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Terry v. Ohio at 50: What It Created, What It has Meant, is It Under Attack and is the Court Opening the Door to Police Misconduct?

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Terry v. Ohio at 50: What It Created, What It has Meant, is It Under Attack and is the Court Opening the Door to Police Misconduct?

Jeffrey D. Swartz, Esq.¹

Fifty years ago, the United States Supreme Court issued their opinion in Terry v. Ohio. The underpinnings of this decision became the bedrock of Fourth Amendment jurisprudence. This article re-examines that decision, and its effect on the development of Fourth Amendment jurisprudence. What is the lasting effect, if any, of Utah v. Strieff and Heien v. North Carolina on Terry? Ultimately, this article is designed to bring the issues forward, and challenge the reader to examine what appears to be innocuous cases, the subtle attack on Terry's objective standards and the individual protections the case created, and whether, after fifty years, is the court is receding from Terry, and, in favor of a good faith exception.

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On June 10, 1968, the Supreme Court of the United States announced its decision in *Terry v. Ohio*,² universally considered the cornerstone of Fourth Amendment jurisprudence on warrantless searches and seizures. The case dealt with the commonly referred to police practice of “stop and frisk.”³ The Court’s endorsement of that practice, albeit with significant objective criteria for its implementation, set the stage for fifty years of decisions in which warrantless searches and seizures were expanded.

In this article we will look at the history, some of which is anecdotal, which lead to the decision; the decision itself; the three doctrinal underpinnings of the decision; if there was a winner, who was it (not in the sense of Mr. Terry and Mr. Chilton, the Petitioners in the case, for they clearly lost); what did it mean to that winner; how and why *Terry* permeates almost every major Fourth Amendment precedent; what is the precedential value of *Terry* today; and can it withstand the new attempts by the more conservative wing of the Court to diminish its core guidance.

I. *TERRY V. OHIO*: THE HISTORY, THE DECISION, AND WHY.

In the early afternoon of October 31, 1963, Officer Joseph McFadden (a thirty-nine year veteran of the City of Cleveland Police Department) was performing his assigned duties as a plainclothes detective in downtown Cleveland, Ohio.⁴ McFadden’s main duty was to patrol the streets of the city looking for “shoplifters and pickpockets,”⁵ and to arrest offenders when

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

3. A frequently taught case in Criminal Law classes provides an example. *See generally* *People v. Rizzo*, 158 N.E. 888 (N.Y. 1927). The defendants were riding in an automobile around a neighborhood in 1927 New York City allegedly looking for a particular person they believed would be carrying a large amount of cash for a payroll. The police spotted the car, and recognizing the occupants as being local troublemakers, stopped the car in which the defendants were occupants. The four defendants attempted to flee on foot and were seized by the police. One was found with a gun, and, although the facts of the case are sketchy, it would seem that one of them told the police what they were doing. All were charged with attempted robbery. *Id.* Although the case is taught as an example of the “dangerous proximity test” for attempts, invariably a student will ask, why the police stopped the vehicle in the first place, if they did not know what the defendants were doing wrong? The only answer one can give to a first term law student is that the courts tolerated these types of stops in a result oriented way. There was no legal basis for the stop as we know the Fourth Amendment today, but a gun was found and a defendant admitted to their goal and purpose.

4. *Terry*, 392 U.S. at 5. One has to remember that in 1965 credit cards were more the exception, not the norm. Personal computers did not exist. People purchased airline tickets at the airport, through travel agents, or at outlet stores established by the airline in major cities. Cash was the ordinary means of payment, and airline ticketing offices, of course, had large amounts of cash from payments and money that was necessary to make change on a purchase.

5. *Terry*, 392 U.S. at 65.

those crimes were observed: an assignment he had been performing for approximately thirty years.⁶ When McFadden approached the corner of Huron and Euclid, he saw two African-American males (John W. Terry and Richard D. Chilton) standing on the opposite corner.⁷

As McFadden watched, each would separately walk in front of two stores near that corner and would try to observe the activity inside a United Airlines ticketing office.⁸ They repeated that process several times, after which they were joined on the corner by a third person (Carl Katz, a Caucasian male)⁹. Katz, within moments, left Terry and Chilton, who then moved from the corner they had all met to about one block west of Huron, where Katz joined them shortly thereafter.¹⁰

At this point McFadden was "thoroughly suspicious."¹¹ He was convinced that the trio was "casing a job, a stick-up" (a robbery).¹² Being concerned that "they may have a gun," McFadden approached all three, identified himself, and ordered all three to keep their hands out their pockets. McFadden asked all three for their names and received mumbled responses.¹³

McFadden grabbed Terry and spun him around using him as a shield against any action the other two suspects may take.¹⁴ The Court stated that McFadden "patted down" the outer clothing Terry was wearing and felt what he knew to be a gun.¹⁵ He was unable to retrieve the gun and ordered Terry, Chilton, and Katz into a nearby store.¹⁶ After removing Terry's coat and seizing the weapon, McFadden "patted down" the outer clothing of the other two suspects, finding a gun in Mr. Chilton's pocket, but no weapon on Katz.¹⁷

The Court was careful to note that it appeared from the record that McFadden testified he was only checking to see if the men were armed, and he never placed his hands beneath the outer clothing of any of the three men.¹⁸ All three of the suspects were taken into custody and transported to

6. *Id.*

7. *Id.*

8. See JOSEPH MCFADDEN, "DEPARTMENTAL INFORMATION" POLICE REPORT, (Oct. 31, 1963).

9. *Id.*

10. *Terry*, 392 U.S. at 6.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Terry*, 392 U.S. at 7.

15. *Id.*

16. *Id.*

17. *Id.* (McFadden described the encounter a little differently in his report. He did not refer to a "pat-down," but a "search.")

18. *Id.*

police headquarters.¹⁹ Terry and Chilton were arrested and charged with carrying a concealed firearm.²⁰ Katz was released.²¹

A motion to suppress the guns was filed.²² At the hearing on the motion, the prosecution took a position that the “guns had been seized following a search incident to a lawful arrest.”²³ The trial court, understanding the circularity of such an argument, stated that it “would be stretching the facts beyond reasonable comprehension” to find that Officer McFadden had probable cause to arrest the men before he patted them down for weapons.²⁴

Nonetheless, the trial court denied the motion to suppress on the basis that McFadden “had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action.”²⁵ The trial court went on to opine that McFadden had the right for his own protection to pat down the outer clothing of the defendant because he had reasonable cause to believe they might be armed.²⁶ In so doing, the trial court enumerated a distinction between an investigatory “stop” and an arrest, and between a “frisk” and a full-blown search for evidence.²⁷ The trial court recognized the existential threat to the officer in such a situation.²⁸

After a bench trial, Terry and Chilton were found guilty.²⁹ Appeals to the state appellate court and the Supreme Court of Ohio left the convictions in place.³⁰ The U.S. Supreme Court granted certiorari on the simple question of whether the admission of the guns violated Terry’s “rights under the Fourth Amendment as made applicable by the Fourteenth Amendment”³¹ under *Mapp v. Ohio*.³²

The Court set the table for its analysis by seizing upon the language from its prior decisions of *Katz v. United States*³³ that “the Fourth Amendment protects people, not places”³⁴ and *Elkins v. United States*,³⁵ “what the

19. *Terry*, 392 U.S. at 1, 7.

20. *Id.*

21. See JOSEPH MCFADDEN, “DEPARTMENTAL INFORMATION” POLICE REPORT, (Oct. 31, 1963).

22. *Terry*, 392 U.S. at 7.

23. *Id.*

24. *Id.* at 7-8.

25. *Id.* at 8.

26. *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Terry*, 392 U.S. at 8.

32. *Mapp v. Ohio*, 367 U.S. 643 (1961).

33. *Katz v. United States*, 389 U.S. 347 (1967).

34. *Id.* at 351.

35. *Elkins v. United States*, 364 U.S. 206 (1960).

Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.”³⁶ These rights of personal security are as important to the person on the street as to any person carrying on his personal affairs within his home.³⁷

Before *Terry* the only recognized exception to the warrant requirement of the Fourth Amendment was search incident to a lawful arrest.³⁸ This venerable doctrine relates as far back as “old English common law.”³⁹ However, police had been engaging in non-consensual, warrantless searches and seizures in a practice known as “stop and frisk” of suspicious persons.⁴⁰

The Court recognized the ongoing debate over this police tactic.⁴¹ The Court however dismissed the notion of the issue just being an abstract question of the State having a right to confront suspects on the street, but being one of the admissibility of evidence uncovered by the search and seizure.⁴²

It was clear that two competing interests were in need of reconciliation. Those interests were the need for effective law enforcement (governmental interest) and the degree of the intrusion upon personal security.⁴³

The State of Ohio argued the Court should adopt the trial court’s distinction between a “stop” (or seizure) and an “arrest” of a person, and a “frisk” and a “search.”⁴⁴ Their justification, in part, was based “upon the notion that a stop and frisk amounted to a minor inconvenience and petty indignity,” which should be allowed “in the interest of effective law enforcement on the basis of a police officer’s suspicion.”⁴⁵

On the other side of the argument was “the authority of the police must be strictly circumscribed by the law of arrest and search as it had developed to that date.”⁴⁶ *Terry* urged that there was, and should not be, a differentiation of police activity which does not depend solely upon the voluntary cooperation of a person, “and yet stops short of an arrest based upon probable cause.”⁴⁷

36. *Id.* at 222.

