No. 03-5554

IN THE

Supreme Court of the United States

LARRY D. HIIBEL,
Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT and THE HONORABLE RICHARD A. WAGNER,
Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR THE PETITIONER

JAMES P. LOGAN, JR.*
Chief Appellate Deputy Public Defender
HARRIET E. CUMMINGS
Appellate Deputy Public Defender
ROBERT E. DOLAN
Deputy Public Defender
OFFICE OF THE NEVADA STATE PUBLIC DEFENDER
511 E. Robinson Street, Suite 1
Carson City, Nevada 89701
(775) 687-4880

* Counsel of Record *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Does the constitution prohibit the state from forcing people to identify themselves during a police investigation when they are seized upon less than probable cause?

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OPINIONS BELOW

The December 20, 2002, opinion of the Supreme Court of the State of Nevada denying Mr. Hiibel's petition for a writ of certiorari is published at 59 P.3d 1201 (Nev. 2002). J.A. 14-32. The April 25, 2003, order of the Supreme Court of the State of Nevada denying rehearing is unpublished and is reproduced in the Joint Appendix. J.A. 33-34.

JURISDICTION

A timely petition for a writ of certiorari was filed on July 22, 2003, and was granted on October 20, 2003. The jurisdiction of this Court rests on 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides, in pertinent part: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . . ."

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Nev. Rev. Stat. 171.123 (2001) provides, in pertinent part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> . . .

> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

This statute was last amended in 1995.

Nev. Rev. Stat. 193.150 (2001) provides, in pertinent part:

> 1. Every person convicted of a misdemeanor shall be punished by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or by both . . . .

The cited portion of the statute was last amended in 1981.

Nev. Rev. Stat. 199.280 (2002) provides, in pertinent part:

> A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
>
> . . .
>
> 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

This statute was last amended in 1995.

STATEMENT OF THE CASE

For the mere act of refusing to identify himself to a deputy sheriff, petitioner Larry D. Hiibel was arrested and convicted of a crime. The circumstances leading up to his arrest are as follows:

On May 21, 2000, in response to a call from police dispatch, Deputy Lee Dove of the Humboldt County, Nevada, Sheriff's Office drove to where a concerned citizen claimed

to have observed someone striking a female passenger inside a pickup truck. There, Deputy Dove spoke to the concerned citizen and was directed to a parked truck a short distance down the road. When Deputy Dove pulled up to the truck he noticed skid marks in the gravel, suggesting the truck had been parked in a sudden and aggressive manner. Deputy Dove saw Petitioner Larry D. Hiibel standing outside the truck and, based on his eyes, mannerisms, speech, and odor, thought Mr. Hiibel might be intoxicated. Mr. Hiibel's minor daughter was in the passenger side of the truck. When Deputy Dove asked Mr. Hiibel to identify himself, Mr. Hiibel refused. Mr. Hiibel said he would cooperate, but stated that he was unwilling to provide identification because he did not believe he had done anything wrong. Instead, Mr. Hiibel placed his hands behind his back and challenged Deputy Dove to take him to jail. After eleven unsuccessful requests for identification, Deputy Dove arrested Mr. Hiibel. J.A. 9-11, 15-16; *Hiibel v. Sixth Judicial District Court*, 59 P.3d 1201, 1203 (Nev. 2002).

Mr. Hiibel was convicted in the Justice Court of Union Township, in and for the County of Humboldt, State of Nevada, of resisting a public officer in violation of Nev. Rev. Stat. 199.280, a misdemeanor. J.A. 16. The basis for the conviction was that Mr. Hiibel, during a *Terry* stop,[1] had failed to identify himself to a police officer upon request in violation of Nev. Rev. Stat. 171.123. J.A. 3-6.

Mr. Hiibel unsuccessfully appealed his misdemeanor conviction to the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt. J.A. 7-12, 13. Thereafter, Mr. Hiibel filed a petition for a writ of certiorari in the Supreme Court of the State of Nevada. In that petition, Mr. Hiibel requested that the court declare as unconstitutional that portion of Nev. Rev. Stat. 171.123 which requires

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

persons who are the subject of a *Terry* stop to identify themselves. Dec. 4, 2001, Petition for Writ of Certiorari filed in Supreme Court of the state of Nevada. In a split decision, the Supreme Court of the State of Nevada upheld the constitutionality of the statute. J.A.14-32; *Hiibel*, 59 P.3d at 1201. Mr. Hiibel then petitioned for rehearing. Jan. 7, 2003, Petition for Rehearing filed in Supreme Court of the State of Nevada. In his rehearing petition, Mr. Hiibel argued that the Nevada Supreme Court should have analyzed the issue utilizing a Fifth Amendment analysis rather than a Fourth Amendment analysis. It was Mr. Hiibel's position that the court should have utilized a weighing analysis similar to this Court's analysis in *California v. Byers*, 402 U.S. 424 (1971). Utilizing this analysis, Mr. Hiibel reasoned that the Nevada court would find the statute unconstitutional. The Nevada Supreme Court summarily denied rehearing in an unpublished order. J.A. 33-34. Mr. Hiibel then petitioned this Court for relief. July 22, 2003, Petition for Writ of Certiorari filed in Supreme Court of the United States. This Court granted certiorari on October 20, 2003.

SUMMARY OF THE ARGUMENT

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court approved limited police seizures and frisks of suspects on the street. Because the holding in *Terry* involved an exception to the general rule requiring probable cause to legitimize a seizure, this Court has been careful to maintain the narrow scope of the seizure.

On several occasions this Court has stated that during a *Terry* stop the police are free to ask a suspect any questions they want to further the investigation. However, the suspect does not have to answer those questions. The issue before this Court is whether the requirement to identify oneself is an exception to that rule or whether this Court will breathe life

into its previous statements and make clear once and for all that the Court meant what it said when it said a suspect does not have to answer.

Requiring people to identify themselves during a *Terry* stop upon pain of imprisonment violates both the Fourth and Fifth Amendments to the United States Constitution. Both of these Amendments are made applicable to the states through the Fourteenth Amendment to the United States Constitution. Therefore, any requirement of a Nevada statute that during a *Terry* stop people are required to identify themselves violates the Fourth, Fifth, and Fourteenth Amendments as well as the Supremacy Clause of the United States Constitution—and for this reason must fail.

The Fifth Amendment prevents governmental authorities from compelling people to testify against themselves. Under our system of criminal justice, which is an accusatorial system rather than an inquisitorial system, a person is free to remain silent or choose to speak as an unfettered exercise of free will. The Fifth Amendment protects persons from being compelled to testify against themselves or to otherwise provide the government with evidence of a testimonial or communicative nature. The amendment has been held to apply not only to criminal trials but to formal and informal civil or criminal proceedings.

In the past, this Court has had the opportunity to determine the constitutionality under the Fifth Amendment of statutes which require people to identify themselves. In these cases the Court balanced the government's need to know against the individual's right to remain silent. The inquiry is basically one of whether the statute is criminal or civil in nature. In order to make this determination the Court looks to whether the notice requirement applies to an area of activity that is permeated with criminal statutes, is directed at a highly selective group of persons inherently suspect of criminal activities, and poses a substantial hazard of self-incrim-

ination. By applying these three criteria to the Nevada statute at issue it is clear that this is a criminal investigation permeated with criminal statutes and directed only at criminal suspects. In addition and given the current state of the law, people's names can incriminate them by identifying them as recidivists and subjecting them to greater punishments. In Nevada, this happens in drunk driving and domestic battery cases, for example. Thus, the mere mention of an individual's name can have serious consequences in a subsequent criminal proceeding.

