No. 03-1470

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DENVER JUSTICE AND PEACE COMMITTEE, INC., et al.,
Plaintiff-Appellees,

vs.

CITY OF GOLDEN, et al.,
Defendants,
And
ANTHONY ORTIZ, an officer with the Denver Police Department, in his individual capacity,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado

The Honorable Zita L. Weinshienk
Senior District Judge

D.C. No. 02-Z-473 (BNB)

APPELLEE'S BRIEF

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

ISSUES PRESENTED FOR REVIEW

1. Whether a police officer violates the Fourth Amendment by conducting a pat-down frisk in the absence of specific articulable facts that amount to reasonable individualized suspicion that the individual to be frisked is armed and presently dangerous.

2. Whether plaintiff Luis Espinosa-Organista's Fourth Amended Complaint, which alleges that Espinosa was subjected to a pat-down frisk without reasonable suspicion, states a claim for violation of his Fourth Amendment rights.

3. Whether the decisions of the United States Supreme Court and this Court provided defendant Anthony Ortiz with fair warning that his suspicionless pat-down frisk of Espinosa would violate Espinosa's Fourth Amendment rights.

STATEMENT OF THE CASE

In December, 2000, Plaintiff Luis Espinosa-Organista ("Espinosa") was the part-time office administrator of the Denver Justice and Peace Committee ("DJPC"), an interfaith, grass-roots organization, with over 800 members, that works for peace and economic justice in Latin America. Since the early 1980s, DJPC has promoted its views through wholly lawful, peaceful, and nonviolent means. On December 14, 2000, police officers from the City of Golden and the City and County of Denver arrived at the DJPC office in Denver to execute a

search warrant. The warrant authorized them to search for membership lists and numerous documents that memorialize DJPC's lawful advocacy, including:

- "Pamphlets, papers, and flyers that are protest related";
- "Posters that are protest related";
- "Videotape and still photographs of persons protesting any organization or business"; and
- "Membership lists for Denver Peace & Justice Committee."

The police officers confiscated membership lists, mailing lists, phone tree lists, leaflets, pamphlets, posters, newsletters, articles, and other advocacy materials.

DJPC filed suit contending that the search and seizure violated its rights under the First and Fourth Amendments and the Privacy Protection Act of 1980. Espinosa joined the action to seek nominal damages from Denver police officer Anthony Ortiz ("Ortiz"), who subjected Espinosa to a suspicionless pat-down frisk during the search of the DJPC office.

Ortiz moved to dismiss Espinosa's claims on the basis of qualified immunity. The District Court denied the motion, and Ortiz filed this interlocutory appeal. DJPC's claims are not before the Court. The sole legal issue in this appeal is whether the District Court correctly denied Ortiz's motion to dismiss Espinosa's claims.

STATEMENT OF FACTS

Although DJPC's claims of an illegal search and seizure are not before the Court, some background about DJPC, the search of its office, and the crime under investigation will assist the Court's evaluation of Ortiz's arguments. As Ortiz acknowledges, AB at 6,[1] the factual allegations of the Fourth Amended Complaint ("Complaint") must be accepted as true when evaluating a motion to dismiss.

A. Espinosa is the office manager of an organization with a twenty-year track record of consistent dedication to peaceful nonviolent advocacy

At all times relevant to the Complaint, Espinosa was the part-time office administrator of DJPC, which shares office space with the Quaker-run American Friends Service Committee (AFSC). Complaint, ¶¶ 5, 8, Aplt. App. at 124, 126.

In its nonviolent advocacy campaigns, DJPC has sought to raise public awareness about ways in which it believes that United States foreign policy thwarts the goals of peace and justice in Latin America. In its early years, DJPC criticized the United States government's support for repressive military dictatorships and opposed our government's involvement in Central American armed conflicts. In more recent years, it has linked the policies of the World Bank and the International Monetary Fund to the perpetuation of poverty and economic dependence in Latin America. Complaint, ¶ 6, Aplt. App. at 125. DJPC carries

[1] Appellant's Brief will be abbreviated as AB. The Fourth Amended Complaint will be referenced as "Complaint."

out its advocacy through its newsletter, its web site, and through speakers, articles, leaflets, letter writing campaigns, peaceful picketing, legislative advocacy, and coalition work. Complaint, ¶ 7, Aplt. App. at 125.

B. DJPC participated in a national campaign in support of Nicaraguan workers

During 2000, DJPC participated in a nationwide nonviolent advocacy campaign in support of workers who were seeking improved working conditions at various factories in Nicaragua, including a plant that produces blue jeans for Kohl's Department Stores. The campaign included peaceful picketing and leafleting at Kohl's Department Stores around the country, with a goal of increasing public awareness of the situation of the workers who produce some of the clothing sold at Kohl's.

Participants nationwide included religious groups, human rights groups, students, and labor organizations. During the summer and fall of 2000, at least five dozen Kohl's stores around the country were the scene of peaceful rallies, demonstrations, and distributions of leaflets conducted by supporters of union workers in Nicaragua. Complaint, ¶¶ 19-22, Aplt. App. at 128. DJPC sponsored such a rally at the Kohl's store in Golden in August, 2000, which proceeded peacefully and without incident. Complaint, ¶ 32.b., Aplt. App. at 131.

C. In December, DJPC sponsored a peaceful rally at Kohl's Department Store

The national campaign called for a special holiday-season "mobilization" to organize additional nonviolent actions at Kohl's stores between Thanksgiving and Christmas. As part of this national effort, DJPC sponsored a rally on December 9, 2000, at the Kohl's store in Golden. Complaint, ¶ 23, Aplt. App. at 128-29. Announcements of the upcoming rally appeared on the Internet and invited the public to participate in costume. Some participants learned of the rally from those announcements. Complaint, ¶ 32, Aplt. App. at 131.

During the rally, participants sang carols, displayed signs, and peacefully distributed literature outside Kohl's. A number of shoppers signed communications addressed to Kohl's management that expressed support for the Nicaraguan workers. Complaint, ¶ 24, Aplt. App. at 129.

D. During the rally, four persons dressed as Santa Claus arrived, vandalized merchandise, and fled

About half an hour after the rally and literature distribution began, a group of four unidentified individuals arrived dressed in Santa Claus costumes. They entered the Kohl's store and one or more of them vandalized property by applying spray paint to store merchandise. The individuals in Santa Claus costumes then fled. Complaint, ¶ 25, Aplt. App. at 129.

E. DJPC did not authorize, approve, or have any advance knowledge of the vandalism, which DJPC strongly condemned

The vandalism was inconsistent with DJPC's mission, goals, tactics, and values. Complaint, ¶ 32.a., Aplt. App. at 130-31. DJPC did not have advance knowledge of, condone, authorize, approve, or ratify the alleged vandalism. Indeed, DJPC strongly condemned the destruction of Kohl's property and stressed that DJPC opposes any and all violent lawbreaking. Complaint, ¶¶ 26-27, Aplt. App. at 129.