37. *Terry*, 392 U.S. at 8.

38. *Fremont Weeks v. United States*, 232 U.S. 383 (1914) (holding that a search conducted incident to a lawful arrest was one of the earliest exceptions to the warrant requirement as recognized by the Supreme Court).

39. *Id.*

40. *Terry*, 392 U.S. at 10.

41. *Id.*

42. *Id.* at 12.

43. *Id.* at 11.

44. *Id.* at 10.

45. *Terry*, 392 U.S. at 11.

46. *Id.* at 8.

47. *Terry*, 392 U.S. at 11.

Terry argued that any acquiescence by the Court to the compulsion inherent in a stop and frisk “would constitute an abdication of judicial control over substantial interference with liberty and personal security by police officers,” [whose sole interest is in] “ferreting out crime.”⁴⁸

Conceding an apparent inability of the courts to supervise each and every law enforcement situation that arises between the police and the public, the Court raised the specter⁴⁹ of the application of the exclusionary rule as the “principal mode of discouraging lawless police conduct.”⁵⁰ Using the words of *Mapp*, the Court stated that the exclusionary rule was “the only effective deterrent to police misconduct in the criminal context . . . [and without it the] guarantee against unreasonable searches and seizure would be a mere ‘form of words’.”⁵¹

Before determining whether stop and frisk should be outside the application of the exclusionary rule, the Court had to decide whether that action fell within the confines of the Fourth Amendment.⁵² The Court *emphatically* rejected the notion that it did.⁵³ Simply put, the Fourth Amendment is involved anytime a person is seized.⁵⁴ “It must be recognized whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.”⁵⁵

The Court went on to find that the action of the “pat down” is nothing short of a search and more than a petty indignity.⁵⁶ “It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to undertaken lightly.”⁵⁷

With all of this, the Court clearly rejected the State’s notion that it should differentiate “stop” from “arrest” and “frisk” from “search.”⁵⁸ The implications were clear that to do so would isolate such actions from constitutional scrutiny.⁵⁹

With the conduct of Officer McFadden relating to Mr. Terry clearly within the bounds of the Fourth Amendment, it now fell upon the Court to determine whether that action passed the test of reasonableness under the Fourth Amendment’s proscription against unreasonable searches and sei-

48. *Id.* at 12.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Terry*, 392 U.S. at 16.

53. *Id.*

54. *Id.*

55. *Id.* (citing Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 393 (1963)).

56. *Id.*

57. *Terry*, 392 U.S. at 17.

58. *Id.*

59. *Terry*, 392 U.S. at 17.

zures.⁶⁰ In so doing the Court set forth a dual inquiry: Whether the action “*was justified at its inception,*” and “whether it was related in scope to the circumstances, which justified the interference in the first place.”⁶¹

“Simple good faith on the part of the arresting officer is not enough.”⁶² “If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects only in the discretion of the police.”⁶³ “The police officer must be able to point to specific and *articulable facts*, which taken together with rational inferences from those facts *reasonably* warrant that intrusion.”⁶⁴

In answering this question, the Court created what is commonly referred to as the “*Terry Balancing Test.*” Taking its recent ruling in *Camara v. Court of City and County of San Francisco*,⁶⁵ the Court defined this dual inquiry as one in which the courts must balance “the governmental interest (which allegedly justifies official intrusion) against the intrusion upon the constitutionally protected interests of the private citizen.”⁶⁶ The Court noted that there was no ready test other than balancing the need to search against the degree of that intrusion.⁶⁷

The Court then considered what it believed to be the governmental interests involved in “stop and frisk cases.” That general interest was, of course, effective crime prevention and detection. That is the ability of the police “in appropriate circumstances, and in an appropriate manner, to approach a person for purposes of investigating” possible criminal activity, even where probable cause does not exist.⁶⁸

But even after disposing of whether the governmental interest existed and was well served by McFadden’s actions by analyzing the facts and determining that it was, the Court then had to deal with the “crux” of the case.⁶⁹ It was not the propriety of McFadden’s seizure of Terry to investigate the matter, but whether “there was justification for the invasion of Ter-

60. *Id.* at 19-20.

61. *Id.* (Emphasis added).

62. *Id.* at 22.

63. *Id.* (citing *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

64. *Terry*, 392 U.S. at 21 (Emphasis added).

65. *Camara v. Mun. Court of City & Cty. of S.F.*, 387 U.S. 523, 534-35 (1967) (“To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.”).

66. *Terry*, 392 U.S. at 21.

67. *Id.*

68. *Id.* at 22.

69. *Id.* at 11.

ry's personal security by searching him for weapons in the course of that investigation."⁷⁰

Refusing to eschew the need of a police officer's need to protect himself and others, where they may lack probable cause, the Court established the standard that "when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others," it is "unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact armed."⁷¹

Taking into consideration the constitutional limitation of "scope" of a search the Court dealt with the nature and quality of the "intrusion." Recognizing that even a search of outer clothing is a severe intrusion, the concept of duration of the intrusion sneaks into the analysis, when the Court describes the intrusion as "*brief*."⁷² They use this same verbiage in describing the "protective" search for weapons "constitutes a *brief*, though far from inconsiderable, intrusion upon the sanctity of a person."⁷³

Thus, for the first time, the concept of "scope and duration" as standards for a search and seizure are applied. The application of duration will become the subject of later cases designed to provide a definition of "duration" in Fourth Amendment terms.

Ultimately, the Court held "that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating" and in order to dispel concerns of his safety and the safety of others, he is entitled to conduct a limited search of the outer clothing of the individual in an attempt to discover weapons."⁷⁴

Out of *Terry*, three basic analyses, which have been the basis of Fourth Amendment jurisprudence for fifty years, are evident. They are an objective standard test of "reasonable and articulable suspicion," the Terry Balancing Test and ultimately the concept that a search can be limited in duration.

Clearly, the Court had concern for societal conditions in the late 1960's and 1970's. In the opinion the Court states:

American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial

70. *Id.* at 23.

71. *Terry*, 392 U.S. at 24.

72. *Id.* at 25.

73. *Terry*, 392 U.S. at 26 (emphasis added).

74. *Id.* at 30.

portion of the injuries are inflicted with guns and knives. In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause⁷⁵

As stated by Arnold Loewy, then Associate Professor of Law at the University of North Carolina, "It would seem that such a novel holding can be explained only by a concern in the Court for providing the police with as much leeway as possible in their fight against crime."⁷⁶ As noted in the statistical reports referenced below, the Sixties were a decade of increased violent crime.⁷⁷ This was due to increased social pressures (Viet Nam War protests) and civil rights inequities.⁷⁸ Lack of direction by the Court, and the abuses of the police in exercising their authority, were met with violence, not only toward the general public, but the police directly.

The decision drew outrage from civil libertarians and criminal defense attorneys alike who felt it was extra constitutional and an infringement on the rights guaranteed by the Fourth Amendment.⁷⁹ It was praised by law enforcement as vindication for good police work and a justification for further action.⁸⁰ That praise was not unanimous, in that some police felt the standards established in *Terry* were unnecessary, cumbersome, and complex.

Fred E. Inbrau and James R. Thompson of Americans for Effective Law Enforcement, Inc., an organization founded for the purpose of filing an *amicus curiae* brief in the case, wrote that the decision was one which "will greatly aid the police in their efforts to prevent crime and apprehend criminals."⁸¹ That by its decision the Court had "delivered into the hands of police a very powerful weapon for the prevention and detection of crime."⁸²

The *Terry* decision was certainly influenced by the findings of the President's Commission on Law Enforcement and the Administration of

75. *Id.* at 23-24.

76. Arnold W. Lowey, *The Warren Court as Defendant of State and Federal Criminal Laws: A Reply to Those Who Believe That the Court is Oblivious to the Needs of Law Enforcement*, 37 GEO. WASH. L. REV. 1218, 1242 (1969).

77. *President's Comm. on Law Enforcement and Administration of Justice Task Force Report: The Police* 178-86 (1967).

78. *Id.*

79. U.S. CONST. amend. IV.

80. Fred E. Inbau & James R. Thompson, *Stop and Frisk: The Power and Obligation of the Police*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 333 (1968).

81. *Id.*

82. *Id.*

Justice⁸³ and Federal Bureau of Investigation, Uniform Reports for the United States – 1966.⁸⁴ The Court stated:

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.⁸⁵

While one might disagree with the Supreme Court's approach, it is clear that the Court was, also, substantially affected by information about the misuse of police power and the effect police investigative activity had on public perception of the police, particularly in African-American communities across the United States.⁸⁶

Terry was a retreat from the traditional warrant requirement of the Fourth Amendment, and a major victory for the police before a Warren Court, which had expanded defendants' rights (*see Mapp v. Ohio*,⁸⁷ *Miranda v. Arizona*,⁸⁸ and *Gideon v. Wainwright*⁸⁹). Despite accepting a police practice that had for years been violating the Fourth Amendment rights of countless Americans, in *Terry* the Court set boundaries on the use of this procedure and established rights for those whose personal security was violated in the pursuit of evidence. The application of the exclusionary rule to violations of what has become known as the “*Terry* Balancing Test” objective “reasonable and articulable suspicion” standard, and later the “scope and duration” analysis, restricted police power.