The Fourth Amendment to the United States Constitution protects the individual from being subjected to unreasonable searches and seizures by governmental authorities. This Court has determined that the "probable cause" standard represents the best compromise between the individual's rights to privacy and to be left alone as opposed to the community's interest to enforce the law for its own protection. There have been only limited and well defined exceptions to the probable cause standard.

Allowing the police to arrest people during a *Terry* stop merely because of a failure to identify themselves unnecessarily reduces the "probable cause" standard to one of reasonable suspicion plus the failure to identify. This does not aid the police officer in determining the extent of criminal activity, if any—which was the reason for the seizure in the first place. The only thing which such a standard adds to reasonable suspicion is to allow the police to arrest someone for failing to identify himself. What this means is that a person under a shadow of suspicion, who has not committed any crime, can be approached by the police, do absolutely nothing, and yet be arrested, convicted and incarcerated. Such a standard for incarceration goes to the very nature of the kind of society in which we live: It is inimical to a free society that mere silence can lead to imprisonment.

The test of reasonableness under the Fourth Amendment requires a balancing between the need for the particular search or seizure against the invasion of the individual rights and liberty interests which it entails. Requiring individuals to identify themselves is an intrusion upon important First, Fourth and Fifth Amendment interests in personal security, mobility, and privacy and authorizes a significant intrusion on constitutionally protected liberty interests. These interests outweigh the speculative law enforcement value of requiring identification.

The interests of the individuals are indeed weighty and compel the conclusion that the Nevada statute violates the Fourth Amendment. For example, requiring people to identify themselves intrudes on the Fifth Amendment right to remain silent and to be free from being compelled to be a witness against themselves. In addition, being required to supply the government with information which identifies and aids in convicting one of domestic battery impacts the Second Amendment right to keep and bear arms.

Also, this Court has recognized a certain right of anonymity when individuals are engaged in First Amendment activities such as promoting religious interests and political views. It is not difficult to imagine the chilling effect on the exercise of First Amendment rights of allowing the government to collect the names of those individuals congregating for the purpose of exercising one of the most important rights of a free and democratic people.

Finally, the collection of someone's identity is a far more intrusive act than a mere "frisk." It allows the police to research, at any time, everything that a person is or has been throughout their lives. This is easily accomplished through the massive electronic databanks which exist today.

Balanced against these important interests is a speculative interest in law enforcement. The "frisk" allowed during a

Terry stop was for purposes of protecting the officer, not, as here, to further the investigation. The police should be more concerned with the actions of the suspect and the circumstances surrounding the detention to determine if a crime has been committed rather than concentrate on identity. In truth, identity has no bearing on whether a crime has been committed.

In this case the lower court asserted a heightened need to determine identity because of a present concern for terrorist activity. However, the lower court failed to explain why a highly trained and well-financed Islamic terrorist would draw unnecessary attention by refusing an officer's request for identification. Moreover, false and stolen identities are commonplace in our society.

In summary, those that assert a need for requiring identification fail to explain how this intrusion will aid the resolution of the investigation. Those who assert that this intrusion upon fundamental liberties will somehow make the citizens of the country safer have failed to heed the admonition of one of our forefathers: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." Letter from Benjamin Franklin to Josiah Quincy (September 11, 1773). To the extent that we as a society are willing to give up our essential liberty interests for our temporary safety, we dishonor the sacrifices of those who came before us, some of whom sacrificed their lives. In so doing, we also fail our children and condemn them to live in a society that is no longer "the land of the free."

ARGUMENT

I. INTRODUCTION

Under current Nevada law, persons may be compelled to identify themselves to peace officers acting under reasonable suspicion of criminal activity, and if they refuse, such persons

can be convicted of a misdemeanor and punished by up to six months in jail. Nev. Rev. Stats. 171.123, 193.150, 199.280. The question the Court must answer in this case is as follows: When persons are being lawfully detained upon less than probable cause, may the government constitutionally require them, under threat of imprisonment, to identify themselves?

Petitioner submits that such a government practice is abhorrent to the Constitution. A brief review of the case law leading up to the issue in this case suggests that this Court agrees.

II. BACKGROUND

Detention upon less than probable cause has commonly become known as a *Terry* stop. In *Terry v. Ohio*, 392 U.S. 1 (1968), and the companion case of *Sibron v. New York*, 392 U.S. 40 (1968), this Court approved limited police seizures and frisks of suspects on the street when the police have articulable facts which, taken together with rational inferences from those facts, reasonably warrant suspicion of criminal activities on the part of a suspect. *Terry*, 392 U.S. at 27; *Sibron*, 392 U.S. at 65. When the police have such reasonable suspicion, along with a reasonable belief that the suspect is armed, they may physically seize the suspect and conduct a protective frisk for weapons. *Terry*, 392 U.S. at 30. The police may also detain the suspect for a reasonable time in order to conduct an investigation. *Id*. The issue in this case has to do with the permissible scope of a *Terry* stop.

This Court has held that seemingly innocent conduct can be the basis for reasonable suspicion justifying a *Terry* stop. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). Moreover, this Court recently acknowledged that "the concept of reasonable suspicion is somewhat abstract," and that "the cause 'sufficient to authorize police to stop a person' is an 'elusive concept.'" *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (quoting *United States v. Cortez*, 449 U.S. 411,

417 (1981)). "Suspicion involves so low a degree of belief and so subjective a judgment that it is impossible . . . to draw a line between 'mere' suspicion and a 'reasonable' suspicion." Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police*), 58 J. Crim. L. Criminology & Police Sci. 433, 445 (1967). Officers are thus left to rely on their own subjective judgment when deciding who should be *Terry* stopped. By deliberately avoiding reducing that cause to "'a neat set of legal rules,'" the Court has necessarily muddied what, in Nevada, an officer must observe before he may stop, and demand identification from, a person. *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)).[2] In essence, police officers proceed with neither guidance nor limitations in assessing what behavior qualifies as suspicious.

Thus, under the current state of the law in Nevada, a person can be stopped by the police for engaging in perfectly innocent yet "suspicious" behavior, asked to identify himself,[3] and if he declines, be arrested and hauled off to jail. This is frighteningly reminiscent of Nazi Germany, where people lived in fear of being approached by the Gestapo and commanded to turn over "Your papers, please."

On at least two occasions this Court has been confronted with the very question which is at issue in this case. On both of these occasions this Court has decided the case on other grounds.

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[2] Moreover, the conflict between the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the State of Nevada regarding the constitutionality of Nev. Rev. Stat. 171.123 further highlights the difficulty police officers in Nevada face in determining whether or not they are legally justified in stopping someone. *Compare Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873 (9th Cir. 2002), *with Hiibel v. Sixth Judicial District Court*, 59 P.3d 1201 (Nev. 2002).

[3] NB: For the sake of brevity this brief will use the pronoun "him" to refer to both the male and female gender.

