

## Curbing Aggressive Police Tactics During Routine Traffic Stops in Illinois

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## I. INTRODUCTION

After a traffic stop for a minor violation, a young woman was asked if she had any “knives, guns, dead bodies, grenades, rocket launchers or anything that shouldn’t be in the vehicle.” She responded that she did not. The officer then intimated that she would surely agree to a search of her vehicle because she had nothing to hide. In another case, a man was stopped for having no rear-registration light on his vehicle whereupon the officer called to the scene a second officer with a canine, which was trained to identify the presence of contraband. In yet another case, an individual was stopped for speeding. This individual informed the officer that he was moving from another jurisdiction to seek employment; however, the officer noticed no baggage or the like in the vehicle and, consequently, called in a canine to check for contraband. Does inquiring about rocket launchers or bringing canines into a routine traffic stop sound like the actions of the authorities in Baghdad? Well, maybe, but these *were* the actions of the police somewhere in the state of Illinois.<sup>1</sup>

1. See, e.g., *People v. Caballes*, 802 N.E.2d 202, 203–04 (Ill. 2003) (canine sniff of vehicle after traffic stop for speeding), *vacated sub nom. Illinois v. Caballes*, 125 S. Ct. 834 (2005);

In the past thirty years, the United States Supreme Court has shown extraordinary tolerance of a wide variety of police conduct during routine traffic stops and has regularly rejected arguments that the procedures violate the Fourth Amendment's prohibition against unreasonable searches and seizures.<sup>2</sup> In a stunning series of cases, however, the Supreme Court of Illinois has quickly interceded and re-examined the law of traffic stops, effectively abolishing a number of investigative techniques used by police.<sup>3</sup> Although the United States Supreme Court recently entered the fray by reversing one of these decisions,<sup>4</sup> the impact of the High Court's action may be lessened somewhat by the Supreme Court of Illinois' rigorous approach to analyzing police conduct during routine traffic stops. This Article will demonstrate that many types of coercive investigative techniques that have been given a pass by the United States Supreme Court are now difficult—if not impossible—to justify under Illinois law.

Part II of this Article will provide background information on the United States Supreme Court's Fourth Amendment case law and will show the Court's lack of oversight of police conduct regarding traffic stops.<sup>5</sup> Part III will summarize the Illinois cases that have affected police conduct during traffic stops,<sup>6</sup> and Part IV will analyze the rules that have emerged from these cases and the lower court decisions that have followed.<sup>7</sup> Part V will discuss approaches that other jurisdictions have taken in this context, employing a reasonable suspicion standard

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People v. Cox, 782 N.E.2d 275, 277 (Ill. 2002) (canine sniff of vehicle after a traffic stop for burned out registration light), *cert. denied*, 539 U.S. 937 (2003); People v. Goeking, 780 N.E.2d 829, 830 (Ill. App. Ct. 2002) (after traffic stop, officer asked motorist if she had any "knives, guns, drugs, dead bodies, grenades, rocket launchers, anything that shouldn't be in the vehicle").

2. See *infra* Part II (recounting United States Supreme Court search and seizure jurisprudence).

3. See *Caballes*, 802 N.E.2d at 202 (concluding canine sniff was inappropriate); People v. Harris, 802 N.E.2d 219 (Ill. 2003) (rendering inventory of vehicle impermissible), *vacated by sub. nom.* Illinois v. Harris, 125 S. Ct. 1292 (2005); People v. Bunch, 796 N.E.2d 1024 (Ill. 2003) (finding officer's questioning of defendant to be beyond scope of stop); People v. Gherna, 784 N.E.2d 799 (Ill. 2003) (concluding the prolonged detention of defendant during traffic stop was unreasonable); *Cox*, 782 N.E.2d at 275 (holding that dog sniff test during traffic stop for not having rear registration light was impermissible); People v. Brownlee, 713 N.E.2d 556 (Ill. 1999) (holding officer's actions invalidated consent to search car and area).

4. Illinois v. Caballes, 125 S. Ct. 834 (2005) [hereinafter *Caballes II*] (holding that, under the Fourth Amendment, reasonable suspicion is not required to conduct a dog sniff during a routine traffic stop).

5. See *infra* Part II (examining United States Supreme Court's search and seizure cases).

6. See *infra* Part III (surveying Illinois search and seizure jurisprudence).

7. See *infra* Part IV (evaluating the Illinois courts' rationale in cases implicating search and seizure principles).

much like Illinois to measure the validity of aggressive police tactics.<sup>8</sup>

## II. THE UNITED STATES SUPREME COURT'S FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment to the United States Constitution reads as follows:

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.<sup>9</sup>

As recently as 1949, the United States Supreme Court revered this Amendment as “basic to a free society” because it protects the “security of one’s privacy against arbitrary intrusion by the police.”<sup>10</sup> Over the past thirty years, however, the Court’s interpretation of the Fourth Amendment has changed significantly—the Court has broadened, stretched, and bent it beyond recognition to preserve law enforcement’s wide authority to intrude into the affairs of citizens. This Section will discuss a number of invasive law enforcement techniques that have been upheld by the Court and will conclude that the Court’s decisions have resulted in the virtual elimination of Fourth Amendment protection for motorists.

### A. *United States Supreme Court Case Law*

Several types of interactions with police implicate search and seizure principles requiring specific attention, including the investigatory stop, the casual police encounter, consensual searches, and police questioning.

#### 1. The Investigatory Stop

In the early development of the United States Supreme Court’s Fourth Amendment jurisprudence, the Court consistently required probable cause in order to search or seize a person.<sup>11</sup> In one case, the

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8. See *infra* Part V (comparing other jurisdictions’ approaches to law enforcement investigatory techniques).

9. U.S. CONST. amend. IV.

10. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643 (1961). See *Boyd v. United States*, 116 U.S. 616 (1886) (describing the British common law origins of the Fourth Amendment).

11. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting) (“[P]olice officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*.”); *Henry v. United States*, 361 U.S. 98, 100 (1959) (“The requirement of probable cause has roots

Court defined probable cause as “evidence which would ‘warrant a man of reasonable caution in the belief’ that a felony has been committed.”<sup>12</sup>

This formulation of the Fourth Amendment changed dramatically in 1968 with the Court’s decision in *Terry v. Ohio*.<sup>13</sup> In *Terry*, the Court upheld the police practice known as the “stop and frisk,”<sup>14</sup> thus permitting officers to seize and search a person based on something less than probable cause.<sup>15</sup> In deciding the case, the Court aimed to strike a compromise between the needs of law enforcement and the rights of citizens guaranteed by the Fourth Amendment.<sup>16</sup> While law enforcement officers needed a set of flexible responses to address the variety of situations they faced while on duty,<sup>17</sup> the Court noted that the Fourth Amendment traditionally imposed a “severe requirement of specific justification” for intruding upon a person.<sup>18</sup> Based on these considerations, the Court announced a two-prong standard for analyzing the reasonableness of a stop and frisk.

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that are deep in our history.”); see also Timothy R. Lohraff, *United States v. Leon and Illinois v. Gates: A Call for State Courts to Develop State Constitutional Law*, 1987 U. ILL. L. REV. 311, 315 (1987) (“Probable cause is the device the framers of the United States Constitution chose to balance privacy rights against the state’s duty to enforce the law.”).

12. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)); see also *Henry*, 361 U.S. at 102 (citing *Stacy v. Emery*, 97 U.S. 642, 645 (1878) as stating: “Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”).

13. *Terry v. Ohio*, 392 U.S. 1 (1968). For a discussion of *Terry* in its historical and legal context, see David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975, 977–87 (1998).

14. Prior to *Terry*, many police officers were making use of this “low visibility” tactic to make brief stops of citizens and frisk them for weapons. 3 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.1(a) (2d ed. 1986). In the years leading up to *Terry*, however, several courts and state legislatures authorized the practice. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* § 9.01 (2d ed. 1986).

It is important to note the history from which the Court’s decision in *Terry* arises. The Court’s decision in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), which extended the Fourth Amendment exclusionary rule to the states, suddenly placed significant restrictions on the ways in which state law enforcement officials gathered evidence. Harris, *supra* note 13, at 977–78. Also, by 1968, the turbulent events of the 1960s had taken their toll on American society, and politicians increased pressure for “law and order” in the judicial system. *Id.* at 981. *Terry* tilted the balance in favor of law enforcement by affirming the constitutionality of their powerful investigative technique. *Id.* at 985.

15. *Terry*, 392 U.S. at 20 (describing the United States Supreme Court jurisprudence to allow these searches with, for example, judicial approval).

16. Susan Bandes, *Terry v. Ohio in Hindsight: The Perils of Predicting the Past*, 16 CONST. COMMENTARY 491, 492 (1999) (arguing that the attempted compromise has failed to accomplish its goal of controlling stops and frisks); Harris, *supra* note 13, at 984.

17. *Terry*, 392 U.S. at 11, 20. The Court also considered the ability for officers to protect themselves while on duty. *Id.* at 23–24.

18. *Id.* at 11.

First, a court should determine “whether the officer’s action was justified at its inception.”<sup>19</sup> Thus, in order to effectuate a stop of a person, an officer must point to “specific and articulable facts” along with “any rational inferences from those facts.”<sup>20</sup> The stop must be objectively reasonable, meaning an officer’s good faith is not enough.<sup>21</sup> Under the second prong, a court should evaluate whether the officer’s actions were “reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>22</sup> Thus, to lawfully search a person for weapons, an officer must reasonably believe that the person is “armed and dangerous.”<sup>23</sup> The officer cannot rely on “his inchoate and unparticularized suspicion or ‘hunch,’” but may draw specific reasonable inferences based on his experience.<sup>24</sup>

The Court’s decision in *Terry* legitimized the growing practice of briefly stopping and questioning citizens, a practice now commonly called an “investigative stop” or a “*Terry* stop.”<sup>25</sup> Whereas police officers previously were required to have probable cause to detain a person, they could now briefly stop a person based on a reasonable, articulable suspicion of wrongdoing.<sup>26</sup> Although the Supreme Court has not expressed a precise formula for determining what constitutes reasonable suspicion,<sup>27</sup> numerous lower court cases have demonstrated

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19. *Id.* at 20.

20. *Id.* at 21.

21. *Id.* at 22.

22. *Id.* at 20.

23. *Id.* at 27. It is important to emphasize that an officer’s lawful *stop* of a citizen does not automatically permit the officer to *frisk* the citizen. LAFAVE, *supra* note 14, at § 9.4(a). In order to conduct a frisk, an officer must have reasonable and articulable suspicion that the citizen may be both armed and dangerous. *Id.* at § 7.2(e).

24. *Terry*, 392 U.S. at 27.

25. See LAFAVE, *supra* note 14, at § 9.1(a).

26. See WHITEBREAD & SLOBOGIN, *supra* note 14, at § 9.02 (indicating that a police officer is authorized to stop a person without probable cause if he can point to unusual conduct suggesting criminal activity may be afoot); see also Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911, 952 (1989) (“As a result of *Terry*, officers are not compelled to make a Hobson’s choice between waiting for suspicious activity to play out in terms of completed crimes, and prematurely intervening to arrest suspects who may be innocent.”).

27. See *United States v. Cortez*, 449 U.S. 411, 417 (1981). In *Cortez*, the Court stated:

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like ‘articulable reasons’ and ‘founded suspicion’ are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based on that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

*Id.*

that this is a fairly low standard.<sup>28</sup>

Today, the most common type of *Terry* stop is a routine vehicle stop for a traffic violation.<sup>29</sup> An officer's observation of any traffic infraction whatsoever can justify an investigatory stop of the vehicle and its driver.<sup>30</sup> Moreover, such observation gives rise to probable cause, which means that an officer has the authority to arrest the driver.<sup>31</sup> The Court has held, however, that traffic stops are normally brief and noncoercive, and thus, are treated as *Terry* stops.<sup>32</sup>

Unlike routine traffic stops, brief vehicle stops at a highway checkpoint or roadblock, in some circumstances, may be conducted without any suspicion of wrongdoing.<sup>33</sup> In *City of Indianapolis v. Edmond*,<sup>34</sup> however, the United States Supreme Court held that "a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing" violated the Fourth Amendment.<sup>35</sup> According to the Court, the narcotics interdiction checkpoint at issue in *Edmond* did not aim to prevent the "immediate, vehicle-bound threat to life and limb" that justified inspections for driver's licenses and drunk drivers.<sup>36</sup> Recently, the Court distinguished the impermissible

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28. See LAFAVE, *supra* note 14, at § 9 (providing a thorough analysis of the various grounds for a *Terry* stop); see also HARRIS, *supra* note 13, at 1021 (criticizing the development of the *Terry* rule to permit investigative techniques "based on categorical justifications that effectively widen police discretion to the point that police may stop most people almost any time"). But see GEORGE C. THOMAS, III, *Terry v. Ohio in the Trenches: A Glimpse at How Courts Apply "Reasonable Suspicion"*, 72 ST. JOHN'S L. REV. 1025 (1998) (concluding that lower courts' application of the *Terry* standard does not appear to be overwhelmingly permissive of police conduct).

