasonableness of law enforcement's suspicion that someone is engaging in or is about to engage in criminal behavior is pivotal in a court's determination that police intervention was justified. Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."); *see also infra* Part I.B (exploring investigative stop law).

Pritchard's reasonable suspicion that he was witnessing a drug deal must have been based on a rational interpretation of all of the surrounding circumstances, not solely the circumstances directly involving Mello.[11] In a criminal justice system where adjudication based on individual responsibility remains a touchstone,[12] it seems unreasonable to render a judgment based on general circumstances and non-particularized facts. However, the totality of the circumstances test applied in *State v. Mello*[13] to determine the validity of an investigative stop mandates just that.[14] Supreme Court Justice Antonin Scalia once derisively suggested that when a judge "comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding."[15] Yet from the unexalted task of fact-finding, the court in *Mello* announced a new legal principle of law for future North Carolina courts to follow, qualify, or reject.[16]

In the abstract, the totality test may seem to present vague commands to a court.[17] However, in *Mello*, the presence of the basic elements of the test—flight and a high-crime area—gave the officer a basis for reasonable

11. Reasonable suspicion is based on a totality of the circumstances test, which requires in this instance that a law enforcement official take in all of the facts to determine whether criminal activity is occurring. *See Terry*, 392 U.S. at 30; United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) (stating that factors in the totality test "[v]iewed singly . . . may not be dispositive, yet when viewed in unison the puzzle may fit"); *infra* Part II.B.

12. *See* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 387 (1976) (propounding the belief that individual freedom may be maximized by clearly defining in the criminal code the bounds of an individual's responsibility to society).

13. 200 N.C. App. 437, 684 S.E.2d 483 (2009), *aff'd* 364 N.C. 421, 700 S.E.2d 224 (2010).

14. *See, e.g.*, 4 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5, at 470 n.8 (4th ed. 2004) ("Where the various factors relied upon by the government 'are related,' they 'must be considered as a whole' under the 'totality of the circumstances test,' but this does not mean the lower court erred here 'by individually examining each factor', as they 'also must be examined in some orderly fashion, which typically involves a brief discussion of each factor and its weight in the analysis.' ") (quoting United States v. Smith, 263 F.3d 571, 591 (6th Cir. 2001)).

15. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180–81, 1187 (1989). Justice Scalia also urged that a totality of the circumstances test should "be avoided where possible; that [instead] the *Rule* of Law, the law of *rules*, be extended as far as the nature of the question allows." *Id.* at 1187. Nonetheless, Justice Scalia acknowledges that the totality test is here to stay. *Id.*

16. *Mello*, 200 N.C. App. at 447, 684 S.E.2d at 490. Mello has been cited to signify that "the conduct of third parties present at the scene is also relevant when analyzing the totality of the circumstances." State v. Forse, No. COA10-5, 2010 N.C. App. LEXIS 1288, at *10 (N.C. Ct. App. July 20, 2010) (citing *Mello*, 200 N.C. App. at 450, 684 S.E.2d at 492).

17. *See* Cathy E. Moore, *Fourth Amendment—Totality of the Circumstances Approach to Probable Cause Based on Informant's Tips*, 74 J. CRIM. L. & CRIMINOLOGY 1249, 1260 (1983).

suspicion, which led to an investigatory stop.[18] But, when neither element is directly attributable to the defendant, as in this case, is the suspicion actually reasonable?

North Carolina courts answered this question in the affirmative. The North Carolina Court of Appeals upheld the lower court's conviction of Mello, and the Supreme Court of North Carolina affirmed without published opinion.[19] This Recent Development argues that the appellate court properly decided *Mello* and, in so doing, correctly concluded that the behavior of associated non-parties is within the scope of the totality of the circumstances test for reasonable suspicion. The totality test is an incremental yet cumulative inquiry, where a court should consider all of the facts that compose a potential criminal transaction. Extracting some facts—such as the behavior of a non-party from the rest of the scene—distorts reality and contravenes the interests of justice.

Part I of this Recent Development lays out the issue of first impression in North Carolina and critically analyzes how the majority decision in the court of appeals, affirmed by the state supreme court, came to its holding. This section also analyzes the dissent's arguments and observes underlying tensions in the opinion that reveal greater insight into the dissent's position. Part II examines background Fourth Amendment case law by order of magnitude, first looking at searches and seizures, and then at investigative stops and their progeny. Part III reintroduces *Mello* through the lens of broader Fourth Amendment law on investigative stops and suggests that the majority view in *Mello* is both reasonable and compatible with precedent. This part will also suggest that *Mello* could be conceived narrowly and only when police suspect an individual of engaging in a transaction crime.

I. THE *MELLO* CASE

The majority and dissenting opinions in *Mello* together represent a microcosm of the ongoing legal debate relating to the requirements for a valid investigatory stop. The two opinions clearly disagreed as to whether there was sufficient suspicion for Officer Pritchard to pull over Mello in his vehicle in this case. However, behind the opposing opinions lies a more fundamental disagreement as to what behavior justifies an investigatory stop under the Fourth Amendment.

18. *See* Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (validating an investigatory stop in a high-crime neighborhood where defendant ran away from police); *Mello*, 200 N.C. App. at 448, 684 S.E.2d at 491.

19. *See Mello*, 364 N.C. 421, 700 S.E.2d 224 (2010).

A. The Majority Decision

The central question of law before the North Carolina Court of Appeals was whether Officer Pritchard had the requisite degree of suspicion to pursue Mello and detain him through a traffic stop.[20] This inquiry requires that, based on all of the surrounding circumstances, Officer Pritchard was justified in making an investigatory stop of Mello's vehicle because he "had reasonable suspicion based on articulable facts that to an officer of his experience and training would lead him to believe that the Defendant was involved in a drug transaction."[21]

Officer Pritchard had a limited universe of facts available to him based on the scene he witnessed[22]: two people—neither of them the defendant—fled after leaning into the driver's side window of Mello's car in a high-crime neighborhood.[23] Officer Pritchard testified that he did not actually see an exchange of goods take place.[24] After the pedestrians fled, Mello simply directed his car "in the opposite direction."[25] The findings of fact do not indicate that Mello fled or drove his car quickly.[26] Furthermore, Officer Pritchard did not suspect Mello of having committed any traffic violations.[27] Therefore, the events that occurred *before* Mello began moving his vehicle were most operative in Officer Pritchard's mind. Taken together, those facts satisfied the court that Officer Pritchard stopped Mello

20. *Mello*, 200 N.C. App. at 439, 684 S.E.2d at 486. In a related proceeding, Mello challenged his charge of loitering for the purpose of engaging in drug-related activity under Winston-Salem City Ordinance §§ 38–29. State v. Mello, 200 N.C. App. 561, 562, 684 S.E.2d 477, 478 (2009). Mello argued the ordinance was void for vagueness, as it did not require proof of intent to violate a drug law, but imposed liability solely for conduct that manifested such purpose. *Id.* at 563, 684 S.E.2d at 480. The North Carolina Court of Appeals agreed and struck down the city ordinance. *Id.* at 568, 684 S.E.2d at 482. The content and holding of the proceeding are separate from the legal issues involved in the investigative stop of Mello, and are not discussed further in this Recent Development.