F. The Golden Police Department obtained a warrant to search the office of DJPC and seize its membership list as well as any papers, pamphlets, flyers, or posters that are "protest related"

The Golden Police Department investigated the vandalism. As part of that investigation, Golden police officers drafted an affidavit seeking authority to search the office of DJPC. Complaint, ¶ 29, Aplt. App. at 130. The Jefferson County Court issued the requested warrant. Complaint, ¶¶ 29, 33, Aplt. App. at 130-31.

The warrant authorized law enforcement officers to seize specified property at the DJPC's offices, including, but not limited to, the following materials:

- "Pamphlets, papers, and flyers that are protest related";
- "Posters that are protest related";
- "Videotape and still photographs of persons protesting any organization or business"; and

- "Membership lists for Denver Peace & Justice Committee."

Complaint, ¶ 34, Aplt. App. at 131. The Complaint alleges that no reasonable officer could have believed that the warrant, or the affidavit in support of it, satisfied the applicable legal standard to seize these materials that are protected by the First Amendment. Complaint, ¶ 35, Aplt. App. at 132.

There was not probable cause to believe that DJPC was responsible for the crime under investigation. Complaint, ¶¶ 73-82, Aplt. App. at 140-41 (claim for relief under Privacy Protection Act of 1980). Thus, the search was the kind the Supreme Court has described as a "third party" search, where officers believe that evidence may be located on identified property "but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred." Zurcher v. Stanford Daily, 436 U.S. 547, 553 (1978).

G. Police spent three-and-one-half hours rummaging through DJPC's files and papers and seized numerous items not specified in the already over-broad warrant

On December 14, 2000, officers from the Golden and Denver police departments arrived at the AFSC and DJPC offices and carried out the search. The Denver officers assisted the Golden officers and in all respects acted in concert with them. Complaint, ¶¶ 36, 38, Aplt. App. at 132.

Police stayed for three and one-half hours. They rummaged through closets, desk drawers, cupboards, file cabinets, and file folders as they selected items to

confiscate. They seized numerous articles, posters, pamphlets, correspondence, writings, mailing lists, media contact lists, phone tree lists, and other written material that was not specified in the already vague and over-broad warrant. Complaint, ¶¶ 37, 43-44, Aplt. App. at 133-33. Paragraph 46 of the Complaint contains subparagraphs a through jj, each listing a separate item from the inventory of materials seized. None of the materials listed is evidence of crime nor the fruits or instrumentalities of crime. On the contrary, they demonstrate that DJPC engages in political expression and association protected by the First Amendment. Complaint, ¶¶ 46-47, Aplt. App. at 134-35.

H. Espinosa was subjected to a pat-down frisk that was not supported by individualized reasonable suspicion

Espinosa was not present when the police arrived to execute the search warrant. He learned about the ongoing search when Danielle Short, his wife and an employee of AFSC, telephoned him. After receiving the call, Espinosa decided to come to the office. Espinosa believed that he could be of assistance, as he knew the location of the files for which the police were searching. Espinosa arrived at approximately 1:30, while the search was underway. Complaint, ¶¶ 56-67, Aplt. App. at 137.

When Espinosa entered the DJPC office, he was immediately approached by two police officers, who asked him why he was in the office. Espinosa explained that he was the DJPC's office administrator and that his wife worked for the AFSC

and was present. The police asked him for identification, which Espinosa readily provided. Complaint, ¶ 58, Aplt. App. at 137.

After Espinosa provided identification, Ortiz immediately put his hands on Espinosa and conducted a pat-down search without consent. While conducting the pat-down search, Ortiz asked Espinosa if he had any knives or other weapons. Espinosa said he did not. Indeed, the frisk of Espinosa failed to disclose any weapons. Complaint, ¶ 59, Aplt. App. at 137-38.

Before Espinosa arrived at the office, everyone present had been asked to provide identification to the police, but none had been frisked. Espinosa was the only one to be frisked, and Espinosa was the only one with dark skin and an apparent Hispanic appearance. Complaint, ¶ 60, Aplt. App. at 138.

When he conducted the pat-down frisk, Ortiz was not in possession of objective and articulable facts that would make a reasonable person suspect that Espinosa was armed. Nor did Ortiz have objective and articulable facts that would make a reasonable person suspect that Espinosa was involved in or about to be involved in criminal activity. Complaint, ¶¶ 61-62, 98, Aplt. App. at 138, 144.

The Complaint also alleges that a custom or practice of the City and County of Denver is responsible for unconstitutional pat-down frisks such as the one to which Espinosa was subjected. Complaint, ¶¶ 64-72, Aplt. App. at 138-40.[2]

SUMMARY OF ARGUMENT

The Complaint alleges that Ortiz subjected Espinosa to a warrantless pat-down frisk in the absence of reasonable suspicion to believe he was armed and presently dangerous. The District Court correctly ruled that the Complaint states a claim for a violation of clearly-established Fourth Amendment law.

A warrantless search is per se unreasonable unless if fits within a specifically-established exception to the warrant requirement. The only exception that permits law enforcement officers to conduct warrantless pat-down frisks was established in Terry v. Ohio, 392 U.S. 1 (1968), and reaffirmed in Ybarra v. Illinois, 444 U.S. 85 (1979). Under that narrow exception, officers may subject an individual to a warrantless pat-down frisk only when they have specific and articulable facts that the person is armed and presently dangerous. On repeated occasions, this Court has reaffirmed that reasonable suspicion is the threshold for

[2] In a Fifth Amended Complaint, Espinosa simplified the claims in the case. He dismissed the claim that the frisk was based on intentional racial discrimination in violation of the Equal Protection Clause. Espinosa also dismissed the claim that Denver is responsible for the illegal pat-down search. Thus Espinosa's only remaining claim alleges that Ortiz is liable to him for a suspicionless pat-down frisk that violated the Fourth Amendment.

such a search, even when police are executing a search warrant and even when, unlike the situation here, there are reasonable grounds to believe that the individual to be frisked is responsible for the criminal activity under investigation.

The Supreme Court's decision in Michigan v. Summers, 452 U.S. 692 (1981), does not change the rule that pat-down frisks must be based on reasonable suspicion. Summers authorizes only a temporary detention, not an intrusion as significant as a pat-down frisk. In cases decided after Summers, the Supreme Court has reiterated that the reasonable suspicion standard of Terry v. Ohio strikes the appropriate balance between the individual's right of privacy and considerations of officer safety.

Because the Complaint alleges that Ortiz conducted the pat-down frisk without specific and articulable facts indicating that Espinosa was armed, Espinosa has stated a claim for violation of his Fourth Amendment rights.

The law governing the pat-down frisk in this case was clearly established in 2000. Because Ortiz had fair warning that his conduct would violate Espinosa's rights, the District Court correctly ruled that Ortiz was not entitled to qualified immunity.