In *Brown v. Texas*, 443 U.S. 47 (1979), this Court was faced with a statute which made it a crime to refuse to identify oneself to a police officer. *Id.* at 48. The appellant had challenged the statute on First, Fourth, Fifth and Fourteenth Amendment grounds. *Id.* at 49. This Court never reached the constitutionality of the statute, however, because it held the initial detention was illegal. *Id.* at 52. Therefore, anything which occurred after the illegal seizure was suppressible.[4]

Another case in which this Court had an opportunity to decide the issue but did not do so was *Kolender v. Lawson*, 461 U.S. 352 (1983). That case involved a statute which required someone to produce identification upon police request. *Id.* at 353. The trial court had reasoned that "'a person who is stopped on less than probable cause cannot be punished for failing to identify himself.'" *Id.* at 354. This Court again did not decide the issue of the constitutionality of compulsory identification, however, and instead held the statute void for vagueness. *Id.* at 353, 361.

While the issue in this case has not been decided, this Court and various of its members have not been entirely silent on the issue. Numerous cases, in the context of deciding other issues, make reference to a person's right not to identify himself or answer other questions put to him by a police officer.

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[4] Noting that the lower court had been troubled by the constitutionality of the statute, *id.* at 53-54, this Court stated that it "need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements," *id.* at 53 n.3, because it decided the case on other grounds.

For example, in *Berkemer v. McCarty*, 468 U.S. 420 (1984), authored by Justice Marshall and joined in by Justices Burger, Brennan, White, Blackman, Powell, Rehnquist, and O'Connor, while discussing *Terry* stops this Court stated:

> The stop and inquiry must be "reasonably related in scope to the justification for their initiation". . . . Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond*. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Id. at 439-40 (internal citations and footnotes omitted) (emphasis added).

In *Davis v. Mississippi*, 394 U.S. 721 (1969), in a footnote the majority made the following observation:

> The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. . . . *But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.*

Id. at 727 n.6 (emphasis added).

Likewise, in *Terry*, Justice White explained in his concurring opinion that, "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." 392 U.S. at 34 (White, J., concurring). Justice Harlan voiced a similar viewpoint, noting that a person to whom questions are addressed has the "right to ignore his interrogator and walk away." *Id.* at 33 (Harlan, J., concurring).

In his dissenting opinion in *Michigan v. DeFillippo*, 443 U.S. 31, 44 (1979), Justice Brennan, joined by Justices Marshall and Stevens, noted that, although a person may be briefly detained and subjected to questioning under *Terry*, he is not required to answer nor may he be arrested for refusing to do so. He stated:

> In the context of criminal investigation, the privacy interest in remaining silent simply cannot be overcome at the whim of any suspicious police officer. "[W]hile the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer" . . . .
>
> In sum then, individuals accosted by police on the basis merely of reasonable suspicion . . . have a right to remain silent . . . .

Id. at 44-45 (Brennan, J., dissenting) (footnote and citation omitted).

And finally, in *Kolender v. Lawson*, Justice Brennan in concurrence stated:

> [T]he scope of seizures of the person on less than probable cause that Terry permits is strictly circumscribed to limit the degree of intrusion they cause. Terry encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, *most importantly, the suspect must be free* to leave after a short time and *to decline to answer the questions put to him*.

461 U.S. at 65 (Brennan, J., concurring) (emphasis added).

Although in *Davis v. Mississipi* this Court referred to the right not to be compelled to answer police questions as a "settled principle," 394 U.S. at 727 n.6, it has never before answered the specific question of whether the constitution

prohibits governments from enacting compulsory identification laws. The instant case presents the Court the opportunity to resolve the issue once and for all.

At this juncture it is important to note that Mr. Hiibel is not claiming that police authorities do not have the right to ask any questions reasonably related to the purpose of the seizure. *See Davis v. Mississippi*, 394 U.S. at 727, n.6. Nor is Mr. Hiibel claiming that the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), apply to a *Terry* stop. *See Berkemer v. McCarty*, 468 U.S. at 440. Moreover, although certainly a strong argument can be made that the Nevada statute is unconstitutionally vague, *cf. Kolender*, 461 U.S. at 361, it is Mr. Hiibel's contention that even if the statute could be rewritten in such a way that it would not be vague, it would nevertheless be unconstitutional as violative of the Fifth and Fourth Amendments.

Mr. Hiibel is, however, asserting that although the police authorities have the right to ask questions, he is not required to answer those questions, in particular questions regarding his identity, and that his failure to do so should not result in criminal sanctions which can include arrest, a fine, and jail.[5] For the reasons that follow, Nev. Rev. Stat. 171.123(3) is violative of the Fifth and Fourth Amendments to the United States Constitution.

[5] *Cf. Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (the state may not "make[] a crime out of what under the Constitution cannot be a crime.")

III. THE REQUIREMENT OF NEV. REV. STAT. 171.123(3) WHICH COMPELS A PERSON DETAINED UPON REASONABLE SUSPICION TO IDENTIFY HIMSELF TO THE POLICE VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."[6] U.S. Const. Amend. V.

The requirement of Nev. Rev. Stat. 171.123(3) that an individual disclose his identity or suffer a criminal conviction frustrates this important Fifth Amendment protection, which is designed to "prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . . ." *United States v. White*, 322 U.S. 694, 698 (1944). The Fifth Amendment requires prosecutors "to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *Id*. at 698. As this Court has noted, the privilege "is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution." *Id.* at 699.

The Fifth Amendment safeguards the "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *see also*

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[6] The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 3, 8 (1964).

U.S. Const. Amend. I ("Congress shall make no law . . . abridging the freedom of speech"). Our accusatorial system of criminal justice "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citation omitted). In short, the proposition *Miranda* has become known for—the right to remain silent—is a bulwark of our legal system.

In speaking of testimony given in response to a grant of legislative immunity this Court has recognized that such statements compelled by law are:

> [T]he essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled. The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination.

New Jersey v. Portash, 440 U.S. 450, 459 (1979) (emphasis in original). As noted by Justice Powell, joined in concurrence by Justice Rehnquist, "the Fifth Amendment . . . prohibits a State from using compulsion to extract truthful information from a defendant, when that information is to be used later in obtaining the individual's conviction." *Id.* at 463 (Powell, J., concurring). Accordingly, it is plain that the government is prohibited from requiring a person to identify himself to the police under threat of criminal prosecution because to do so violates the Fifth Amendment privilege against compulsory self-incrimination.

Here too, moreso even than if the police resorted to sophisticated techniques of custodial interrogation (*see Miranda*, 384 U.S. at 448-57), it is the force of the law that extracts proof of identity from the suspect under a *Terry* detention. If the suspect exercises his Fifth Amendment right to remain silent, he is punished as a criminal. There is no right to remain silent if silence receives a criminal sanction. To hold otherwise would render the protections of the Fifth Amendment meaningless.