21. *Mello*, 200 N.C. App. at 441, 684 S.E.2d at 487 (citation omitted) (quoting the trial court's opinion).

22. A portion of the literature on investigative stops highlights the misuse of power by police in drawing suspicion from improper sources, such as race. *See, e.g.*, Charles L. Becton, *The Drug Courier Profile: "All seems infected that th' infected spy, as all looks yellow to the jaundic'd eye*," 65 N.C. L. REV. 417, 421 (1987) (noting the numerous drug-courier-profile characteristics courts have used and criticizing the standards as imprecise and unworkable); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 127–29 (1999) (arguing that the character of the neighborhood in reviewing reasonable suspicion determinations disproportionately affects law-abiding citizens in high crime neighborhoods).

23. *Mello*, 200 N.C. App. at 440–41, 684 S.E.2d at 486–87.

24. *Id.* at 440, 684 S.E.2d at 486.

25. *Id.* at 441, 684 S.E.2d at 487.

26. *Id.* at 438, 684 S.E.2d at 485.

27. *Id.*

with the requisite reasonable suspicion.[28] While the *Mello* majority ultimately arrived at the correct result, the court's analysis rests on tenuous precedent.

In denying the defendant's motion to suppress the evidence found in plain view when Officer Pritchard stopped the vehicle,[29] the court relied principally on *State v. Butler*,[30] a Supreme Court of North Carolina case also involving evasive behavior in a high-crime neighborhood.[31] The issue before the *Butler* court was whether, in light of the totality of the circumstances and based on "specific and articulable facts" before any arrest warrant information was obtained, the officers reasonably concluded that the "defendant was, or was about to be, engaged in criminal activity and that [he] was 'armed and presently dangerous.' "[32] The *Butler* court pronounced the investigative stop lawful because, in relevant part, the defendant "immediately [left] the corner and walk[ed] away from the officers after making eye contact with them."[33] Butler's behavior was taken to be "evidence of flight,"[34] and considered with other contextual factors,[35]

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28. *Id.* at 449–51, 684 S.E.2d at 491–93; *see infra* Part II (discussing standards for search and seizure in Fourth Amendment jurisprudence).

29. *Mello*, 200 N.C. App. at 447, 684 S.E.2d at 490.

30. 331 N.C. 227, 415 S.E.2d 719 (1992). The Court of Appeals of North Carolina closely analogizes *Butler* to the instant case, noting that "[a] careful review of the record indicates that all of the features that led the Supreme Court to uphold the investigative detention at issue in *Butler* are present in this case as well. . . . [W]e are not persuaded that *Butler* can be distinguished from this case in any meaningful way . . . ." *Mello*, 200 N.C. App. at 446–47, 684 S.E.2d at 490.

31. In *Butler*, Florida police officers were on routine patrol of a known "drug hole" when they saw a group of people, including the defendant, standing together at a street corner. *Butler*, 331 N.C. at 231–32, 415 S.E.2d at 721. As the officers approached the group, the defendant made eye contact with the officers and immediately walked away. *Id.* at 232, 415 S.E.2d at 721. The officers followed the defendant, asked him for identification, frisked the defendant for weapons, and, following routine procedure, checked with police dispatch to see if the defendant had any outstanding warrants. *Id.* The officers received word that the defendant was wanted for homicide in North Carolina, and the defendant was promptly arrested. *Id.*

32. *Id.* at 233, 415 S.E.2d at 722 (citing Terry v. Ohio, 392 U.S. 1, 21, 24 (1968)).

33. *Id.* at 234, 415 S.E.2d at 722–23.

34. *Id.* at 233, 415 S.E.2d at 722.

35. The *Butler* court listed seven factors that, taken together, amounted to reasonable suspicion. *Id.* They were:

> 1) defendant was seen in the midst of a group of people congregated on a corner known as a 'drug hole'; 2) [the arresting officer] had had the corner under daily surveillance for several months; 3) [the arresting officer] knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months; 4) [the arresting officer] was aware of other arrests there as well; 5) defendant was a stranger to the officers; 6) upon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight; and 7) it was [the arresting officer's] experience that people involved in drug traffic are often armed.

Id.

including presence among a group of people on a known drug corner, amounted to reasonable suspicion.[36]

Butler stands for the proposition that turning and walking away from a police officer in a high-crime neighborhood justifies an investigatory stop in North Carolina.[37] Under this theory, Mello's behavior of driving away in the other direction seems to be the automobile equivalent of "immediately leaving," which was sufficient to constitute flight in *Butler*.[38] In accepting the holding of *Butler*, the *Mello* majority suggested that Mello fled within the meaning of *Butler*.[39]

B. Butler *as a Weak Legal Foundation*

Both the dissenting and majority opinions in *Mello* accepted *Butler*'s legal foundation regarding the officer's assessment of reasonable suspicion.[40] This is troubling because the *Butler* court itself did not devote significant time analyzing the validity of the officer's reasonable suspicion calculation.[41] In characterizing Butler's actions as sufficiently "evasive" in the reasonable suspicion calculation, the *Butler* court made a semantic leap between the act of headlong flight—which the Supreme Court described as the ultimate evasive action warranting suspicion[42]—and Butler's act of "immediately mov[ing] away."[43]

The *Butler* court did not discuss the important distinction between proceeding in rapid motion, which describes quick action, and "immediately leaving," which describes a short time lapse, but not necessarily rapid motion.[44] Neither did *Butler* discuss that flight or "rapid motion"[45] has been required by both the United States Supreme Court[46] and

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36. *Id.*

37. *See id.* at 232, 415 S.E.2d at 721.

38. *See id.* at 234, 415 S.E.2d at 722–23.

39. *Compare id.* at 233, 415 S.E.2d at 722 (factoring as part of the reasonable suspicion decision the fact that the defendant "immediately moved away" after being approached by an officer, though the court fell short of requiring the defendant to have actually fled), *with* State v. Mello, 200 N.C. App. 437, 441–47, 684 S.E.2d 483, 487–90 (2009) (suggesting that the criteria that led the North Carolina Supreme Court to uphold *Butler* are also present in the facts of *Mello*, and that Mello drove away from the scene), *aff'd* 364 N.C. 421, 700 S.E.2d 224 (2010).

40. *See Mello*, 200 N.C. App. at 451–56, 684 S.E.2d at 490, 493–95 (Hunter, J., dissenting).

41. *See Butler*, 331 N.C. at 233–34, 415 S.E.2d at 722–23. The *Butler* court listed the contextual factors the officer considered, rather summarily declared them to cumulatively amount to reasonable suspicion, and pronounced lawful the officer's investigative stop for weapons. *Id.*

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

43. *Butler*, 331 N.C. at 233, 415 S.E.2d at 722.

44. *See id.* at 233–34, 415 S.E.2d at 722–23.