ARGUMENT

I. ORTIZ'S ARGUMENTS VIOLATE THE PRINCIPLE THAT THE ANALYSIS OF A MOTION TO DISMISS MUST ACCEPT AS TRUE ALL OF THE PLAINTIFF'S ALLEGATIONS, AND MUST DRAW ALL REASONABLE INFERENCES IN THE PLAINTIFF'S FAVOR

Ortiz acknowledges that this Court must accept the truth of all well-pleaded facts that are alleged in the Complaint. Ortiz further acknowledges that the Court must "view the factual allegations in the light most favorable to Plaintiff." AB at 9. Yet Ortiz pays mere lip service to these guiding principles. His brief ignores the proper legal standard by repeatedly mischaracterizing the factual allegations of the Complaint, drawing inferences against Espinosa, and relying on additional "facts" that do not appear anywhere in the Complaint.

A. The vandalism incident

The Complaint states that police were investigating vandalism. It does not state, as Ortiz does, that that police were investigating a "serious" crime that included "assault," AB at 3, nor does it state that the damages amounted to "$50,000." AB at 18. Ortiz invents the "fact" that the vandals pepper-sprayed shoppers at Kohl's. AB at 3. Ortiz later expands this invented "fact" and asserts that the vandals also pepper-sprayed employees. AB at 18. Neither of these "facts" appears in the Complaint. Nor does the Complaint contain the additional "fact" that the vandals were "alleged anarchists." AB at 18.

B. Contrary to Ortiz's misstatements, neither DJPC nor Espinosa were "criminal suspects"

According to Ortiz, DJPC was "the target" of the criminal investigation or "the suspect." See AB at 2 ("target of criminal investigation"); 3 (same); 8 ("target" of criminal investigation); 18 ("suspect"). Ortiz also states that DJPC's "members" were "the target," AB at 3, or "the suspects," AB at 6, and even that Espinosa specifically was "a criminal suspect." AB at 23. With these statements, Ortiz contradicts the allegations of the Complaint and the inferences in Espinosa's favor that must be drawn from those allegations. Nothing in the Complaint suggests that DJPC, its staff, or its members were responsible for the vandalism. DJPC had no advance knowledge of the vandalism, and DJPC did not authorize it or ratify it. On the contrary, DJPC condemned the vandalism, which was clearly inconsistent with the organization's missions and values. Complaint, ¶¶ 26-27, 32, Aplt. App. at 129, 130-31. The inference to be drawn from the Complaint is that the unidentified vandals essentially "crashed" DJPC's rally, and that the search of DJPC's office was the kind of "third party" search for mere evidence that is described in Zurcher v. Stanford Daily, 436 U.S. 547, 553 (1978).

C. Contrary to Ortiz's misstatements, Espinosa did not seek to enter a "secured area," nor does the Complaint suggest that Ortiz's role was limited to providing security for the Golden officers

Ortiz repeatedly asserts that Espinosa sought to enter "a secured area," a term that appears nowhere in the Complaint and that erroneously suggests some

sort of official legal category. See AB at 2; 3 (twice), 4 (three times); 7, 8, 10 (mentioned twice), 15, and 18. By invoking the term "secured area," Ortiz appears to suggest that every person seeking to enter the premises was subjected to the same treatment as Espinosa, a suggestion that contradicts the allegations of the Complaint. See Complaint, ¶¶ 60, 103, Aplt. App. at 138, 144 (similarly-situated individuals were not frisked). Ortiz repeatedly asserts that he served a narrow, specialized function during the search: to "maintain the peace." AB at 3, 6, 13. He suggests that he was present solely because Golden officers were executing a warrant in Denver. AB at 3. These "facts" do not appear in the Complaint, nor does the additional "fact" that "Ortiz was responsible for the safety of the Golden police officers . . . ." AB at 19. On the contrary, the Complaint alleges that Ortiz assisted and acted in concert with the Golden officers "in all respects." Complaint, ¶ 36, Aplt. App. at 132.

D. Ortiz mischaracterizes the facts of his interaction with Espinosa

Ortiz repeatedly states that Espinosa "demand[ed]" to be allowed into the office, AB at 2, 4, 12, a "fact" that appears nowhere in the Complaint. Ortiz also asserts that he "did not know Espinosa-Organista," AB at 21, and that Espinosa arrived "while his desk was being searched." AB at 2. Neither of these "facts" appears in the Complaint. In attempting to justify the pat-down frisk, Ortiz relies in part on the fact, alleged in the Complaint, that Espinosa arrived at the office

after his wife called him and told him a search was being conducted. See AB at 2, 16, 23. The Complaint, however, nowhere asserts that Ortiz overheard that phone call or otherwise knew that Espinosa was already aware of the search.

II. THE FOURTH AMENDMENT PROHIBITS LAW ENFORCEMENT OFFICERS FROM CONDUCTING WARRANTLESS PAT-DOWN FRISKS IN THE ABSENCE OF REASONABLE INDIVIDUALIZED SUSPICION

A. A Warrantless Search Is Per Se Unreasonable Unless It Fits Within A Specific Exception To The Warrant Requirement

The Complaint alleges that Ortiz subjected Espinosa to a warrantless search that did not meet the standards of the Fourth Amendment. The basic framework for analyzing such an allegation has been clearly established for decades: a warrantless search is per se unreasonable unless it falls within a specifically-established exception. The Supreme Court restated that basic framework in 1967:

> Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.

Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes and internal quotations omitted). A few years later, the Supreme Court referred to this principle as "the most basic constitutional rule in this area." Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971). It also explained that the government bears the burden of demonstrating that a warrantless search falls within one of the narrow exceptions

to the normal requirement of prior judicial approval. Id. at 454-55; see also United States v. Sporleder, 635 F.2d 809, 813 (10th Cir. 1980) (quoting Katz and Coolidge).

Thus, the law has long been clearly established that the warrantless pat-down search at issue in this case violates the Fourth Amendment unless the government carries its burden of demonstrating that the search fits within one of the specifically-delineated exceptions to the warrant requirement.

B. The Only Exception That Permits Warrantless Pat-down Frisks Requires Reasonable Individualized Suspicion Under the Standard of Terry v. Ohio and Ybarra v. Illinois

The scope of the only exception that arguably applies has been clearly established for over 35 years, ever since the Supreme Court decided Terry v. Ohio, 392 U.S. 1 (1968). In Terry, the Court carved out two exceptions to the normal Fourth Amendment standard. First, with regard to seizures of persons that are regulated by the Fourth Amendment, Terry permits police officers to conduct limited short-term detentions on the basis of reasonable suspicion. Second, with regard to searches of the person, the Court held that police officers may conduct a limited pat-down frisk of the outer clothing when there are reasonable grounds to suspect that the individual may be armed and dangerous. See id. at 30.

The Court explained that this warrantless pat-down search based on reasonable suspicion was a "narrowly drawn" exception to the normal requirement

of probable cause. See id. at 27. The Court emphasized that to justify the intrusion, the police officer must be able to identify "specific and articulable facts" that objectively justify the intrusion. Id. at 21-22. The Court also noted that the legal standard of objective reasonable suspicion "becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." Id. at 21. In this civil action, Espinosa seeks to subject Ortiz's conduct to the detached and neutral judicial scrutiny contemplated in the Terry decision.