29. ROBERT H. WHORF, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Interdiction Technique*, 28 OHIO N.U.L. REV. 1, 4 (2001).

30. *Whren v. United States*, 517 U.S. 806, 818–19 (1996) (rejecting the defendant's argument that "the multitude of applicable traffic and equipment regulations" makes it possible for the police to stop anyone they wish and therefore requires a higher standard of justification).

31. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (upholding the officer's arrest of the defendant for failing to wear a seat belt, a misdemeanor punishable by a twenty-five to fifty dollar fine).

32. *Berkemer v. McCarty*, 468 U.S. 420, 439–40 (1984). In *Berkemer*, the Court also stated, "We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Id.* at 439, n.29. See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (authorizing the Border Patrol to make brief stops of vehicles in which the officer reasonably suspects contains illegal aliens).

33. See *Illinois v. Lidster*, 124 S. Ct. 885, 889 (2004) (providing information regarding a recent crime); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (addressing drunk driving checks); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (assessing driver's license checks); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558–59 (1976) (discussing the interception of illegal aliens).

34. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

35. *Id.* at 41.

36. *Id.* at 43. The Court rejected the city's argument that its alleged secondary purposes of verifying licenses and keeping impaired drivers off the road justified the roadblock. *Id.* at 46.

roadblock in *Edmond* from a checkpoint in which officers asked motorists for information regarding a hit-and-run automobile accident.<sup>37</sup> In that case, *Illinois v. Lidster*,<sup>38</sup> the police did not seek to determine whether the motorist himself was committing a crime, but instead, the police sought information “to help find the perpetrator of a specific and known crime.”<sup>39</sup> The Court, finding the public concern justifying the stop a “grave” one and the means to conduct the stop only minimally intrusive, concluded that the roadblock in *Lidster* was constitutionally permissible.<sup>40</sup>

## 2. Consensual Encounters

In addition to arrests and investigative stops, the Court has sanctioned a third category of police-citizen encounters: the consensual encounter.<sup>41</sup> This type of encounter was recognized in *Terry* when the Court stated, “Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons.”<sup>42</sup> Whereas arrests and investigative stops must be “reasonable” within the meaning of the Fourth Amendment,<sup>43</sup> a consensual encounter has no such requirement.<sup>44</sup> Thus, the Fourth Amendment is triggered only when a person becomes “seized” by law enforcement officers.<sup>45</sup>

Clearly, simply being approached or questioned by a law enforcement officer does not constitute a seizure.<sup>46</sup> However, the point

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According to the Court, “[i]f this were the case, . . . law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check.” *Id.*

37. *Lidster*, 124 S. Ct. at 889.

38. *Id.* at 885.

39. *Id.* at 891.

40. *Id.*

41. See generally, LAFAVE, *supra* note 14, at § 9.3(a) (discussing situations in which the suspect does not attempt to leave). This is sometimes referred to as law enforcement’s “community-caretaking” function. *People v. Murray*, 560 N.E.2d 309, 311–12 (Ill. 1990).

42. *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968). The Court continued, “Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *Id.*

43. In other words, an arrest must be based on probable cause, and an investigative stop must be based on reasonable suspicion.

44. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *United States v. Mendenhall*, 446 U.S. 544, 552 (1980).

45. See *Bostick*, 501 U.S. at 434 (“Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions.”).

46. *Id.* In *Florida v. Royer*, 460 U.S. 491, 497–98 (1983), the Court summarized the rules in the following manner:

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he

at which a person becomes seized for Fourth Amendment purposes remained unclear until the Court's decision in *United States v. Mendenhall*,<sup>47</sup> a case in which Drug Enforcement Administration ("DEA") agents approached the defendant at an airport.<sup>48</sup> In that case, Justice Potter Stewart, writing only for himself and Justice William Rehnquist, determined that the encounter was consensual.<sup>49</sup> They decided that the appropriate standard for a consensual stop was an objective one,<sup>50</sup> in which a court should determine whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>51</sup> Stewart gave several examples of relevant factors in making such a determination, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."<sup>52</sup> Although only two justices supported the *Mendenhall* test, it appeared to garner a majority of the Court three years later in *Florida v. Royer*.<sup>53</sup>

The Court has continued to apply the *Mendenhall* test to determine

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is willing to answer some questions, by putting some questions to him if the person is willing to listen, or by offering [into] evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any questions put to him; indeed he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

*Id.* (citations omitted).

47. *United States v. Mendenhall*, 446 U.S. 544 (1980).

48. In *Mendenhall*, two Drug Enforcement Administration agents stationed at an airport spotted the defendant and believed she fit the agency's "drug courier profile." *Id.* at 547 n.1. The agents approached her and, after identifying themselves as federal agents, asked for her identification and her ticket. *Id.* at 547. After learning that the names on the documents did not match, the agents asked her to accompany them to their office in the airport. *Id.* at 548.

49. *Id.* at 560. Justice Lewis Powell, joined by Chief Justice Warren Burger and Justice Harry Blackmun, concurred in the judgment, concluding that the stop was justified by reasonable and articulable suspicion. *Id.* (Powell, J., concurring).

50. *Id.* at 554 n.6 ("[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent.").

51. *Id.* at 554.

52. *Id.*

53. *Florida v. Royer*, 460 U.S. 491 (1983). See Tracey Maclin, *The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1272 (1990) [hereinafter Maclin, *The Decline*]. The *Mendenhall* test was applied in the plurality opinion by Justice Byron White, joined by Justices Thurgood Marshall, Lewis Powell, and John Paul Stevens, and also in Justice Harry Blackmun's dissenting opinion. *Royer*, 460 U.S. at 491.

when an encounter develops into a seizure,<sup>54</sup> although the test was complemented by another test in *Florida v. Bostick*.<sup>55</sup> In *Bostick*, the Court considered a police sweep of a bus as part of a drug interdiction program and concluded that the *Mendenhall* “free-to-leave” standard does not apply to bus sweeps and other situations in which a person’s freedom of movement is restricted by a “a factor independent of police conduct.”<sup>56</sup> According to the Court, the “mere fact” that *Bostick* did not wish to exit the bus and risk being stranded did not mean that the encounter was coercive.<sup>57</sup> Thus, to determine whether the passenger was seized, the appropriate inquiry was “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”<sup>58</sup>

### 3. Consensual Searches

Closely related to consensual encounters with the police is the practice of consensual searches.<sup>59</sup> Like consensual encounters, police searches authorized by a citizen’s consent do not require any justification whatsoever.<sup>60</sup> Many officers find such consensual searches attractive because they avoid the necessity of obtaining a search warrant and they often include a broader scope to search than otherwise permissible with a showing of probable cause.<sup>61</sup> This technique is also

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54. See, e.g., *Michigan v. Chesternut*, 486 U.S. 567 (1988) (holding that the officers’ pursuit of the defendant did not constitute a “seizure”); *Florida v. Rodriguez*, 469 U.S. 1 (1984) (finding that no seizure occurred where an officer displayed his badge and asked the defendant to step aside and talk to him).

55. *Florida v. Bostick*, 501 U.S. 429 (1991).

56. *Id.* at 435–36.

57. *Id.* at 436.

58. *Id.* See also *United States v. Drayton*, 536 U.S. 194 (2002) (holding, in another bus sweep case, that the encounter was consensual).

59. There are several possible reasons that a person might submit to a consensual search. A person: (1) may be attempting to bluff the officer; (2) may not realize the consequences of a search; (3) may be confused or frightened by the police presence; or (4) may feel that his refusal to consent will lead to further suspicion. WHITEBREAD & SLOBOGIN, *supra* note 14, at § 10.02 (relying upon *Martinez v. United States*, 333 F.2d 405 (9th Cir. 1964), *vacated by*, 380 U.S. 260 (1965)). In addition, as one scholar noted, “Americans are not educated to say no to the police.” Daniel L. Rotenberg, *An Essay on Consent (Less) Police Searches*, 69 WASH. U.L.Q. 175, 189 (1991). See generally LAFAVE, *supra* note 14, at § 8 (discussing consent searches).

60. See LAFAVE, *supra* note 14, at § 8.1(c) (describing the nature and scope of consent in police searches).

61. *Id.* at § 8.1. Besides conducting a consensual search, an officer can also utilize a number of other exceptions to the search warrant requirement to search a vehicle during a routine traffic stop. Such exceptions include the “plain view” exception, a search incident to arrest, an inventory, and the automobile exception. Robert H. Whorf, “Coercive Ambiguity” in the Routine Traffic Stop Turned Consent Search, 30 SUFFOLK L. REV. 379, 382–90 (1997). See also *Cady v. Dombrowski*, 413 U.S. 433, 451 (1973) (Brennan, J., dissenting) (describing the various

attractive to law enforcement because it has proven highly effective.<sup>62</sup> An officer may make hundreds of consensual searches each year while conducting traffic stops.<sup>63</sup> The technique, familiar to law enforcement officers, often occurs in the following manner:

A police officer stops a vehicle for a routine traffic violation such as speeding; the police officer asks the driver to get out of the vehicle; the police officer chats in a friendly way with the driver and, sometimes, with the passengers as well; the police officer issues a warning rather than a citation for the traffic offense; the police officer asks if the vehicle contains anything illegal; and then, right on the heels of the inevitable denial, the police officer asks for permission to search the vehicle.<sup>64</sup>

In this way, consensual searches have become inextricably linked not only with traffic stops, but also with the war on drugs.<sup>65</sup> Officers commonly use a motorist's commission of a traffic violation as a pretext for conducting a search of the vehicle in hopes of finding illegal substances.<sup>66</sup> Despite the problems surrounding the "routine traffic stop turned consent search,"<sup>67</sup> the United States Supreme Court has twice upheld its constitutionality.<sup>68</sup>

Prior to 1972, confusion existed as to whether a person's consent to a search constituted a "waiver" of his Fourth Amendment right, which must be obtained knowingly and intelligently pursuant to *Johnson v.*

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exceptions to the search warrant requirement in connection with automobiles).

62. Whorf, *supra* note 29, at 3 ("Denials of consent to search in these circumstances are apparently rare.").

63. *Id.*

64. *Id.* Likewise, the tactics of Georgia State Trooper B.E. "Benjie" Hodges have been described as follows:

After stopping a vehicle for a traffic infraction, Hodges more often than not issues a warning to the driver rather than a citation, chats with the driver in a folksy manner and then obtains permission to look in the car. If consent forms are used, Hodges downplays their importance by stating that the form is paperwork and that it is more for his protection than anything else.

Mark G. Ledwin, Note, *The Use of the Drug Courier Profile in Traffic Stops: Valid Police Procedure or Fourth Amendment Violation?*, 15 OHIO N.U. L. REV. 593, 606 (1988) (citing *United States v. Suarez*, 694 F. Supp. 926, 930 (S.D. Ga. 1988)).

65. James A. Adams, *The Supreme Court's Improbable Justifications for Restrictions of Citizens' Fourth Amendment Privacy Expectations in Automobiles*, 47 DRAKE L. REV. 833, 845 (1999); Whorf, *supra* note 29, at 5-6. See Ledwin, *supra* note 64, at 593 (detailing a routine traffic stop that resulted in a narcotics arrest).

66. Whorf, *supra* note 29, at 5-6; David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 572-73 (1998) [hereinafter *Car Wars*].

67. Whorf, *supra* note 29, at 2 n.5 (using the term to describe motorists consenting to searches if the right police technique is used).

68. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

*Zerbst*.<sup>69</sup> Although application of this long-standing doctrine to consensual searches seemed natural, in *Schneckloth v. Bustamonte*<sup>70</sup> the Supreme Court refused to apply *Zerbst* to this context.<sup>71</sup> In this 1972 case involving a vehicle search following a routine traffic stop,<sup>72</sup> the Court noted that in previous cases, it had applied the *Zerbst* standard to analyze waivers “in the context of the safeguards of a fair criminal trial.”<sup>73</sup> In vague and conclusory language, the Court stated that the “protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial.”<sup>74</sup> Furthermore, the Court observed that it would be “thoroughly impractical” to require officers to inform a person of his right to refuse consent.<sup>75</sup>

Nonetheless, in *Schneckloth*, the Court acknowledged that a person’s consent to be searched must be given “freely and voluntarily.”<sup>76</sup> Unable to formulate a “talismanic definition” of “voluntary,” the Court instead held that the totality of the circumstances should dictate whether a person’s consent was voluntary.<sup>77</sup> The factors to consider include the defendant’s age, education, intelligence, “lack of any advice . . . of his constitutional rights,” the length of detention, and “the repeated and prolonged nature of the questioning.”<sup>78</sup> The Court also rejected a formal requirement that a defendant have actual knowledge of his right to refuse to consent and instead relegated this to a permissible factor of voluntariness.<sup>79</sup>

In 1996, the Court again rejected a challenge to the consensual search

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69. LAFAVE, *supra* note 14, § 8.1(a). The Court, since its 1938 decision in *Johnson v. Zerbst*, held that a waiver of a constitutional right is an “intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled on other grounds* by *Edwards v. Arizona*, 451 U.S. 477 (1981). Applying *Zerbst* to consensual searches, then, a person could waive his Fourth Amendment right only if he *knew* of the right and intentionally relinquished that right. LAFAVE, *supra* note 14, § 8.1(a).

70. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1972).

71. *Id.* at 246.

72. The defendant was a passenger in a vehicle stopped for having a burned-out headlight and license plate light. *Id.* at 220. An officer asked another passenger for permission to search the car, and the passenger replied, “Sure go ahead.” *Id.* The search revealed, “[w]added up under the left rear seat,” three stolen checks. *Id.*

73. *Id.* at 235.

74. *Id.* at 242.

75. *Id.* at 231.

76. *Id.* at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). The prosecutor bears the burden of proof to show consent was voluntary. *Bumper*, 391 U.S. at 548.

77. *Schneckloth*, 412 U.S. at 224–27.

78. *Id.* at 226 (internal citations omitted).

79. *Id.* at 248–49.

in *Ohio v. Robinette*.<sup>80</sup> In that case, a police officer stopped the defendant for speeding.<sup>81</sup> The officer asked the defendant for his license and checked for outstanding warrants, finding none.<sup>82</sup> The officer then asked the defendant to step out of the car, issued a verbal warning, and returned his license.<sup>83</sup> Next, the officer said to the defendant, “One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?”<sup>84</sup> After the defendant answered that he had none, the officer asked for permission to search his car.<sup>85</sup> The defendant agreed, and the officer’s search uncovered drugs.<sup>86</sup>

The Ohio Supreme Court held that the defendant was illegally detained when the officer asked him to exit his vehicle.<sup>87</sup> The court observed that these “routine traffic stops turned consent searches”<sup>88</sup> involved a “seamless” transition between a person’s detention and the purportedly consensual exchange.<sup>89</sup> Further, “[t]he undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.”<sup>90</sup> Applying the *Mendenhall* free-to-leave test, the court concluded:

Most people believe that they are validly in a police officer’s custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.<sup>91</sup>

To emphasize the clear break between the legal detention and the consensual encounter, the court held that, at the conclusion of the traffic stop, officers were required to inform motorists that they were free to

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80. *Ohio v. Robinette*, 519 U.S. 33 (1996).

81. *Id.* at 35.

82. *Id.*

83. *Id.*

84. *Id.* at 35–36.

85. *Id.* at 36.

86. *Id.* The officer found a small amount of marijuana and a pill of methylenedioxy-methamphetamine. *Id.*

87. *State v. Robinette*, 653 N.E.2d 695, 698 (Ohio 1995), *rev’d* by *Ohio v. Robinette*, 519 U.S. 33 (1996).

88. *See supra* note 67 (attributing the genesis of the term “consent search” to Professor Whorf).

89. *Robinette*, 653 N.E.2d at 698.

90. *Id.*

91. *Id.*

leave.<sup>92</sup>

The United States Supreme Court granted certiorari to determine whether the United States Constitution mandated the rule announced by the Ohio Supreme Court.<sup>93</sup> In a brief opinion by Chief Justice William Rehnquist, the Court reversed the judgment.<sup>94</sup> The Court reiterated its holding in *Schneckloth* that a person's consent may be valid even though the person did not know of his right to refuse consent.<sup>95</sup> In addition, the Court continued its avoidance of bright line rules regarding the Fourth Amendment's reasonableness requirement and held that the Ohio Supreme Court's per se rule would be unrealistic in its application.<sup>96</sup>

Therefore, after *Schneckloth* and *Robinette*, a police officer need not inform a citizen, before he consents to a search, that (1) he has the right to refuse consent and (2) he is free to leave.<sup>97</sup> Instead, these factors bear on whether the citizen's consent was voluntary, based on the totality of the circumstances.<sup>98</sup>

#### 4. Police Questioning

The final constitutional issue regarding police conduct in traffic stops is the extent to which officers can question motorists during the stop. Although the United States Supreme Court has not directly ruled on this issue, a number of federal circuit courts have considered the issue and have come to differing conclusions.<sup>99</sup> For instance, in *United States v. Shabazz*,<sup>100</sup> the United States Court of Appeals for the Fifth Circuit held that *Terry*'s scope inquiry restricted only the *length of time* an officer

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92. *Id.* at 699.

93. *Ohio v. Robinette*, 519 U.S. 33, 36 (1996).

94. *Id.* at 40.

95. *Id.* at 39.

96. *Id.* at 39–40.

97. *Id.*; *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973).

98. *Robinette*, 519 U.S. at 40; Adams, *supra* note 65, at 847.

99. See Amy L. Vazquez, Note, "Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?" *What Questions Can a Police Officer Ask During a Traffic Stop?*, 76 TUL. L. REV. 211 (2001) (discussing the circuit split over allowable police conduct at traffic stops). Vazquez argues that the *Holt* standard, which considers both the scope and duration of a *Terry* stop, is the correct articulation of the rule. *Id.* at 226–27; Vazquez also encourages the United States Supreme Court to settle the dispute by granting certiorari in a case involving this issue. *Id.* at 225. See *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001); Bill Lawrence, Note, *The Scope of Police Questioning During a Routine Traffic Stop: Do Questions Outside the Scope of the Original Justification for the Stop Create Impermissible Seizures if They Do Not Prolong the Stop?*, 30 FORDHAM URB. L.J. 1919, 1927–28 (2003) (discussing *United States v. Childs*, 277 F.3d 947, 949 (7th Cir. 2002) which upheld the officer's questioning that was unrelated to the original purpose for the stop, but did not prolong the detention).

100. *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993).

could detain a driver.<sup>101</sup> Thus, in *Shabazz*, unrelated questioning during a traffic stop was not improper because the officers were still waiting for the results of Shabazz's computer check.<sup>102</sup> On the other hand, in *United States v. Holt*,<sup>103</sup> the United States Court of Appeals for the Tenth Circuit held that *Terry* imposed limits on both the *length and manner* of a detention.<sup>104</sup> In that case, the officer's unrelated questioning while he was writing a ticket was held invalid.<sup>105</sup>

Despite the Court's lack of guidance on the broad issue, its 2004 opinion in *Hiibel v. Sixth Judicial District Court of Nevada*,<sup>106</sup> addressed the narrow issue of the validity of an officer's request for identification.<sup>107</sup> In *Hiibel*, an officer investigated a report that a woman had been assaulted while in the defendant's truck.<sup>108</sup> The officer approached the truck and asked the defendant for identification, but he refused to comply with the officer's request.<sup>109</sup> The defendant was subsequently convicted under a Nevada statute that required a person detained pursuant to an investigatory stop to identify himself to the officer.<sup>110</sup> The United States Supreme Court rejected the defendant's Fourth Amendment challenge to the law.<sup>111</sup> Noting that "[a]sking questions is an essential part of police investigations,"<sup>112</sup> the Court held that a request for identification under the Nevada law was consistent with the *Terry* standard because it "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop."<sup>113</sup> Furthermore, the law "does not alter the nature of the stop itself: it does not change its duration, or its location."<sup>114</sup>

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101. *Shabazz*, 993 F.2d at 437–38 (recognizing a need to balance the law enforcement purposes of a stop and the time reasonably needed to accomplish those purposes). See *supra* note 22 and accompanying text (describing the second prong of the *Terry* test as whether the officer's actions were "reasonably related in scope to the circumstances which justified the interference in the first place").

102. *Shabazz*, 993 F.2d at 438.

103. *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001).

104. *Id.* at 1230.

105. *Id.*

106. *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451 (2004).

107. *Id.* at 2455.

108. *Id.*

109. *Id.*

110. *Id.* at 2455–56 (referring to NEV. REV. STAT. § 171.123 (2003)).

111. *Hiibel*, 124 S. Ct. at 2457. The Court also rejected *Hiibel*'s Fifth Amendment challenge to the law. *Id.* at 2460–61.

112. *Id.* at 2458.

113. *Id.* at 2459.

114. *Id.* (internal citations omitted).

*B. The Court's Lack of Oversight*

The United States Supreme Court's permissive approach to the Fourth Amendment during the past thirty years has subjected the Court to a great deal of scholarly criticism.<sup>115</sup> In cases involving vehicles, one scholar has concluded that "it is no exaggeration to say that in cases involving cars, the Fourth Amendment is all but dead."<sup>116</sup> Indeed, the Court's decisions have overwhelmingly favored law enforcement's powers over the rights of motorists.<sup>117</sup> These cases give police officers a broad array of legal justifications for effectuating traffic stops<sup>118</sup> and

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115. See, e.g., James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413, 471 (1993) ("Failure or refusal to consider the Court's treatment of the foregoing issues as humor leads to a conclusion that the Court lacks candor and is applying theories inconsistently."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) ("The Fourth Amendment today is an embarrassment."); JOHN F. DECKER, *REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA* 52 (1992).

In virtually every case, [the Court] will state that the warrant requirement and probable cause test is the standard that normally is to be employed in assessing the propriety of a police search and seizure and, thereafter, as it suits the Court's convenience, invoke this or that exception or the doctrine in order to conclude all was fair and reasonable.

*Id.*; Wayne R. LaFare, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004) (finding the courts are engaged in "judicial straining to aid law enforcement and . . . undervaluing . . . the Fourth Amendment protection of privacy and freedom from government intrusion").

Professor Maclin painted a grim picture of life under the Court's Fourth Amendment holdings:

While the Court has continued to expand police authority, our right of locomotion has been sharply curtailed. Law-abiding persons can be accosted and questioned by police officers at any time. An individual, in effect, can be required to "show his papers" to a curious officer, even though the officer has no reason to suspect the person of wrongdoing. Citizens may be chased down the streets at the whim of patrolling police officers.

Maclin, *The Decline*, *supra* note 53, at 1335.

116. Harris, *Car Wars*, *supra* note 66, at 556. See Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 144 (2001) (criticizing the Court for applying Fourth Amendment principles governing pedestrians to traffic stops) [hereinafter Maclin, *The Fourth*].

117. *Illinois v. Lidster*, 124 S. Ct. 885, 889 (2004). *Lidster* is one of the most recent Fourth Amendment cases involving vehicles in which Justice Stephen Breyer, writing for a unanimous Court, wryly noted, "The Fourth Amendment does not treat a motorist's car as his castle." *Id.* at 889. See *supra* notes 37-40 and accompanying text (discussing the *Lidster* case).

118. David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 558-59 (1997) [hereinafter, *Driving While Black*]. For example, Professor Harris cites a number of traffic "violations" that police have at their disposal to effectuate a traffic stop:

[I]n any number of jurisdictions, police can stop drivers not only for driving too fast, but for driving too slow. In Utah, drivers must signal for at least three seconds before changing lanes; a two second signal would violate the law. In many states, a driver must signal for at least one hundred feet before turning right; ninety-five feet would

conducting searches of vehicles.<sup>119</sup>

However, the Court's 1996 decision in *Whren v. United States* illustrates a more fundamental problem.<sup>120</sup> In *Whren*, plainclothes officers in an unmarked car stopped the defendant's vehicle after the officers observed the vehicle stopped at a stop sign for more than twenty seconds while the driver looked into the passenger's lap.<sup>121</sup> The defendant challenged the stop, arguing that state motor vehicle codes are so broad in scope that no one can possibly comply with the regulations at all times.<sup>122</sup> Thus, the defendant argued, an officer, following a vehicle long enough to observe a traffic violation, can use the traffic stop as a pretext to stop whomever they wish for any purpose.<sup>123</sup> The Court, however, unanimously rejected the defendant's argument.<sup>124</sup> In an opinion by Justice Antonin Scalia, the Court held that an officer's actual motivations for conducting a stop "*play no role in ordinary, probable-cause Fourth Amendment analysis.*"<sup>125</sup>

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make the driver a offender. And the driver making that right turn may not slow down "suddenly" (undefined) without signaling. Many states have made it a crime to drive with a malfunctioning taillight, a rear-tag illumination bulb that does not work, or tires without sufficient tread. They also require drivers to display not only license tags, but yearly validation stickers, pollution control stickers, and safety inspection stickers; driving without these items displayed on the vehicle in the proper place violates the law.

*Id.* (citations omitted). In Illinois, courts have upheld a variety of bases for conducting a traffic stop. *See, e.g.*, *People v. Kelly*, 802 N.E.2d 850, 852–53 (Ill. App. Ct. 2d Dist. 2003) (sanctioning a police traffic stop based on twenty-second delay in proceeding through an intersection after a traffic light has changed to green); *People v. Greco*, 783 N.E.2d 201, 205 (Ill. App. Ct. 2d Dist. 2003) (approving police traffic stop where driver was weaving within a single lane of traffic); *People v. Rush*, 745 N.E.2d 157, 162 (Ill. App. Ct. 2d Dist. 2001) (permitting traffic stop due to single, momentary crossing of the center line, unless an officer has additional facts to explain the lane cross); *People v. Mendoza*, 599 N.E.2d 1375, 1383–84 (Ill. App. Ct. 5th Dist. 1992) (upholding police action based on fuzzy dice and other objects hanging from rear view mirror); *People v. Strawn*, 569 N.E.2d 269, 273 (Ill. App. Ct. 4th Dist 1991) (finding stop resulting from tinted windows proper); *People v. Houlihan*, 521 N.E.2d 277, 281–82 (Ill. App. Ct. 2d Dist 1988) (allowing defective muffler and exhaust system to justify traffic stop); *People v. Hardy*, 491 N.E.2d 493, 498–99 (Ill. App. Ct. 4th Dist 1986) (authorizing police stop where unfamiliar vehicle was parked "in the shadows" at 5:20 am with engine running).