45. United States v. Magda, 547 F.2d 756, 758–59 (2d Cir. 1976).

46. *See* United States v. Jones, 584 F.3d 1083, 1087 (D.C. Cir. 2009) (stating in dicta that "[m]erely walking away, even quickly . . . upon the arrival of the uniformed police officer would not provide articulable suspicion of criminal wrongdoing").

the North Carolina courts.[47] Indeed, Butler's act of "immediately mov[ing] away"[48] appears factually closer to defendants' behavior in cases where courts have declined to find reasonable suspicion, even where the defendant was present in a high-crime area.[49]

C. *The Majority Used* Magda *to Hedge Its Legal Bets*

While silent on the elastic definition of flight in *Butler*, the *Mello* court seemed to anticipate an attack on the argument that Mello exhibited behavior of flight, and so it implied an alternative theory.[50] Rather than rely on evidence of Mello's own behavior of flight, the majority implied that, under *United States v. Magda*,[51] Mello could assume the suspiciousness associated with the flight of his pedestrian companions.[52] In *Magda*, a uniformed police officer patrolling an area known to have a high incidence of drug activity saw two men exchange an object.[53] Upon seeing the officer, one man walked quickly in the other direction while the other, Magda, walked in the direction of the officer.[54] The officer stopped Magda and subsequently arrested him.[55]

The *Mello* court used *Magda* to support the proposition that courts have considered, and continue to recognize, that non-party conduct may be pertinent to the reasonable suspicion inquiry.[56] However, the *Mello* court nearly ignored the factual differences between the two cases. One big

47. *See In re* J.L.B.M., 176 N.C. App. 613, 621–22, 627 S.E.2d 239, 245 (2006) (holding that a juvenile's decision to walk away from an approaching patrol car was insufficient to provide reasonable suspicion); State v. Rhyne, 124 N.C. App. 84, 89–91, 478 S.E.2d 789, 791–93 (1996) (stating that police lacked reasonable suspicion to pat down a defendant who was sitting in an area known for drug activity without taking evasive action).

48. *Butler*, 331 N.C. at 233, 415 S.E.2d at 722.

49. *See, e.g.*, State v. Fleming, 106 N.C. App. 165, 170–71, 415 S.E.2d 782, 785–86 (1992) (holding that presence in high-drug area plus decision to walk away from police did not give rise to reasonable suspicion).

50. When relying heavily on *Butler*, the *Mello* court dismissed the notion that the two cases were incompatible because the *Butler* defendant was the individual who took evasive action, whereas two pedestrians, rather than the *Mello* defendant, fled from the scene. *See* State v. Mello, 200 N.C. App. 437, 449–51, 684 S.E.2d 483, 491–93 (2009), *aff'd* 364 N.C. 421, 700 S.E.2d 224 (2010).

51. 547 F.2d 756 (2d Cir. 1976).

52. *See Mello*, 200 N.C. App. at 450–51 684 S.E.2d at 492. *Magda*, a New York case, was cited in *Butler* in support of the same theory about non-party behavior and its impact on a defendant's suspiciousness. *See Butler*, 331 N.C. at 234, 415 S.E.2d at 723.

53. *Magda*, 547 F.2d at 757.

54. *Id.*

55. When stopped, Magda first told the officer that nothing had happened, but when pressed, Magda stated that he had just bought a marijuana cigarette, which he showed to the officer. *Id.* The officer arrested Magda and, pursuant to a search incident to a lawful arrest, discovered evidence linking Magda to a bank robbery. *Id.*

56. *Mello*, 200 N.C. App. at 449–51, 684 S.E.2d at 492.

distinction is the nature of the police interaction: Magda was stopped on the street while walking, and Mello was pulled over by a police vehicle with its lights activated. The *Magda* stop could be reasonably interpreted as a consensual police-civilian encounter, whereas Mello was under a legal obligation to stop his vehicle. This major factual difference, among others, raises the question of whether the legal principle of *Magda* is applicable to *Mello*.[57] Still, *Magda* reaffirms the important contention that "the circumstances before [the officer] are not to be dissected and viewed singly; rather they must be considered as a whole."[58] Separating Magda's actions from the other individual's behavior and Mello's actions from the pedestrian's behavior requires factual and logical contortion beyond what high courts have deemed legally prudent.[59]

Mello cited selectively to *Butler* and *Magda* as independent, alternative theories to reinforce the validity of the investigatory stop of Mello. As *Butler* may have been cited to suggest that Mello in fact fled,[60] *Magda*, on the other hand, suggests that Mello need not himself have fled; it was sufficient that Magda's marijuana dealer fled. However, unlike in *Mello*, the *Magda* analysis requires no contortions of fact and no dictionary inquiries into what it means "to flee."[61]

D. The Dissenting Opinion

On its face, the dissenting opinion in *Mello* set out to achieve two objectives: dissect the flaws in the majority's legal analysis;[62] and criticize the majority's use of *Magda* to support the contention that flight of a non-party may cast suspicion on a defendant who did not flee.[63] But beneath this surface argument, the dissent revealed a deeper discomfort with the Supreme Court precedent that makes flight such an important element in the reasonable suspicion test.

By questioning the strength of the *Magda* rule[64] and casting doubt on its force in North Carolina,[65] the dissent declined to consider the flight of

57. *See id.* at 449 n.3, 684 S.E.2d at 492 n.3 (stating that the facts of *Magda* and *Butler* differ, but the principle of law from *Magda* still applies).

58. *Magda*, 547 F.2d at 758 (quoting United States v. Hall, 525 F.2d 857, 859 (D.C. Cir. 1976)).

59. *See* United States v. Hall, 525 F.2d 857, 859 (D.C. Cir. 1976).

60. *See supra* text accompanying notes 29–49.

61. *See Mello*, 200 N.C. App. at 442–43, 684 S.E.2d at 487–88; *see also supra* text accompanying notes 50–59 (arguing that *Butler* mischaracterized the defendant's actions as flight).

62. *Mello*, 200 N.C. App. at 453–57, 684 S.E.2d at 494–96 (Hunter, J., dissenting).

63. *Id.* at 455–56, 684 S.E.2d at 495–96.

64. *Mello*, 200 N.C. App. at 455–56, 684 S.E.2d at 495–96 (Hunter, J., dissenting) ("*Magda* hardly stands for the proposition that the flight of third persons other than the defendant is singularly sufficient for 'reasonable suspicion.' ").

non-parties in the reasonable suspicion calculation.[66] The dissent pointed out that "if we look only at the defendant's actions leading up to Officer Pritchard's intervention, we are left only with the defendant being approached by two individuals who put their hands into his car in a 'well-known drug location.' "[67] From the dissent's perspective, the factual findings were listed numerically and easily identifiable, making it a simple task to separate the defendant's actions from those of non-parties.[68] However, as the dissent well knew, the reasonable suspicion calculation occurs not in a courtroom, but on the street, where a possible crime scene is "rapidly unfolding and often dangerous."[69]

E. Analysis of the Dissent's Theory

The dissent seemed to eschew a "general" totality of the circumstances test—where the court considers facts and circumstances both incidental and directly relevant to the defendant—in favor of "specific" totality, where the court selectively applies facts and circumstances only if they pass some sort of threshold test for sufficient relation to the defendant.[70] In both *Mello* and *Magda*, specific totality would cut against finding reasonable suspicion, as the non-parties did the fleeing in those cases. However, numerous practical concerns make the dissent's theory of non-party behavior unworkable.