A. Being Compelled To Identify Oneself To The Police Is A Testimonial Communication Protected By The Fifth Amendment.

The Fifth Amendment protects persons from being compelled to testify against themselves or to otherwise provide the state with evidence of a testimonial or communicative nature. *Schmerber v. California*, 384 U.S. 757, 761 (1966), *see also United States v. Hubbell*, 530 U.S. 27, 34 (2000). It does not protect a person from being compelled to disclose real or physical evidence. *Schmerber*, 384 U.S. at 764. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, 487 U.S. 201, 210 (1988) (quoted in *Pennsylvania Muniz*, 496 U.S. 582, 589 (1990)). Being compelled to identify oneself to an inquiring officer is not evidence of real or physical evidence in the nature of physical characteristics such as blood or handwriting exemplars; rather, it is evidence of a testimonial or communicative nature that, upon disclosure, can itself be incriminating or lead to incriminating evidence. If it did not, the police would have little interest in asking persons their names or identities. Consciousness of who we are goes to the very essence of our being, and being commanded to reveal our identity and hence face the "trilemma" of truth, falsity, or

silence, *Muniz*, 496 U.S. at 597, causes us to reveal evidence which is testimonial at its core.

Significantly, in *Lefkowitz v. Turley*, 414 U.S. 70 (1973), this Court said of the Fifth Amendment privilege against compelled self-incrimination:

> The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Id. at 77. Thus, it does not matter that Mr. Hiibel was asked to identify himself in the context of a *Terry* stop rather than in a formal judicial proceeding. In fact, it appears that this Court and various of its members have assumed that the Fifth Amendment's prohibition against compulsory self-incrimination applies to *Terry* stops. *See, e.g.*, *Berkemer*, 468 U.S. at 439-40; *Terry*, 392 U.S. at 34 (White, J., concurring); *DeFillippo*, 443 U.S. at 44-45 (Brennan, J., dissenting). Following the dictates of *Lefkowitz*, *supra*, this assumption is plainly correct. Compulsory identification for purposes of permitting an officer "to ascertain his identity and the suspicious circumstances surrounding his presence abroad," Nev. Rev. Stat. 171.123(3), is inherently testimonial and falls within the purview of the Fifth Amendment. By itself, the identification process can be incriminating or lead to evidence which might incriminate the person in future criminal proceedings. It is therefore the type of testimonial or communicative evidence which the Fifth Amendment is designed to protect against being compelled.

B. Utilizing The Analysis Of *California v. Byers*, Nev. Rev. Stat. 171.123(3) Violates The Fifth Amendment.

In *California v. Byers*, 402 U.S. 424 (1971), this Court analyzed the constitutionality, under the Fifth Amendment, of a California "hit and run" statute which required motorists involved in a property damage accident to stop and give their names and addresses. In a plurality opinion by Chief Justice Burger, the Court stated a general rule as follows:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Id. at 427. The opinion discussed three factors that determine whether a self-reporting requirement violates the Fifth Amendment privilege against self-incrimination: Whether the notice requirement (1) applies to an area of activity that is "permeated with criminal statutes," (2) is directed at a "highly selective group inherently suspect of criminal activities," and (3) poses "substantial hazards of self-incrimination." *Id.* at 430 (citing *Albertson v. SACB*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes v. United States*, 390 U.S. 85 (1968)). In the cited cases of *Albertson*, *Marchetti*, *Grosso*, and *Haynes*, the Court found that compliance with the statutory disclosure requirements would confront the petitioner with substantial hazards of self-incrimination because they might require admission of a crucial element of a crime. *Byers*, 402 U.S. at 429-30. In addition, in these

cases the disclosures condemned were only extracted from a highly selective group inherently suspect of criminal activities, such as members of a Communist organization (*Albertson*), gamblers (*Marchetti*, *Grosso*), and possessors of firearms (*Haynes*). Finally, the privilege was applied in the cases in areas permeated with criminal statutes—not in "an *essentially noncriminal* and *regulatory area* of inquiry." *Byers*, 402 U.S. at 429 (emphasis in original).

In contrast to *Albertson*, *Marchetti*, *Grosso*, and *Haynes*, the Court in *Byers* upheld the statute requiring motorists involved in an accident to give their names. *Byers*, 402 U.S. at 430-31. However, the opinion found it significant that the law "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liberties." *Id.* at 430. It was essentially regulatory, not criminal, in nature. *Id.* Nor was the law aimed at a "highly selective group inherently suspect of criminal activities," but rather, it was directed "at the public at large." *Id.* at 430 (internal quotation marks and citations omitted). Moreover, under the circumstances the required disclosure was an "essentially neutral act" under the statute, although the opinion noted that disclosure was "always subject to the driver's right to assert a Fifth Amendment privilege concerning specific inquiries." *Id.* at 432-33.

Although *Byers* involved motorists, Mr. Hiibel asserts that its analysis is equally applicable to situations involving pedestrians. The essential question is not whether the statute applies to motorists or pedestrians (Nev. Rev. Stat. 171.123 applies to both), but whether its identification requirement applies in a criminal context to a select group posing a self-incrimination hazard. Mr. Hiibel submits that it does. For this reason, *Byers*, though analytically on point, is factually distinguishable.

C. Nevada's Compulsory Identification Requirement: 1) Applies To An Area Of Activity That Is Permeated With Criminal Statutes, 2) Is Directed At A Highly Selective Group Of Persons Inherently Suspect Of Criminal Activities, And 3) Poses A Substantial Hazard Of Self-Incrimination; It Is Therefore Violative Of The Fifth Amendment.

Applying the analytical framework from *Byers*, it becomes clear that the Nevada statute at issue violates the Fifth Amendment protection against compelled self-incrimination. In stark contrast to the facts of *Byers*, Nev. Rev. Stat. 171.123(3) is entirely different. The request for identification takes place during a valid Fourth Amendment seizure when there is an articulable suspicion that criminal activity is afoot. *See* Nev. Rev. Stat. 171.123; *Terry v. Ohio*, 392 U.S. 1 (1968). Therefore, the only time the request for identification takes place is during an actual criminal investigation. Failure to identify oneself can be the basis for the crime of resisting a public officer, a misdemeanor punishable by up to six months in jail. Nev. Rev. Stats. 193.150, 199.280. Unmistakably, then, this is an area of activity "permeated with criminal statutes" under *Byers*. Moreover, the statute is directed at a "highly selective" group of persons "inherently suspect of criminal activities," as it is limited to persons whom the officer believes "has committed, is committing or is about to commit a crime," and the officer is limited to inquiring about the person's identity and "suspicious circumstances surrounding his presence abroad." Nev. Rev. Stat. 171.123(1), (3). Most significantly, the type of encounter authorized by Nev. Rev. Stat. 171.123 poses a "substantial hazard" of self-incrimination under *Byers*. The circumstances of this case demonstrate how there is a direct likelihood that being compelled to identify oneself can be incriminating by pro-

viding testimonial information in one's name that could be used as evidence against a suspect otherwise lacking probable cause for arrest.

In this case the officer, having been advised that someone was seen striking a female passenger inside a pickup truck, was investigating a possible battery or domestic battery.[7] The same last name can be evidence of a relationship which triggers the domestic battery laws. *See* Nev. Rev. Stat. 33.018. The alleged victim of the battery was Mr. Hiibel's daughter. Thus, one's name can in itself be incriminating.[8]

Moreover, domestic battery differs from simple battery in a number of ways. Police officers must arrest a suspect in a domestic battery case as opposed to using their discretion in a battery case. Nev. Rev. Stat. 171.137. Once arrested, a domestic battery suspect cannot be bailed out of jail for a minimum of twelve (12) hours and then only at exorbitant amounts of bail unless the suspect appears before a magistrate, which can take at least as long as forty-eight hours. Nev. Rev. Stat. 178.484(5); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Moreover, under 18 U.S.C. 922(g)(9), a person convicted of a misdemeanor crime of domestic violence may not lawfully possess a firearm and thus loses his Second Amendment right to bear arms forever. Finally, domestic battery, like driving under the influence, subjects offenders to increased punishment for those having prior offenses, ultimately constituting a felony. Compare Nev. Rev. Stats. 200.481, 200.485 and 484.3792.