119. *See, e.g.*, *Cady v. Dombrowski*, 413 U.S. 433, 451–53 (1973) (Brennan, J., dissenting) (describing the various exceptions to the search warrant requirement in connection with automobiles).

120. *Whren v. United States*, 517 U.S. 806 (1996).

121. *Id.* at 808. Subsequently, an officer observed, in plain view, two bags of crack cocaine in the defendant's hands. *Id.* at 808–09.

122. *Id.* at 818.

123. *Id.* *See Harris, Driving While Black, supra* note 118, at 558 ("Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation.").

124. *Whren*, 517 U.S. at 813–19.

125. *Id.* at 813 (emphasis added). *See also supra* notes 20–21 and accompanying text

Furthermore, the Court declined to balance the interests of police and motorists to address the issues raised by the defendant.<sup>126</sup>

In *Whren*, the Court absolutely refused to place any restrictions on an officer's ability to use the variety of investigative techniques available to them.<sup>127</sup> Moreover, the entire Court seemed unconcerned with the implications of its decision.<sup>128</sup> Consequently, an officer's racially-motivated reasons to stop a motorist or an officer's desire to conduct a fishing expedition for drugs or other evidence of criminality are wholly irrelevant.<sup>129</sup> Thus, under case law once an officer has witnessed the violation of even a minor traffic law, the Fourth Amendment places virtually no further restrictions on his conduct.

### III. THE SUPREME COURT OF ILLINOIS' APPROACH

Against the backdrop of the United States Supreme Court's permissive approach toward police conduct during traffic stops, the Supreme Court of Illinois has announced, in rapid-fire succession, a series of cases that have dramatically changed the law governing traffic stops in this state.<sup>130</sup> Although the Supreme Court of Illinois in previous cases has followed a "lockstep" doctrine with respect to the Fourth Amendment<sup>131</sup>—in which the court interprets search and seizure

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(describing objective standard).

126. *Id.* at 817–18.

127. See Maclin, *The Fourth*, *supra* note 116, at 134–35 (noting that, in consensual encounter cases, the Court has held that a typical police-citizen encounter will not constitute a seizure because a contrary rule would bar valid police practices, including police questioning).

128. *Whren*, 517 U.S. at 819. But see *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (upholding an officer's ability to order passengers to exit the vehicle during a lawful traffic stop). Justice Kennedy, in his dissent, stated that "[t]he practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances." *Id.* at 423 (Kennedy, J., dissenting). Justice Kennedy worried *Whren* and *Wilson* put "tens of millions of passengers at risk of arbitrary control by the police." *Id.* (Kennedy, J., dissenting).

129. David A. Harris, *The Use of Traffic Stops Against African-Americans: What Can Be Done?*, 1 J.L. SOC'Y 91, 94 (1999) (stating that, after *Whren*, the "real reasons for the stop do not matter" because the "ever-present traffic offense provides all the justification needed for a temporary stop") [hereinafter *Traffic Stops*].

130. See generally ILLINOIS CRIMINAL PROCEDURE § 1.26 (Ralph Ruebner, ed.) (2004) (providing examples of Illinois cases defining the scope of an allowable search); *supra* note 3 (listing Illinois cases outside the lockstep approach of U.S. Supreme court cases); *infra* Part III (discussing Supreme Court of Illinois decisions that place greater restrictions on police steps than United States Supreme Court cases).

131. See, e.g., *People v. Mitchell*, 650 N.E.2d 1014, 1016–17 (Ill. 1995) (applying the holding of *Minnesota v. Dickerson*, 508 U.S. 366 (1993), which held the "plain feel" doctrine during pat downs does not violate the Fourth Amendment, to the Illinois Constitution); *People v. Tisler*, 469 N.E.2d 147, 156–57 (Ill. 1984) (citing, as examples of prior applications of the lockstep doctrine, *People v. Power*, 295 N.E.2d 472 (Ill. 1973), *People v. Jackson*, 176 N.E.2d 803 (Ill. 1961), and *People v. Tillman*, 116 N.E.2d 344 (Ill. 1953)). See generally Thomas B. McAfee, *The Illinois*

questions arising out of the Illinois Constitution in line with decisions by the United States Supreme Court—the analyses in the recent cases significantly depart from those used in the United States Supreme Court decisions. In effect, the Illinois cases have severely limited the conduct of law enforcement during routine traffic stops and eliminated many of law enforcement’s investigative techniques. This Section will review these cases and interpret the rules that have resulted from the decisions.

#### A. Continued Detentions

In *People v. Brownlee*<sup>132</sup> and *People v. Gherna*,<sup>133</sup> the Supreme Court of Illinois decided that the police officers in those cases unconstitutionally detained the motorists beyond the purposes of the traffic stops. Aside from the restrictive holdings of the cases, the opinions are also noteworthy for their thorough and candid examination of the circumstances of the stop.

##### 1. *People v. Brownlee*: Court’s Scrutiny Reveals a Continued Detention

The Supreme Court of Illinois’ close scrutiny of traffic stops began with its 1999 decision in *Brownlee*.<sup>134</sup> In that case, the Court examined what appeared to be a routine traffic stop turned consensual search.<sup>135</sup> However, the Court did not focus on the circumstances of the search, but rather on the officer’s continued detention of the driver, which it held to be improper.<sup>136</sup>

In *Brownlee*, two police officers stopped a vehicle for failing to activate a turn signal within one hundred feet of an intersection and stopping two feet past a stop sign.<sup>137</sup> After obtaining the identities of the

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*Bill of Rights And Our Independent Legal Tradition: A Critique Of The Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1, passim (1987) (providing a history of the lockstep doctrine in Illinois and criticizing its continued use by the court).

In order to find greater protection of Fourth Amendment rights in the Art. I, § 6 of the Illinois Constitution, the Supreme Court of Illinois has held that it must find “in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.” *Tisler*, 469 N.E.2d at 157.

132. *People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999).

133. *People v. Gherna*, 784 N.E.2d 799 (Ill. 2003).

134. *Brownlee*, 713 N.E.2d at 556.

135. *Id.* at 559.

136. *Id.* at 560, 562–66.

137. *Id.* at 559. The officers had been patrolling for drug activity when they drove past a car that had stopped in front of an apartment complex. *Id.* When the car stopped, a person exited the vehicle, knocked on a residence door, and then returned to the car. *Id.* According to the officers, crack houses were known to exist in that area, and it was common for people “to pull up, run up

passengers, including the defendant, the officers returned to their vehicle and performed a warrant check.<sup>138</sup> Finding no outstanding warrants, the officers returned to the stopped car, where one officer returned the driver's license and insurance card and stated that they would not issue any citations.<sup>139</sup> Then, the officer "paused a couple [of] minutes," before asking the driver for permission to search the car.<sup>140</sup> The driver asked if he had a choice, and the officer responded affirmatively and said that he was "asking."<sup>141</sup> The driver said, "Okay, you can search," and the police subsequently discovered an open bottle of beer and two marijuana "blunts."<sup>142</sup> All the passengers were arrested.<sup>143</sup>

The Supreme Court of Illinois, in an opinion by Justice Michael Bilandic, first examined the United States Supreme Court's recent decision in *Robinette*.<sup>144</sup> While *Robinette* reaffirmed a totality-of-the-circumstances test to determine whether consent is voluntarily given, the court interpreted the issue in *Brownlee* as requiring considerations that are independent of the consensual search issue.<sup>145</sup> Unlike *Robinette*, in *Brownlee* the officers detained the car *before* requesting permission to search the car.<sup>146</sup> Thus, *Robinette* did not control the outcome of the case.<sup>147</sup>

Next, the state argued that following the officer's statement that no citations would be issued, the ensuing encounter between the driver and

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to a home for just a moment, make a buy and leave." *Id.* Aware of such practices, the officers followed the car until they observed its driver commit two traffic violations. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (alteration in original). When the officers first approached the car, they saw Brownlee holding an unopened bottle of beer, which did not violate the law. *Id.* Upon asking the driver for permission to search, the officer explained that they "were concerned that there might be more alcohol in the car." *Id.*

141. *Id.*

142. *Id.* at 559–60.

143. *Id.* at 560. A search incident to Brownlee's arrest revealed more drugs, resulting in a charge against Brownlee of possession with intent to deliver a controlled substance containing cocaine. *Id.* at 558, 560.

144. *Id.* at 562–64.

145. *Id.* at 563.

146. *Id.* The court described the difference between the two cases as follows: "Certainly *Robinette* does not stand for the proposition that, following the conclusion of a lawful traffic stop, officers may detain a vehicle without reasonable suspicion of any illegal activity and for any amount of time, so long as they ultimately request and obtain permission to search the car." *Id.*

147. *Id.* at 563–64. Because *Robinette* was not controlling, the court also stated that it could not determine whether the Illinois search and seizure provision could be interpreted in lockstep with the United States Supreme Court's interpretation of the Fourth Amendment. *Id.*

the officer was consensual.<sup>148</sup> The Court rejected this argument, however, applying the *Mendenhall* standard and concluding that a reasonable person would not have felt free to leave.<sup>149</sup> The court emphasized the officer's "two-minute" pause and explained that the officers stood in front of the car's doors for two minutes without saying anything.<sup>150</sup> Thus, their conduct constituted a show of authority to which a reasonable person would feel obligated to submit.<sup>151</sup> If the driver had driven away, a reasonable person would believe that "the two officers would soon be in hot pursuit."<sup>152</sup> The driver therefore did not submit to a consensual encounter, but instead was subject to a seizure.<sup>153</sup>

For a lawful seizure, the officers needed to have had at least a reasonable and objective suspicion for the detention.<sup>154</sup> However, after the completion of the initial stop for the two traffic violations, the officers had no such basis to continue to detain the car.<sup>155</sup> Thus, the court reversed the decision of the appellate court and affirmed the suppression of the evidence obtained as a result of the detention.<sup>156</sup>

## 2. *People v. Gherna*: 'Casual Talking' Leads to Illegal Detention

Four years after *Brownlee*, the Supreme Court of Illinois again invalidated an officer's continued detention of a driver after an investigatory stop in *Gherna*.<sup>157</sup> In *Gherna*, two officers were on bike patrol when they saw the defendant and another female sitting in a pickup truck in a parking lot.<sup>158</sup> As the officers rode past the truck, they saw a beer bottle in a cup holder between the two females, who appeared "pretty young."<sup>159</sup> Suspecting underage drinking and an open-bottle violation, the officers approached either side of the truck, placing their bikes against the vehicle.<sup>160</sup> They then determined that the defendant was older than twenty-one years old, the other passenger was her thirteen-year-old daughter, and the beer bottle was unopened and in

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148. *Id.* at 564.

149. *Id.* at 565–66.

150. *Id.* at 566.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 566.

156. *Id.*

157. *People v. Gherna*, 784 N.E.2d 799, 810–11 (Ill. 2003).

158. *Id.* at 801.

159. *Id.*

160. *Id.* at 801–03.

its original container.<sup>161</sup> At this point, one officer began “casually talking” to the defendant and asked her to step out of the car “so [he] could speak with her in private, not around her 13-year-old daughter.”<sup>162</sup> After she stepped outside of the vehicle, the officer asked if she had any drugs or narcotics.<sup>163</sup> After the defendant responded that she did not, she began emptying her pockets, and a plastic bag containing drugs fell out of her pocket.<sup>164</sup> Prior to trial, the circuit court, relying on *Brownlee*, suppressed the drugs as the product of an unlawful continued detention.<sup>165</sup> The Supreme Court of Illinois, in an opinion by Chief Justice Mary Ann McMorrow, unanimously affirmed the trial court’s suppression of the evidence.<sup>166</sup>

The State first argued that the officers’ contact with the defendant was consensual and therefore outside the scope of the Fourth Amendment.<sup>167</sup> However, the court held that a reasonable person would have felt compelled to submit to the officer’s requests.<sup>168</sup> Applying the United States Supreme Court’s language from *Bostick*<sup>169</sup> and *Mendenhall*,<sup>170</sup> the court found that the officers conveyed an official show of authority when they positioned themselves on either side of the car and placed their bikes against the vehicle.<sup>171</sup> In addition, the

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161. *Id.* at 801–02.