The dissent's theory would encourage a police officer to parse out the suspicious event as it relates to the suspected person—in other words, target the suspect and then assess the surroundings. This arrangement

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65. *Id.* at 455, 684 S.E.2d at 495. *Magda* is a Second Circuit case and was cited in *Butler* for a separate principle of law than in *Mello*. *See supra* note 61 and accompanying text.

66. *Mello*, 200 N.C. App. at 457, 684 S.E.2d at 496 (Hunter, J., dissenting) ("Were the fleeing individuals the defendants in this appeal, their actions would certainly bear the indicia of guilt prescribed by our United States Supreme Court.").

67. *Id.* at 455, 684 S.E.2d at 495.

68. *See, e.g.*, *id.* at 440–41, 684 S.E.2d at 486–87 (majority opinion).

69. Terry v. Ohio, 392 U.S. 1, 10 (1968).

70. In this analysis, "general use" of the totality test refers to the scope of facts included in the test. It is not synonymous with the type of non-particularized suspicion that the *Terry* test seems to eschew. *See id.* at 21 (using language like "particular," "specific," and "articulable" to describe the justification for a police intrusion); Esther Jeanette Windmueller, *Reasonable Articulable Suspicion—The Demise of* Terry v. Ohio *and Individualized Suspicion*, 25 U. RICH. L. REV. 543, 552 (1991) (citing Yale L. Rosenberg, *Notes from Underground: A Substantive Analysis of Summary Adjudication by the Burger Court: Part II*, 19 HOUS. L. REV. 831, 890–91 (1982)) (charting the evolution and "descent" of *Terry*'s reasonable articulable suspicion standard in subsequent court decisions). In another variation, one scholar uses "generalized suspicion" to refer to group searches. *See* Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 612 (2007) (permitting generalized suspicion to justify group searches "only if there is reason to believe that the proportion of criminals likely to be so discovered roughly equals the hit rate associated with the intrusion involved").

essentially requires that an officer ignore or discount some suspicious actions and not others, simply because the officer has had to "choose" a suspect. This sequencing works against an officer's police training, which ordinarily teaches him to view the whole scene for ongoing activity.[71] Instead, the officer must identify the suspected person, and then ascribe suspicious behavior or occurrences to him. This seems both prejudiced and cognitively complicated.

Perhaps more problematic is the requirement that the officer make evidentiary and probability calculations within seconds of an event. The Supreme Court originally designed the totality test to apply in "rapidly unfolding and often dangerous situations on city streets [where] the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess."[72] The Court's time-consciousness denotes that necessary quick action, rather than precision, justifies the minimal intrusion of an investigative stop.[73]

Separating the actions of one individual is not only contrary to the way a police officer performs his duties, it also runs counter to how one theory of cognitive psychology explains human perception. When a person visually takes in a scene, she tends to cognitively organize the people and things in the scene as a group, or as a whole.[74] The dissent's view would require an officer to overcome this cognitive tendency in order to close any gap between the suspected individual with the suspicious actions. The totality test parallels our mental processes by allowing us to take in "the *whole* picture."[75]

The unworkable result of a narrower reasonable suspicion test suggests the dissent's deeper discomfort with the legal principle that makes the *Magda* rule significant in *Mello*: the high-crime status of the neighborhood. In particular, the dissent suggested an aversion to the "neighborhood plus" line of cases, in which courts have sometimes found reasonable suspicion by considering an often innocuous act in the context

71. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, CRIME SCENE INVESTIGATION: A REFERENCE FOR LAW ENFORCEMENT TRAINING 10 (2004), *available at* http://www.ncjrs.gov/pdffiles1/nij/200160.pdf.

72. *See Terry*, 392 U.S. at 30; *infra* Part II.B.

73. *See Terry*, 392 U.S. at 10.

74. *See* GREGORY A. KIMBLE, PSYCHOLOGY: THE HOPE OF A SCIENCE 115 (1996). The genre of Gestalt psychology more generally posits that the "whole" that humans perceive is different from the sum of the scene's individual parts. *See generally* KURT KOFFKA, PRINCIPLES OF GESTALT PSYCHOLOGY (1935) (outlining the Gestalt model of perception and cognition).

75. United States v. Sokolow, 490 U.S. 1, 8 (1989) (emphasis added) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

of a high-crime neighborhood.[76] In this view, seemingly innocent acts take on a suspicious character in a high-crime neighborhood, where the same acts in a different neighborhood might not attract police attention at all. By requiring more of an evidentiary showing to substantiate reasonable suspicion, the dissent opposed the hair trigger nature of reasonable suspicion with respect to high-crime neighborhoods.

In *Mello*, flight was the "plus" factor in the neighborhood plus calculation. The Supreme Court has noted that running, the activity most often associated with flight, is capable of innocent explanation.[77] The dissent was prepared to ignore the plus factor, not because it lacks criminal valence, but because Mello was not the one who fled. However, as suggested above, it strains logic and legal prudence to ignore that Mello's companions fled after having contact with Mello. Instead, the dissent may have attacked the flight factor because it seemed an easier way of declining to find reasonable suspicion in the investigatory stop of Mello; whether flight by a non-party counts as a plus factor may be a less formidable legal question than high-crime neighborhood status. The simplicity of the argument causes its failure. The *Mello* dissent loses on the question of whether non-party behavior belongs in the reasonable suspicion calculation, and so the case never reaches the veiled issue of whether the high-crime neighborhood factor is legitimate in *Mello* or legitimate in the first instance.

With the majority finding reasonable suspicion and the dissent unwilling to recognize it, each side articulated its position on how far it was willing to look outside of the defendant's specific context when making the neighborhood plus calculation. The ease of finding reasonable suspicion in a high-crime neighborhood brings a broader question of Fourth Amendment jurisprudence to the fore: how far have we strayed from the Constitution's original mandates in deciding a case like *Mello*, where

76. *See* Raymond, *supra* note 22, at 115–16. Such banal acts have included "[w]alking across a shopping center parking lot late at night, looking into the open palm of a companion, or looking into the trunk of someone's car ." *Id.*; *see, e.g.*, Jackson v. State, 804 S.W.2d 735, 737 (Ark. Ct. App. 1991) (en banc) (holding that defendants standing on a street corner in a high crime neighborhood was sufficient reasonable suspicion); State v. Lomnicky, No. MV 120200, 1997 Conn. Super. LEXIS 833, at *2 (Conn. Super. Ct. Mar. 26, 1997) (holding that sitting in a parked car in a high-crime neighborhood was enough to substantiate the police officer's reasonable suspicion).

