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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.1, Petitioner respectfully petitions this Court for rehearing.

ARGUMENT

I. PETITIONER HIIBEL DID NOT VIOLATE NEV. REV. STAT. 171.123(3) AND THIS COURT HAS ERRONEOUSLY UPHELD HIS CONVICTION.

A majority of this Court held that Mr. Hiibel had an obligation under Nev. Rev. Stat. 171.123(3) to answer an officer's request to state his name, but was under no obligation to show identification to that officer. The record reflects, however, and this Court acknowledges, that Mr. Hiibel was repeatedly ordered to produce written identification, and never instructed to state his name. This Court has improperly affirmed Mr. Hiibel's conviction for failing to answer a question that he was never asked. Accordingly, Mr. Hiibel's conviction must be reversed because no evidence exists that he failed to comply with Nev. Rev. Stat. 171.123(3).

The majority states, "[a]s we understand it, the statute does not require a suspect to give the officer a driver's license or any other document" (Slip Opinion, p. 6), and notes that "the statutory obligation does not go beyond answering an officer's request to disclose a name." (Slip Opinion, pp. 8-9.) The majority acknowledges that Deputy Dove's demands of Mr. Hiibel were "a request to produce a driver's license or some other form of written identification." (Slip Opinion, p. 2.) Indeed, as the videotape of the encounter shows, Deputy Dove explicitly requested – eleven times within a two minute period – that Mr. Hiibel show his "identification."[1] The context of those requests (e.g., "show me your identification," "let me see some ID") makes

[1] Initially, Deputy Dove asked: "You got any identification on you?" Mr. Hiibel replied: "No…why should I have an ID?" Deputy Dove countered, "The thing is this: we're conducting an investigation, okay, so I need to see some identification." Ten more times Deputy Dove insisted that he see Mr. Hiibel's identification. "I need to see some identification." "I need to see some identification." "Let me see your identification, okay?" "Let me see your identification." "Show me your identification." "Let me see your identification." "Let me see some ID." "Let me see some ID." "Let me see some ID and we'll talk, okay?" "Let me see some ID, okay?" Finally, just before arresting Mr. Hiibel, Deputy Dove told Mr. Hiibel: "You're gonna face arrest here if I don't get some identification …." Defendant's Exhibit A (6 minute videotape of incident).

clear that the deputy was insisting on a document of some sort. A spoken name obviously cannot be seen. Deputy Dove never asked for Mr. Hiibel's name, and Mr. Hiibel never refused to provide his name. It is factually erroneous to state that Mr. Hiibel refused to disclose his name to Deputy Dove.[2]

By affirming Mr. Hiibel's conviction, this Court has effectively required that a *Terry* suspect know that Nev. Rev. Stat. 171.123(3) requires him "merely to state his name to an officer" in order to avoid arrest (Slip Opinion, p. 6), but does not hold the law enforcement officer to the same standard.[3] It allows the officer to demand identity documents, even though the Court has specifically stated that the statute does not require the production of such documents, and allows the officer to conduct an arrest if the suspect does not disclose his name even though not prompted to do so. Thus, the Court's ruling unreasonably requires a suspect to be clairvoyant and upon divining that reasonable suspicion exists to announce, of his own volition, his name to a law enforcement officer. Such an outcome is untenable. This Court should clarify that the rule is that an officer may arrest a suspect for refusing to state his name only after he has been requested to do so by the officer.

Mr. Hiibel's refusal to provide an identification document was the reason for his arrest by Deputy Dove – not a refusal to state his name. By this Court's own words, Mr. Hiibel was under no obligation to provide Deputy Dove with "a driver's license or any other document." (Slip Opinion, p. 6.) If Deputy Dove wanted and was entitled to Mr. Hiibel's name, he should have asked precisely for that, instead of demanding to see "written identification" which is what he, in

[2] In contrast, minutes after Mr. Hiibel's arrest, Trooper Merschel asked Mr. Hiibel's daughter, Mimi, for her name, which she readily provided. *See* Defendant's Exhibit A. The trooper did not insist on seeing – or even ask to see – an identification document from her, even though she was the driver of the vehicle.