162. *Id.* at 802 (alteration in original). The officer testified that during the conversation, the defendant became “very nervous.” *Id.* The officer had been peering into the car with a flashlight and noticed something resembling a credit card underneath the defendant’s thigh. *Id.* at 802–03. He asked her about the card, which was revealed to be an Illinois Link card under the name Lowell Briggs. *Id.* at 802. The defendant stated that “she did not know how the card got into her vehicle and that possibly someone had dropped it there when the police arrived.” *Id.*

163. *Id.* at 802. The officer asked whether she had “anything on her that belonged to Lowell Briggs’, including any illegal drugs or narcotics . . .” *Id.* The officer also asked if there was anything else belonging to Lowell Briggs in her vehicle that she did not know about, to which the defendant replied that he was “free to look.” *Id.*

164. *Id.* at 802–03.

165. *Id.* at 804.

166. *Id.* at 812 (refraining from participating in the decision were Justices Rita Garman and Philip Rarick).

167. *Id.* at 806–07.

168. *Id.* at 808.

169. *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (evaluating “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter”); *see also supra* notes 55–58 and accompanying text (discussing the *Bostick* case, which held that the *Mendenhall* free-to-leave standard does not apply to bus sweeps).

170. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (explaining that a detention results “if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave”). *See also supra* notes 47–54 and accompanying text (recounting the facts and holding of the *Mendenhall* case, which states that a seizure occurs when a reasonable person would believe that he was not free to leave).

171. *Ghera*, 784 N.E.2d at 808. The Court rejected the State’s argument that, because the

officers' questions "communicated to a reasonable person that [she] was not at liberty to ignore the police presence and go about [her] business."<sup>172</sup> Therefore, the encounter was not consensual.<sup>173</sup>

The court next addressed the propriety of the encounter as a *Terry* stop.<sup>174</sup> Finding the case controlled by *Brownlee*, the court held that the initial stop of the defendant was proper because the officers had reasonable suspicion of underage drinking.<sup>175</sup> However, once the officers' suspicions of underage drinking had been "allayed," the specific reason for the stop had concluded, and they "did not indicate in word or manner that defendant was free to leave, even though the officers harbored no reasonable suspicion of any other criminal conduct on defendant's part."<sup>176</sup> The officers remained positioned on both sides of the truck.<sup>177</sup> More importantly, they continued to question the defendant while using a flashlight to peer into the truck.<sup>178</sup> Therefore, the court held that the defendant's detention was improper.<sup>179</sup>

### B. *The Scope of Investigatory Stops*

The Supreme Court of Illinois has filled the void left by the United States Supreme Court's lack of guidance by developing a logical three-part inquiry for analyzing the permissible scope of investigatory stops.<sup>180</sup> This section will discuss this inquiry and its application, which has resulted in a restriction of police questioning and warrant checks during traffic stops.

#### 1. *People v. Gonzalez*: The Court Develops a Scope Inquiry

In *Gonzalez*,<sup>181</sup> the Supreme Court of Illinois considered the extent to which police officers can question the occupants of a vehicle during a traffic stop and formulated its own three-step approach to analyzing this issue.<sup>182</sup> In this case, the defendant was a passenger in a car stopped for

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officers were assigned to bike patrol, their law enforcement authority was diminished. *Id.*

172. *Id.* (quoting *Bostick*, 501 U.S. at 437).

173. *Id.* at 808.

174. *Id.* at 808–10.

175. *Id.* at 810–11.

176. *Id.* at 811.

177. *Id.*

178. *Id.* at 811.

179. *Id.* at 812.

180. *See* *People v. Gonzalez*, 789 N.E.2d 260, 269–70 (Ill. 2003) (outlining the method that Illinois courts should use to determine the validity of investigatory stops).

181. *Id.* at 260.

182. *Id.* at 270.

failing to display a front license plate.<sup>183</sup> Although the officer “observed no criminal conduct by defendant,” he asked for his identification.<sup>184</sup> The officer then ran a computer check on the defendant and discovered that he was a gang member with a “lengthy criminal history” and was on parole.<sup>185</sup> The officer testified that this information led him to believe the defendant may have been carrying a weapon.<sup>186</sup> Therefore, the officer asked the defendant to exit the vehicle in order to conduct a pat-down search.<sup>187</sup> During the pat-down search, the officer discovered drugs in the defendant’s coat pocket.<sup>188</sup> Prior to trial, the circuit court granted the defendant’s motion to suppress the evidence.<sup>189</sup>

The Supreme Court of Illinois, in an opinion by Justice Thomas Fitzgerald, addressed the issue by focusing on the second prong of the *Terry* inquiry, which examines whether a stop is “reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>190</sup> Acknowledging a “divergence of opinion”<sup>191</sup> as to whether the second prong of the *Terry* test limits only the length of a detention<sup>192</sup> or the length and manner of detention,<sup>193</sup> the court concluded that neither test struck the appropriate balance.<sup>194</sup> Although every question asked by police should not be strictly limited to the purpose of a stop, the court also recognized that “unfettered” police questioning is inappropriate.<sup>195</sup>

Instead, the court adopted a three-part inquiry<sup>196</sup> that forbids officers from “fundamentally altering the nature of the stop . . . absent an independent basis for reasonable articulable suspicion or probable

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183. *Id.* at 262.

184. *Id.*

185. *People v. Gonzalez*, 753 N.E.2d 1209, 1212 (Ill. App. Ct. 2d Dist. 2001).

186. *Id.*

187. *Id.* at 1211–12.

188. *Id.* at 1212.

189. *Id.* at 263.

190. *Id.* at 266 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

191. *Id.*

192. *See United States v. Shabazz*, 993 F.2d 431, 437–38 (5th Cir. 1993) (holding that four minutes was not an unreasonable amount of time for an officer to run a license check while detaining a motorist who was stopped for speeding).

193. *See United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir. 2001) (holding that to determine if a traffic stop is reasonable under the Fourth Amendment a court should determine the length of detention and the manner in which the detention was carried out).

194. *Gonzalez*, 753 N.E.2d at 268–69.

195. *Id.*

196. This inquiry was initially expressed in a partial concurrence and partial dissent in *Holt*, 264 F.3d at 1240 (Murphy, J., concurring in part and dissenting in part).

cause.”<sup>197</sup> Under this inquiry, a question is permissible if, first, it is “reasonably related to the purpose of the stop” or, second, there is “reasonable, articulable suspicion that would justify the question.”<sup>198</sup> However, if the question is not justified under either of these standards, the third and final question is whether “in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop.”<sup>199</sup>

The court used its test to determine whether the officer’s request for identification of the defendant, a passenger in the car, was proper.<sup>200</sup> First, the identification of “a passive occupant” was not reasonably related to the initial stop for a missing license plate.<sup>201</sup> Similarly, the officer had no reasonable and articulable suspicion that the defendant was participating in criminal activity.<sup>202</sup> However, under the third prong of the test, the court determined that the question did not prolong the detention or change the fundamental nature of the stop.<sup>203</sup> The request for identification is “facially innocuous” and “does not suggest official interrogation,” especially since the defendant was not required to comply.<sup>204</sup> In addition, such a request would not “increase the confrontational nature of the encounter.”<sup>205</sup> Thus, the officer’s request was proper, and the subsequent search constitutional.<sup>206</sup>

Justice Robert Thomas specially concurred in the case, agreeing with the result but applying different standards to the driver and passengers during a traffic stop.<sup>207</sup> According to Justice Thomas, the driver of a lawfully stopped car is permissibly detained and obviously required to submit to the officer’s authority.<sup>208</sup> However, a passenger in a car is not detained because he is the subject of an investigation but because he is a “passenger in a car that [has] not yet reached its destination.”<sup>209</sup> Because the passenger was detained for a reason independent of police

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197. *Gonzalez*, 789 N.E.2d at 269 (quoting *Holt*, 264 F.3d at 1240 (Murphy, J., concurring in part and dissenting in part)).

198. *Id.* at 270.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 271 (Thomas, J., specially concurring).

208. *Id.* (Thomas, J., specially concurring).

209. *Id.* at 272 (Thomas, J., specially concurring).

conduct, the *Bostick* standard should apply.<sup>210</sup> Here, the officer's request for identification was "facially innocuous and was done in a nonthreatening manner."<sup>211</sup> Therefore, the encounter was consensual, and the defendant's detention proper.<sup>212</sup> Justice Thomas also noted that the majority's test, while purportedly derived from *Holt*, was essentially the same test he applied, since both tests ultimately confirmed the encounter's consensual nature.<sup>213</sup> Although both tests led to identical conclusions, Justice Thomas argued that the majority's test did not provide enough guidance to the lower courts.<sup>214</sup> He stated that "in future cases it will be difficult for the lower courts to determine what does and does not change the fundamental nature of the stop."<sup>215</sup>

## 2. *People v. Bunch*: Gonzalez Test Invalidates Officer's Questioning

In *People v. Bunch*,<sup>216</sup> the Court again applied the *Gonzalez* test but came to the opposite conclusion, finding the questioning of a vehicle's occupant improper.<sup>217</sup> In this case, an officer stopped a car when he noticed its brake lights were not functioning.<sup>218</sup> When the driver could not produce his driver's license, the officer placed him under arrest and walked him to the rear of the car.<sup>219</sup> Next, the officer approached the defendant, a passenger in the vehicle, and asked him to step out of the car.<sup>220</sup> Then, the officer, standing a foot away from the defendant, shined a flashlight on the defendant's face and asked, "What's your name? Where you [sic] coming from?"<sup>221</sup> The defendant told the officer his name and then asked why the driver was being arrested.<sup>222</sup>

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210. *Id.* at 272 (Thomas, J., specially concurring). In *Florida v. Bostick*, 501 U.S. 429, 436 (1991), the United States Supreme Court inquired whether the defendant, a passenger on a bus, "would feel free to decline the officers' requests or otherwise terminate the encounter." See *supra* notes 53–56 and accompanying text (noting that the *Mendenhall* "free-to-leave" standard does not apply to situations like bus sweeps).

211. *Gonzalez*, 789 N.E.2d at 273 (Thomas, J., specially concurring).

212. *Id.* (Thomas, J., specially concurring).

213. *Id.* (Thomas, J., specially concurring).

214. *Id.* (Thomas, J., specially concurring).

215. *Id.* (Thomas, J., specially concurring).

216. *People v. Bunch*, 796 N.E.2d 1024 (Ill. 2003).

217. *Id.* at 1033–34.

218. *Id.* at 1026.

219. *Id.* at 1027.

220. *Id.*

221. *Id.* According to the officer, he asked the defendant's name because he "was curious to find out exactly who he was." *Id.* The officer testified that he often shined his flashlight in people's eyes when he questioned them at night because there was a "strong possibility they may have something in their mouths." *Id.* However, the officer denied that he questioned Bunch solely to see if there was something in his mouth. *Id.*

222. *Id.*

During the conversation, the officer noticed a “small, clear plastic item, containing something white” in the defendant’s mouth.<sup>223</sup> Based on the officer’s experience, he believed the object in the defendant’s mouth contained drugs.<sup>224</sup> The officer placed the defendant under arrest and ordered him to spit out the object, which indeed contained drugs.<sup>225</sup>

In an opinion by Justice Fitzgerald, the Supreme Court of Illinois applied the framework established in *Gonzalez*.<sup>226</sup> The court first determined that the officer’s questions—“What’s your name?” and “Where you [*sic*] coming from?”—were not related to the purpose of the stop for failing brake lights.<sup>227</sup> Likewise, the officer’s questions were not justified by reasonable and articulable suspicion, because the defendant was “simply a passive occupant of the car.”<sup>228</sup> Thus, the court turned to the third inquiry—whether the officer’s questions prolonged the detention or changed the fundamental nature of the stop.<sup>229</sup> In this case, the questioning took place after the officer arrested the driver and decided to have the car towed, meaning the purpose of the stop had concluded.<sup>230</sup> The court distinguished this from the valid questioning in *Gonzalez*, in which the officer’s questions occurred while the driver was still being processed.<sup>231</sup>

The court also rejected the State’s argument that the defendant’s conversation with the officer was consensual.<sup>232</sup> According to the court, as in *Brownlee*, the officer’s purpose for the stop concluded before the conversation began.<sup>233</sup> Furthermore, the officer’s close proximity and his use of the flashlight constituted a show of authority to which a reasonable person would not feel free to leave.<sup>234</sup>

Justice Rita Garman concurred in part, agreeing that the *Gonzalez* framework should apply as a matter of stare decisis.<sup>235</sup> However, she dissented from the majority’s conclusion that the stop was prolonged.<sup>236</sup> According to Justice Garman, the “two simple questions” were asked

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 1030.

227. *Id.*

228. *Id.*

229. *Id.* at 1031.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 1032.

234. *Id.*

235. *Id.* at 1033 (Garman, J., concurring in part and dissenting in part).