77. Illinois v. Wardlow, 528 U.S. 119, 128–29 (2000) ("A pedestrian may break into a run for a variety of reasons—to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest, to avoid contact with a bore or a bully, or simply to answer the call of nature—any of which might coincide with the arrival of an officer in the vicinity.").

neither the high-crime status of the neighborhood nor the evasive behavior was particularized to the defendant?

II. FOURTH AMENDMENT ANTECEDENTS

While the existence or nonexistence of various factual circumstances may have been dispositive in *Mello*, it is important to recognize the vast body of constitutional law that has given legal force to those various factual concerns. The content of Fourth Amendment protection is famously complex and often results in uneven law.[78] Still, understanding these historical origins may shed light on the reasonableness or unreasonableness of Mello's particular police encounter.

A. Seizures Under the Fourth Amendment

The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures, and also protects the "right of the people to be secure in their persons."[79] Perhaps the most apparent type of seizure is the formal arrest, which must be reasonable in order to be legal.[80] A seizure of a person occurs when a reasonable person would have believed her freedom of movement was restricted, in view of all of the surrounding circumstances.[81] The boundary between consensual submission to a stop (e.g. choosing to speak with police) and a police seizure can be at its most nebulous in the context of a police encounter with a civilian on the street.[82]

A lawful seizure must be founded upon probable cause.[83] In one of its early iterations, probable cause was framed as a question of whether the "facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that" the individual was guilty of the offense.[84] This determination is often made using a case-by-case balancing test between an individual's right against government

78. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–59 (1994) (noting that Fourth Amendment jurisprudence "is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse").

79. U.S. CONST. amend. IV; *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the Fourth Amendment to states through the Fourteenth Amendment).

80. 3 LAFAVE, *supra* note 14, § 5.1, at 4.

81. United States v. Mendenhall, 446 U.S. 544, 554 (1980); *see also* Florida v. Royer, 460 U.S. 491, 502 (1983) (accepting the *Mendenhall* test for seizures).

82. *See* 3 LAFAVE, *supra* note 14, § 5.1, at 6.

83. U.S. CONST. amend. IV; *see also* 3 LAFAVE, *supra* note 14, § 5.1(b), at 14 (discussing the standard in the context of warrantless arrests).

84. Carroll v. United States, 267 U.S. 132, 162 (1925).

intrusion and law enforcement.[85] This *ad hoc* approach demonstrates that probable cause is "an exceedingly difficult concept to objectify," made even more complicated when multiple actors are responsible for identifying it.[86]

Police make the probable cause determination in the case of a warrantless arrest, where "the quantum of information which constitutes probable cause . . . must stand upon firmer ground than mere suspicion."[87] Alternatively, where police make an arrest with a warrant, a magistrate has made the probable cause determination in issuing the warrant.[88] While the precise standards of probable cause may vary, much Supreme Court attention has been focused on justifying serious intrusions on freedom.[89] Parallel doctrines with less stringent procedural and substantive protections have been developed for a class of police activity that is considered less intrusive.

B. Investigatory Stops Under Terry v. Ohio

In *Terry v. Ohio*,[90] the Supreme Court stated that an investigative stop or limited pat-down procedure for weapons did not rise to the level of a police search or seizure, and thus no probable cause was required by law.[91] Instead, the Supreme Court required that police abide by a less onerous standard: reasonable and articulable suspicion.[92] Reasonable suspicion, in turn, was to be determined based on "all the circumstances surrounding an encounter."[93] This totality test aimed to defer to the reasonable suspicions of veteran law enforcement officials while limiting the intrusion on the suspected person.[94]

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85. *See* Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967).

86. *See* 2 LAFAVE, *supra* note 14, § 3.2, at 24 (quoting Joseph G. Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317, 317 (1971)). While a law enforcement officer can make a warrantless arrest at the scene, the arrestee is legally entitled to a prompt post-arrest probable cause hearing before a court. *See* Gerstein v. Pugh, 420 U.S. 103, 123–25 (1975).

87. Wong Sun v. United States, 371 U.S. 471, 479 (1963).

88. 2 LAFAVE, *supra* note 14, § 3.1(c), at 15.

89. *See* United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) ("The contours and salient principles of probable cause have been faithfully catalogued in a surfeit of decisional law.").

90. 392 U.S. 1 (1968).

91. *Id.* at 27. *Terry* principles have been expanded to include a limited search for narcotics. *See, e.g.*, United States v. Place, 462 U.S. 696, 706 (1983).

92. *See Terry*, 392 U.S. at 27.

93. Ybarra v. Illinois, 444 U.S. 85, 107 (1979).

94. *Terry*, 392 U.S. at 28 ("Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.").

Since *Terry*, courts have narrowed the link between suspected crimes involving weapons and suspected crimes involving narcotics and contraband, justifying an investigative pat-down of those suspected of being involved with narcotics.[95] *Terry* analysis has also been applied to incidents involving automobiles, as officers are now allowed to stop a moving vehicle based on a reasonable and articulable suspicion that its occupants are engaged in illegal drug trafficking.[96] These principles form the legal foundation under which an officer may stop a driver without probable cause. The tension in the *Mello* case exists over whether Officer Prichard had the requisite reasonable suspicion for the stop given the events he witnessed.

An investigative stop based on a reasonable suspicion of criminal activity can arise from wholly lawful conduct.[97] In the context of *Mello*, the defendant's behavior of "merely" driving down the street after chatting with two pedestrians may have been lawful, but when viewed together with other factors, may have given rise to reasonable suspicion. Mello's actions, in and of themselves, were innocuous. In this same vein, the fact that an action may be "susceptible of an innocent explanation" does not necessarily establish a Fourth Amendment violation.[98] Indeed, the Supreme Court has noted that with reasonable suspicion, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."[99] These acts are considered cumulatively in the totality of the circumstances test, which takes into account all of the surrounding facts in a situation and requires a professional assessment as to whether the sum of all of the facts passes the reasonable suspicion threshold.[100] Evidence obtained from an investigative stop based on reasonable suspicion may be used against the person from whom the evidence was taken.[101]

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95. United States v. Ceballos, 719 F. Supp. 119, 126 (E.D.N.Y. 1989) ("Because of the increasingly violent nature of narcotics trafficking . . . the need to frisk those suspected of committing a narcotics offense in the course of a street encounter is obvious.").

96. *See, e.g.*, United States v. Sharpe, 470 U.S. 675, 687 (1985).

97. *See* United States v. Arvizu, 534 U.S. 266, 274–75 (2002); Illinois v. Wardlow, 528 U.S. 119, 125–26 (2000); United States v. Sokolow, 490 U.S. 1, 9–10 (1989).

98. *See Wardlow*, 528 U.S. at 125; State v. Mello, 200 N.C. App. 437, 453, 684 S.E.2d 483, 494 (2009) (Hunter, J., dissenting), *aff'd* 364 N.C. 421, 700 S.E.2d 224 (2010).

99. Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983); *see also Sokolow*, 490 U.S. at 9 (holding that factors which by themselves were "quite consistent with innocent travel" together amounted to reasonable suspicion).

100. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (allowing a policeman to make reasonable inquiries where he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot"); United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) (stating that the totality test "[v]iewed singly . . . may not be dispositive, yet when viewed in unison the puzzle may fit").

101. *Terry*, 392 U.S. at 31.

C. *Stops in High-Crime Neighborhoods*

While a defendant's own behavior may cause a police officer to be reasonably suspicious that the defendant is engaged in criminal activity, factors external to the defendant also play into the reasonable suspicion calculation. Part of Officer Pritchard's reasonable suspicion of Mello stemmed from Mello's presence in a high-crime neighborhood.[102] The content of suspicion based on a neighborhood's status is both complex and controversial, and opens up a related discussion about the relevance of a suspected persons' associations to the high-crime neighborhood criterion.

In *Illinois v. Wardlow*,[103] the Supreme Court held that the defendant's presence in a high-crime area, coupled with unprovoked, "headlong flight" from police, provided reasonable suspicion for an investigative stop.[104] In so holding, the Supreme Court noted that the fact that an investigatory stop occurred in a high-crime area is relevant to determining the validity of the stop considerations in a *Terry* analysis.[105]

In cases where courts have grounded reasonable suspicion in the high-crime character of a neighborhood, the neighborhood's character is used as a heuristic, or experienced-based shortcut for problem solving, to better understand and predict the kind of behavior that "should" occur in that neighborhood.[106] This shortcut for finding reasonable suspicion throws into sharp relief how far courts have strayed from the original strictures of Fourth Amendment search and seizure law. Some scholars have criticized the high-crime neighborhood criterion for being a proxy for profiling based

102. *Mello*, 200 N.C. App. at 440, 684 S.E.2d at 486.

103. 528 U.S. 119 (2000).

104. *Id.* at 124–25.

105. *Id.* at 124. Limiting principles exist in the *Wardlow*-type situation. For example, mere presence in a neighborhood frequented by drug users does not alone constitute a basis for concluding that the defendant was himself engaged in criminal activity. Brown v. Texas, 443 U.S. 47, 52 (1979). Similarly, "[m]erely walking away, even quickly . . . upon the arrival of the uniformed police officer would not provide articulable suspicion of criminal wrongdoing." United States v. Jones, 584 F.3d 1083, 1087–88 (D.C. Cir. 2009) (obiter dictum).

106. *See* Raymond, *supra* note 22, at 134–35 n.107 ("If a court were asked to evaluate the separate likelihood that each of twenty individuals standing on a street corner in a high crime neighborhood were engaged in criminal activity, the decisionmakers might then view base-rate information as relevant."); *see, e.g.*, United States v. Momodu, 909 F. Supp. 1571, 1575 (N.D. Ga. 1995) (noting that while "both time of day and the level of criminal activity in the area" are important to a court's analysis, they are "facts which focus on defendant's surroundings rather than on the defendant himself," and thus, "an additional fact or facts particular to defendant's behavior is required to justify a suspicion of criminal conduct"); State v. Dickerson, 481 N.W.2d 840, 843 (Minn. 1992) (holding that the police justifiably stopped the defendant, who made eye contact with police and turned to walk in the other direction after he was seen leaving an apartment building known as a "24-hour-a-day crackhouse").

on race or socio-economic status.[107] It may also imply that in high-crime areas, police attach too much weight to conceivably neutral behavior, such as standing on a street corner or sitting in a parked car.[108] In spite of this criticism, the high-crime criterion "has become a familiar 'talismanic litany' often quoted and almost always determinative in legitimating the police conduct of stopping an individual."[109]

In *Mello*, the majority and dissent treated the high-crime criterion differently. Whereas the majority tacitly accepted it by citing precedent that adopts *Wardlow*,[110] the dissent strongly resisted applying the high-crime neighborhood factor to this case by questioning whether the area in fact had a high incidence of drug crime and casting doubt on Officer Pritchard's experience with the neighborhood.[111] In this line of reasoning, the dissent took a more independent view by questioning the factual applicability of the rule, instead of the constitutionality of the rule itself.[112]

D. *Another Angle: Reasonable Suspicion by Association*

Mello is susceptible to attack from a number of angles, most notably because the majority's reasoning accepted the logic that the suspiciousness

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107. *See* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1590–93 (2008) (citing David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–78 (1994) ("It will not surprise anyone who lives or works in an urban center to learn that these areas share another characteristic in addition to the presence of crime: They are racially segregated. African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas.")).

108. *See* Jackson v. State, 804 S.W.2d 735, 737 (Ark. Ct. App. 1991) (en banc) (finding reasonable suspicion where defendant was standing on a street corner in a neighborhood known for drug sales); State v. Lomnicky, No. MV 120200, 1997 Conn. Super. LEXIS 833, at *2 (Conn. Super. Ct. Mar. 26, 1997) (finding reasonable suspicion where defendant was observed in a parked car in a parking lot that was known for drug and prostitution activities). Attaching too much weight to a particular fact is a phenomenon explored in the psychology of heuristics. In making calculations that require judging the probability of a particular possibility, people often "overestimate the probabilities of representative . . . events and/or underestimate the probabilities of less representative events." Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293, 311 (1983).

109. Ferguson & Bernache, *supra* note 107, at 1590 (quoting Curtis v. United States, 349 A.2d 469, 472 (D.C. Cir. 1975)).

110. *See* State v. Mello, 200 N.C. App. 437, 445–46, 684 S.E.2d 483, 489–90 (2009) (employing the analysis of *Butler* regarding flight in a high crime neighborhood), *aff'd* 364 N.C. 421, 700 S.E.2d 224 (2010).

111. *Id.* at 454–55, 684 S.E.2d at 495 (Hunter, J., dissenting).

112. *See, e.g.*, Stanley A. Goldman, *To Flee or Not To Flee—That Is the Question: Flight as Furtive Gesture*, 37 IDAHO L. REV. 557, 572 (2001) (exploring how judges attempt to find a constitutionally acceptable definition of "high-crime area" without questioning the designation itself).

of a behavior could depend on where the behavior is taking place.[113] Case law relevant to whether and how much a person's surroundings should weigh on his suspiciousness has rendered an inconsistent and incoherent doctrine[114] and seems to suggest that someone is more suspect simply because he is standing in one location and not another.[115] Yet, *Mello* involved an additional layer of ambiguity with respect to a defendant's relationship to the source of suspiciousness.

Officer Pritchard was suspicious of Mello not just because the neighborhood was known for drug sales, but also because Mello had shown himself to be associated with people who demonstrated the "consummate act of evasion"—flight.[116] As noted above, it is logical to ascribe to Mello the suspicious behavior of his associates within the totality test. [117] It may also be legally sound to view a suspected person in light of his associates.