The Supreme Court reaffirmed the principles of Terry eleven years later in Ybarra v. Illinois, 444 U.S. 85 (1979), where police officers executing a warrant to search a bar for narcotics also subjected the patrons to pat-down frisks without individualized reasonable suspicion. In rejecting the argument that the pat-down frisks were reasonable under the Fourth Amendment, the Court pointed out that it had "invariably held" that a pat-down frisk must be predicated on a reasonable belief that the individual is armed and presently dangerous. See id. at 93. The Ybarra Court reaffirmed that the pat-down frisk authorized in Terry represents a "narrow" exception to the normal requirement of probable cause. See id. It emphasized that nothing in Terry authorizes "a generalized 'cursory search for

weapons.'" Id. at 93-94. On the contrary, the Terry exception requires individualized suspicion; that is, a reasonable suspicion "directed at the person to be frisked." Id. at 94.

Cases from the Tenth Circuit confirm the clearly-established principle that a pat-down frisk requires reasonable individualized suspicion that the individual is armed and presently dangerous. This principle applies when the individual is present when a search warrant is being executed, and even when, unlike this case, there are reasonable grounds to believe that the individual is responsible for the criminal activity that prompts the search. See United States v. Sporleder, 635 F.2d 809, 813-14 (10th Cir. 1980); United States v. Ward, 682 F.2d 876, 879-81 (10th Cir. 1982).

In Sporleder, this Court considered a pat-down frisk that government officers conducted while serving a search warrant for a methamphetamine laboratory. The warrant did not specifically authorize a search of anyone's person. Accordingly, this Court stated in no uncertain terms that the pat-down frisk of Sporleder was unconstitutional unless the government carried its burden of demonstrating that the search fit within an exception to the warrant requirement. See Sporleder, 635 F.2d at 813. Relying on the Supreme Court's pronouncements in Katz and Coolidge, this Court reiterated that warrantless searches that did not fit within a specific exception are "per se unreasonable under the Fourth

Amendment." Id. In response to the government's argument that the frisk was permissible pursuant to Terry v. Ohio, this Court reminded the government that Terry does not permit a generalized "cursory search for weapons." Id. `On the contrary, this Court explained that under Terry and Ybarra, a pat-down frisk must be premised on a reasonable belief that the subject is armed and dangerous. This is true even if the individual is present during execution of a search warrant and even if he or she was involved in the criminal activity that justified the search: "Except as it may related to an officer's reasonable belief that a person is armed and presently dangerous, it is of no consequence that the person is an object of the government's suspicion that led to the search of the premises." Id. at 814.[3]

The Tenth Circuit reaffirmed the holding of Sporleder two years later in United States v. Ward, 682 F.2d 876 (10th Cir. 1982). In Ward, law enforcement officers executed a search warrant to search Ward's home, and they subjected Ward to a pat-down frisk "as a routine precaution." 682 F.2d at 880. Following the clearly-established legal principle articulated in Sporleder, Terry and Ybarra, this Court held that the pat-down frisk violated Ward's Fourth Amendment rights, because nothing in the record indicated that Ward was "armed and presently dangerous." Id. at 881. Even though the law enforcement officers had probable

[3] Although the Sporleder decision is controlling authority in this case, Ortiz fails to discuss it in his brief.

cause to believe that Ward was committing a federal offense, he was not under arrest, and the pat-down frisk of Ward was invalid because it "was not supported by a reasonable suspicion that he was armed and presently dangerous." Id. at 880.

In the face of this unbroken line of clearly-established precedents, Ortiz contends that the Fourth Amendment permits a pat-down frisk without reasonable individualized suspicion whenever an individual seeks to enter an area where the police are executing a search warrant. According to Ortiz, the Supreme Court's decision in Terry governs only pat-down frisks "on individuals who happen to encounter a police officer, as opposed to a person who intentionally seeks to enter an area where a search warrant is being executed." AB at 11. Similarly, Ortiz contends that Ybarra applies only to persons who were already on the premises when the search began. AB at 10-11. According to Ortiz, the Ybarra decision did not "extend" Fourth Amendment protection to persons who seek entry while a search is being conducted. AB at 10.

Ortiz not only misconstrues the case law, he also turns the proper analysis upside down. The Ybarra decision does not represent an "extension" of the Fourth Amendment to persons who did not previously enjoy its protection. As the Supreme Court explained in Katz and Coolidge, and as this Court reiterated in Sporleder, the normal requirements of the Fourth Amendment apply to all persons and all circumstances unless a specific recognized exception exists. The Supreme

Court announced such an exception in Terry v. Ohio, when it permitted warrantless pat-down frisks on less than probable cause as long as they were supported by individualized reasonable suspicion. In Ybarra, the Supreme Court reaffirmed the rule of Terry. In doing so, it did not extend the reach of the Fourth Amendment. On the contrary, the Ybarra Court rejected the government's invitation to reduce the scope of Fourth Amendment protections. Contrary to Ortiz's suggestion, Espinosa does not seek to extend the protection of the Fourth Amendment to situations where it has not applied before. It is Ortiz, not Espinosa, who invites the Court to make new law. Ortiz asks this Court to invent a new exception to the rule of Terry and Ybarra, an exception that would fly in the face of decades of settled law of the Supreme Court and the Tenth Circuit.

C. The Supreme Court's Decision in Michigan v. Summers Does Not Change the Rule That Pat-down Frisks Must Be Based On Reasonable Individualized Suspicion

According to Ortiz, the Supreme Court's decision in Michigan v. Summers, 452 U.S. 692 (1981), somehow changed the longstanding rule holding that pat-down frisks must be justified by objective facts amounting to reasonable suspicion that the individual is armed. Ortiz misreads the Summers decision, which considered a temporary detention only, not a pat-down frisk. The Summers opinion did not authorize officers to conduct a suspicionless pat-down frisk, nor did it, as Ortiz contends, AB at 11, limit the scope of the Ybarra decision. Indeed,

the Court expressly warned that the "seizure" or detention issue in Summers "should not be confused with the 'search' issue presented in Ybarra v. Illinois." Summers, 452 U.S. at 695 n.4. Ortiz makes the precise mistake the Supreme Court expressly warned against: he confuses the detention issue decided in Summers with the search question decided in Ybarra.

In Summers, law enforcement officers obtained a warrant to search the defendant's home for illegal narcotics. When the detectives arrived to execute the search warrant, the defendant was leaving. The detectives made him re-enter the house, and they detained him there while they searched the premises. Id. at 693. After they found narcotics in the home, they had probable cause to arrest the defendant. Id. at 695. They arrested him, subjected him to a search incident to arrest, and found 8.5 grams of heroin. Summers was charged with illegal possession of the heroin found on his person, and he moved to suppress the evidence on the grounds that the search of his person violated his Fourth Amendment rights. Id. at 694.