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[7] In addition, the officer noticed the smell of alcohol on Mr. Hiibel's breath, and thus was faced with a possible drunk driving situation. Recall that Deputy Dove encountered Mr. Hiibel standing outside a pickup truck along the side of the road.

[8] Similarly, even merely sharing a residence can be evidence of a relationship which triggers the domestic battery laws. *See* Nev. Rev. Stat. 33.018. Thus, giving one's address can be equally incriminating.

The prior record of the offender is discoverable through sophisticated electronic databases indexed by name among other ways.[9] It is clear that at this time in our criminal justice, a person's name can be used to enforce a harsher penalty. While the police can obtain this information through other sources (e.g., fingerprints), the Fifth Amendment protects individuals from being compelled to provide information which tends to incriminate them. Nev. Rev. Stat. 171.123's requirement that a detained person identify himself plainly violates this important constitutional safeguard.

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[9] For example, through databases such as the National Crime Information Center (NCIC), the Multi-State Anti-Terrorism Information Exchange (MATRIX), and Florida's Driver and Vehicle Information Database (DAVID), officers can access information regarding a person's name; address; city; county; phone number; social security number; race; sex; date and place of birth; age; physical characteristics; photographic array; fingerprints; signature; employment; professional licenses; voter registration information; property ownership; utilities; bankruptcies, liens and judgments; driver's and other licenses; license plate & registration information; vehicle identification number; status as a missing or wanted person; arrests, warrants, and juvenile and adult convictions; whether the person is in possession of stolen property or vehicles; etc. *See generally*, 28 U.S.C. 534; Bureau of Justice Statistics, *Report of the National Task Force on Privacy, Technology and Criminal Justice Information*, NCL 187669 (Aug. 2001); Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update*, NCJ 187670 (Dec. 2001); *MATRIX and ATIX: Information Programs Developed in Response to September 11, 2001*, Ga. Homeland Security Bulletin No. 20-03 (Ga. Office of Homeland Security), Aug. 1, 2003; Institute for Intergovernmental Research, *MATRIX Program Objectives #1*, at www.iir.com/matrix/objectives_1.htm; Florida Department of Highway Safety and Motor Vehicles, DAVID Brochure, at *casey.hsmv.state.fl.us.intranet/ddl/AAMVA/david.pdf*. These databases can be searched on partial information. Thus, officers can avail themselves of "one stop shopping" by using a single piece of information to access a wealth of detailed information about the person with whom they are dealing.

Additionally, little imagination is required to devise scenarios in which compelled identification can be incriminating. For example, in *Kirby v. Illinois*, 406 U.S. 682 (1972), a lawfully stopped suspect produced the credentials of a mugging victim upon an officer's demand for identification. In another case, *United States v. Purry*, 545 F.2d 217 (D.C. Cir. 1976), officers requested identification from a suspect whose wallet they had discovered at the scene of a crime. In each of these cases, the proof of identity provided evidence supporting an eventual conviction. Therefore, in both of these cases a statutory requirement of self-identification would have constituted compelled self-incrimination in violation of the Fifth Amendment.

As can be readily seen from the above discussion, compelled identification during a *Terry* stop is a testimonial communication which gives police authorities information that can be later used in a subsequent criminal proceeding. The Nevada statute applies to an area of activity that is permeated with criminal statutes, is directed at a highly selective group of persons who are inherently suspect of criminal activities, and poses a substantial hazard of self-incrimination. Because this statute directly contravenes the protections preserved by the Fifth Amendment, it must be held unconstitutional.

IV. NEV. REV. STAT. 171.123(3) REQUIRING INDIVIDUALS WHO ARE THE SUBJECT OF A *TERRY* STOP TO IDENTIFY THEMSELVES VIOLATES THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES.[10]

A. Probable Cause Is The Bedrock Of The Fourth Amendment And Is Required Before A Person Can Be Arrested For Refusing To Produce Identification.

Imposition of criminal sanctions for the refusal to produce identification, when the demand for identification is made without probable cause to believe an offense has been committed, violates the Fourth Amendment rights of individuals: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."[11] U.S. Const. Amend. IV.

Over a period of decades this Court has stressed many times the central importance of the probable cause requirement to the protection of a person's privacy afforded by the guarantees of the Fourth Amendment. *See, e.g., Henry v. United States*, 361 U.S. 98, 100 (1959). As stated, for example, in *Dunaway v. New York*, 442 U.S. 200 (1979): "The long-prevailing standards of probable cause embodied the best compromise that has been found for accommodating

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[10] This argument was raised in *Kolender v. Lawson*, 461 U.S. 352 (1983), but because this Court decided the case on vagueness grounds it never reached this issue. *Id.* at 361 n.10; Brief for Appellee Edward Lawson, No. 81-1320, October Term 1982.

[11] The prohibition against unreasonable searches and seizures guaranteed by the Fourth Amendment is applicable to the states as part of the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

the often opposing interests in safeguarding citizens from rash and unreasonable interferences with privacy and in seeking to give fair leeway for enforcing the law in the community's protection." *Id.* at 208 (internal quotation marks, brackets and citation omitted).

The Fourth Amendment's protection of the right to privacy and its safeguards against unreasonable searches and seizures are not shed simply because an individual leaves his home to walk or drive the streets. According to *Terry v. Ohio*, 392 U.S. 1 (1968):

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'

Id. at 8-9 (citation omitted). In short, this represents the right that Brandeis and Warren articulated in their seminal "Right of Privacy" law review article: the "right to be let alone." Warren & Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890-91).

Although the Court in *Terry* created an exception to the principle that seizures of the individual must be based on probable cause, the standard of probable cause continues to govern. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway*, 442 U.S. at 210. *See also Michigan v. DeFillippo*, 443 U.S. 31, 44 (1979) (Brennan, J., dissenting) ("[T]he authority of police to accost citizens on the basis of suspicion is 'narrowly drawn.'") (quoting *Terry*, 392 U.S. at 27).

The test of reasonableness under the Fourth Amendment requires a balancing of the need for the particular search or seizure "against the invasion of personal rights that the search [or seizure] entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Balancing those competing interests in this case reveals that the scales tip heavily in favor of protecting individual rights.

B. By Requiring Identification Under Force Of Law During A Seizure With Less Than Probable Cause, Nev. Rev. Stat. 171.123(3) Undermines The Probable Cause Standard By Sanctioning An Arrest For Merely Failing To Identify Oneself.