236. *Id.* at 1034–35 (Garman, J., concurring in part and dissenting in part).

shortly after the officer ordered the defendant out of the car and did not unnecessarily prolong his detention.<sup>237</sup> Justice Garman then examined whether the questions altered the fundamental nature of the stop and concluded that this standard forbade only questions “reasonably calculated to elicit incriminating responses.”<sup>238</sup> In this case, the defendant’s name and his previous location were not likely to constitute incriminating responses; instead, the item in his mouth incriminated him.<sup>239</sup> Thus, Justice Garman would have found the officer’s questioning to be proper.<sup>240</sup>

Justice Thomas, who specially concurred in *Gonzalez*, dissented here.<sup>241</sup> Justice Thomas stated that the majority’s decision contradicted “a wealth of well-settled fourth amendment law” and improperly extended *Gonzalez* and *Brownlee* to the present case.<sup>242</sup> According to him, the need for a *Gonzalez* inquiry ceased when the defendant exited the car, and thus, the proper inquiry should have proceeded under the *Bostick* test.<sup>243</sup> Bunch’s response to the officer—in which he did not reveal where he was coming from, but instead asked another question—showed “without a doubt, that he believed he was free to decline the officer’s request.”<sup>244</sup>

Even under the majority’s standard, Justice Thomas argued that the questions were permissible, because they were related to the purpose of the stop.<sup>245</sup> According to Justice Thomas, the purpose of the stop broadened once the driver was arrested and included the encounter with the passenger.<sup>246</sup> At that point, the officer had many reasons to converse with the passenger, who was to be stranded as a result of the driver’s arrest.<sup>247</sup> Justice Thomas also distinguished the case from *Brownlee*,

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237. *Id.* at 1034 (Garman, J., concurring in part and dissenting in part).

238. *Id.* at 1035 (Garman, J., concurring in part and dissenting in part).

239. *Id.* at 1035 (Garman, J., concurring in part and dissenting in part).

240. *Id.* (Garman, J., concurring in part and dissenting in part).

241. *Id.* at 1035–40 (Thomas, J., dissenting).

242. *Id.* at 1035 (Thomas, J., dissenting).

243. *Id.* at 1036–38 (Thomas, J., dissenting). Thus, Justice Thomas echoed his *Gonzalez* special concurrence, in which he argued that different standards applied to drivers and passengers of vehicles. See *People v. Gonzalez*, 789 N.E.2d 260, 272–73 (Ill. 2003) (Thomas, J., specially concurring) (asserting that the *Bostick* standard should apply only when a passenger is detained for a reason independent of police conduct but not for any other lawfully stopped car); see also *supra* notes 207–10 and accompanying text (discussing Justice Thomas’s dissent in *Gonzalez*).

244. *Bunch*, 796 N.E.2d at 1036 (Thomas, J., dissenting).

245. *Id.* at 1037 (Thomas, J., dissenting).

246. *Id.* (Thomas, J., dissenting).

247. *Id.* at 1038 (Thomas, J., dissenting). “That the officer, out of courtesy, may have wanted to explain the reason for the arrest or that he may have been concerned for the passenger as he attempted to arrange his way home does not mean that the encounter continued to be a

because the defendant was not a driver and the officer here did not make a comparable show of authority.<sup>248</sup>

### 3. *People v. Harris: Gonzalez* Invalidates Warrant Checks

In *People v. Harris*,<sup>249</sup> the Supreme Court of Illinois extended the *Gonzalez* inquiry beyond simple police questioning and into the police practice of conducting warrant checks.<sup>250</sup> In addition, for the first time, the court held that an officer's conduct improperly changed the fundamental nature of the stop.<sup>251</sup>

In this case, the defendant was a passenger in a vehicle stopped for making an illegal left turn.<sup>252</sup> When the officer learned that the driver's license was suspended or revoked, he requested identification from the defendant, who produced his state identification card.<sup>253</sup> The officer then ran a warrant check and learned that Harris had an outstanding warrant for failing to appear in court.<sup>254</sup> On the basis of this information, the officer arrested Harris, and an ensuing search revealed drugs and drug paraphernalia.<sup>255</sup>

The Supreme Court of Illinois, in a 4–3 decision, ruled that the warrant check was improper.<sup>256</sup> Justice Charles Freeman, writing for the court, first applied the *Gonzalez* test to the officer's request for Harris's identification.<sup>257</sup> As in *Gonzalez*, the court characterized the officer's simple question as “facially innocuous” and “did not change the fundamental nature of the stop by converting it into a general inquisition about past, present and future wrongdoing.”<sup>258</sup> Justice Freeman also noted that the request served to “identify a potential witness” to the events and provide “a certain level of protection” to the officer and

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nonconsensual seizure.” *Id.*

248. *Id.* at 1039 (Thomas, J., dissenting).

249. *People v. Harris*, 802 N.E.2d 219 (Ill. 2003), *vacated sub. nom.* *Illinois v. Harris*, 125 S. Ct. 1292 (2005).

250. *Id.* at 229.

251. *Id.* at 231.

252. *Id.* at 221.

253. *Id.* at 222. According to the officer, when a driver was illegally driving, it was his regular practice to request passengers' identification to determine whether they could be alternate drivers. *Id.*

254. *Id.*

255. *Id.* at 221–22.

256. *Id.* at 229 (citing cases in support of the conclusion that retaining the defendant's identification card and performing a warrant check are outside the scope of a traffic stop).

257. *Id.* at 226.

258. *Id.* (pointing to the similarities in both facts and approach in *Gonzalez* and other Supreme Court of Illinois decisions).

driver.<sup>259</sup>

Unlike *Gonzalez*, however, the court did not end its inquiry at the request for identification, but rather, applied the test to the officer's warrant check.<sup>260</sup> First, the court found the warrant check unrelated to the initial justification for the traffic stop, specifically, the driver's illegal left turn.<sup>261</sup> Next, the court held that the warrant check was not justified by any reasonable and articulable suspicion of criminal wrongdoing by the defendant.<sup>262</sup> Then, the court applied both prongs of the third step in the *Gonzalez* test.<sup>263</sup> Under the first prong, the court examined whether the warrant check improperly prolonged the detention, but found the record inconclusive on this point.<sup>264</sup> However, this was irrelevant, as the warrant check did not satisfy the second prong, which considered whether the warrant check altered the fundamental nature of the stop.<sup>265</sup> According to the court, the officer's warrant check changed a routine traffic stop into a general investigation about the defendant's past wrongdoing, and thus, the officer improperly exceeded the scope of the traffic stop.<sup>266</sup>

Realizing the controversial nature of its decision, the court recognized the "tempestuous discourse" among foreign jurisdictions regarding the propriety of requesting a passenger's identification and conducting subsequent warrant checks.<sup>267</sup> However, the court limited the case's holding by describing several hypothetical instances in which an officer's warrant check of a passenger would be proper.<sup>268</sup> First, the officer could reasonably suspect the passenger of criminal

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259. *Id.* This justification was not offered by the *Gonzalez* court, and indeed, the court's description seems to offer an affirmative approval of the officer's request. *Id.*

260. *Id.* at 227–28 (referring to warrant check conducted by an officer on the passenger-defendant during a stop for a traffic violation).

261. *Id.* at 228.

262. *Id.*

263. *Id.* at 228–29. *See supra* text accompanying note 199 (discussing the third prong of *Gonzalez* test).

264. *Harris*, 802 N.E.2d at 228. Although the officer testified that he "transmitted the driver's and defendant's information to county dispatch at the same time. . . . [The officer] did not testify that the warrant check [performed] on defendant was completed before the check on the driver." *Id.*

265. *Id.*

266. *Id.* at 228–29. Alternatively, the State also argued that the evidence recovered from the defendant should be admitted under the inevitable discovery doctrine because a post-arrest, inventory search of the vehicle would have uncovered the defendant's drugs anyway. *Id.* at 230. However, the court rejected the argument, stating that the chain of events leading to such a scenario was "simply too tenuous." *Id.*

267. *Id.* at 228 (citing numerous state court decisions on both sides of the issue).

268. *Id.* at 228–29 (listing cases from various states to highlight such instances).

wrongdoing.<sup>269</sup> Second, the passenger himself may have committed a traffic violation.<sup>270</sup> Third, the passenger's conduct may cause the officer to fear for his safety.<sup>271</sup> Finally, if the passenger consents to drive because of the driver's arrest, a warrant check may be proper.<sup>272</sup>

Justice Fitzgerald, the author of the *Gonzalez* opinion, dissented in an opinion joined by Justices Thomas and Garman.<sup>273</sup> According to Justice Fitzgerald, the court's decision prevents police from utilizing a basic law enforcement technique that does not implicate Fourth Amendment concerns.<sup>274</sup> Once the officer has the passenger's identification, a warrant check is not "inquisitorial, confrontational, or suggestive of official interrogation," and does not further intrude on a passenger's privacy.<sup>275</sup> In addition, a person cannot have a reasonable expectation of privacy in such information, which is a matter of public record.<sup>276</sup> Moreover, the dissent found it absurd that the majority's opinion left open the possibility that a *driver* might challenge a warrant check as well.<sup>277</sup> Finally, the dissent argued that the majority essentially required an officer performing a warrant check to testify to a subjective fear for his safety, despite case law and statistics demonstrating that officer safety concerns heighten during a vehicle stop.<sup>278</sup>

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269. *Id.*

270. *Id.* For example, the passenger may be riding in a car with an open container of alcohol. *Id.*

271. *Id.* at 229. On this point, the court noted that the officer did not testify to any safety concerns during the traffic stop. *Id.* at 229–30 n.4. In addition, the court directly addressed the dissent's argument which focused heavily on the safety rationale for performing warrant checks:

[W]hile we share the anxiety of our dissenting colleagues over the number of officers killed during traffic stops, we simply cannot allow the understandable emotional reaction to such numbers to cloud our legal analysis, or ignore, as those in dissent appear to do, the fact that Officer Reed did not fear for his safety in this case.

*Id.* at 230 n.4.

272. *Id.* at 230.

273. *Id.* at 231 (Fitzgerald, J., dissenting). Justice Thomas also wrote a brief dissenting opinion in which he stated that the court's decision confirmed his "fears" in *Gonzalez* that the *Gonzalez* rule was unworkable. *Id.* at 235 (Thomas, J., dissenting).

274. *Id.* at 233–34 (Fitzgerald, J., dissenting). The dissent also noted that the court's decision conflicted with previous cases that seemed to uphold an officer's warrant check. *Id.* at 234 (Fitzgerald, J., dissenting).

275. *Id.* at 232 (Fitzgerald, J., dissenting).

276. *Id.* (Fitzgerald, J., dissenting) (citing 725 ILL. COMP. STAT. 5/107-1 (West 2002) to assert that "[a] warrant check is simply a computerized retrieval of information in the public record—information which indicates whether a court has entered a written order commanding the arrest of a specific person").

277. *Id.* at 234 (Fitzgerald, J., dissenting).

278. *Id.* at 235 (Fitzgerald, J., dissenting).

*C. Vacation for the Dogs: The Court Restricts Canine Sniffs*

The final set of Illinois cases addresses an officer's use of a canine to sniff for drugs during a traffic stop. The Supreme Court of Illinois regarded canine sniffs as an impermissible expansion of the scope of a traffic stop, which led the court to require reasonable suspicion before an officer could administer a sniff.<sup>279</sup> Although the United States Supreme Court ultimately disagreed with this bright-line rule, the Court expressly left intact another Illinois decision that indicated numerous concerns with an officer's use of a canine.<sup>280</sup>

1. *People v. Cox*: Canine Sniff Invalidated on Several Grounds

In *People v. Cox*,<sup>281</sup> the Supreme Court of Illinois, for the first time, addressed the use of a canine unit during a traffic stop. In strikingly powerful language, the court invalidated the officer's use of the canine unit and signaled that it would closely scrutinize such investigative techniques in the future.<sup>282</sup>

In *Cox*, a police officer stopped the defendant's vehicle for not having a rear registration light.<sup>283</sup> Upon making the stop, the officer called a deputy and requested a canine unit.<sup>284</sup> Fifteen minutes later, the deputy and canine arrived at the scene, while the officer was writing the defendant's ticket.<sup>285</sup> The dog walked around the car and, after it alerted the officers to the presence of drugs, the officer searched the car and found "possible cannabis seeds and residue" on the floor.<sup>286</sup> The officer's search of the defendant's vehicle revealed a small amount of cannabis.<sup>287</sup> At trial, the court held that the officer had "no reasonable basis" to justify the canine walk around and therefore granted the defendant's motion to suppress the evidence.<sup>288</sup>

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279. *People v. Caballes*, 802 N.E.2d 202, 204 (Ill. 2003), *vacated sub nom. Illinois v. Caballes*, 125 S. Ct. 834 (2005).

280. *Caballes II*, 125 S. Ct. at 837 ("[C]onducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.")

281. *People v. Cox*, 782 N.E.2d 275 (Ill. 2002), *cert. denied sub nom. Illinois v. Cox*, 539 U.S. 937 (2003).

282. *Id.* at 281 (stating that the officer in question did not have sufficient facts to draw a "rational inference" to warrant detention of the defendant's vehicle or the canine search).