Like with the assumption that suspicious behavior in a high-crime neighborhood is more likely to be criminal, weighing the importance of relationships or associations also requires a police officer to use a heuristic.[118] To date, however, the Supreme Court has applied the suspicious-by-association heuristic only to probable cause determinations for arrests or searches.[119] In these instances, probable cause requires more than mere proximity to criminal activity alone.[120] As of yet, the Court has

113. *See Mello*, 200 N.C. App. at 446–47, 684 S.E.2d at 490; *supra* Part II.C.

114. *See generally* Amar, *supra* note 78, at 757–59 (asserting that the Supreme Court, practitioners, and academics have framed Fourth Amendment jurisprudence in a light that is "not merely complex and contradictory, but often perverse").

115. Raymond, *supra* note 22, at 138–39.

116. Illinois v. Wardlow, 528 U.S. 119, 124 (2000); *see also Mello*, 200 N.C. App. at 446–47, 684 S.E.2d at 490 (holding that flight and presence in a high-crime neighborhood, when considered together, justified a stop).

117. *See supra* Part I.C.

118. *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1330 n.2 (1971) ("[A]ll factual evidence is ultimately 'statistical,' and all legal proof ultimately 'probabilistic,' in the epistemological sense that no conclusion can ever be drawn from empirical data without some step of inductive inference .") (emphasis omitted).

119. *See supra* Part II.A (suggesting that probable cause requires a higher degree of suspicion than reasonable suspicion); Terry v. Ohio, 392 U.S. 1, 20 n.16 (1968).

120. Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (citing Sibron v. New York, 392 U.S. 40, 62–63 (1968)) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."). In *United States v. Di Re*, 332 U.S. 581 (1948), *superseded by statute on other grounds*, TEX. PENAL CODE § 38.03, *as recognized in* Villafranca v. United States, No. 3:06-CV-0806-N, 2008 U.S. Dist. LEXIS 111716, at *5–6 (N.D. Tex. Aug. 19, 2008), and *Ybarra v. Illinois*, the Supreme Court held that police must have particularized probable cause in order to arrest and/or search an individual. Closeness to criminal activity is not enough to give rise to probable cause. However, if there is evidence of a common criminal enterprise, the link between the proximate criminal activity and the individual is tighter, and probable cause may be sufficiently particularized to that individual.

not applied the heuristic in the context of an investigative stop based on reasonable suspicion.

While the Supreme Court has yet to address this issue, a number of state courts have treated an individual's companionship status as valid for consideration under the totality of the circumstances test for a reasonable suspicion-based investigative stop. Notably, in *El-Amin v. Commonwealth*,[121] the Supreme Court of Virginia upheld a pat-down that was based on a police officer's reasonable belief that the individuals involved were traveling in a "pack."[122] The court was "careful to dispel any implication that El-Amin's companionship status alone was sufficient to authorize a pat down search or that an officer's generalized concern for his safety alone would validate such a search under the Fourth Amendment."[123] However, the court found it relevant that during a police encounter with someone understood to be El-Amin's companion, El-Amin "remained within six feet of the officers and did not attempt to withdraw from the area of the encounter, further supporting the officers' perception that the four individuals were a group."[124]

While the Supreme Court of Virginia made companionship status an issue in the *El-Amin* case, North Carolina courts have not yet explicitly adopted the *El-Amin* logic. This is true even though in *Butler*, the defendant's companions' presence in a "drug hole" was listed as one of seven factors within the totality of the circumstances test.[125] It is unclear whether the court weighed more heavily the defendant's presence in a group, or the group's presence in a drug area.[126] The *Mello* majority seemed to take the position of the *El-Amin* court by considering companionship

121. 607 S.E.2d 115 (Va. 2005).

122. *Id.* at 116.

123. *Id.* at 119.

124. *Id.* at 118–19. If the defendant in *El-Amin* had separated from his friends, police officers observing the scene and a court reading the facts might interpret the behavior as "evasive" under *Wardlow*. *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (noting that flight can be an expression of guilt or suspiciousness); *supra* Part II.C. However, the *El-Amin* defendant did not change his location or proximity to the people around him, and this, too, was counted against him with respect to suspiciousness. A defendant in El-Amin's position has the difficult task of adequately separating himself from the source of suspiciousness, and not drawing attention to himself for fleeing.

125. *See* State v. Butler, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (noting that the defendant's location among a group of people was important).

126. *See id.* Courts in other states have not clarified whether group activity in a high-crime area is worse than, or distinct from other activity in a high-crime area. For example, one case in Nevada also enmeshes the issue of the high-crime neighborhood status with suspicious group behavior. *See* State v. Stinnett, 760 P.2d 124, 127 (Nev. 1988), ("The men were in a neighborhood that was known for drug related activity. They were huddled together in a suspicious manner in front of an abandoned residence. Upon seeing the patrol car, one of the men fled without provocation toward the rear of the abandoned residence.").

status as a factor in the totality test; Mello's association with people who fled reflected on Mello's own suspiciousness.[127]

III. *MELLO*, NARROWLY CONCEIVED

As the previous parts suggest, *Mello* is consistent with the line of Supreme Court cases arising out of *Terry v. Ohio* that validate investigative stops based on reasonable suspicion. The dissent's opposition to considering the actions of non-parties may have been an abstraction from the dissent's greater discontent with the trajectory of reasonable suspicion in high-crime neighborhoods. Indeed, the *Mello* holding raises questions about its general applicability. Outside the context of a suspected crime that, by its legal elements, requires two or more people to interact, how suitable is it to consider the behavior of non-parties?

The *Mello* decision not only comports with precedent, but also is compatible with the *Terry* decision itself in at least one important respect: it seems that in both *Terry* and *Mello*, the behavior of the non-parties was only relevant insofar as it evinced a common criminal enterprise.[128] In *Terry*, three men acted suspiciously together, though only two were found to be armed after a pat-down search.[129] It is reasonable to conclude that the third non-defendant contributed to, but was not ultimately made party to, the eventual prosecution. There, the non-party's actions were no less crucial to arousing the suspicions of the officer than the actions of the two defendants, and the Supreme Court made no mention of disregarding the non-party's behavior simply because he was not a named defendant.[130] Thus, in creating the reasonable suspicion test, which is, in turn, determined by the totality of the circumstances test, the Supreme Court seemed to contemplate that the conduct of non-parties could factor into the suspiciousness of the defendant.

If the conduct of non-parties is part of the reasonable suspicion calculation, it may make sense to apply this rule only to transaction crimes or suspected transaction crimes, where the behavior of a non-party is necessarily related to the behavior of the defendant because of the nature of

127. *See* State v. Mello, 200 N.C. App. 437, 450, 684 S.E.2d 483, 492 (2009) ("Although the necessary reasonable suspicion can be created by the suspect's own conduct, there are reported cases . . . in which reviewing courts have considered the conduct of third parties to be relevant to the 'reasonable articulable suspicion' inquiry as well."), *aff'd* 364 N.C. 421, 700 S.E.2d 224 (2010).

128. This echoes the rule announced in *Maryland v. Pringle*, 540 U.S. 366, 373 (2003). *See supra* notes 116–27 and accompanying text.