The requirement of Nev. Rev. Stat. 171.123(3) that proof of identity be disclosed upon no more than satisfaction of the *Terry* criteria of reasonable suspicion represents an unwarranted departure from the probable cause standard so essential to Fourth Amendment freedoms. The statute effectively undermines the probable cause standard by sanctioning an arrest where there are insufficient grounds to arrest the suspect for the underlying offense that was the predicate to the initial stop. *See e.g.*, *Lawson v. Kolender*, 658 F.2d 1362, 1366-67 (9th Cir. 1981), *aff'd*, *Kolender v. Lawson*, 461 U.S. 352 (1983). When a suspect refuses to provide proof of identity under Nev. Rev. Stat. 171.123(3), the officer is justified in arresting the suspect for violating Nev. Rev. Stat. 199.280. Thus, Nevada law impermissibly allows an officer to conduct a complete search incident to arrest even though he has only a suspicion of underlying criminal activity.

Accordingly, Nevada's statutory scheme violates the Fourth Amendment because, as a result of the demand for identification, "the statutes bootstrap the authority to arrest on less than probable cause." *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 880 (9th Cir. 2002) (quoting *Lawson*, 658

F.2d at 1366-67) (internal quotation marks omitted). In addition, the serious intrusion on personal security, privacy and mobility that results from enforcement of the statute "outweighs the mere possibility that identification might provide a link leading to arrest." *Lawson*, 658 F.2d at 1367-68; *see also Martinelli v. City of Beaumont*, 820 F.2d 1491, 1494 (9th Cir. 1987) (an arrest grounded on refusal to identify oneself during a *Terry* stop violates the Fourth Amendment). *Accord*, *United States v. Butler*, 223 F.3d 368, 374 (6th Cir. 2000); *United States v. Obasa*, 15 F.3d 603, 607 (6th Cir. 1994); *Richardson v. Bonds*, 860 F.2d 1427, 1432 (7th Cir. 1988); *Moya v. United States*, 761 F.2d 322, 325 (7th Cir. 1984); *Gaynor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992); *United States v. Brown*, 731 F.2d 1491, 1494, *modified on other grounds*, 731 F.2d 1505 (11th Cir. 1984); *Timmons v. City of Montgomery*, 658 F. Supp. 1086, 1093 (D. Ala. 1987); *Spring v. Caldwell*, 561 F. Supp. 1223, 1229-30 (D. Tex. 1981), *rev'd on other grounds*, 692 F.2d 994 (5th Cir. 1982); *City of Pontiac v. Baldwin*, 413 N.W.2d 689, 699 (Mich. App. 1987); *People v. DeFillippo*, 262 N.W.2d 921 (Mich. 1977), *rev'd on other grounds*, *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *People v. Berck*, 300 N.E.2d 411, 414-16 (N.Y. 1973); *State v. White*, 640 P.2d 1061 (Wash. 1982); *Burks v. State*, 719 So.2d 29 (Fla. App. 1998); *State v. Huan*, 361 N.W.2d 336 (Iowa App. 1984).

"A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown v. Texas*, 443 U.S. 47, 51 (1979). *See generally Steagald v. United States*, 451 U.S. 204, 212, 215-16 (1981); *See v. Seattle*, 387 U.S. 541, 545 (1967). Yet Nev. Rev. Stat. 171.123(3) loosens constitutional control over discretionary and potentially arbitrary police conduct. By imparting a general investigative statute with criminal sanctions, it substitutes standards for mere inves-

tigatory activities, i.e., reasonable suspicion, in place of the constitutional standard imposed by the Fourth Amendment for arrest, i.e., probable cause. It allows the requirement of probable cause to be functionally subverted inasmuch as it facilitates arrests and searches based on artifice where an insufficient basis exists to arrest the suspect for the underlying offense that justified the initial stop. As such, it violates the Fourth Amendment.

If, as this Court has unanimously held, "[a] direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) (footnote omitted), then a blanket direction to arrest all "suspicious" persons who refuse or are unable to dispel the suspicions officially perceived as to their activities should be similarly unconstitutional. *Id*. ("Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system"). For persons who refuse to identify themselves, the police still lack more than just reasonable suspicion, "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Certainly, the mere refusal to identify oneself does not add enough to a *Terry*-based suspicion to give rise to probable cause to arrest for the underlying activity that prompted the stop.

Nev. Rev. Stat. 171.123(3), at its core, makes criminal an individual's refusal to identify himself. The sole intent of the law's identification requirement is to find out who the person under detention is—to increase police knowledge about that individual in order to create a case against him. The statute is otherwise useless: surely once the person provides identification to the police, without more facts brought to the attention of the officer to establish probable cause to arrest or arouse reasonable suspicion warranting further investigation, the person is free to go. The statute therefore creates "a crime

out of what under the Constitution cannot be a crime."[12] *Michigan v. DeFillippo*, 443 U.S. 31, 45 (1979) (Brennan, J., dissenting) (quoting *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971)). It manufactures probable cause from the outside edge of the *Terry* standard to create a violation of Nev. Rev. Stat. 199.280. As the Ninth Circuit held in *Lawson v. Kolender*, "as a result of the demand for identification, the statutes bootstrap the authority to arrest on less than probable cause." 658 F.2d at 1366-67. Nev. Rev. Stats. 171.123 and 199.280 authorize arrest and conviction "for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense." *Id.* at 1367 (internal quotation marks and citation omitted).

Yet that is precisely what has happened in Nevada. Nev. Rev. Stat. 171.123(3) collapses the probable cause requirement for a search incident to arrest into the *Terry* standard. In *United States v. Robinson*, 414 U.S. 218 (1973), this Court stressed the "distinction in purpose, character, and extent" between a search incident to an arrest and the limited search for weapons authorized by *Terry*. *Id.* at 227 (quoting *Terry*, 392 U.S. at 21-22). Said the Court:

> The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon . . . is also justified on other grounds . . . and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest,

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[12] *Cf. Thompson v. Louisville*, 362 U.S. 199, 204-06 (1960) (conviction for not giving satisfactory account of oneself and for arguing with police violated due process because there was no evidence of guilt of loitering or disorderly conduct); *Norwell v. Cincinnati*, 414 U.S. 14, 16 (1973) (conviction for disorderly conduct reversed as violative of free speech rights where defendant voiced objection to questionable detention).

> however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. . . . Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby . . . .

Id. at 227-28 (citations omitted).

Nev. Rev. Stat. 171.123(3) undoes this distinction for persons detained under its provisions. Since "[n]othing in Terry can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons," *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979), an officer ordinarily cannot, consistent with the Fourth Amendment, examine the contents of a wallet or purse for proof of a subject's identity where probable cause to arrest does not first exist. However, under Nev. Rev. Stat. 171.123(3), persons to whom the demand for proof of identification is directed are unable to rely upon this constitutional standard. For even when no probable cause to arrest exists, they must either themselves furnish proof of identification or where a request for identification is refused, the police may take the person and search him incident to the arrest and determine his identification at the time of the search or at the police station. The law cannot reach into an individual's pocket to obtain proof of identity on the *Terry* standard alone, yet Nev. Rev. Stat. 171.123(3) requires the individual to do the reaching for the police. *Cf. Hiibel*, 59 P.3d at 1209 (Agosti, C.J., dissenting) ("With today's majority decision, the officer can now, figuratively, reach in, grab the wallet and pull out the detainee's identification). The reaching is not merely figurative, however: where the individual objects, the law then finds supposed "probable cause" within itself, and thereby proceeds to authorize the police to reach into the suspect's pocket for themselves as a search incident to arrest. *See DeFillippo*, 443 U.S. at 46 (Brennan, J., dissenting) (police acting on less than probable cause may not search, compel answers, or search those who

refuse to answer their questions). The search consequently takes place unconstitutionally—without the suspicions justifying the stop and demand for identification ever ripening into probable cause.