The dispositive legal issue, and the only issue the Court decided, was whether the initial detention of Summers was reasonable under the Fourth Amendment.[4] Id. at 694-95 & n.4. The Summers Court reviewed cases in which

[4] In his brief, Ortiz presents a misleading characterization of the holding of Summers. According to Ortiz, Summers held "that the Fourth Amendment is not

(footnote continued on next page)

it had approved brief temporary seizures on less than probable cause. See id. at 698-99. Summarizing the principles of those cases, the Court explained that substantial law enforcement interests can justify some limited and temporary intrusions on personal security, based on less than probable cause, "so long as the police have an articulable basis for suspecting criminal activity." See id. at 699.[5]

The Summers Court discussed in general terms the law enforcement interests that are served when police are able to detain the residents while a search warrant is executed. First, a temporary detention prevents the risk of flight if incriminating evidence is found. Second, it reduces the risk of harm to officers. The Court noted that executing a warrant to search for narcotics "may give rise to

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(footnote continued from previous page)

violated when the police seized the person who owned or occupied the premises being searched as he was leaving the premises, detained the person throughout the execution of the warrant, and subsequently searched his person." AB at 11, citing Summers 452 U.S. at 693 (emphasis added). The underlined portion of this quotation, however, does not appear in the holding of the Summers opinion. See Summers, 452 U.S. at 705 (stating holding). The Court noted that "in this case, only the detention is at issue." 452 U.S. at 695 n.4. The search of Summers's person was carried out after police found the narcotics described in the search warrant and after they had validly arrested him based on probable cause. It was a search incident to arrest, justified under another longstanding exception to the warrant requirement, see United States v. Robinson, 414 U.S. 218 (1973), and is not relevant to the legal issues raised in the case before this Court.

[5] In the case before this Court, the police did not have any objective articulable basis for suspecting Espinosa of criminal activity. Complaint, ¶¶ 61-62, 98, Aplt. App. at 138, 144.

sudden violence or frantic efforts to conceal or destroy evidence." Id. at 702. Finally, the Court said that the "orderly completion of the search" may be facilitated if the residents are present. Id. at 703.

Most significantly, and "of prime importance," id. at 701, the Court noted that police could justify their detention of Summers on the basis of "articulable and individualized suspicion," because a judicial officer had already determined that police had probable cause to believe that someone in the home was committing a crime. Id. at 703. Thus, the warrant to search for contraband, the possession of which is a felony, combined with Summers's connection to the home, provided police with "an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of the occupant." Id. at 704. The Court concluded by holding that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Id. at 705.

Because Summers did not alter the longstanding rule that permits pat-down frisks only on the basis of reasonable suspicion, Ortiz argues that this Court should invent a new rule of law. Ortiz relies on the law enforcement interests that Summers identified as factors in favor of a temporary detention when executing a search warrant for contraband. He also relies on an additional factor that this Court

noted in discussing a temporary detention authorized by Summers: preventing a suspect from leaving the premises may ensure that he will not return to the premises later and try to forcibly thwart the officers from carrying out the search. AB at 12; see United States v. Ritchie, 35 F.3d 1477, 1484 (10th Cir. 1994).[6]

Ortiz's reliance on Summers and Ritchie is misplaced. Neither case authorized a pat-down frisk in the absence of individualized suspicion. In addition, the holding of Summers would not support a temporary detention, let alone a pat-down frisk, in the circumstances of this case. The rule of Summers applies only when, unlike the situation in this case, police execute a warrant to search for material the possession of which is illegal. See Summers, 452 U.S. at 705; Ritchie,

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[6] Ortiz contends, erroneously, that he was confronted with the "very danger" identified in Ritchie: "a suspect knowing that a warrant was being executed in his office, arriving on scene and demanding to be allowed into the office." AB at 12. Ortiz states that he did not know whether or not Espinosa "was arriving on the scene to forcibly thwart the execution of the warrant." AB at 13. Ortiz invents facts that are not in the Complaint. Espinosa was not a suspect; he did not "demand" entrance; nor does the Complaint state that Ortiz was even aware that Espinosa knew that a search was in progress before coming to the office.

Indeed, instead of trying to prevent the "very danger" identified in Ritchie, Ortiz actually re-enacted it. The officers told Espinosa that he would have to leave the premises after he spoke with his wife, and he did so. See Early v. Bankers Life and Casualty Co., 959 F.2d 75, 79 (7th Cir. 1992) ("[a] plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint"). Ortiz was (justifiably) unconcerned that Espinosa might "return to the premises later and try to forcibly thwart the officers from carrying out the search." Ritchie, 35 F.3d at 1484.

35 F.3d at 1483. The Summers Court expressly noted that its reasoning did not apply to a case where the warrant authorizes a search for mere evidence at the premises of a party whose possession of the materials sought is not a crime. See Summers, 452 U.S. at 705 n.20, citing Zurcher v. Stanford Daily, 436 U.S. 547, 560 (1978). As this Court explained when discussing that portion of the Summers decision, the Zurcher case "involved the validity of third-party searches, where there is 'probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but [there is no] probable cause to believe that the owner or possessor of the property is himself implicated in the crime.'" Ritchie, 35 F.3d at 1483, quoting Zurcher, 436 U.S. at 553. The police in this case were executing a third-party search for evidence, as described in Zurcher. There was no probable cause to believe that DJPC was responsible for the crime under investigation. Complaint, ¶ 78, Aplt. App. at 141.[7] Nor was there reasonable

[7] The Complaint asserts claims under the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, which was enacted in reaction to Zurcher to "afford[] the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment." S. Rep. No. 874, 96th Cong., 2d Sess., reprinted in U.S.C.C.A.N. 3950, 3850. An exception to the special protections of the Act applies when law enforcement officers have probable cause to believe that the person in possession of the materials sought has committed the criminal offense under investigation. See 42 U.S.C. § 2000aa(a)(1); (b)(1). Paragraph 78 of the Complaint alleges that none of the exceptions to the Privacy Protection Act apply. Thus, the Complaint alleges that that the law enforcement officers did not have probable cause to believe that DJPC was responsible for the criminal offense that they were investigating.

suspicion to believe that Espinosa was involved in criminal activity. Complaint, ¶ 61, Aplt. App. at 138. Thus, in the absence of individualized suspicion, the Summers decision would not have justified even a temporary detention, let alone a pat-down frisk.

Even after the Summers decision, this Court in Ward reaffirmed the longstanding rule of Terry and Ybarra, and it reaffirmed the Sporleder holding. Thus, even when police have probable cause to believe the person to be frisked is involved in the crime under investigation, and even when that person is connected to the premises to be searched pursuant to a probable cause warrant, police nevertheless cannot conduct a pat-down frisk unless they have individualized reasonable suspicion that the person is armed and presently dangerous. United States v. Ward, 682 F.2d 876, 880-81 (10th Cir. 1982).

D. In The Absence Of Reasonable Individualized Suspicion, The Law Enforcement Interests Identified In Summers Cannot Justify An Intrusion On Privacy As Significant As A Pat-down Frisk

The generalized law enforcement interests identified in Summers and Ritchie are not sufficient to justify an intrusion as significant as a pat-down frisk without individualized suspicion. In approving a temporary detention, the Summers Court analyzed "both the character of the official intrusion and its justification." Summers, 452 U.S. at 701. Similarly, in Terry v. Ohio, the Court explained that determining whether a search is reasonable requires balancing the

government's need to search against the degree to which the search intrudes on privacy interests protected by the Fourth Amendment. Terry, 392 U.S. at 21.