129. Terry v. Ohio, 392 U.S. 1, 5–7 (1968).

130. *See id.* at 7.

the activity.[131] Applying the rule to non-transaction crimes may depart from the factual foundation of *Mello* and cases like it. Moreover, it would seem to violate the Supreme Court pronouncement that *Terry* stops must be based on particularized suspicion,[132] where stops should not be based solely on proximity to criminal activity.[133] This does not mean that the totality test must disregard behavior of non-parties where the suspected crime is not transactional.[134] It may mean, however, that a court might weigh non-party actions less heavily with respect to the defendant, when the defendant is the only person under suspicion.

It follows from the previous discussion that there are some causes for reasonable suspicion that may be beyond the scope of *Mello*. Non-transaction crimes, such as simple drug or weapons possession, do not necessarily implicate another person's participation in committing the criminal offense. The first North Carolina case to cite to *Mello*, *State v. Forse*,[135] demonstrates that applying the *Mello* principle only to transaction crimes strains the logic of the totality test.

In *State v. Forse*, the North Carolina Court of Appeals quoted from *Mello*: "The conduct of third parties present at the scene is also relevant when analyzing the totality of the circumstances."[136] *Forse* applied the

131. The term "transaction crime" is used here to describe conduct that requires the involvement of more than one person in order to qualify as criminal. The clearest example is the sale or purchase of an illicit item such as drugs. By definition, a drug sale cannot be performed without a purchaser; otherwise, the crime might be possession of drugs, which may be accomplished by only one person. Police might suspect individuals around the drug seller to be potential purchasers, so the behavior of an individual's companions might reflect on the suspiciousness of the individual.

132. *See, e.g.*, Maryland v. Buie, 494 U.S. 325, 334 n.2 (1990) ("*Terry* requires reasonable individualized suspicion before a frisk for weapons can be conducted.").

133. In *El-Amin*, the court declined to establish a *per se* rule that would approve the search of someone validly detained solely because of the status of their companion. *See* El-Amin v. Commonwealth, 607 S.E.2d 115, 118 (Va. 2005). Further, the *El-Amin* court opined that the Supreme Court had not adopted a *per se* rule, either. Instead, the searches in the relevant cases "were sustained on grounds other than simple companionship." *Id.* at 118 n.4; *see also* United States v. Simmons, 567 F.2d 314, 320 (7th Cir. 1997) (upholding a search of the area within reach of a companion present during the arrest of a suspect for a violent crime occurring the same night); United States v. Poms, 484 F.2d 919, 921–22 (4th Cir. 1973) (upholding the search of a known associate of an arrestee when the police knew the associate was likely armed and the associate arrived at the arrestee's home during the execution of a search warrant); United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971) (validating the search of an arrestee's wife's purse when police executed an arrest warrant for the arrestee and found his wife in the same car because arrestee could not invoke his wife's personal Fourth Amendment rights and the purse was a temporary "depository" of arrestee's property).

134. *See supra* Part I.A (discussing the totality test as applied in *State v. Butler*, a case not involving a transaction crime).

135. State v. Forse, No. COA10-5, 2010 N.C. App. LEXIS 1288 (N.C. Ct. App. July 20, 2010).

136. *Id.* at *10.

Mello rule to the context of contraband possession, a non-transaction offense. In *Forse*, special agents of the North Carolina Alcohol Enforcement Division saw a driver and passenger in a Mustang pull into the parking lot of a liquor store.[137] The Mustang's passenger went into the liquor store, and when the passenger returned, the driver directed the car to a nearby lot and parked.[138] The two remained in the parking lot after being in the liquor store for only a short time, and this signaled to the agents that the individuals were either drinking in their car or engaging in a drug transaction.[139] Soon after, the defendant arrived in a Toyota and parked close to the Mustang.[140] The defendant's passenger went inside the store, followed by the Mustang's passenger.[141] Inside the store, the agents overheard the two passengers talking about alcohol and drugs.[142] When the agents identified themselves as law enforcement, the defendant's passenger jumped into the Mustang and fled the parking lot, leaving the defendant to speak with the agents.[143] The agents determined that the defendant, who remained in his Toyota, had consumed alcohol, and the agents subsequently found drugs on his person.[144]

Forse exemplifies the difficulty of applying the transaction/non-transaction principle and demonstrates the need for the North Carolina judiciary to announce a clearer principle as to the legitimacy of an investigative stop based on the suspicious status of a non-party companion. *Forse* may be distinguished from Mello in two important respects: *Forse* involved neither a high-crime neighborhood nor a transaction crime.[145] The preceding analysis suggested that there exists a particular danger in the high-crime area context of using too many heuristics to justify reasonable suspicion. A high-crime neighborhood points to what kinds of behavior ought to occur in that area, and the defendant's companions point to what the defendant himself has done. This dynamic is not evident in *Forse*, and this kind of application may lessen the danger in considering the acts of non-parties.

While the lack of high-crime status cuts toward admissibility of non-party actions, the absence of a transaction crime may cut against it. A narrow application of *Mello* would have forced the agents to ignore a

137. *Id.* at *2.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at *3.
142. *Id.*
143. *Id.* at *3–4.
144. *Id.* at *4.
145. *Id.* at *5.

number of critical facts in the case. First, when considering the defendant, who arrived second in the Toyota, the agents would have had to ignore the earlier suspicious behavior of the Mustang's occupants.[146] Second, the agents would have had to disregard the Toyota passenger's flight to the Mustang, and the Mustang's flight from the parking lot. While it may seem improper to disregard these suspicious actions, it is important to recognize that none of the facts imply the defendant's guilt or innocence. Instead, the facts are non-particularized; they merely indicate that the defendant associates with suspicious people.

Forse is an instructive case because it lays bare the tensions and ambiguities that the *Mello* majority and dissent raised. When applied judiciously, the transaction crime limitation could prevent further broadening of "neighborhood plus," at least until the North Carolina judiciary is prepared to adopt a clear rule regarding investigative stops based on the suspicious status of non-party companions.

CONCLUSION

This Recent Development traced the continuity of *Terry v. Ohio*, which originally authorized the investigative stop procedure based on reasonable suspicion, to *State v. Mello*, the North Carolina case holding that the behavior of others present at the scene may be considered when an officer is deciding, based on all of the circumstances, that such an investigative stop is necessary. In exploring this topic, this Recent Development examined and questioned the legal principles behind reasonable suspicions attached to flight, high-crime neighborhoods, and flight in high-crime neighborhoods. It also considered the wisdom of the totality of the circumstances test. In concluding that *Mello* was rightly decided, this Recent Development also suggested that the *Mello* rule could be limited to totality tests involving transaction crimes. Limiting the scope of *Mello* may better reach the delicate balance between personal freedom and safety that *Terry* originally intended to achieve.

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146. This would be true unless the officers reasonably suspected that the occupants of the two cars were going to exchange or sell drugs. *See id.* at *2 (noting the agents' suspicions that a drug transaction might be in progress).