C. Nev. Rev. Stat. 171.123(3) Authorizes Significant Intrusion On The Individual's Constitutionally Protected First, Fourth, And Fifth Amendment Liberty Interests Even Though These Important Interests In Personal Security, Mobility And Privacy Greatly Outweigh The Intrusion's Speculative Law Enforcement Value.

The enforcement of Nev. Rev. Stat. 171.123(3)'s identification requirement significantly impairs the exercise of constitutionally protected interests in personal security, mobility and privacy. "In the absence of any basis for suspecting [an individual] of misconduct, the balance between the public interest [in preventing crime] and [the individual's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52 (1979).

The balance between constitutional rights and crime prevention does not shift by conditioning the demand for proof of identity upon the police first establishing a *Terry* basis for detention. As already noted, although the police have the right to request persons to answer voluntarily questions concerning unsolved crimes, they have no right to compel their answers. *E.g.*, *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984); *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969); *see also Dunaway v. New York*, 442 U.S. 200, 210 n.12 (1979). In balancing the need for the particular seizure against the invasion of personal rights that it entails,

it is apparent that Nev. Rev. Stat. 171.123(3) authorizes a significant intrusion on constitutionally protected liberty interests.

Intrusions upon protected interests where officers lack probable cause to arrest have always been "brief and narrowly circumscribed." *Dunaway*, 442 U.S. at 212. Here, the interference is materially different. By transforming refusal to answer into a basis for arrest, Nev. Rev. Stat. 171.123(3) effectively compels answers from persons who are unwilling to sacrifice their liberty in order to maintain their constitutionally protected interests in privacy, security and mobility. Consequently, Nev. Rev. Stat. 171.123(3) effectively functions as a "suspicious persons' registration act," authorizing the police to collect the names of individuals although their only reason for appearance in law enforcement files may be the exercise of constitutional rights. Yet, unlike authoritarian countries like China, the United States does not require its citizens to register with the authorities. Upholding the constitutionality of Nev. Rev. Stat. 171.123(3) would have the effect of authorizing a national identification system.

Nev. Rev. Stat. 171.123(3) significantly intrudes upon several fundamental constitutional rights. As demonstrated in Section III above, the statute significantly intrudes upon the Fifth Amendment because it requires persons to identify themselves or suffer arrest, in violation of their right against self-incrimination. Also, as demonstrated in Section IV.B. above, the statute significantly intrudes upon the probable cause standard of the Fourth Amendment by reducing probable cause to arrest to a mere reasonable suspicion coupled with the refusal to identify oneself, in violation of the person's rights against unreasonable search and seizure.

In addition to the significant intrusions discussed above, Nev. Rev. Stat. 171.123(3) also intrudes upon the First Amendment right to speak or not to speak freely. Moreover, this Court has recognized that citizens who are engaging in

certain First Amendment activities are entitled to some amount of anonymity. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150, 166 (2002) (door to door religious solicitation); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199 (1999) (political petition circulation); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (distribution of campaign literature); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958) (membership in a nonprofit association).

For example, in *Watchtower*, this Court struck down a requirement that door-to-door canvassers obtain a permit from the city as a condition of that canvassing. One of the reasons offered by the Court was that such a scheme robbed noncommercial canvassers of the right to solicit anonymously. Because would-be canvassers must be "identified in a permit application filed in the mayor's office and available for public inspection," a surrender of anonymity necessarily resulted. *Id.* at 166.

It is not difficult to see how officers might circumvent the result in *Watchtower*, whether intentionally, or more likely, by merely carrying out what they believe to be legitimate police activity: Persons proceeding door-to-door, especially in the evening, could reasonably be suspected of casing prospective burglary targets. Thus, an officer might reasonably have the requisite level of suspicion to stop those canvassers, and ascertain whether their intent is lawful or not. As part of that stop, under the Nevada Supreme court's ruling in this case, the officer would have the power to demand the identity of those canvassers.

If officers were to routinely *Terry* stop door-to-door canvassers, the result would be that innocent parties, such as the plaintiffs in *Watchtower*, would become ensnared. They would have to justify themselves, and their identities, to officers whenever engaging in what *Watchtower* held was

protected First Amendment activity. Even if such stops of canvassers were sporadic, the ability to demand their identities could well have exactly the chilling effect described and condemned by the majority in *Watchtower*.

In a similar vein, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court held that involuntary disclosure of membership lists could only be effected by the government upon a sufficiently compelling reason. *Id.* at 463. Alabama's interest did not survive the heightened test, despite the fact that Alabama was armed with an existing court order and had a reasoned need for the list in conjunction with litigation.

It is difficult to explain how the membership list in *NAACP* was not sufficiently important to Alabama, yet identities of persons stopped pursuant to *Terry* are so important to officers that they might be unmasked upon mere reasonable suspicion. As with the facts in *Watchtower*, it takes little imagination to foresee an evasion of the result in *NAACP* in which officers, even well-meaning ones, observe large congregations of black persons, especially at night, and in high-crime areas. The chilling effects on NAACP meetings, gatherings of Communists, and Klan members alike, is equally evident.[13]

Plainly, as the Court has recognized under these cases, there would be a chilling effect on protected First Amendment activity if the government were allowed to keep a list of "suspicious persons" who expressed minority views or political views opposed to current governmental policies—or

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[13] Moreover, such dragnets of persons of color are hardly confined to conjecture. Black men in particular often find themselves being stopped, questioned and searched by police pursuant to policies of indiscriminately stopping and frisking members of youth gangs, often in blatant disregard of constitutional norms. T. Maclin, Book Review: *Seeing the Constitution from the Backseat of a Police Squad Car*, 70 B.U.L. Rev. 543, 570 (1990).

of persons who merely wished to remain anonymous when out and about. It is not difficult to imagine how the authority to stop and identify could be abused in the context of First Amendment protections. The facts of *Watchtower* illustrate the potential for abuse. A group of young men are approaching the door of each apartment in a large complex. Are these youths distributing religious or political material or are they casing the residences looking for an unlocked door? In another instance, a group of people are gathering along the sidewalks. Are these people going to engage in a religious activity or engage in a legal political protest regarding engagement in a foreign war? Under the rule that will be decided in this case will the government be able to record the names of people engaged in First Amendment activities and political protests under the guise of crime prevention? Such a ruling would be more reminiscent of a totalitarian state that registers and restricts its citizens rather than a nation of free people expressing opposing religious and political views.

Finally, in contrast to the pat-down search authorized by *Terry*, seizures pursuant to Nev. Rev. Stat. 171.123(3) are peculiarly personal, directed specifically toward the individuals against whom the police apply its identification requirement. The intent of the statutory intrusion, after all, is discovery of the person's identity. The frisk, while concededly "a severe, though brief, intrusion upon cherished personal security," *Terry*, 392 U.S. at 25, nonetheless constitutes an immediate and limited incursion upon an anonymous person. State intervention through a pat-down finishes with its administration: police know no more about the subject of the search than they did moments before.

