

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

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Many of you are probably all-too-familiar with law enforcement's routine, if not talismanic, invocation of "high crime neighborhood" at a suppression hearing to support their stop of your client. Because so-called "high crime neighborhoods" are often impoverished areas and communities of color, asserting presence in a high crime area as a justification for detention by law enforcement privileges only a certain race or class of people with Fourth Amendment protections and relegates others to second-class status in regard to the Fourth Amendment.

We propose a challenge to the assertion of "high crime neighborhood" absent empirical data to support the assertion and other evidentiary showings. As the prosecution bears the burden of coming forward, we suggest you present your challenge in argument at the close of the hearing. Our concern is that if you cross the cop to undercut his assertion, you could inadvertently provide a platform for the cop to clean things up.

However, if you believe it would be better to try to expose the illegitimacy of the cop's assertion, or if the cop provides more than just a bare bones assertion that the neighborhood is high crime, ie, he or she cites "recent arrests" in the area, we provide in the box at the end of the newsletter some tactics to consider.

*We also provide some authority for you to cite in support of your arguments, and, in particular, encourage a perusal of Judge Lohier's concurrence in the recent Second Circuit case, *United States v. Weaver*, 9 F.4th 129, 155-56 (2d Cir. 2021)(Lohier, J., concurring in result only). We summarize its main points in fn. 2.*

Some background

Over 20 years ago, the Supreme Court in *Illinois v. Wardlow*, 528 U.S. 119, 124 (1999), over four dissenting Justices, stated that whether a stop occurred in a "high crime area" was one factor in finding reasonable suspicion.

As legal commentators have observed, neither the Supreme Court nor any lower court has defined "high crime area" with any precision, and there is rarely any analysis of why a particular area is high crime, on what objective, verifiable, or empirical data the police officer has based his conclusion, or whether the officer knew this information before he made the stop. Hearing courts are deferential to the prosecution's "high-crime" classifications and statistical data is rarely (if ever) entered in the record by the prosecution or required by the court. Ferguson and Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AMULR 1587 (Aug. 2008); Note, *Leveraging Predictive Policing Algorithms to Restore Fourth Amendment Protections in High-Crime Areas*

in a Post-Wardlow World, 90 CHIKLR 301 (2015).

Given that law enforcement has the technology and tools today to determine empirically a high-crime area due to the prevalence of crime-mapping software and crime pattern analysis,¹ there is no reason why the prosecution should not have to provide an empirical basis for asserting a high-crime area designation. *See* Ferguson and Bernache, at 1593; Note, at 306 (singling out NYPD for its early development of technologies (CompStat) to map crime in the city); *see also United States v. Weaver*, 9 F.4th 129, 155-56 (2d Cir. 2021)(Lohier, J., concurring in result only).

Your Arguments

If a cop testifies to suspecting your client of criminal activity because of their presence in a “high crime” area or neighborhood, argue that this assertion should not contribute to the reasonable suspicion analysis because:

- the prosecution did not prove that the area was statistically or objectively proven to have a higher incidence of particularized criminal activity in comparison to neighboring areas with available objective and verifiable data. In other words, the “high crime” label is a conclusory assertion lacking in reliability and relevance absent empirical underpinnings.
 - Because whether an area is a high crime area – meaning whether the area is *disproportionately* affected by criminal activity – is, under *Wardlow* a relevant legal and constitutional fact, it should be found by a court, not by a police officer based either on subjective impressions or his own limited day-to-day experiences. Ferguson and Bernache, at 1624. For the high-crime designation to meaningfully apply, it must be proven by objective data.
 - Historical NYPD data has shown the *absence* of a correlation between an officer’s characterization of an area as high crime and the actual rate of crime. The biggest contributors to the characterization were the racial composition of the neighborhood and the officer who made the stop. *United States v. Weaver*, 9 F.4th 129, 155-56 (2d Cir. 2021)(Lohier, J., concurring in result only).²

¹ *See* <https://www1.nyc.gov/site/nypd/stats/crime-statistics/crime-statistics-landing.page> (“The NYPD maintains statistical data which is used as a management tool in reducing crime, improving procedures and training, and providing transparency to the public and government oversight agencies. . . . The department provides up-to-date crime-related statistics in the seven major crime categories on the citywide, borough, and precinct levels, as well as historical crime data.”)

² *Weaver* upheld a search of the defendant after a pretext car stop. In concurring only in the result, Judge Lohier condemned the use of “high crime neighborhood” as a legitimate factor in the reasonable suspicion calculus when unsupported by specifics. In particular, he doubted that a person’s presence in a “high-crime area” should ever meaningfully support reasonable suspicion.” *Id.* at 155-56. “Blind acceptance of police testimony on this issue creates an unjustified risk of arbitrary and discriminatory policing.” *Id.* at 156. He pointed out that historical NYPD data showed that actual crime rates were “almost unrelated to whether an officer characterized the area as ‘high crime.’” *Id.* at 156. Rather, the two biggest contributors to whether an officer characterized a neighborhood as “high crime” were the neighborhood’s racial composition and the officer who made the stop. *Id.* In other words, an officer’s belief that the area was high-crime was unrelated both to crime rates and the likelihood that criminal activity was afoot. He thus posited that an assertion that an area is high crime is reasonable only if supported by data – neither “war stories” nor anecdotal views should be relied upon or taken at face

So an officer's empirically unsupported assertion should never be taken at face value because, in the absence of supportive data, his or her characterization may have nothing to do with crime rates at all.

- the prosecution did not narrowly tailor the area at issue to a precise geographic location (particular block, intersection, housing complex, park), therefore any inference of criminal activity is not reasonable. Bernache and Ferguson, at 1631-34; *Weaver*, 9 F.4th at 156.
 - crime is not distributed evenly throughout a neighborhood, so your client's presence in the neighborhood means nothing absent proof of the precise area of the criminal activity. *Weaver*, 9 F.4th at 156.
- the prosecution did not present data showing recent (meaning past few weeks) and similar (meaning the same offense) criminal activity. There must be a nexus between the crimes occurring in the area and the criminal activity the officer suspects for the high crime designation to have relevance. In other words, it is not more likely that your client (say) possessed a gun by virtue of presence in the neighborhood unless there is evidence of *recent gun possession* in the neighborhood. Recent drug sales or thefts would not make his presence relevant to reasonable suspicion. Bernache and Ferguson, at 1635-37 (discussing importance of "nexus" between what the cop knows about the crime in an area and the observations of an individual on the street); *Weaver*, 9 F.4th at 156.

Consider these tactics and lines of examination if you want to challenge the cop's assertion rather than just rely on argument:

- What data is the cop relying on? Even if they cite their own recent arrests, can they produce the documentation? Police records/arrests reports? Probe timing, geography, identity of crimes based on the points made above.
- Consider calling your own expert to challenge the facts presented by the prosecution with contrary data if it exists. Remember, the question is always whether the area at issue has a higher incidence of crime than other relevant areas. So it is not only the data showing the incidence of crime in the area at issue, but in other relevant areas.

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value; that little if any weight should be given to a suspect's presence in a high-crime area unless the areas' boundaries are "narrowly circumscribed," to a "very specific location" – like an intersection where illegal drug deals are made. This "would more accurately identify suspicious behavior and better respect the liberty of people going about their daily business;" and that police officers and courts should focus on recent and relevant criminal activity. Unless there is some identity between the prevalent crime and crime suspected, an individual's presence in a high-crime area does not make their conduct more suspicious. *Id.*