83. *President's Comm. on Law Enforcement and Administration of Justice Task Force Report: The Police* 178-86 (1967).

84. *Terry*, 392 U.S. at 24 n.21.

85. *Id.*

86. Gregory Howard Williams, *The Supreme Court and Broken Promises: "The Gradual But Continual Erosion of Terry v. Ohio"*, 34 HOWARD L.J. 567, 573 (1991).

87. *Mapp v. Ohio*, 367 U.S. 643 (1961).

88. *Miranda v. Arizona*, 384 U.S. 436 (1966).

89. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

II. REASONABLE AND ARTICULABLE SUSPICION

In defining reasonable and articulable suspicion, the Court stated: “[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous”⁹⁰ This conclusion must be subject to specific and articulable facts, which taken together with reasonable inferences from those facts, reasonably warrant the intrusion known to the officer at the inception of the contact with the subject.⁹¹

The determination of the officer and his conduct must be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstance (totality of the circumstances).⁹² The Court was insistent that this must be an objective standard of review: “would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”⁹³ As stated above, simple “good faith” alone is not enough.⁹⁴

On the same day as *Terry* the Court also decided *Sibron v. State of New York*.⁹⁵ In *Sibron*, police observed the defendant “hanging out” on a street corner with known drug dealers and users for a substantial period of time.⁹⁶ The police never saw any exchange or heard any conversations between Sibron and the other people.⁹⁷ The police approached Sibron, and the officer claimed he saw Sibron make a furtive movement by reaching into his pocket and discarding drugs.⁹⁸ None of the officers had any suspicion that he was armed or that they were in danger.⁹⁹ Sibron was searched and drugs were found on him.¹⁰⁰

At the hearing on the motion to suppress the State argued that the observed activity and the people with whom Sibron was associating established articulable suspicion.¹⁰¹ The State abandoned any claim that there was probable cause for the police action.¹⁰²

90. *Terry*, 392 U.S. at 30.

91. *Id.* at 19-20.

92. *Id.*

93. *Id.* at 22 n.19.

94. *Id.*

95. *Sibron v. New York*, 392 U.S. 40 (1968).

96. *Id.* at 62.

97. *Id.*

98. *Id.* at 43.

99. *Id.* at 63.

100. *Sibron*, 293 U.S. at 63.

101. *Id.* at 45.

102. *Id.*

In response to the State's position regarding whether reasonable and articulable suspicion for the initial seizure and subsequent search the Court stated: "The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."¹⁰³

In *United States v. Sokolow*,¹⁰⁴ DEA agents approached the defendant upon his return to Hawaii.¹⁰⁵ The police had been advised by agents in Los Angeles that the defendant had exhibited the indicia of being a drug courier, including nervously looking around the waiting area for his flight connection.¹⁰⁶ In addition, the agents knew Sokolow had paid \$2,100 cash for round trip tickets to Miami (the ticket agent had alerted the DEA), used a possible alias, the phone number he had given the ticket agent at the time of the purchase was in another person's name (they did not know it was the defendant's roommate), he was only in Miami for 48 hours (it was more than a 20 hour round trip), he appeared nervous, and he had not checked any luggage.¹⁰⁷ After a search, 1,063 grams of cocaine were found in Sokolow's possession.¹⁰⁸ Sokolow's motion to suppress was denied, and he was convicted of possession with intent to distribute the cocaine found in his possession.¹⁰⁹ The 9th Circuit Court of Appeal, in a divided ruling, found in favor of Sokolow's claim that the facts did not give rise to a reasonable and articulable suspicion.¹¹⁰

The Supreme Court stated that the concept of reasonable suspicion, like probable cause, is not "readily, or even usefully, reduced to a neat set of legal rules."¹¹¹ "The level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence."¹¹² "The level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause."¹¹³ In determining that the totality of the circumstances supported a finding of reasonable and articulable suspicion in this case the Court stated:

Any one of these factors [the observations and investigation by the police] is not by itself proof of any illegal conduct and is quite consistent with in-

103. *Id.* at 62.

104. *United States v. Sokolow*, 490 U.S. 1 (1989).

105. *Id.* at 5.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Sokolow*, 490 U.S. at 6.

110. *Id.*

111. *Id.* at 6.

112. *Id.*

113. *Id.*

nocent travel. But taken together they amount to reasonable suspicion. . . . We said in *Reid v. Georgia* . . . “there could, of course be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity is afoot.”¹¹⁴

But, like in a finding of probable cause, in making a determination of reasonable and articulable suspicion “the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of non-criminal acts.”¹¹⁵

Reasonable and articulable suspicion need not be based upon a police officer’s personal observations.¹¹⁶ Unprovoked flight at the sight of the police is simply not a mere refusal to cooperate, and “by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite” and can establish a reasonable and articulable suspicion.¹¹⁷

III. APPLICATION OF *TERRY* TO AUTOMOBILE STOPS

Automobile stops provided an additional problem. Clearly, vehicle stops usually involve probable cause that the driver committed a traffic offense. However, due to the nature of the reason for the stop, the Court has treated them as “*Terry*-type” stops.

*Pennsylvania v. Mimms*¹¹⁸ permits officers to order the driver out of the vehicle incident to a traffic stop.¹¹⁹ The Court stated that action is “not a ‘serious intrusion upon the sanctity of the person,’ but it hardly rises to the level of a ‘petty indignity.’”¹²⁰ The Court went on to state that the search of the driver is acceptable if the officer “reasonably concludes the driver is armed.”¹²¹

*Maryland v. Wilson*¹²² extended *Mimms* to passengers because the threat of a passenger being armed is just as great as the driver.¹²³ *Brendlin v. California*¹²⁴ found that when an automobile is stopped, the officer effectively seizes everyone in the vehicle.

114. *Sokolow*, 490 U.S. at 9.

115. *Id.* at 9-10.

116. *Adams v. Williams*, 407 U.S. 143 (1972).

117. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

118. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

119. *Id.* at 111.

120. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

121. *Id.* at 112 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

122. *Maryland v. Wilson*, 519 U.S. 408 (1997).

123. *Id.* at 414.

124. *Brendlin v. California*, 551 U.S. 249 (2007).

In *Arizona v. Johnson*¹²⁵ the defendant was the passenger in a car stopped for traffic infractions.¹²⁶ In observing the defendant's behavior and clothing, the police started questioning him.¹²⁷ After learning Johnson was from out of town, a member of the Crips, a street gang, and had been in prison, the officers ordered him out of the car.¹²⁸ They patted him down and found a firearm.¹²⁹ The Court recognized that *Mimms*, *Wilson*, and *Brendlin* portray *Terry*'s application in a traffic stop setting, and determined the actions of the police officer were reasonable in the setting of an automobile stop by meeting the balancing test requirement.¹³⁰

Although *Johnson* was not typical of *Terry* and its progeny in the development of the reasonable and articulable suspicion standard, it gives evidence of the evolution of the law in this regard. The Court took the opportunity to reconcile and bring cohesiveness to the various permutations announced over the years.¹³¹ Most of all, in noting the same conflicts exist among *Mimms*, *Brendlin*, and *Wilson*, the Court seemed to be giving even more alternatives to trial courts in exercising their discretion when determining whether the totality of the circumstances facing the officer at the time of the interaction with a particular person justifies the intrusion into that person's privacy rights.

IV. SCOPE AND DURATION

The requirement that the scope of a search be defined was established in the Fourth Amendment:

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, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*. (emphasis added).¹³²

As we have seen, *Terry* established the scope of the search in a "stop and frisk" as being the pat-down of the outer clothing to determine if the

125. *Arizona v. Johnson*, 555 U.S. 323 (2009).

126. *Id.* at 326.

127. *Id.* at 328.

128. *Id.*

129. *Id.*

130. *Johnson*, 555 U.S. at 333.

131. *Id.* at 330-33.

132. U.S. CONST. amend. IV.

subject is armed.¹³³ In *Ybarra v. Illinois*¹³⁴ the defendant was present at a bar where the police were executing a search warrant.¹³⁵ For the safety of the officers, the defendant was patted down and no weapons were found, however, the officer did feel what seemed to be a cigarette pack in the defendant's shirt pocket.¹³⁶ A few minutes later the officer returned, patted down the defendant again, and seized the cigarette pack, finding drugs inside.¹³⁷

The Court stated the scope of a *Terry* frisk allows law enforcement officers, for their own protection and safety, to conduct a pat-down to find weapons that the officer reasonably believes or suspects are then in the possession of a suspect. This narrow scope of the permissible search does not permit a frisk for weapons upon less than a reasonable belief or suspicion directed at the suspect, even though that suspect happens to be on the premises where an authorized search is taking place.¹³⁸

In addition, *Terry* first established the principal of the duration of the seizure, which has since been attached to the scope of the search.¹³⁹ By requiring in *Terry* that the seizure be "brief," the Court left the definition of "brief" as open as it did many of the "limitations which the Fourth Amendment places upon a protective seizure and search for weapons."¹⁴⁰

If the determination of the legality of a warrantless seizure, and the search attendant thereto, is based upon its reasonableness, as the Fourth Amendment requires, then bright-line rules leave no room for a determination of the reasonableness of an officer's actions by trial courts. This discretion is reliant upon a court's ability to judge the credibility of an officer's observations in exercising his judgment and using his experience and training, and objectively determines whether the actions of the officer are violative of a person's Fourth Amendment rights.