In asking that this Court sanction the suspicionless search in this case, Ortiz mischaracterizes the pat-down frisk of Espinosa as "minimally intrusive," AB at 15, and "a de minimis intrusion." AB at 23. In doing so, Ortiz ignores decades of court decisions that recognize that any Fourth Amendment balancing test must weigh a pat-down frisk as a major intrusion on personal privacy, personal security, and bodily integrity. As the Supreme Court recognized in Terry: "[e]ven a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." Terry, 392 U.S. at 24-25. The Terry Court also noted that a pat-down frisk "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly." 392 U.S. at 17. The Court has repeatedly reaffirmed that pat-down searches represent a substantial, not a minimal, intrusion on personal privacy. See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) ("even a limited search of the person is a substantial invasion of privacy"); Wyoming v. Houghton, 526 U.S. 295, 303 (1999) ("severe" intrusion, quoting Terry).

The Supreme Court has repeatedly rejected the argument that officer safety or the other generalized law enforcement interests identified in Summers are

sufficient, in the absence of individualized suspicion, to justify a significant intrusion on privacy interests. For example, in Maryland v. Buie, 494 U.S. 325, 333 (1990), law enforcement officers entered a suspect's home to execute a valid arrest warrant for armed robbery. The government argued that, after the arrest, police were justified in conducting a "protective sweep" throughout the remainder of the suspect's home to ensure that potentially dangerous confederates were not lurking in a spot from which they could launch an attack or otherwise thwart the arrest. Relying on Michigan v. Summers, the government argued that it could carry out such a "protective sweep" without any particularized suspicion of danger. The Court rejected the government's argument. In Buie, the Court reiterated that the detention authorized in Summers was justified because "the search warrant implied a judicial determination that police had probable cause to believe that someone in the home was committing a crime." 494 U.S. at 334 n.2. Moreover, the Court noted that the temporary detention authorized in Summers was much less severe an intrusion than the protective sweep at issue in Buie. Id. The Court reasoned that the proper analogy was to the Ybarra decision, with its standard of reasonable individualized suspicion. In Buie, the Court concluded that that the reasonable suspicion standard of Terry and Ybarra "strikes the proper balance between officer safety and citizen privacy." Id.

Similarly, in Richards v. Wisconsin, 520 U.S. 385 (1997), the government asked the Court to adopt a blanket exception to the Fourth Amendment knock-and-announce rule for every felony drug investigation. The government invoked generalized arguments about officer safety and the risk that knocking and announcing would result in destruction of evidence. The Court rejected the government's argument, holding instead that officers can effect a "no knock" entry only if they have reasonable suspicion, under the particular facts of each case, that knocking and announcing their presence would be dangerous or would result in destruction of evidence. See id. at 394. This standard of individualized reasonable suspicion, the Court explained, "strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." Id.

The situations law enforcement officers confronted in Buie and Richards were far more fraught with potential danger than executing a search warrant for mere evidence at the office of a longtime peace and justice organization, especially in the absence of probable cause to believe the organization was responsible for the crime under investigation. As Buie and Richards held, the standard of reasonable suspicion, the legal standard that has governed pat-down frisks for over 35 years, strikes the appropriate balance between privacy and officer safety. See Buie, 494

U.S. at 334 n.2; Richards, 520 U.S. at 394.[8] Ortiz has failed to present a single case from the Tenth Circuit or the Supreme Court that merits reversing this longstanding legal principle.

E. Ortiz's Reliance on Decisions Outside the Tenth Circuit Is Not Persuasive

Ortiz admits that this Court has never sanctioned the routine suspicionless frisking of persons seeking entrance to an area being searched, though Ortiz mischaracterizes the issue as an open question of law rather than an issue long settled by Katz, Coolidge, Terry, Ybarra, Sporleder, and Ward. AB at 13. Ortiz argues, however, that lower courts outside this Circuit have sanctioned such

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[8] For the same reasons, the "special needs" doctrine, see Dubbs v. Aguire, 336 F.3d 1194, 1212 (10th Cir. 2003), cannot justify a pat-down frisk conducted without reasonable individualized suspicion. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" New Jersey v. T.L.O., 469 U.S. 325, 342 (1985), quoting Delaware v. Prouse, 440 U.S. 648, 654-655 (1979). Indeed, the only kind of suspicionless search of the person ever authorized under the "special needs" doctrine is urine testing, which involves an invasion of privacy the Supreme Court has analyzed as "not significant." Veronia Sch. Dist. v. Acton, 515 U.S. 646, 660 (1995); Bd. of Educ. v. Earls, 536 U.S. 822, 833 (2002) In contrast, the Supreme Court has repeatedly characterized a pat-down frisk as a "severe" or "substantial" invasion of privacy. See Terry, 392 U.S. at 24-25; T.L.O., 469 U.S. at 338. Thus, the "special needs" doctrine cannot be invoked to justify the suspicionless pat-down frisk in this case, which implicates privacy interests that are not "minimal." T.L.O., 469 U.S. at 342, and which was not accompanied by safeguards designed to minimize the officer's discretion whether to conduct a frisk. Id.

suspicionless frisking. AB at 13. Cases from other circuits, however, are not sufficient to call into question the clearly-established precedents from the Supreme Court and this Court that hold that individualized reasonable suspicion is required. See United States v. Nichols, 169 F.3d 1255, 1261 (10th Cir. 1999) (A three-judge panel "is bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court").

This is especially true because the cases from other circuits that Ortiz relies on do not support his reading of them. In Section IX.B. of his brief, at pages 13-14, Ortiz cites four cases in an unsuccessful attempt to support his claim that circuit courts of appeal outside the Tenth Circuit have permitted frisks, without individualized suspicion, of persons seeking to enter an area where officers are executing a search warrant. In each of these cases, however, the court analyzed the frisk under the long-settled standard of Terry and Ybarra. In each case, the court held that the frisk was supported by individualized reasonable suspicion. See United States v. Bohannon, 225 F.3d 615, 617-18 (6th Cir. 2000); United States v. Patterson, 885 F.2d 483, 484-85 (8th Cir. 1989); United States v. Proctor, 148 F.3d 39, 42 (1st Cir. 1998); United States v. Barlin, 686 F.2d 81, 86-87 (2d Cir. 1982). Thus, the cases Ortiz cites at pages 13-14 of his brief do not support the argument that this Court should create a new exception to the requirement of individualized

suspicion. On the contrary, each of the cases supports the longstanding principle that a pat-down frisk must be based on individualized reasonable suspicion.

III. CONTRARY TO ORTIZ'S ARGUMENT, THE FACTS ALLEGED IN THE COMPLAINT DO NOT DEMONSTRATE THAT THE PAT-DOWN FRISK WAS SUPPORTED BY REASONABLE SUSPICION

In part IX.C of his brief, Ortiz contends, erroneously, that, even if this Court confirms that reasonable suspicion is the threshold for the pat-down frisk to which Espinosa was subjected, then that standard is satisfied in this case.