[3] The Court's assertion that Mr. Hiibel could have complied with the statute by either "stat[ing] his name or communicat[ing] it" to Deputy Dove does not resolve the fundamental defect that insufficient evidence exists to convict Mr. Hiibel of violating Nev. Rev. Stat. 171.123(3) because the officer never requested that he disclose his name. (Slip Opinion, p. 6.)

fact, did. (Slip Opinion, p.2.) Petitioner's conviction should be reversed because he was not asked to disclose and did not refuse to disclose his name, and therefore did not violate Nev. Rev. Stat. 171.123(3).

II. MR. HIIBEL'S LAST NAME IMPLICATED HIM IN THE ALLEGED SERIOUS CRIME DEPUTY DOVE WAS INVESTIGATING AND THEREFORE HE VALIDLY RELIED ON HIS FIFTH AMENDMENT RIGHT.

The *Hiibel* majority states that, "[e]ven today, petitioner does not explain how the disclosure of his name could have been used against him in a criminal case." (Slip Opinion, p. 12.) Deputy Dove was dispatched to investigate an alleged battery reported by a bystander. The parties to the alleged altercation were Mr. Hiibel and his daughter, Mimi. As stated on page 25 of Petitioner's opening brief, in Nevada the familial relationship between Mr. Hiibel and his daughter could subject him to the more serious crime of domestic battery under Nev. Rev. Stat. 33.018, which carries additional punishments and restrictions on bail. Nev. Rev. Stat. 171.137, 178.484(5), 200.481, 200.485.

The fact that Mr. Hiibel and his daughter possess the same, unique last name easily could have furnished the trier of fact with the "link in the chain of evidence" needed to prosecute him[4] for the more serious crime of domestic battery, because his name could have been used against him at trial as a statement against interest pursuant to Nev. Rev. Stat. 51.035(3)(a). The majority notes that a case may arise where "furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense." (Slip Opinion, pp. 12-13.) However, such a scenario is present in the instant case: Mr. Hiibel's identity at the time of the stop provided a link in the chain of evidence of the domestic battery

[4] *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

that was currently under investigation. Consequently, Mr. Hiibel's name was incriminating and he was entitled to rely on his Fifth Amendment right.

The majority also implies, without citation to authority, that because Mr. Hiibel failed to affirmatively assert the basis for his refusal at the time of the encounter, he effectively waived his right to claim protection under the Fifth Amendment. (Slip Opinion, p. 12.) In fact, there is no such authority, and any holding to the effect that silence as to the right constitutes a waiver would upset several decades of this Court's jurisprudence.

A claim of protection under the Fifth Amendment's self-incrimination clause "does not require any special combination of words." *Quinn v. United States*, 349 U.S. 155, 162 (1955).[5] The Court has defined waiver of a constitutional right as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Recognizing the potential gravity of waivers, the Court has instructed, "[c]ourts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights." *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972) (internal quotations and citations omitted). "Presuming waiver from a silent record is impermissible." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

In the instant case, Mr. Hiibel effectively communicated to the officer that his refusal to identify himself was because he did not feel that the deputy had the right to compel his identification. Petitioner's Reply Brief at 1 n.2. His reticence was borne not out of mere stubbornness but out of the assumption that "he had a right not to disclose his identity." (Slip Opinion, Stevens, J., dissenting, p. 3.) Seen in context, Mr. Hiibel's insistent refusal to provide

[5] *See also United States v. Goodwin*, 470 F.2d 893, 902 (5th Cir. 1972) (relying on *Quinn* to state, "it is axiomatic that a waiver of constitutional rights is not lightly to be implied, and it seems clear that even the most feeble attempt to claim a Fifth Amendment privilege must be recognized").

identification is easily understood as an assertion of his right against compelled self-incrimination.

To expect Mr. Hiibel to recite some Talismanic phrase in order to preserve his Fifth Amendment right is unrealistic. At the time of his police-citizen encounter, this Court's jurisprudence stated in the Fourth Amendment context that the subject of a *Terry* stop was not obliged to answer questions, but those cases did not address Fifth Amendment rights. *See, e.g.*, *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984); *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969). In addition, the law within the Ninth Circuit was that requiring identification violated the Fourth Amendment. *See Lawson v. Kolender*, 658 F.2d 1362 (9th Cir. 1981), *aff'd*, *Kolender v. Lawson*, 461 U.S. 352 (1983). Finally, there was a split of authority among the state and federal circuit courts. Petition for Writ of Certiorari, pp. 4-6**.** Indeed, a legal scholar would have had difficulty forming a proper response in order to preserve the Fifth Amendment right at issue in this case.