Subsequently, however, the Court had to provide better guidance. Essentially, the duration of the search is defined by the scope.¹⁴¹ The duration is defined by the reasonable time necessary to complete the scope of the mission.¹⁴²

133. *Terry*, 392 U.S. at 30.

134. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

135. *Id.* at 88-89.

136. *Id.*

137. *Id.*

138. *Id.* at 94 (emphasis added).

139. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (citing *Florida v. Royer*, 460 U.S. 491 (1983) and *Illinois v. Caballes*, 543 U.S. 405 (2005)).

140. *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

141. *Rodriguez*, 135 S. Ct. at 1614.

142. *Id.*

*Florida v. Royer*¹⁴³ addressed both scope and duration.¹⁴⁴ Believing Royer fit a drug-courier profile, police officers at Miami International Airport approached Royer and asked several questions.¹⁴⁵ They took possession of his identification and his airline ticket.¹⁴⁶ While one officer took Royer to an interrogation room, the other went to the airplane and collected Royer's luggage.¹⁴⁷ A full search of Royer's luggage revealed a large quantity of marijuana.¹⁴⁸

The Court stated that *Terry* and its progeny created only a limited exception to the general rule that seizures of the person require probable cause.¹⁴⁹ A reasonable suspicion of a crime is insufficient to justify custodial interrogation even though the interrogation is investigative.¹⁵⁰ "The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. . . . however, it is clear [that] an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."¹⁵¹

In *United States v. Perkins*,¹⁵² the 11th Circuit Court of Appeals dealt with duration in the context of an automobile stop. Citing *United States v. Purcell*,¹⁵³ the court stated that:

Terry requires that an officer have an objective, reasonable suspicion of criminal activity. Pursuant to this standard, a traffic stop must be "reasonably related in *scope* to the circumstances which justified the interference in the first place," and may not last "any longer than necessary to process the traffic violation" unless there is articulable suspicion of other illegal activity.¹⁵⁴

The Supreme Court picked up on this theme in *Rodriguez v. United States*.¹⁵⁵ Rodriguez was stopped for a traffic offense.¹⁵⁶ After giving Ro-

143. *Florida v. Royer*, 460 U.S. 491 (1983).

144. *Id.* at 500.

145. *Id.* at 494.

146. *Id.*

147. *Id.*

148. *Royer*, 460 U.S. at 494-95.

149. *Id.* at 499.

150. *Id.*

151. *Id.*

152. *United States v. Perkins*, 348 F.3d 965 (11th Cir. 2003).

153. *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001).

154. *Perkins*, 348 U.S. at 969 (first quoting *Terry*, 392 U.S. at 20; then quoting *United States v. Holloman*, 113 F.3d 192, 196 (11th Cir 1997)).

155. *Rodriguez*, 135 S. Ct. at 1609.

driguez a formal warning, the officer continued to detain Rodriguez for fifteen minutes while awaiting the arrival of a canine unit to perform an exterior “dog sniff” of the vehicle in hopes of finding drugs, for which he had no probable cause, or even reasonable and articulable suspicion, would be present.¹⁵⁷

A seizure for a traffic violation justifies a police investigation of that violation.¹⁵⁸ It is a relatively brief encounter.¹⁵⁹ A routine traffic stop is more analogous to a *Terry* stop than to a formal arrest.¹⁶⁰ “Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is,” as stated in *Rodriguez v. United States*,¹⁶¹ “determined by the seizure’s ‘mission,’ [which is] to address the traffic violation that warranted the stop¹⁶² and attend to related safety concerns.”

Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. The traffic stop may last no longer than what is necessary to address the infraction.¹⁶³ Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. Furthermore, authority for the seizure initiated by the traffic-stop ends when any tasks are, or reasonably should have been, finished.¹⁶⁴ “[I]n determining the reasonable duration of a stop, ‘it [is] appropriate to examine whether the police diligently pursued [the] investigation’ that prompted the seizure in the first place.¹⁶⁵

Other minor warrantless intrusions have passed Supreme Court scrutiny. In *Michigan v. Summers*,¹⁶⁶ the Court dealt with the detention of the occupant of a house being searched pursuant to a search warrant issued with probable cause.¹⁶⁷ The Court held that, when a reviewing magistrate is convinced the information provided in an affidavit in support of an application for a search warrant is sufficient to establish probable cause, evidence of an offense is not a violation for Fourth Amendment purposes.¹⁶⁸ It is constitutionally reasonable to require the occupant to remain while law enforcement

156. *Id.* at 1612.

157. *Id.* at 1613.

158. *Id.* at 1614.

159. *Id.*

160. *Rodriguez*, 135 S. Ct. at 1609.

161. *Id.* at 1614.

162. *Id.* at 1612-16 (citing *Illinois v. Caballes*, 543 U.S. 405 (2005)).

163. *Id.* at 1614.

164. *Id.*

165. *Rodriguez*, 135 S. Ct. at 1614 (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

166. *Michigan v. Summers*, 452 U.S. 692 (1981).

167. *Id.* at 694-95.

168. *Id.* at 705

officers execute the warrant to search the person's home.¹⁶⁹ In reaching this conclusion, the Court held that even though there is no probable cause for the arrest of the suspect (until after obtaining evidence from the search), for Fourth Amendment purposes, "a warrant to search for contraband founded on probable cause [the scope] implicitly carries with it the limited authority to detain the occupants at the premises while a proper search is conducted [the duration]."¹⁷⁰

*Segura v. United States*¹⁷¹ presented a slightly different situation. Police suspected the defendant was selling drugs out of his apartment.¹⁷² After observing and arresting two people the police believed had just purchased drugs from the defendant, and obtaining a statement from one of the arrestees implicating the defendant in the purchase of the drugs found on the informant, police officers went to Segura's apartment, forcibly entered, and arrested and removed him and his girlfriend from the premises.¹⁷³ The officers then occupied the apartment for nineteen hours while awaiting the issuance of a search warrant.¹⁷⁴

The Court approved the subsequent warrant and search by determining that the officers acted in *good faith* with the purpose of maintaining the status quo.¹⁷⁵ "[The] securing of the premises under these circumstances does not violate the Fourth Amendment, at least when undertaken to preserve the status quo while a search warrant is being sought."¹⁷⁶

*Illinois v. McArthur*¹⁷⁷ is similar in application to *Segura*. A police officer's refusal to allow the defendant to enter his residence without a police officer accompanying him until a search warrant for the residence was obtained, following a statement by the defendant's wife that her husband had illegal drugs in residence, was a "reasonable seizure" that did not violate the Fourth Amendment.¹⁷⁸ The decision was based upon the fact that the officer had probable cause to believe the defendant had illegal drugs in the residence and reason to fear destruction of the evidence, and thus the restriction was limited in time (duration) and scope.¹⁷⁹

With the development of *good faith* in the guise of exceptions in the enforcement of the reasonable and articulable suspicion standard,¹⁸⁰ the

169. *Id.* at 704.

170. *Id.* at 705.

171. *Segura v. United States*, 468 U.S. 796 (1984).

172. *Id.* at 799.

173. *Id.* at 799-800.

174. *Id.* at 801.

175. *Id.* at 798.

176. *Segura*, 468 U.S. at 809.

177. *Illinois v. McArthur*, 531 U.S. 326 (2001).

178. *Id.* at 336.

179. *Id.* at 337.

180. See discussion *infra* pp. 28-29 and accompanying text.

survival of *Rodriguez* and the application of scope and duration to *Terry* automobile cases and other areas of application has to be in question. *Rodriguez* was a recent six to three decision,¹⁸¹ and although the addition of Justice Gorsuch replacing the late Justice Antonin Scalia does not change the ideological “balance” of the Court prior to Scalia’s death, the survival of *Rodriguez* has to be called into question. Justice Scalia’s general disdain for unwarranted searches and continued efforts to protect the historical trespassory search doctrine as the true measure of a Fourth Amendment violation may not be as important to Justice Gorsuch and those justices leaning toward a more liberal use of the good faith exception.

V. THE *TERRY* BALANCING TEST, SPECIAL NEEDS SEARCHES, AND THE SLIPPERY SLOPE OF DIMINISHMENT

The third underpinning of *Terry* was the balancing test created by the Court in determining whether a warrantless search is reasonable. In simple terms, the test requires the Court to balance the governmental interest against the degree of intrusion by the authority upon the personal security of a person’s reasonable expectation of privacy: “there is ‘no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion of which the search (or seizure) entails.’”¹⁸²

According to the Court, this test is meaningless unless “it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.”¹⁸³ Nowhere does this become more evident than in the Court’s analysis of special needs and administrative searches conducted under statutory schemes created by the state and federal legislatures.

As discussed below these types of searches range from drug testing of federal and state employees¹⁸⁴ to schoolchildren,¹⁸⁵ inventory searches,¹⁸⁶ administrative inspections of highly regulated industries, and DUI¹⁸⁷ and border checkpoints.¹⁸⁸ As shown, each of these have been approved or disapproved based upon this balancing of interests.

181. *Rodriguez*, 135 S. Ct. at 1612.

182. *Terry*, 392 U.S. at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

183. *Id.* at 21.