283. *Id.* at 277. A "registration light" is the light that illuminates the rear license plate.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* (revealing less than 2.5 grams of substance containing cannabis).

288. *Id.*

The Supreme Court of Illinois, in an opinion by Justice Freeman, affirmed the trial court's suppression of the evidence, finding the dog sniff impermissible.<sup>289</sup> The court first stated its concern with the duration of the fifteen-minute traffic stop, which should have been relatively brief. Although the court stated that it was not imposing a rigid time limit on traffic stops, it noted that the officer "should have issued a traffic ticket or warning to the defendant expeditiously. Had he done so, defendant would have left the scene of the traffic stop prior to the arrival of the canine unit."<sup>290</sup>

The court also specifically focused on *Terry*'s second prong, which considers the scope of the stop.<sup>291</sup> Here, the officer stopped Cox for a minor traffic violation; however, he had no reason to believe that her vehicle contained drugs.<sup>292</sup> The officer did not smell or see any drugs, and Cox did not appear nervous or suspicious.<sup>293</sup> Thus, the court noted, "were we to accept the State's contention that the dog-sniff test was permissible, we would be endorsing a drug-sniff test at every stop for a traffic violation."<sup>294</sup>

Justice Thomas's lengthy dissent criticized the majority on a number of grounds.<sup>295</sup> First, he stated that the court ruled on an issue different than the one for which the court granted the appeal.<sup>296</sup> Second, he declared that there was "no factual basis" for the majority's concern with the length of the stop.<sup>297</sup> According to Justice Thomas, the officer testified that he generally spent an average of "10 to 12 minutes, 15 minutes" writing traffic citations, and that he was in fact still writing the ticket when the canine unit arrived.<sup>298</sup> Thus, Justice Thomas said, the

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289. *Id.* at 281. In justifying the police action, the state argued that the canine unit arrived at the scene while the officer was still writing the defendant's ticket. *Id.* at 279. Thus, it appears that the state was trying to distinguish the case from *People v. Brownlee*, 713 N.E.2d 556, 566 (Ill. 1999), in which the officer's *continued* detention of the driver was improper.

290. *Cox*, 782 N.E.2d at 279.

291. *Id.* at 278–79 (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)). Furthermore, the *Terry* standard is codified in the Illinois Code of Criminal Procedure at 725 ILL. COMP. STAT. 5/107-14 (2002 & West Supp. 2004) ("A police officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense. . ."). See *supra* note 22 and accompanying text (setting forth this aspect of the *Terry* test).

292. *Id.* at 280.

293. *Id.* at 280–81.

294. *Id.* at 280.

295. *Id.* at 281–91 (Thomas, J., dissenting).

296. *Id.* at 281 (Thomas, J., dissenting). According to Thomas, the State appealed whether the dog sniff constituted a "search" under the Illinois Constitution. *Id.* (Thomas, J., dissenting).

297. *Id.* at 282 (Thomas, J., dissenting).

298. *Id.* at 282 (Thomas, J., dissenting). Thomas further stated that the majority's ruling

only way for the majority to reach its conclusion was to “determine sua sponte” that the officer was lying.<sup>299</sup> Third, Justice Thomas noted that the court’s decision could not be reconciled with United States Supreme Court precedent.<sup>300</sup> For instance, in *United States v. Sharpe*,<sup>301</sup> the Supreme Court rejected a rigid time limit for traffic stops and reaffirmed its case-by-case analysis.<sup>302</sup> Also, in *United States v. Place*,<sup>303</sup> the Court held that a canine sniff of luggage at an airport did not constitute a “search” for Fourth Amendment purposes.<sup>304</sup> Conducting his own analysis under federal law, Justice Thomas concluded that a canine sniff is not a “search,” and thus, the sniff of Cox’s vehicle was constitutionally permissible.<sup>305</sup>

## 2. *People v. Caballes*: Suspicionless Canine Sniffs Outlawed

The court repeated its strong denouncement of canine sniffs from *Cox* in *People v. Caballes*,<sup>306</sup> in which the court clearly held that officers

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subtly shifted the burden of proof to the State to show that the stop was not impermissibly prolonged. *Id.* at 283 (Thomas, J., dissenting).

299. *Id.* at 283 (Thomas, J., dissenting).

300. *Id.* at 283 (Thomas, J., dissenting) (observing that the court essentially determined that a traffic stop that exceeds fifteen minutes automatically becomes illegal unless otherwise justified).

301. *United States v. Sharpe*, 470 U.S. 675 (1985).

302. *Cox*, 782 N.E.2d at 283 (Thomas, J., dissenting) (discussing *Sharpe*, 470 U.S. at 686). In addition, Thomas noted the Court’s decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), permitted an officer to arrest a driver for a minor traffic infraction. *Id.* (Thomas, J., dissenting). According to Thomas, this meant that the officer here could have arrested Cox and then searched incident to arrest, an option police officers would be forced to take if the traffic stop could take longer than fifteen minutes. *Id.* (Thomas, J., dissenting).

303. *United States v. Place*, 462 U.S. 696 (1983).

304. *Id.* at 707.

305. *Cox*, 782 N.E.2d at 286–91 (Thomas, J., dissenting). Justice Thomas relied primarily on the Court’s decision in *Place*. In *Place*, DEA agents seized an airplane passenger’s luggage and subjected the luggage to a canine sniff to detect the presence of narcotics. *Place*, 462 U.S. at 699. The Court held that the sniff was not a “search” within the meaning of the Fourth Amendment. *Id.* at 707. The Court described the dog sniff as follows:

A “canine sniff” by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

*Id.*

306. *People v. Caballes*, 802 N.E.2d 202 (Ill. 2003), *vacated sub nom. Illinois v. Caballes*, 125 S. Ct. 834 (2005).

need reasonable and articulable suspicion to conduct a canine sniff during a routine traffic stop.<sup>307</sup> In *Caballes*, a state trooper witnessed the defendant speeding and reported the traffic stop to the radio dispatcher.<sup>308</sup> Another state trooper, also a member of the state drug interdiction team, overheard the radio dispatch and proceeded to meet the officer at the scene to conduct a canine sniff of the stopped vehicle.<sup>309</sup> As the first state trooper approached Caballes's car, he observed in the car an atlas, an open ashtray, two suits hanging in the back seat, and he smelled air freshener.<sup>310</sup> The officer told the defendant that he was only going to give him a warning ticket, and then he called the dispatcher to verify the defendant's information and perform a warrant check.<sup>311</sup>

While the trooper awaited the results of the check, he asked the defendant "where he was going and why he was 'dressed up.'"<sup>312</sup> The defendant stated that he was moving from Las Vegas to Chicago and that he was accustomed to dressing up since he was a salesman.<sup>313</sup> The officer found it unusual that the defendant acted nervous, even after he learned he would receive only a warning ticket.<sup>314</sup> The officer then requested permission to search the car, which the defendant refused.<sup>315</sup> While the officer wrote the warning ticket, the drug interdiction trooper arrived and began walking around the defendant's vehicle.<sup>316</sup> The dog alerted the officer to the presence of drugs, and a subsequent search of the vehicle uncovered marijuana.<sup>317</sup>

In a brief opinion by Justice Thomas Kilbride, the court held that the canine sniff unjustifiably exceeded the scope of the traffic stop.<sup>318</sup> The court held that, under *Cox*, an officer needed reasonable and articulable suspicion to conduct a canine sniff during a traffic stop.<sup>319</sup> However, in this case, the officer's observations did not amount to reasonable suspicion.<sup>320</sup> First, the lack of visible luggage in the car, despite moving

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307. *Id.* at 205.

308. *Id.* at 203 (traveling six miles per hour above the speed limit).

309. *Id.* (proceeding to the scene without the request of the other officer).

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 205.

319. *Id.* at 204.

320. *Id.*

across the country, could be “readily explained” because his property could have been in the trunk or shipped separately.<sup>321</sup> Second, the defendant’s air freshener could have been used to mask odors besides drugs, such as cigarettes.<sup>322</sup> Third, the fact that the defendant wore business attire did not suggest involvement in criminal activity.<sup>323</sup> Finally, the defendant’s apparent nervousness alone did not engender reasonable suspicion.<sup>324</sup> Even when viewing these factors together, the court described them as “nothing more than a vague hunch” that the defendant was involved in criminal wrongdoing.<sup>325</sup> Therefore, the officer improperly exceeded the scope of the traffic stop.<sup>326</sup>

As in *Cox*, Justice Thomas dissented, joined by Justices Fitzgerald and Garman.<sup>327</sup> Justice Thomas stated that he could not apply *Cox* as a matter of stare decisis because the majority’s decision was “wholly incompatible” with the United States Supreme Court’s interpretation of the Fourth Amendment.<sup>328</sup> According to Justice Thomas, *Cox*’s discussion of the canine sniff was dicta in that case, but it had now become the law in Illinois.<sup>329</sup> Citing extended passages from his *Cox* dissent, Justice Thomas again decided that the dog sniff was not a “search” within the meaning of the Fourth Amendment, and thus, found the officer’s conduct proper.<sup>330</sup>

The United States Supreme Court, in a 6–2 decision, reversed the decision of the Supreme Court of Illinois.<sup>331</sup> In its brief decision, the Court aimed to answer the “narrow” question, “[w]hether the Fourth Amendment requires a reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.”<sup>332</sup> Thus, the Court assumed, for the purposes of its decision, that the dog sniff of the defendant’s car was not justified by any suspicion of wrongdoing and that all other aspects of the traffic stop were proper.<sup>333</sup>

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321. *Id.* at 205.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* (Thomas, J., dissenting).

328. *Id.* at 205–06 (Thomas, J., dissenting).

329. *Id.* at 205 (Thomas, J., dissenting).

330. *Id.* at 206–07 (Thomas, J., dissenting).

331. *Caballes II*, 125 S. Ct. 834, 838 (2005). Justice Stevens wrote the opinion of the Court, and Justices David Souter and Ruth Bader Ginsburg dissented. Chief Justice Rehnquist did not participate in the decision.

332. *Id.* at 837.

333. *Id.*

The Court noted the Supreme Court of Illinois' decision in *Cox* and interpreted that case—with apparent approval—to forbid a dog sniff where the traffic stop was already unreasonably prolonged.<sup>334</sup> However, the Court disagreed with the Supreme Court of Illinois over whether the dog sniff in the current case impermissibly changed the nature of the traffic stop.<sup>335</sup> According to the Court, “conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed [Caballes’s] constitutionally protected interest in privacy.”<sup>336</sup> In examining the privacy interest, the Court summarily rejected the defendant’s arguments concerning the fallibility of the dogs and looked almost exclusively to its decision in *Place*, in which it stated that a dog sniff is *sui generis*.<sup>337</sup> Because a dog’s alert reveals limited information, namely the presence or absence of illegal drugs, its use by police does not implicate legitimate privacy interests.<sup>338</sup> Similarly, in this case, a dog sniff conducted during a legitimate traffic stop does not violate the Fourth Amendment.<sup>339</sup>

In a dissent, Justice David Souter called for a re-examination of the assumptions that resulted in the Court’s decision in *Place*.<sup>340</sup> Noting the dogs’ high error rates, Justice Souter argued that a dog falsely alerting to the presence of drugs could lead to the disclosure of intimate details and is therefore a “search” under the Fourth Amendment.<sup>341</sup> Because the search at issue was not justified by any suspicion of wrongdoing, it was “unreasonable” and, therefore, violated the Fourth Amendment.<sup>342</sup>

Justice Ruth Bader Ginsburg, in a dissenting opinion joined by Justice Souter, criticized the majority for wholly abandoning the *Terry* framework used to analyze traffic stops.<sup>343</sup> Like the Supreme Court of Illinois, Justice Ginsburg concluded that the drug sniff impermissibly broadened the scope of the initial stop:

The stop becomes broader, more adversarial, and (in at least some cases) longer. Caballes—who, as far as Troopers Gillette and Graham

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334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 837–38 (citing *United States v. Place*, 462 U.S. 696, 707 (1983) (“We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.”)).

338. *Id.* at 838.

339. *Id.*

340. *Id.* at 839 (Souter, J., dissenting).

341. *Id.* at 839–40 (Souter, J., dissenting).

342. *Id.* at 841 (Souter, J., dissenting).

343. *Id.* at 845 (Ginsburg, J., dissenting).

knew, was guilty solely of driving six miles per hour over the speed limit—was exposed to the embarrassment and intimidation of being investigated, on a public thoroughfare for drugs.<sup>344</sup>

Finally, Justice Ginsburg expressed concern that the majority's decision would permit an expansion of police use of drug-sniffing dogs beyond traffic stops, such as using the dogs to sniff along parked cars or at traffic lights.<sup>345</sup>

#### IV. ANALYSIS OF ILLINOIS' APPROACH

Underlying the Supreme Court of Illinois' recent cases involving routine traffic stops is the idea that the second prong of the *Terry* test, which concerns the scope of the detention, should apply in a meaningful way to prevent officers from using a lawful stop for a traffic infraction to conduct a broad investigation without suspicion of wrongdoing. Despite the United States Supreme Court's decision in *Caballes*, the decisions of the Supreme Court of Illinois will likely have an enormous impact in curbing aggressive police tactics during traffic stops.