It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, "he has 'seized' that person." *Terry*, 392 U.S. at 16. Yet, unlike a frisk, which ends upon its conclusion and simply informs the officer whether or not the suspect is armed,

obtaining a person's identity is just the tip of the iceberg in terms of what information an officer can discover. As the Ninth Circuit observed in *Lawson*,

> In contrast, police knowledge of the identity of an individual they have deemed 'suspicious' grants the police unfettered discretion to initiate or continue investigation of the person long after the detention has ended. Information concerning the stop, the arrest and the individual's identity may become part of a large scale data bank.

Lawson v. Kolender, 658 F.2d at 1368. By entering the detainee's name, the police can obtain a disquieting amount of information about the detainee that can go far beyond the purpose for the initial stop. *See* n. 9, *supra* at 24.

A frisk "must surely be an annoying, frightening, and perhaps humiliating experience," *Terry*, 392 U.S. at 25, and possibly some will consider it moreso than enforcement of the identification requirement of Nev. Rev. Stat. 123.123(3). But this acknowledgement does not diminish the significant impact of the statute upon the detained person. For the individual stopped knows, as do those observing, that wrong-doing is strongly connoted by his act of reaching upon his person to secure identification papers, followed by their production to the police for verification and entry into a database.

As has been established, the detainee has significant constitutionally protected interests in not incriminating himself, in being free from unreasonable search and seizure, in freedom of speech, and in maintaining his anonymity. These interests in personal security, mobility and privacy are not outweighed by the government's interest in obtaining identification during a *Terry* stop.

D. Nev. Rev. Stat. 171.123(3) Does Not Meaningfully Advance Any Significant Governmental Interest In Crime Prevention.

To determine whether the identification requirement of Nev. Rev. Stat. 171.123(3) satisfies Fourth Amendment strictures, it is necessary to balance the intrusions upon the individual constitutional rights just described against "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen." *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 534-35 (1967). The state has asserted broad interests of crime detection and prevention in support of the statute in the lower courts. These interests are not, of course, of the same magnitude as the constitutional interests asserted by Mr. Hiibel *supra* at IV.C. This Court, moreover, is expected to accept such a generalized justification for intrusions on recognized constitutional interests on faith, without benefit of analysis.

While prevention of crime is a "weighty social objective," *Brown v. Texas*, 443 U.S. 47, 52 (1979), it is unclear to what degree, if any, making criminal the refusal to disclose identification will itself further that objective or the objective of crime detection. Moreover, as demonstrated in Section III above, to the extent that identification furthers the objective of crime detection and prosecution, it is violative of the detainee's Fifth Amendment right against compulsory self-incrimination.

Further, the interests assertedly served by identification requirements—crime prevention and detection—have never been found by this Court to be sufficient by themselves to justify a seizure beyond an initial stop upon less than probable cause. In *Terry*, the brief detention of an individual to permit officers a limited frisk for weapons was premised upon "the neutralization of danger to the policeman in the investigative circumstance." 392 U.S. at 26. At issue then

was much more than a general interest in effective crime prevention and detection: "there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could . . . be used against him." *Id*. at 23.

The Court in *Terry* described as "[t]he crux of th[e] case . . . not the propriety of [the officer's] taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for [the officer's] invasion of [petitioner's] personal security by searching him for weapons in the course of that investigation." *Id*. The purpose of the pat-down was to enable the police to carry out the investigation in safety, not, as here, to compel the detainee to assist actively the purpose of the stop. The "sole justification" of a protective frisk in a *Terry* situation "is the protection of the police officer and others nearby." *Id*. at 29. It must therefore "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* Cases following *Terry* have consistently repeated this basis for permitting the frisk. *See, e.g.*, *Ybarra v. Illinois*, 444 U.S. 85, 93 (1970); *Dunaway v. New York*, 442 U.S. 200, 209-10 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977); *Adams v. Williams*, 407 U.S. 143, 146 (1972).

In balancing the asserted governmental interests against the infringement of the detainee's constitutional rights, this Court must assess not only the substantiality of those interests but also the relationship of an identification requirement to them. Under Nev. Rev. Stat. 171.123(3), police are authorized to demand and obtain by use of criminal sanction identification when there is suspicion of criminal activity. This suspicion may relate to such serious criminal behavior as robbery, murder or other violent crimes, but it may equally relate to nonviolent criminal activity such as soliciting door-to-door without a license or hitchhiking in the roadway. The state

cannot establish that the identification requirement is causally linked to its blanket interest in crime prevention and detection in any substantial manner, nor can it show that its interest outweighs Mr. Hiibel's significant First, Fourth and Fifth Amendment rights. By any measure, the state's interest in identification of individuals suspected of an offense is therefore far less substantial than the detainee's constitutional rights to personal security, mobility and privacy.

In sum, although the generalized justifications offered in this case to uphold Nev. Rev. Stat. 171.123(3) were also asserted in those cases involving the few exceptions to the probable cause requirement previously sanctioned, the Court has always rested those exceptions upon far narrower and far more compelling concerns. Here no comparable concerns exist. Moreover, the procedure at issue here is far less effective at serving the broad interests of crime prevention and detection than were the procedures, such as a search for weapons, at issue in earlier cases. Hence, any demand for one's name or identification absent probable cause for arrest offends the Constitutional protections afforded by the Fourth Amendment.

The majority decision of the Nevada Supreme Court "avoids the fact that knowing a suspect's identity does not alleviate any threat of immediate danger." *Hiibel*, 59 P.3d at 1209 (Agosti, C.J. dissenting). What it fails to recognize is that "it is the observable conduct, not the identity, of a person, upon which an officer must legally rely when investigating crimes and enforcing the law." *Id.* Being forced to identify oneself to a police officer or else face arrest "is government coercion—precisely the type of governmental intrusion that the Fourth Amendment was designed to prevent." *Id.*

In parting, petitioner will conclude with a quote from the dissenting opinion of the Chief Justice of the Nevada Supreme Court:

> . . . Now is precisely the time when our duty to vigilantly guard the rights enumerated in the Constitution becomes most important. To ease our guard now, in the wake of fear of unknown perpetrators who may still seek to harm the United States and its people, would sound the call of retreat and begin the erosion of civil liberties. . . . The majority, by its decision today, has allowed the first layer of our civil liberties to be whittled away. The holding weakens the democratic principles upon which this great nation was founded. . . . At this time, this extraordinary time, the true test of our national courage is not our necessary and steadfast resolve to defend ourselves against terrorist activity. The true test is our necessary and steadfast resolve to protect and safeguard the rights and principles upon which our nation was founded, our constitution and our personal liberties.

Hiibel, 59 P.3d at 1209-10 (Agosti, C.J., dissenting).

CONCLUSION

For the reasons stated above, Nev. Rev. Stat. 171.123(3) violates the Fourth and Fifth Amendments to the United States Constitution because it compels people to identify themselves during a police investigation when they are seized upon less than probable cause. Accordingly, the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

JAMES P. LOGAN, JR.*
Chief Appellate Deputy Public Defender
HARRIET E. CUMMINGS
Appellate Deputy Public Defender
ROBERT E. DOLAN
Deputy Public Defender
OFFICE OF THE NEVADA STATE
PUBLIC DEFENDER
511 E. Robinson Street, Suite 1
Carson City, Nevada 89701
(775) 687-4880

* Counsel of Record *Counsel for Petitioner*