184. *Skinner v. Ry Labor Execs.' Assoc.*, 489 U.S. 602 (1989); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

185. *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

186. *New York v. Burger*, 482 U.S. 691 (1987).

187. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

188. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Terry is not specifically cited in the leading cases regarding inventory searches,¹⁸⁹ however, the use of the balancing of interests was instrumental in the initial approval of inventories by the Court in *South Dakota v. Opperman*,¹⁹⁰ followed by *Illinois v. Lafayette*,¹⁹¹ and *Colorado v. Bertine*.¹⁹²

In *Opperman*, the Court held that an inventory search might be reasonable under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause.¹⁹³ The Court assessed the reasonableness of an inventory search of the glove compartment of an abandoned automobile impounded by the police.¹⁹⁴ They found that inventory procedures serve to protect an owner's property while it is in the custody of the police; to insure against claim of lost, stolen, or vandalized property; and to guard the police from danger.¹⁹⁵ In light of the strong governmental interests and the diminished expectation of privacy in an automobile, the Court upheld the search.¹⁹⁶

In *Lafayette*, at the jailhouse, the police inventoried the contents of a shoulder bag taken from the possession of an individual being taken into custody.¹⁹⁷ The Court found that the legitimate governmental interest was the same as that approved in *Opperman*.¹⁹⁸

Bertine dealt not with an abandoned vehicle or a handbag on the person of the defendant, but the impounding of a vehicle after an arrest supported by probable cause.¹⁹⁹

In this case, the defendant was arrested for DUI and his van was inventoried before being towed to the impound lot.²⁰⁰ The inventory revealed the presence of controlled substances.²⁰¹ In his motion to suppress, Bertine

189. The use of the term "inventory search" is an oxymoron. If a "search" is conducted, it is an action by an authority to obtain evidence. *Terry*, 392 U.S. at 8. The Court's justification for approval of inventories is for the protection of the officer and the owner of the vehicle against claims of destroyed or missing items seized during the inventory. *Id.* at 12. The Court has stated more than once that the purpose of the inventory cannot be evidentiary, but fulfilling the purpose, which justifies the inventory. *Id.* at 29.

190. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

191. *Illinois v. Lafayette*, 462 U.S. 640 (1983).

192. *Colorado v. Bertine*, 479 U.S. 367 (1987).

193. *Opperman*, 428 U.S. at 367.

194. *Id.* at 369.

195. *Id.*

196. *Id.* at 368–69.

197. *Lafayette*, 462 U.S. at 648.

198. *Bertine*, 479 U.S. at 372.

199. *Id.* at 369–70.

200. *Id.*

201. *Id.*

alleged the search of the closed backpack and containers exceeded the permissible scope of such a search under the Fourth Amendment.²⁰²

Affirming the principles in *Opperman* and *Lafayette*, the Court determined that reasonable police regulations related to inventory procedures administered in *good faith* satisfy the Fourth Amendment, even though Courts might, as a matter of hindsight, be able to devise equally reasonable rules requiring a different procedure:

When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and some containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.²⁰³

In both *Opperman* and *Lafayette*, the police must be operating pursuant to established procedures meant to fulfill the governmental interest in the least intrusive way that impedes upon the privacy interests of the citizen.²⁰⁴ In *Florida v. Wells*,²⁰⁵ the Court stated: “The individual police officer must not be allowed so much latitude that inventory searches are turned into a ‘purposeful and general means of discovering evidence of a crime.’”²⁰⁶

Drug testing presented another challenge to an individual’s personal security. The criteria for approval (or disapproval) of such testing are established in the following series of four decisions.

In 1989, two decisions, *Nat’l Treasury Emps. Union v. Von Raab*²⁰⁷ and *Skinner v. Ry. Labor Execs.’ Assn.*,²⁰⁸ settled the issue that drug tests required by the statute are searches. Each balances the individual’s privacy expectations against the government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

In *Skinner*, the Federal Railroad Administration established regulations that required blood and urine tests of rail employees involved in train accidents or had violated certain safety rules.²⁰⁹ There was clear documented evidence of drug and alcohol abuse by some railroad employees and the

202. *Id.* at 372–73.

203. *Bertine*, 479 U.S. at 375 (citing *United States v. Ross*, 456 U.S. 798 (1982)).

204. *Bertine*, 479 U.S. at 371–73.

205. *Florida v. Wells*, 495 U.S. 1 (1990).

206. *Id.* at 1.

207. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

208. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602 (1989).

209. *Skinner*, 489 U.S. at 648.

obvious safety hazards of such abuse.²¹⁰ The Court recognized that urinalysis invaded certain privacy rights.²¹¹ In balancing against those rights was the reduced intrusiveness of the procedure, and that these employees, solely by being engaged in a highly regulated industry, which was charged with the public safety, had a diminished expectation of privacy.²¹²

The Court, in eschewing any need for any particularized suspicion and setting forth the governmental interest, found, that in addition to the safety interests, such drug tests could deter illegal drug use by railroad employees, workers positioned to cause great human loss before any signs of impairment become noticeable to supervisors, outweighed the degree of intrusion on the employees' expectation (though diminished) of privacy.²¹³

In *Von Raab*, the Court sustained a United States Customs Service program that made drug testing a condition for those employees who held positions directly involving drug interdiction or requiring the employee to carry a firearm.²¹⁴ Just as in *Skinner*, there was no question the drug testing requirement was an invasion of the employees' legitimate expectation of privacy.²¹⁵

In approving the treasury department regulations, the Court, just as in *Skinner*, felt that the governmental interest outweighed the degree of intrusion.²¹⁶ The governmental interest was that work which directly involves drug interdiction and/or the carrying of a firearm pose grave safety threats to employees who hold those positions and also expose them to large amounts of illegal narcotics and persons involved in the drug trade.²¹⁷ An employee who is using illicit drugs could be susceptible to ambivalence to his responsibilities, and tempted by bribes, or threatened with blackmail.²¹⁸

Vernonia Sch. Dist. 47J v. Acton dealt with another aspect of drug testing: students involved in interscholastic athletic competitions.²¹⁹ The Court recognized the critical duty (governmental interest) the government bears under a public school system, as a guardian and tutor of children entrusted to its care.²²⁰ Evidence clearly established a "sharp increase in drug use" in the respondent school district, in which the athletes were not only users, but leaders in the local drug culture.²²¹

210. *Id.*

211. *Id.* at 626.

212. *Id.* at 625–26.

213. *Id.* at 631.

214. *Von Raab*, 489 U.S. at 660.

215. *Id.* at 670.

216. *Von Raab*, 489 U.S. at 666.

217. *Id.*

218. *Id.* at 669–70.

219. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995).

220. *Id.* at 647.

221. *Id.* at 649.

The Court recognized that students have a lesser expectation of privacy than the general population.²²² In finding that the governmental interest outweighed the degree of intrusion of the students' personal security, the Court decided the testing would act as a deterrence of drug use by the students and reduce the risk of injury to the athletes, teammates, and opponents.²²³

All three of these decisions were central in the Court's decision in *Chandler v. Miller*²²⁴ in overturning a Georgia statute requiring candidates for statewide office to submit to drug testing before, and as part of, qualifying to be placed on the ballot.²²⁵ The state, in an attempt to ameliorate the privacy issue, set up a scheme where the candidate would be drug tested privately by a state-authorized laboratory, and the results would only become public, if or when, the candidate attempted to file qualification documents to be placed on the ballot.²²⁶

The statute was challenged by the libertarian candidate for governor.²²⁷ In addition to the minimally invasive testing, Chandler claimed the scheme also invaded his obvious First Amendment and Fourteenth Amendment rights.²²⁸ The Court believed the issue was whether the special needs showing of a legitimate governmental interest was established.²²⁹

The State of Georgia argued that the governor's and other statewide officers' use of illicit drugs would jeopardize the discharge of public functions, including antidrug law enforcement efforts, and undermine public confidence and trust in elected officials.²³⁰ The Court determined that this certification requirement was not designed to identify candidates who violate antidrug laws, nor would it deter illegal drug users from seeking public office.²³¹ They saw no reason why ordinary law enforcement could not deal with any issue that may arise.²³²

In closing, the Court made the following statement recognizing the balancing test and its application:

We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example,

222. *Id.* at 657.

223. *Id.* at 663.

224. *Chandler v. Miller*, 520 U.S. 305 (1997).

225. *Id.* at 311.

226. *Id.* at 318.

227. *Id.*

228. *Id.*

229. *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

230. *Id.*

231. *Id.*

232. *Id.* at 320.

searches now routine at airports and at entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.²³³

Closely regulated industries provided another area where governments may require persons involved in those type of activities to submit to warrantless searches and seizures. *New York v. Burger*²³⁴ provides the best example of the use of the balancing test to a determination of the efficacy of such statutory schemes.

Burger owned a junkyard.²³⁵ His business consisted of dismantling of cars and the selling of their parts.²³⁶ A New York statute required that an individual engaged in this business was required to have a license and additionally required that certain records be kept, and:

Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises²³⁷

Failure to comply was a criminal offense (Class A misdemeanor).²³⁸

The Court first found that although the Fourth Amendment was applicable to such searches, the owner or operator of commercial premises in a closely regulated industry has a reduced expectation of privacy, and the warrant requirements of the Fourth Amendment have lessened application.²³⁹ It found that certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such a business.²⁴⁰ A warrantless inspection, however, even in the context of a heavily regulated business, will be deemed reasonable only so long as three criteria are met.²⁴¹

233. *Chandler v. Miller*, 520 U.S. 305, 320 (1997).