Based upon the foregoing, Mr. Hiibel plainly had a right to refuse to identify himself because to do so would have incriminated him in a more serious crime. Moreover, he effectively communicated to the deputy that he believed it was his right not to identify himself. A citizen accosted by an officer on the street should not be required to "say the magic words" in order to invoke his Fifth Amendment right.

III. AFTER *HIIBEL*, OFFICERS ARE LEFT WITH NO GUIDANCE ON WHEN CITIZENS MAY BE COMPELLED TO ANSWER QUESTIONS, AND CITIZENS WHO ATTEMPT TO ASSERT PROTECTED RIGHTS DURING POLICE ENCOUNTERS FACE AN UNREASONABLE RISK OF ARREST.

The majority ruling in this case creates a paralytic confusion in the operation of our Fifth Amendment rights against self-incrimination. The Court acknowledges that there may be occasions when an individual is justified under the Fifth Amendment in refusing to provide

identification, yet analysis of such instances is left for resolution on another day and on a case-by-case basis. (Slip Opinion, pp. 12-13.) Such a ruling introduces significant legal uncertainty into police-citizen encounters. Officers and citizens alike can no longer rely on a clear rule of law, which this Court should have provided, defining, "like the metes and bounds of a deed," the conduct which is required.[6]

Presently, a police officer, when faced with a suspect who declines to state his name, must speculate on whether the suspect's refusal is constitutionally justified on grounds that compliance would tend to incriminate him. The practical effect of the uncertainty faced in this dilemma is that the officer will most likely arrest the citizen and leave to the courts the decision of whether the citizen's refusal was illegal or constitutional. The vague parameters of the decision thus encourage arbitrary enforcement of the statute, something this Court has previously frowned upon. *Kolender v. Lawson,* 461 U.S. 352 (1983).

Moreover, the result in *Hiibel* creates significant degrees of risk when a citizen attempts to legitimately rebuff identification demands and thus creates a grey area between constitutionally-protected actions and arrestable offenses. At least five scenarios readily demonstrate this point.

First, a citizen can refuse to give his name if he is confident that his particular jurisdiction has no stop-and-identify statute, or that his jurisdiction's stop-and-identify statute is unconstitutional for vagueness under *Kolender*. Second, because an officer does not approach a pedestrian with an announcement regarding the nature of their encounter, in a sudden confrontation with an officer the citizen could gamble that the officer is not conducting a *Terry* stop and is instead simply seeking voluntary cooperation which the citizen could legitimately

[6] Petition for Rehearing, *Graver Mfg. Co. v. Linde Co.*, 337 U.S. 910 (1949), 339 U.S. 605 (1956), *reprinted in* Frederick B. Wiener, *Effective Appellate Advocacy* 503-07 (1950).

refuse. Third, a citizen could refuse to identify himself if he knows that the officer is attempting to make an illegal *Terry* stop, such as one not based on reasonable suspicion. Fourth, in a valid *Terry* stop a citizen could withhold his name if he were able to divine that the officer's demand was not "reasonably related to the circumstances justifying the stop." (Slip Opinion, p. 10.) Finally, the citizen in a valid *Terry* stop could decline to cooperate based on valid Fifth Amendment grounds, namely, that he would be providing a "link in the chain of evidence" needed to convict him for a separate offense. Attempting to prevail in any of these five cases, however, puts the citizen at great risk: he must either successfully persuade the officer that he is under no obligation to provide his name, or submit to an arrest, acquire a criminal record, obtain an attorney, and convince a court that his refusal to comply was constitutionally permissible.

In Nevada, in each of these scenarios a misstep on the part of the citizen could result in incarceration for up to six months. Nev. Rev. Stat. 193.150(1). In a free society, the criminal laws should be clear so that citizens can reasonably know what conduct is required and what conduct is prohibited. With the *Hiibel* ruling, the majority has created a situation where ordinary citizens, potentially millions a year, cannot be sure if they are invoking their constitutionally-guaranteed rights or whether they are committing a crime.[7] Their Fifth Amendment rights have thus been rendered meaningless.

Similarly, law enforcement officers on the street cannot be expected to possess the considered expertise of a constitutional law scholar. To expect them or those who advise them to successfully navigate the foggy waters of what the public's right against self incrimination has become, is sadly unrealistic. This Court must clarify the nature of the right against self-

[7] Yet, as the vast majority of *Terry* detainees "will never be arrested, never be charged with a crime, and never be prosecuted in a criminal case," one can reasonably conclude that a significant number of them are innocent of any wrongdoing. Amicus NAPO Brief at 24.

incrimination in the context of a police-citizen encounter such that the right is understandable and its exercise functional.