Ortiz has filed a motion to dismiss, not a motion for summary judgment. In analyzing a motion to dismiss, this Court must accept as true all the factual allegations of the complaint. In addition, this Court must draw all reasonable inferences from those allegations in the plaintiff's favor. Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1244 (10th Cir. 1999). The District Court's denial of the motion to dismiss must be affirmed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Espinosa's claim clearly alleges that Ortiz conducted the pat-down frisk without reasonable suspicion. Paragraph 61 of the Complaint states as follows: "When he conducted the pat-down frisk, Ortiz was not in possession of objective and articulable facts that would make a reasonable person suspect that Espinosa was involved or about to be involved in criminal activity."

Aplt. App. at 138. Paragraph 62 states: "Ortiz was not in possession of objective and articulable facts that would make a reasonable person suspect that Espinosa was armed." Id. Paragraph 98 reiterates that "Ortiz did not have reasonable grounds to suspect that Espinosa was armed." Id. at 144. Thus, once this Court confirms that reasonable suspicion is the governing legal standard, the Complaint clearly states a claim for violation of Espinosa's Fourth Amendment rights. Ortiz's argument in Part IX.C. of his brief must be rejected.

Although paragraphs 61, 62, and 98 of the Complaint are themselves sufficient to defeat Ortiz's argument, Ortiz attempts to argue that this Court's decision in United States v. Ritchie, 35 F.3d 1477 (10th Cir. 1994), somehow demonstrates that the frisk of Espinosa meets the standard of reasonable suspicion. AB at 15-16. The Ritchie decision analyzed a temporary detention pursuant to Michigan v. Summers, not a pat-down frisk. Although the defendant in Ritchie was frisked, this Court did not discuss, consider, or analyze the validity of that frisk under the Fourth Amendment. The unanalyzed frisk in the Ritchie decision does not provide any support for Ortiz's contention that the frisk of Espinosa was supported by individualized reasonable suspicion.

Ortiz cites to three decisions from outside the Tenth Circuit in which courts held that the specific set of circumstances confronting law enforcement officers

provided reasonable individualized suspicion for a pat-down frisk.[9] AB at 16-19. In each case, a judicial officer had found probable cause to believe that the premises were used for narcotics trafficking. In two of the cases, the frisk took place after police had already found narcotics and firearms. See United States v. Barlin, 686 F.2d 81, 86-87 (2nd Cir. 1982); United States v. Harvey, 897 F.2d 1300, 1304 (5th Cir. 1990), overruled on other grounds, United States v. Lambert, 984 F.2d 658 (5th Cir. 1993). In the third, the person frisked had been caught sneaking out of the basement window of a "known drug house" that was being searched by a SWAT team pursuant to a warrant authorizing a search for firearms as well as drugs. United States v. Nelson, 931 F. Supp. 194, 200-02 (W.D.N.Y. 1996). Contrary to Ortiz's argument, the facts that justified a pat-down frisk in these very different cases involving drug dealing and firearms do not demonstrate that there was reasonable suspicion to believe that Espinosa was armed.

After discussing these cases involving drugs and guns, Ortiz devotes a paragraph to what he presents as the circumstances of this case "as described in the

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[9] Ortiz also relies on Collier v. Locicero, 820 F. Supp. 673 (D. Conn. 1993), in which the court stated, without reasoning or analysis, that police do not need reasonable suspicion before conducting a pat-down frisk of persons present when a search warrant is executed. The statement in this district court decision cannot be reconciled with this Court's binding precedents in Sporleder and Ward, discussed in the previous section. See United States v. Nichols, 169 F.3d 1255, 1261 (10th Cir. 1999).

Complaint." AB at 18. Most of so-called "facts" Ortiz discusses, however, cannot be found anywhere in the Complaint.[10] The allegations that can be found in the Complaint clearly demonstrate that Espinosa was subjected to a pat-down frisk in the absence of reasonable suspicion, thus stating a claim for relief under the Fourth Amendment.

IV. BECAUSE THE DECISIONS OF THIS COURT AND THE SUPREME COURT PROVIDED ORTIZ WITH FAIR WARNING THAT THE SEARCH WAS UNREASONABLE, ORTIZ IS NOT ENTITLED TO QUALIFIED IMMUNITY

The District Court concluded correctly that Ortiz is not entitled to dismissal of Espinosa's claims on grounds of qualified immunity. In Hope v. Pelzer, 536 U.S. 730 (2002), the Supreme Court reviewed the legal standard for determining whether a government official is entitled to qualified immunity:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

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[10] See, e.g., AB at 18 (asserting erroneously that DJPC was "the suspect"; referencing "$50,000 of vandalism"; referring to "pepper spraying of store employees and customers"; labeling perpetrators as "alleged anarchists"; stating that the area was "secured" for execution of warrant). Even if this Court considers the extra "facts" invented by Ortiz, and it should not, they do not alter the analysis. Espinosa has clearly alleged that he was frisked without reasonable suspicion.

Id. at 739 (citations and internal quotations omitted). In discussing the degree of factual similarity that is required to conclude that the law is clearly established, the Court noted that all that is required is that prior case law provide "fair warning" that an officer's conduct would violate constitutional rights. Id. at 739-40. Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Id. at 741.

Ortiz clearly had fair warning that a pat-down frisk requires reasonable suspicion. As explained in Section II, supra, the Supreme Court has long held that a warrantless search is "per se" unreasonable unless it fits within a clearly delineated exception to the warrant requirement. In Terry v. Ohio, the Court established such an exception for pat-down frisks, but only when officers can articulate specific objective facts that amount to reasonable suspicion. In Ybarra v. Illinois, the Supreme Court reiterated that the scope of the Terry exception is narrow and that reasonable suspicion is an "invariable" standard that governs all pat-down frisks. In Sporleder and again in Ward, this Court confirmed that reasonable suspicion is required, even when officers execute a felony search warrant and the person to be frisked is the resident of the premises and the suspect in the crime under investigation.

In the face of this unbroken line of solid precedents, Ortiz contends that a reasonable officer would not have known that a pat-down frisk in this case required

reasonable suspicion, because Espinosa was not already present at the scene of the search but, instead, was seeking to enter the area while the search was underway. Such a minor factual difference is not sufficient to entitle Ortiz to qualified immunity. The precedents cited here and in Section II show that Ortiz had "fair warning" that his conduct violated Espinosa's constitutional rights. Hope, 536 U.S. at 739-40.

A. The Allegations Of The Complaint Are Sufficient To Show That Ortiz Had Fair Warning That His Conduct Violated Espinosa's Fourth Amendment Rights

Ortiz contends that it is not enough for Espinosa to establish the general Fourth Amendment principle that pat-down searches require individualized suspicion. Relying on Saucier v. Katz, 533 U.S. 202 (2001), Ortiz contends that Espinosa must establish that a reasonable officer would have known that individualized suspicion was required "in the specific situation he confronted." AB at 20, quoting Saucier, 533 U.S. 202 (2001).