234. *New York v. Burger*, 482 U.S. 691 (1987).

235. *Burger*, 482 U.S. at 698.

236. *Id.*

237. N.Y. VEH. & TRAF. LAW § 415a-5(a) (McKinney 1986).

238. *Burger*, 482 U.S. at 693.

239. *Id.* at 698.

240. *Id.* at 702.

241. *Id.* at 702.

First, there must be a substantial *government interest* that informs those involved in the industry of the regulatory scheme pursuant to which the inspection is made.²⁴² Second, the warrantless inspections must be necessary to further the regulatory scheme.²⁴³ Lastly, the statute's inspection program, in terms of the certainty and regularity of its application, must provide constitutionally adequate substitute for a warrant.²⁴⁴

The New York regulatory scheme satisfied those three criteria.²⁴⁵ The state established it had a "substantial interest in regulating the vehicle-dismantling and automobile junkyard industry"²⁴⁶ because of increased vehicle theft and the problem of theft associated with that industry.²⁴⁷ Also, the regulation reasonably served the State's substantial interest in dealing with those thefts.²⁴⁸ Therefore, the state's interest outweighed the commercial owner and operator's diminished expectation of privacy and the degree of the intrusion was minimal in accomplishing the enforcement of the government interests.²⁴⁹

In *Maryland v. King*,²⁵⁰ the Court reviewed a Maryland statute that required persons who had been arrested on any serious offense to provide DNA samples whenever they were to be detained in custody.²⁵¹ The claimed purpose of this procedure was the governmental interest in properly identifying defendants before being released on bond.²⁵² King went through that procedure, and his DNA was compared with the samples obtained from other serious crimes.²⁵³ It matched, and he was arrested on charges related to the matches.²⁵⁴ The DNA evidence was admitted at trial.²⁵⁵

King claimed that the procedure of a cheek swab to obtain a DNA sample violated the Fourth Amendment and his reasonable expectation of privacy.²⁵⁶ The Court found that with the significant improvement in testing of DNA, the procedure met a legitimate government interest in assisting the

242. *Id.* at 702.

243. *New York v. Burger*, 482 U.S. 691, 703 (1987).

244. *Id.* at 702-03.

245. *Id.* at 708.

246. *Id.* at 703.

247. *Id.* at 709.

248. *New York v. Burger*, 482 U.S. 691, 708-09 (1987).

249. *Id.* at 709.

250. *Maryland v. King*, 133 S. Ct. 1958 (2013).

251. *Id.* at 1965.

252. *Id.* at 1967.

253. *Id.* at 1966.

254. *Id.*

255. *Maryland v. King*, 133 S. Ct. 1958, 1966 (2013) (note that King was released on bond weeks before the DNA identifications were made, seemingly discrediting the use of the DNA for identification of King before being admitted to bond).

256. *Id.* at 1968.

criminal justice system and police, much like fingerprinting and photographing.²⁵⁷

In balancing the reasonableness of this procedure against the intrusion upon arrestee's privacy rights, the Court gave great weight to the significant governmental interest at stake in the identification of arrestees and the DNA identification to unmatched DNA evidence potential to serving those interests.²⁵⁸ They found that the intrusion of a cheek swab to obtain the sample was minimal and that an arrestee's privacy interest is greatly diminished.²⁵⁹

All three of these cases are not instances of criminal investigations. They are special needs searches outside the scope of criminal enforcement. However, they are clear examples of the slippery slope of diminishing the true balance expressed in *Terry*, in which the Court has engaged.

The results contradict the purposes in *Burger*. Police officers, not regulators, determined, not that Burger had failed to comply with the regulatory requirements, but that Burger had violated other statutes relating to possession of stolen property (the automobiles). In *King*, the claimed purpose for identification of King as being who he said he was for bond purposes, was a subterfuge for the real purpose: gathering DNA to be matched against known samples. Thus, the intrusion far exceeded the stated governmental interest. In each case, it was a search for criminal evidence.

VI. *TERRY* AND THE ESTABLISHMENT OF "CHECKPOINTS"

In approving border checkpoints and traffic checkpoints, the Court relied upon the Terry Balancing Test to justify warrantless and suspicionless seizures without suspicion, which the Court deemed in the public interest (government intrusion) and outweighed the degree of the intrusion in citizens' lives.²⁶⁰

In *United States v. Martinez-Fuerte*,²⁶¹ the border patrol had set up a checkpoint sixty-six miles north of the Mexican border near San Clemente.²⁶² Every car was warned one mile south of the checkpoint that "ALL VEHICLES, STOP AHEAD, 1 MILE."²⁶³ The purpose of the checkpoint was to engage the occupants of the vehicles in brief questioning and check for illegal aliens entering the U.S.²⁶⁴

257. *Id.* at 1972.

258. *Id.* at 1977.

259. *Id.* at 1977-78.

260. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

261. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

262. *Id.* at 546.

263. *Id.* at 545.

264. *Id.* at 546.

The Court held that such warrantless stops, even when they are not supported by any particularized suspicion, were consistent with the Fourth Amendment.²⁶⁵ It further approved referring certain motorists selectively to a secondary inspection for further questioning about citizenship and immigration status even though they were made largely on a basis of apparent Mexican ancestry.²⁶⁶

Agreeing “that checkpoint stops are ‘seizures’ within the meaning of the Fourth Amendment,”²⁶⁷ the Court determined that the governmental interest in enforcing the restrictions on immigration created by Congress outweighed the minimal intrusion of the initial contact at the checkpoint.²⁶⁸

In *Michigan Department of State Police v. Sitz*, the Court addressed the State of Michigan’s establishment of temporary DUI checkpoints.²⁶⁹ The Court confirmed the ruling in *Martinez-Fuerte*.²⁷⁰ It authorized the State police scheme based upon the balancing of the interests and sufficient effectiveness of the State in deterring and apprehending drivers who were under the influence (governmental interest) against the minimal invasion of the primary checkpoint lane and the referral to a secondary lane for further investigation (degree of intrusion).²⁷¹

VII. *FLOYD V. CITY OF NEW YORK* (THE ABUSE OF STOP AND FRISK)

During the mayoral terms of Michael Bloomberg in New York City, the police engaged in a stop and frisk practice, nicknamed “Zero Tolerance Policing”, based upon a New York statute,²⁷² which in turn was based upon *Terry*. New York Police Department statistics indicate that from 2002 to 2012, an average of one in eight people stopped under the program were found to have violated the law in some manner and were formerly charged.²⁷³ In 2011 alone, over 684,000 people were subject to stop and frisk.²⁷⁴ The statistics also indicate that the overwhelming majority of that

265. *Id.* at 561.

266. *Martinez-Fuerte*, 428 U.S. at 563.

267. *Id.* at 556.

268. *Id.* at 556.

269. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

270. *Id.* at 455.

271. *Id.* at 451-52.

272. N. Y. CRIM. PROC. LAW § 140.50 (McKinney 2010).

273. *Stop and Frisk Data*, N.Y. CIVIL LIBERTIES UNION (May 23, 2017), <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/23RB-CED7>].

274. Ryan Devereaux, *Scrutiny Mounts as NYPD ‘Stop and Frisk’ Searches Hit Record High*, THE GUARDIAN (February 14, 2012, 16:55 EST), <https://www.theguardian.com/world/2012/feb/14/nypd-stop-frisk-record-high> [<https://perma.cc/565E-SXMN>].

number were either African-American or Latino.²⁷⁵ As the abuses seemed to pile up, disapproval of the program by the public grew.²⁷⁶

Four plaintiffs filed a class action against the NYPD and several officials of the City of New York alleging violations of their civil rights under 42 U.S.C. § 1983, the Fourth and Fourteenth Amendments of the United States Constitution, The Civil Rights Act of 1964, and the laws of the State of New York, claiming that the stop and frisk program was aimed at persons of certain races and nationalities.²⁷⁷

This was not the first challenge to the department's use of stop and frisk. In 2003, a settlement was reached in *Daniels v. the City of New York*, in which the city agreed to adopt several procedural changes to reduce ethnic and racial disparities in the use of the program.²⁷⁸ These changes were designed to expose abuses by creating a field investigation card to be filled out with each contact between the police and the citizenry relating to stop and frisk.

August 12, 2013, after a bench trial, the trial judge ordered several remedial measures including: the appointment of a monitoring of the use of stop and frisk by the NYPD; immediate reforms to the program; revisions to training programs; changes to stop and frisk record keeping; changes to supervision and discipline; the institution of a pilot project providing for the use of body cameras; and a joint remedial process to ensure continued community input.²⁷⁹

The trial court, in ordering those remedial measures, ruled that the police department had violated the Fourth Amendment by conducting unreasonable searches and the Fourteenth Amendment by systematically conducting stops and frisks in a racially discriminatory manner.²⁸⁰ The ruling of the trial court was appealed to the Second Circuit Court of Appeal.²⁸¹ However, before the matter could be completed, Mayor Bloomberg left

275. Devereaux, *supra* note 274.

276. Brent Staples, *The Human Cost of 'Zero Tolerance'*, N.Y. TIMES (Apr. 28, 2012), <http://www.nytimes.com/2012/04/29/opinion/sunday/the-cost-of-zero-tolerance.html?mcubz=3> [<https://perma.cc/Z445-8YM7>]; James Ford, *Stop and Frisk: How Controversial NYPD Practice Affects Real People*, WPIX (Mar. 22, 2012).

277. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

278. *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001) (No. 1:99-cv-01695).

279. *Floyd v. City of New York*, 959 F. Supp. 2d 668, 669 (S.D.N.Y. 2013).

280. *Id.* at 663.

281. *Floyd v. City of New York*, 770 F.3d 1051 (2d Cir. 2014) (Case No. 13-3088-CV).

office, and the new mayor announced the city was abandoning the program and the appeal.²⁸²

VIII. THE ATTACK ON *TERRY*'S REASONABLE STANDARD IN FAVOR OF "GOOD FAITH"

It is clear, that even if *Terry* itself is rarely mentioned, if at all, in these different applications of the balancing test, the balancing of interests test established in *Terry* is the overwhelming basis of the Court's approval of many warrantless searches and seizures. This balancing test is one of the reasons the Court has chosen not to take on cases where *Terry*'s reasonableness test is sought to be overturned. The Court has chosen instead to address *Terry* in terms of establishing exceptions, much as it has done in warrant cases.

In the past two terms, the Court seems to have adopted such an approach in addressing the reasonable and articulable suspicion standard. We now address *Heien v. North Carolina*²⁸³ and *Utah v. Strieff*.²⁸⁴

In *Heien*, a police officer thought the defendant's vehicle was "suspicious."²⁸⁵ He noted that one of the brake lights was not working. He stopped the vehicle and wrote the driver a warning.²⁸⁶ While issuing the warning, he became suspicious of the activities of two of the occupants and the answers to the questions he posed to them.²⁸⁷ During the discussions, Heien gave consent to the officer to search the vehicle at which time the officer found cocaine.²⁸⁸

Heien pursued a motion to suppress, alleging that the officer did not have a reasonable and articulable suspicion to support the seizure of Heien by way of the stop of his vehicle.²⁸⁹ The basis of this claim was that the statute relied upon by the officer for the stop required two operating tail-lights, which Heien's vehicle had, but required only one operating brake light, which Heien also had.²⁹⁰

The Court commenced its analysis by stating that the Fourth Amendment requires government officials to act reasonably, not perfectly, and gives those officials "fair leeway for enforcing the law"²⁹¹ and that

282. See PRESS OFFICE OF NEW YORK CITY, TRANSCRIPT: MAYOR BILL DE BLASIO ANNOUNCES AGREEMENT IN LANDMARK STOP-AND-FRISK CASE (2014).

283. *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

284. *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

285. *Heien*, 135 S. Ct. at 534.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Heien*, 135 S. Ct. at 534.

291. *Id.* at 536 (citing *Brinegar v. United States*, 338 U.S. 160 (1949)).

“[s]earches and seizures based upon mistakes of fact may be reasonable.”²⁹² However, the standard was announced as the mistake of reasonable men, not reasonable trained police officers.

Heien argued that mistake of law and mistake of fact are not the same.²⁹³ The standard for their application is different, and the maxim “Ignorance of the law is no excuse”²⁹⁴ should apply.²⁹⁵ It was “fundamentally unfair to let police officers get away with mistakes of law when the citizenry is accorded no such leeway.”²⁹⁶

Heien argued that a number of the Court’s decisions have examined “the reasonableness of an officer’s legal error in the course of considering the appropriate remedy for a constitutional violation, [not necessarily] whether there was a violation at all.”²⁹⁷

Mistake of law can be accepted as a defense to prosecution; however, in this case, the Court determined that, even if the state has incorrectly interpreted the law, or as in this case, did not know the law, the officer’s reasonable and honest belief was sufficient to avoid the dictates of *Terry*’s reasonable, articulable suspicion for an unlawful seizure.²⁹⁸

In determining where to put this case in our syllabi to teach to Criminal Procedure students, my colleagues and I struggled on how to label such an exception. For myself, I could only use the concept of “good faith” as an explanation. Good faith is a subjective examination of the officer’s state of mind, as opposed to the objective examination of the facts as they existed at the inception of the contact between the officer and the suspect.

Under *Heien*, if an officer is to be said to be acting reasonably when he is trained in the law but makes a mistake of law, then he is acting on a “good faith” basis. To show the Court’s attack on reasonableness application to warrantless searches as *Terry* defined it, one need only remember that *Terry* specifically eschewed the application of “good faith” as a basis for justifying a warrantless seizure.²⁹⁹

The facts of *Utah v. Strieff*³⁰⁰ are even more direct. A police officer, based upon a tip that a house was being used as a “drug house,” performed periodic surveillance.³⁰¹ Seeing no independent proof or even articulable

292. *Id.* (citing *Illinois v. Rodriguez*, 497 U.S. 177, 183–86 (1990)).

293. *Id.* at 539

294. *Id.* at 540

295. *Heien*, 135 S. Ct. at 540.

296. *Id.* at 540.

297. *Id.* at 539 (citing *Davis v. United States*, 564 U.S. 229, 240 (2011); *Illinois v. Krull*, 480 U.S. 340, 359–60 (1987); *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

298. *Heien*, 135 S. Ct. at 540.

299. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

300. *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

301. *Id.* at 2059.

suspicion to support the tip, he nonetheless, on a hunch, approached Strieff upon seeing him exit the house with hopes of gaining information on the activities in the house.³⁰²

The officer asked Strieff for his name and immediately radioed for a warrants check on the hope one would be pending.³⁰³ Strieff had a parking ticket warrant; the officer immediately arrested Strieff and found drugs on him pursuant to a search incident to the arrest.³⁰⁴

Throughout the entire litigation, including before the Supreme Court, the State of Utah conceded that at the time the officer approached Strieff, he did not have any reasonable and articulable suspicion to approach Strieff.³⁰⁵ The case turned in the lower court on the issue of attenuation as defined and applied per *United States v. Wong Sun*.³⁰⁶³⁰⁷ The Utah Supreme Court had found that there was no attenuation, since the whole encounter took but a few minutes, and it saw no break in the chain of events leading to Strieff's arrest.³⁰⁸

In what many observers thought was a surprise five to three decision,³⁰⁹ the Court found there was attenuation and the warrant itself was the attenuation.³¹⁰ In stating that the officer's errors in judgment hardly rise to a purposeful violation of Strieff's Fourth Amendment rights, and not denying that the officer's purpose or the flagrancy were a violation of those rights in the seizure, Justice Thomas, nonetheless stated that these violations did not rise "to the level of misconduct to warrant suppression."³¹¹

One can only read those words to mean: it was misconduct, but what the officer did was not bad enough for suppression, and it was for the right reasons. *Terry* was clear that the encounter between the officer and the citizen must be reasonable at its inception, not justified by the result.³¹²

Justice Sotomayor in closing a blistering dissent stated: "By legitimizing the conduct that produces this double consciousness, this case tells eve-

302. *Id.* at 2060.

303. *Id.*

304. *Id.*

305. *Strieff*, 136 S. Ct. at 2060.

306. *Wong Sun v. United States*, 371 U.S. 471 (1963).

307. *Strieff*, 136 S. Ct. at 2062-63 (Explains attenuation depends upon three factors: 1) temporal proximity between the unlawful stop and the search (how long was the subject detained before the search took place); 2) the presence of an intervening circumstance (the existence of some happening or event during the seizure); and 3) the purpose and flagrancy of the official misconduct (in other words, how bad was the conduct).

308. *Wong Sun*, 371 U.S. at 471.

309. *Strieff*, 136 S. Ct. at 2056 (Justice Scalia participated in the oral argument and the deliberation of the Court, however he died before the Court rendered its decision, so only eight justices participated in the decision.).

310. *Id.* at 2064.

311. *Id.*

312. *Terry*, 392 U.S. at 17.

ryone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights.”³¹³

Addressing the deterrent effect of *Terry* and the exclusionary rule, Justice Kagan, with Justice Ginsberg concurring, wrote in her dissent:

If the officer believes that any evidence he discovers will be inadmissible, he is likely to think the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today’s decision? Now the officer knows that the stop may well yield admissible evidence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer’s incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove.³¹⁴

One has to wonder why the Court reached so far down to grant certiorari in the first place, if not to peripherally attack *Terry*. Remember, Justice Scalia was part of the Court that voted to accept the case.³¹⁵

The Court appears to be taking aim at the reasonable and articulable suspicion standard itself. By its dicta, the majority clearly wanted to send a message that the concept of justification at the inception may not be the standard they intend to consider in the future.³¹⁶

Discussed below is a brief survey of cases before certain circuit courts of appeal, which reveal several matters pending before those courts. Some of which were litigated in the trial courts after *Strieff* was decided, which present the courts with *Strieff* type good faith issues. Two of these, if they reach the Supreme Court could give the Court more areas upon which to create exceptions to the effect of violations of Terry’s reasonable and articulable standard.

United States v. Felix recently decided by the Eleventh Circuit is particularly disturbing.³¹⁷ The matter revolves around a stop of a “black man

313. *Strieff*, 136 S. Ct. at 2070.