IV. THE MAJORITY'S FOURTH AMENDMENT ANALYSIS IS QUITE TROUBLING AS IT MISAPPREHENDS PETITIONER'S ARGUMENT AND UNREASONABLY EXPANDS THE RULE OF *HAYES V. FLORIDA*.

The majority frames the Fourth Amendment issue in this case in a particularly troubling manner. It correctly states that "the Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government[,]" but then asserts that because the "legal obligation arises from Nevada State law, not the Fourth Amendment[,]" the Amendment and key precedential cases such as *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), do not apply. (Slip Opinion, p. 8.) This misapprehends petitioner's argument. The question is whether state law requiring a *Terry* suspect to answer questions regarding identity under threat of criminal sanction contravenes the protections imposed by the Fourth Amendment, not whether the Fourth Amendment imposes obligations on the citizen to act. Thus, the fundamental premise of petitioner's argument is one of protections against government overreaching, not obligations on the citizenry. This flaw in the majority's analysis is critical as it leads to an erroneous disregard of important Fourth Amendment jurisprudence.

In addition, the majority vaguely asserts that "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop" (Slip Opinion, p. 10), citing dicta from *Hayes v. Florida*, 470 U.S. 811, 817 (1985), where it was suggested that compulsory collection of fingerprints from a pre-custodial suspect might be constitutionally permissible if there is a reasonable basis for believing that fingerprinting will "establish or negate the suspect's connection with that crime." *Id.* But then the majority states that "[i]t is clear in this case that the request for identification

was 'reasonably related in scope to the circumstances which justified' the stop," curiously quoting *Terry* instead of *Hayes*. (Slip Opinion, p. 10.) This switch in citation is important. By recouching the *Hayes* analysis which requires the intrusion to "establish or negate the suspect's connection with that crime" in terms of *Terry's* much broader "reasonably related in scope" language, the majority has, without fanfare or analysis, seemingly vaulted the *Hayes* dicta into a new and vastly expanded rule of law.

CONCLUSION

In the past, this Court has been careful not to allow procedures which would chill the exercise of constitutional rights. *See*, *e.g. United States v. Jackson*, 390 U.S. 570 (1967) (imposition of the death penalty only by jury discourages the exercise of the right to trial by jury); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (imposition of a greater sentence after appeal discourages the exercise of the right of appeal). Yet the rule as announced by the majority in this case discourages the exercise of both Fourth and Fifth Amendment rights because to do so in the face of official inquiry will most assuredly result in arrest and possible incarceration.

In addition, the rule announced by the majority causes absurd results. When "Killer McGee" and wanted felons refuse to identify themselves and are ultimately found to have validly exercised their Fifth Amendment rights, this Court's ruling precludes their conviction for violating Nev. Rev. Stat. 171.123(3). On the other hand, otherwise innocent people who improperly rely on Fourth Amendment protections, such as by confusing a *Terry* stop with a voluntary encounter, or wrongfully assert Fifth Amendment rights, such as a citizen who thinks he's been *Terry* stopped for identity theft but the investigation is actually for manslaughter, are guilty of violating Nev. Rev. Stat. 171.123(3) and face incarceration. The law should not condone such results.

Most importantly, the record plainly indicates that Deputy Dove demanded an identification document – and only an identification document – from Petitioner Hiibel. As this Court has interpreted Nev. Rev. Stat. 171.123(3) to require that a suspect only say his name, Petitioner Hiibel's conviction is unsupportable and must be reversed.

Based upon the foregoing, the Court should grant the petition for rehearing, vacate the opinion of June 21, 2004, and either reverse Petitioner Hiibel's judgment of conviction or schedule the case for reargument.

Respectfully submitted,

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July 16, 2004

CERTIFICATE OF COUNSEL

As counsel for the petitioner, we believe this petition for rehearing to be meritorious and hereby certify that this petition is presented in good faith and not for purposes of delay.

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and
THE STATE OF NEVADA, Real Party in Interest.

PROOF OF SERVICE

I, James P. Logan, Jr., do swear or declare that on this date, July 16, 2004, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR REHEARING on each party to the above proceeding or that party's counsel, and on each other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on July 16, 2004, at Carson City, Nevada.

_____
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