In analyzing the specific situation Ortiz confronted, it must be remembered that Ortiz has filed a motion to dismiss, not a motion for summary judgment. Ortiz's motion should be denied unless it is clear "beyond doubt" that there is "no set of facts" that Espinosa can prove that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Ortiz makes the mistake of assuming that the

only facts Espinosa will be able to prove are the facts specifically alleged in the Complaint.[11]

In holding that corrections officials were not entitled to qualified immunity in Hope v. Pelzer, the Supreme Court relied not only on the prior case law, but also on a regulation of the Alabama Department of Corrections and a report from the Department of Justice that advised Alabama officials that the challenged practice violated the Constitution. 536 U.S. at 741-42. In this case, Espinosa may be able to demonstrate that written regulations of the Denver Police Department clearly state that pat-down frisks must always be justified by individualized reasonable suspicion. Espinosa may be able to demonstrate that all of Ortiz's training left no doubt that the standard of individualized suspicion governs all pat-down frisks. Espinosa may also be able to demonstrate that there have been prior controversies

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[11] Ortiz also makes the mistake of inventing "facts" that are not alleged in the Complaint. In arguing, for example, that he faced a situation "vastly different" from the circumstances in Ward, Ortiz states that he "did not know" Espinosa. AB at 21. That "fact" appears nowhere in the Complaint. Indeed, to the extent that Ortiz's knowledge of Espinosa is relevant, it would be consistent with the allegations of the Complaint that Ortiz had interacted with Espinosa on numerous occasions, knew that he had no criminal record, knew that he had never been suspected of a crime, knew that he never carried a weapon, and knew him as a peaceful, nonviolent, law-abiding individual who had cooperated fully with police numerous times in the past. See Early v. Bankers Life and Casualty Co., 959 F.2d 75, 79 (7th Cir. 1992) ("[A] plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint").

raising questions about whether Denver police officers routinely conduct pat-down frisks in violation of the reasonable suspicion standard. If the result of such prior controversies resulted in a letter, similar to the letter referenced in the Hope decision, from either the Department of Justice or the Denver Public Safety Review Commission, that fact may inform the analysis whether Ortiz had "fair warning" that the pat-down frisk in this case required reasonable suspicion. See Hope, 536 U.S. at 739-40.

B. Contrary To Ortiz's Suggestion, the Legal Standard Governing the Suspicionless Pat-down Frisk in This Case Is Not "Unsettled"

Ortiz asserts, erroneously, that courts have recognized that the law is "unsettled" with regard to how the Summers decision should be harmonized with Ybarra. AB at 21. Ortiz relies on dicta in this Court's decision in United States v. Mitchell, 783 F.2d 971 (10th Cir. 1986), and on two cases in which Justices of the Supreme Court dissented from the Court's decision to deny certiorari. See AB at 21-23. Ortiz misreads these three opinions, not one of which even mentions the Summers decision. Moreover, neither this Court's opinion in Mitchell nor the dissents from denial of certiorari undermine the clearly established law that requires individualized reasonable suspicion for the pat-down frisk of Espinosa.

In Mitchell, this Court held that the trial court properly rejected the defendant's argument that the officers who arrested him violated the knock-and-announce requirement of the Fourth Amendment. 783 F.2d at 974-75. On appeal,

the defendant attempted to raise for the first time a new argument: he claimed that officers illegally subjected him to a pat-down frisk while they executed the search warrant. Id. at 975. This Court concluded that this argument was waived and declined to consider it on the merits. Id. at 976. The Court's holding in no way undermines the clearly-established legal principle that a pat-down frisk for weapons requires reasonable individualized suspicion.

The non-precedential dissents from denial of certiorari also carry no weight in determining whether it is clearly established that a pat-down frisk requires reasonable suspicion. This is especially true in this case, because the particular rules of law proposed by the dissenting Justices, even if adopted someday in a majority opinion, still would not validate the suspicionless pat-down frisk of Espinosa in this case.

Ortiz grossly mischaracterizes the minority view expressed by the Justices who dissented from denial of certiorari in Michigan v. Little, 474 U.S. 1024 (1985). Contrary to Ortiz's characterization, see AB at 22, the brief dissent did not offer any opinion about whether it is reasonable to conduct a pat-down frisk in the absence of reasonable suspicion. On the contrary, the dissenting Justices contended that the search of the defendant's clothing was justified by individualized probable cause to believe he was concealing contraband for which the warrant authorized them to search. 474 U.S. at 1025. The dissenters did not,

as Ortiz suggests, express "concern over whether the law was established." AB at 22. On the contrary, they argued that the lower court had misapplied the holding of Ybarra. Their view that a particular search was justified by individualized suspicion, even if it were adopted by the Supreme Court, would not modify the clearly-established law that prohibits the suspicionless pat-down frisk in this case.

Similarly, in Guy v. Wisconsin, 509 U.S. 914 (1993), two Justices dissented from the Court's denial of certiorari in a case in which the lower court upheld the pat-down frisk of persons who were present when police executed a search warrant at a private residence. The lower court held that the frisks were based on individualized reasonable suspicion supported by 1) the fact that a magistrate had found probable cause to believe that cocaine trafficking was taking place at the residence; and 2) the fact that weapons are often the tools of the trade for drug dealers. The lower court distinguished Ybarra on the ground that persons found in a private residence, unlike the patrons of a public tavern, are "very likely" to be associated with the illegal narcotics activity and thus likely to be armed and dangerous. In dissenting from denial of certiorari, two Justices noted that other courts had rejected similar reasoning and had held that pat-down frisks under similar circumstances are not permissible. The dissenters argued that the differences in outcome merited the Court's attention in order to provide guidance to law enforcement.

The brief dissent from denial of certiorari in Guy v. Wisconsin does not affect this Court's qualified immunity analysis. First, the views expressed by two dissenting justices have no precedential value. Second, even if some lower courts disagree about how to apply Ybarra in a particular situation, that disagreement does not undermine the clearly-established precedents of this Court, as established in Sporleder and Ward. Finally, even if the Supreme Court had granted certiorari and had adopted the view promoted by the dissenters, that could not have altered the clearly-established law requiring reasonable suspicion for the pat-down frisk in this case. Unlike the circumstances in Guy, the search warrant in this case was not based on probable cause to believe that DJPC was engaged in narcotics trafficking or any other criminal activity, let alone criminal activity with which dangerous weapons are closely associated.[12]

CONCLUSION

For the foregoing reasons, the Complaint states a claim for a violation of clearly-established law. Accordingly, the District Court correctly ruled that Ortiz was not entitled to qualified immunity. This Court should affirm the ruling of the District Court.

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[12] In addition, in reviewing a later decision from the same court, the Supreme Court rejected the automatic "drugs equals guns" reasoning that the lower court in Guy v. Wisconsin relied on. See Richards v. Wisconsin, 520 U.S. 385, 390-95 (1997).

STATEMENT ON ORAL ARGUMENT

Espinosa respectfully requests oral argument in this matter. This case raises important constitutional issues because Ortiz asks this Court to adopt a rule that would significantly limit the scope of the Fourth Amendment right to be free from searches conducted without individualized suspicion.

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