314. *Id.* at 2073-74.

315. *Id.* (Certiorari was granted on October 1, 2015. Justice Scalia died on February 13, 2016. The Court announced the decision on June 20, 2016.).

316. *Id.* at 2062.

317. *United States v. Felix*, No. 16-16457, 2017 WL 5176219 (11th Cir. Nov. 8, 2017).

wearing a black shirt,³¹⁸ after a BOLO was issued in response to an armed robbery of two individuals of their keys and wallets.³¹⁹

The victims stated that two black men in their early twenties, wearing black shirts were involved, and they had fled running on foot in an easterly direction.³²⁰ Approximately ten minutes later, and almost half a mile south of scene of the offense, a police officer spotted the defendant walking alone in a southerly direction.³²¹ The officer, who was driving on the opposite side of the street divided by a median strip, turned on his blue and red emergency lights, made a U-turn, crossed the median strip, and pulled up to Felix.³²² Felix immediately dropped to his knees and called his mother on his cell phone, in an obvious submission to the show of authority by the officer.³²³

The officer exited his vehicle and immediately handcuffed Felix and frisked him, finding a handgun.³²⁴ A further search revealed cocaine in the possession of the defendant.³²⁵

An investigation determined Felix had nothing to do with the armed robbery.³²⁶ However, Felix was charged with being a felon in possession of a firearm in violation of and possession of cocaine.

Felix filed a motion to suppress alleging the officer did not have a reasonable and articulable suspicion to approach and seize him.³²⁷ The only cause articulated by the officer was Felix was wearing a black shirt, was an African-American male and he was in a high crime area of the city of Fort Meyers, Florida.³²⁸ In addition to arguing that there was reasonable and articulable suspicion for the officer's actions, the government also argued that the officer had exercised "excellent judgment."³²⁹

In ruling on the motion to suppress, the trial court found that these factors, and Felix's nervousness upon the officer approaching him, were enough to establish a reasonable and articulable suspicion. Furthermore,

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. United States v. Felix, No. 16-16457, 2017 WL 5176219 (11th Cir. Nov. 8, 2017).

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. United States v. Felix, No. 16-16457, 2017 WL 5176219 (11th Cir. Nov. 8, 2017).

328. *Id.*

329. *Id.*

Felix's action of dropping to his knees was a form of consent to the seizure resulting in the officer's subsequent actions.³³⁰

This case had presented the possibility of the Eleventh Circuit determining that, even if a reasonable and articulable suspicion did not exist, the defendant's conduct subsequent to the seizure by acceding to the authority of the officer before actually being confronted, and the "excellent judgment" exercised by the officer created a totality of circumstances, like those in *Strieff*, which do not rise to the level of suppression. However, the court avoided this issue by finding that simply being a black man walking on the street a half mile from the scene of a crime, wearing a black shirt created a reasonable and articulable suspicion for the officer's actions. Was this an avoidance of having to confront good faith? Is this the type of "reasonable and articulable suspicion" *Terry* contemplated? Was the court's decision tainted by concern for the effect of a *Strieff* type decision?

In *United States v. Ronald Allen Class*, Class, who was known to police and the specific officer in question, as a "meth dealer" was with another male working on a motor vehicle with its hood up, and was legally parked on the street.³³¹ With no indication that any criminal activity was afoot, or belief that Class was armed, the officer pulled up behind the parked vehicle and approached Class and the other male.³³²

After some brief conversation, the officer asked Class to step away from the vehicle and stated he was going to pat him down. Nothing was found in his outer clothing, but the officer then reached into the Class' pants pocket and took a package of marijuana out of the pocket.³³³ The officer then placed Class under arrest, put him in the back of the police vehicle, walked up to the front of the parked vehicle the defendant had been repairing, and looked in the exposed engine compartment, looking for, and finding more drugs.³³⁴ After being advised of his *Miranda* rights, Class was questioned, and told the officer the drugs were his and that there was another firearm in the vehicle.³³⁵

330. *Felix*, 2017 WL 880521 (In addition, the trial Court made the determination that although the defendant was actually 32 years old, he appeared much younger than he was and could have been mistaken for a younger man. This was a factor not considered or known to the officer upon the inception of his contact with the defendant and thus is irrelevant to whether reasonable and articulable suspicion existed).

331. Brief of Appellant at 3, *United States v. Class*, No. 16-4503, 2017 WL 1130385 (8th Cir. Mar. 21, 2017).

332. *Id.*

333. *Id.* at 4.

334. *Id.* at 5.

335. Brief of Appellant at 7, *United States v. Class*, No. 16-4503, 2017 WL 1130385 (8th Cir. Mar. 21, 2017).

Class was charged with possession of a firearm by a convicted felon.³³⁶ His motion to suppress the weapons and his statements was denied, despite the court concurring with Class that reasonable and articulable suspicion did not exist at the inception of the contact with him, or for the pat-down that resulted in the first drugs being found.³³⁷ The trial court relied upon the “plain view doctrine” of finding the drugs in the engine well of the vehicle as attenuating the illegal seizure, and everything that occurred thereafter was as a result of a lawful arrest.³³⁸

The defendant entered a conditional plea to preserve his appeal on the motion to suppress.³³⁹ His brief has been filed with the Eighth Circuit.³⁴⁰ The government has yet to answer. It is anticipated, that in light of the trial court’s determination that reasonable an articulable suspicion did not exist prior to the pat-down and search, the government will rely upon *Strieff* to support the trial court’s use of plain view to justify the officer’s actions.

Will the Eighth Circuit use plain view as an attenuation fitting *Strieff*’s rationale? Will it sanction a police officer’s conduct of approaching someone without any reasonable and articulable suspicion that criminal activity is afoot, just because the person is known to the officer as having been convicted of a prior offense and seize that person, all in hopes of finding something criminal to justify an arrest or further search? Is this not what *Strieff* seems to permit, and if so, will “plain view” be a form of attenuation similar to the finding of a parking violation warrant?

To be sure, the Eleventh Circuit is one of the most “conservative” in the country. If the questions above are open to an answer in the affirmative, will the Supreme Court grant *certiorari* and be willing to start differentiating between exceptions, and which doctrines are applicable to excuse police misconduct?

IV. CONCLUSION

Heien diminished a person’s personal security by allowing officers to make mistakes in the enforcement of the law, and the prosecution still benefit from the encounter to the detriment of the person seized. *Strieff* opened the door to officers ignoring the dictates of *Terry*’s admonition against “good faith” or “hunches” and burying the violation of a person’s personal security in the result of the search. This thought process is an avoidance of

336. *Id.*

337. *Id.*

338. *Id.* at 8.

339. *Id.*

340. Brief of Appellant at 7, *United States v. Class*, No. 16-4503, 2017 WL 1130385 (8th Cir. Mar. 21, 2017).

Terry's requirement that there must be reasonable and articulable suspicion at the inception of the contact.

In today's supercharged partisan atmosphere, and, with the assent of Justice Gorsuch to the Court to replace Justice Scalia, on the issues surrounding immigration and deportation of "illegal aliens" or "undocumented immigrants," *Strieff* and *Heien* could give rise to more purposeful acts designed to discover criminal evidence under the guise of immigration status checks, or vice versa. And where evidence of illegality is discovered, will the Court apply *Strieff* to justify those acts in support of criminal charges or deportation of those persons?

Justice Sotomayor's dissent in the quote above sounds the alarm from that point of view. The future may hold rulings where the Court approves instances of stop and identify without even articulable suspicion, as was required in *Hiibel v. Nevada*.³⁴¹ In *Hiibel*, the Court approved the Nevada stop and identify statute,³⁴² but where there existed reasonable and articulable suspicion for the initial encounter.

If we apply *Strieff*, in particular to instances where the police approach a person without any articulable suspicion or probable cause, simply to determine if they have proof of legal residency status in the United States, and it is determined they have no such proof on their person, the Court may approve a search and the fruits thereof, whether it is determined that the suspect does or does not have a legal basis for entry and remaining in this country. The use of checkpoints with other facially legitimate purposes, but being used for immigration status checks, could be sanctioned by the Court for the same purpose. Officers without true particularized suspicion, beyond a desire to satisfy their own curiosity, could diminish every citizen's personal security.

Police officers, no longer being bound by any explanation for their initial confrontation with a citizen on the street, or anywhere for that matter, can approach that citizen simply because of the clothes they wear, have an accent, are of color or appear to be of Hispanic, Middle Eastern or Oriental descent, and demand identification and immigration status papers.³⁴³ Even though that confrontation would be in violation of *Terry*, and all of its underpinnings, the establishment of an illegal immigration status would act as a shield against any relief that a person may seek as attenuated or the conduct of the police as not rising to the level of suppression.

Even more disconcerting would be the lack of relief for those who are wrongfully approached, but do not have a legal immigration status, or where evidence of criminal offenses is obtained leading to prosecution.

341. *Hiibel v. Nevada*, 542 U.S. 177 (2004).

342. NEV. REV. STAT. § 199.280 (2003).

343. *Strieff*, 136 S. Ct. at 2070, (Sotomayor, J., dissenting).

That gives rise to the police state where officers have unfettered power to ask for “your papers, please.” One need only remember the warnings of *Terry* itself: “If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers and effects,’ only in the discretion of the police.”³⁴⁴

344. *Terry*, 392 U.S. at 22.