##### A. Consensual Encounters and Searches

At first glance, the facts in *Brownlee*<sup>346</sup> appear strikingly similar to the facts in *Robinette*,<sup>347</sup> the leading United States Supreme Court consensual search case. Both defendants, stopped for traffic violations, later gave consent to search the vehicle.<sup>348</sup> In fact, the Illinois Appellate Court initially applied the *Robinette* decision to the case and decided against the defendant in *Brownlee*, finding simply that there was no duty to inform the driver that he was free to leave.<sup>349</sup> The Supreme Court of Illinois could have reasonably affirmed on this basis. However, the Supreme Court of Illinois found a way to distinguish the two cases, primarily based upon the officer's assertion that he "paused for a couple minutes" before asking for consent.<sup>350</sup> The court interpreted this pause as a continued detention after the traffic stop had concluded and before the officers asked for consent to search.<sup>351</sup>

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344. *Id.* (Ginsburg, J., dissenting).

345. *Id.* at 845–46 (Ginsburg, J., dissenting).

346. *People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999). *See supra* notes 134–156 and accompanying text (discussing *Brownlee* in detail).

347. *Ohio v. Robinette*, 519 U.S. 33 (1996). *See supra* notes 80–98 and accompanying text (discussing *Robinette* in detail).

348. *Robinette*, 519 U.S. at 36; *Brownlee*, 713 N.E.2d at 559.

349. *People v. Brownlee*, 674 N.E.2d 503, 507 (Ill. App. Ct. 4th Dist. 1996).

350. *Brownlee*, 713 N.E.2d at 564.

351. *Id.* at 564–65.

Comparing the two cases, the court stated, “Certainly *Robinette* does not stand for the proposition that, following the conclusion of lawful traffic stop, officers may detain a vehicle without reasonable suspicion of any illegal activity and for any amount of time, so long as they ultimately request and obtain permission to search the car.”<sup>352</sup> Thus, without specifically contradicting recent United States Supreme Court authority, the court nonetheless reached a more protective result.<sup>353</sup>

The court then proceeded to decide the case based on the State’s argument that the post-traffic stop encounter was consensual.<sup>354</sup> In doing so, the court applied the *Mendenhall* “free to leave” standard by focusing on the officers’ “show of authority.”<sup>355</sup> The officers in *Brownlee* demonstrated a show of authority when they remained on either side of the car and “stood there, saying nothing.”<sup>356</sup> Quite logically, the court also noted that if the motorist drove away, “the two officers would soon be in hot pursuit.”<sup>357</sup> The court also looked at the driver’s subjective reaction—asking whether he had a choice in the matter—as evidence.<sup>358</sup> Based on these factors, the court concluded that a reasonable person would not have felt free to leave, and therefore the driver and passengers were seized.<sup>359</sup>

The court applied these same factors in a similarly restrictive way in *Gherna* and *Bunch*.<sup>360</sup> In *Gherna*, the court seriously examined the circumstances surrounding the encounter, namely the facts that the officers wore badges and were fully equipped,<sup>361</sup> the position of the officers and their bikes next to the car doors, and “the request to examine the bottle of beer on the heels of other questioning.”<sup>362</sup> In view

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352. *Id.* at 563.

353. *Robinette*, 519 U.S. at 39–40 (rejecting the Ohio Supreme Court’s bright line rule requiring officers to inform citizens of their right to refuse consent in order for the consent to be voluntary).

354. *Brownlee*, 713 N.E.2d at 566.

355. *Id.* at 564.

356. *Id.* at 565–66.

357. *Id.* at 566.

358. *Id.*

359. *Id.*

360. *People v. Bunch*, 796 N.E.2d 1024, 1032 (Ill. 2003); *People v. Gherna*, 784 N.E.2d 799, 808–09 (Ill. 2003).

361. *Gherna*, 784 N.E.2d at 808. The State had argued that the officers were “less threatening” because they were on bike patrol and wore short-sleeved shirts and short trousers. *Id.* at 807–08. However, these facts did not “diminish their apparent authority as law enforcement personnel.” *Id.* at 808.

362. *Id.* at 808. The court determined that the dividing point between the investigatory stop and the post-stop encounter was when the officer asked the defendant to hand him the bottle of beer. *Id.* However, at that point, it seems that the officer was still in the process of confirming or

of these factors, the court held that a reasonable person would have felt compelled to submit to the officer's authority and would not have felt free to leave.<sup>363</sup> In *Bunch*, the positioning of the officer again was critical to determining that there was a show of authority that compelled a person to remain.<sup>364</sup> There, the court observed that after the decision to tow the car, the officer (1) ordered Bunch to stand at the vehicle's rear next to the arrested driver, (2) stood a foot in front of Bunch's face, (3) shined his flashlight on Bunch, and (4) asked Bunch's name and where he was coming from.<sup>365</sup> Based on these four facts, the court found that the officer's show of authority would have caused a reasonable person to believe he was not free to leave.<sup>366</sup>

In applying the "free to leave" test, the court seems to have abolished distinctions between detentions of the driver and passengers during a traffic stop. In *Gonzalez*, the state expressly contended that the officer's request for the passenger's identification represented an act of "community caretaking," and therefore was consensual.<sup>367</sup> Justice Thomas, concurring, applied the *Bostick* test, which is appropriate whenever a person's detention stems from a factor independent of police conduct.<sup>368</sup> A passenger who remains because the police have stopped his driver arguably fits this test.<sup>369</sup> The majority, however, rejected this argument because the state did not describe how the officer's request for the passenger's identification served any public-safety function.<sup>370</sup> Thus, in *Gonzalez*, *Bunch*, and *Brownlee*, the fact that the defendants were passengers seemed to have no bearing on the court's holdings regarding whether they consented to the encounter.<sup>371</sup>

Overall, the Supreme Court of Illinois has applied the "free to leave" test much more rigorously than the United States Supreme Court has applied it.<sup>372</sup> For instance, in *United States v. Drayton*,<sup>373</sup> three plain-

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dispelling his suspicions of underage drinking. When he learned that the beer was unopened, his suspicions were dispelled, and the purpose of his stop was complete.

363. *Id.*

364. *Bunch*, 796 N.E.2d at 1032.

365. *Id.*

366. *Id.*

367. *People v. Gonzalez*, 789 N.E.2d 260, 263–64 (Ill. 2003).

368. *Id.* at 272 (Thomas, J., concurring).

369. *Id.* (Thomas, J., concurring); *Bunch*, 796 N.E.2d at 1036 (Thomas, J., dissenting).

370. *Gonzalez*, 789 N.E.2d at 263–64.

371. The driver-passenger distinction also arose in *People v. Harris*, when the court suggested that the majority would hold warrant checks of drivers unconstitutional. *People v. Harris*, 802 N.E.2d 219, 234 (Ill. 2003) (Fitzgerald, J., dissenting), *vacated sub. nom.* *Illinois v. Harris*, 125 S. Ct. 1292 (2005). See *infra* notes 439–45 and accompanying text (discussing *Harris* in further detail).

372. See, e.g., *INS v. Delgado*, 466 U.S. 210 (1984) (applying a lenient standard to what

clothed police officers displaying badges conducted a bus sweep for drugs. One officer moved to the back of the bus, one remained kneeling in the driver's seat, and the third officer walked through the aisle, speaking with the passengers and asking to search their luggage. In its decision, holding that an encounter between a passenger and officer was consensual, the Court placed a great deal of weight on the simple facts that the officer did not brandish a weapon and that he questioned the bus passengers "in a polite, quiet voice."<sup>374</sup> Short of handcuffing a citizen,<sup>375</sup> the United States Supreme Court's decisions do not suggest a realistic point at which the encounter is no longer consensual.<sup>376</sup> In contrast, the decisions of the Supreme Court of Illinois take into consideration the

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constitutes a seizure). In *Delgado*, INS officers visited a factory to survey for illegal immigrants. *Id.* at 212. Several agents stood near the buildings' exits while several others—who were armed, displayed badges, and carried walkie-talkies—walked through the factory and questioned employees. *Id.* In its decision, holding that an encounter between an agent and employee was consensual, the Court stated that the questioning, "given its obvious purpose, could hardly result in a reasonable fear that [the employees] were not free to continue working or to move about the factory." *Id.* at 220–21. The Court also stated that the "obvious purpose" for the agents posted at the exits was not to prevent the employees from leaving, but rather to ensure that all employees were questioned. *Id.* at 218. In a partial dissent, Justice William Brennan explained that the questioning was systematically conducted by fifteen to twenty-five INS agents who, in fact, handcuffed and detained persons they suspected to be illegal aliens. *Id.* at 230 (Brennan, J., concurring in part and dissenting in part).

373. *United States v. Drayton*, 536 U.S. 194 (2002).

374. *Id.* at 203–04.

375. In *Kaupp v. Texas*, 538 U.S. 626, 627 (2003), the United States Supreme Court reversed a Texas court's decision involving a seventeen-year-old boy who was awakened by three police officers at 3:00 am, handcuffed, and—wearing only boxer shorts and a T-shirt—was driven from his home to police headquarters. The Texas Court of Appeals, in considering whether the boy was under arrest at the time he was handcuffed, incredibly held that the boy was not under arrest. *Kaupp v. State*, No. 14-00-00128-CR, 2001 Tex. App. LEXIS 3732, \*8–9 (Tex. Ct. App. June 7, 2001). In its decision, the court appeared to rely on the same factors noted by the Court in *Drayton*:

[A]fter being allowed into appellant's house by his father and led to appellant's bedroom, Detective Pinkins identified himself to appellant and told him they "need to go and talk," to which appellant replied "Okay." Although Pinkins's weapon was visible, neither he nor any of the other officers had their guns drawn. There was no evidence of any threat, either express or implied, that appellant would be forcibly taken to the station for questioning.

*Id.*

The United States Supreme Court, in a per curiam opinion, held that the boy was indeed under arrest, stating that "Pinkins offered Kaupp no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words 'we need to go and talk' presents no option but 'to go.'" *Kaupp*, 538 U.S. at 631. Though the Texas court's decision was unmistakably incorrect, it does illustrate the deficiencies of the *Drayton* factors in determining whether an encounter is truly consensual.

376. See *Drayton*, 536 U.S. at 209–10 (Souter, J., dissenting) (describing various factual patterns in which police questioning of citizens become decreasingly consensual). See also LaFave, *supra* note 115, at 1900 (noting that the Court, in *Robinette*, avoids the issue).

reality of traffic stops: a driver, stopped on the side of the road while being questioned by a police officer, would most likely not feel free to leave.<sup>377</sup>

In addition, *Brownlee* and *Gherna* make the police practice of requesting consensual searches more difficult to justify. The Supreme Court of Illinois will not allow police to continue encounters with citizens after the purpose of the stop has concluded. Indeed, the court left little leeway to argue that such an encounter would be consensual, in part, due to its emphasis on the positions of the officers surrounding the vehicle.<sup>378</sup> According to the court, such a position inherently constitutes a lawful show of authority from which a reasonable person would not feel free to leave.<sup>379</sup> Thus, an officer's continued detention of the motorist essentially nullifies a later request for consent to search the vehicle.

Indeed, lower court decisions applying the *Brownlee* cases to allegedly consensual encounters support this reading of the Supreme Court of Illinois' decisions.<sup>380</sup> Perhaps the most important of these cases is *People v. Goeking*,<sup>381</sup> in which the Appellate Court of Illinois expressly stated that consensual encounters following a traffic stop would be rare after *Brownlee*.<sup>382</sup> In *Goeking*, an officer asked a driver to

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377. See *State v. Robinette*, 653 N.E.2d 695, 698 (Ohio 1995) (analyzing when legal detention ends and a consensual encounter begins); *supra* notes 90–91 and accompanying text. For a lower court opinion finding a show of authority, see *People v. Dent*, 797 N.E.2d 200, 210–11 (Ill. App. Ct. 5th Dist. 2003) (finding a show of authority where the defendant, walking into a residence, heard an instruction to “wait a minute” and then saw that “seven to nine uniformed police officers were emerging from five vehicles arriving in tandem” and that the officers were surrounding him on three sides).

378. *People v. Bunch*, 796 N.E.2d 1024, 1032 (Ill. 2003); *People v. Gherna*, 784 N.E.2d 799, 808 (Ill. 2003); *People v. Brownlee*, 713 N.E.2d 556, 565–66 (Ill. 1999).

379. *Id.* at 566 (“A reasonable person in this driver’s situation would likely conclude that, if he or she drove away, then the two officers would soon be in hot pursuit.”).

380. See, e.g., *People v. Granados*, 773 N.E.2d 1272, 1276 (Ill. App. Ct. 4th Dist. 2002) (holding that, after officers verified a driver’s license and registration during a roadside check, an officer saw cased shotguns in the bed of the driver’s pickup truck, the officer’s second detention of the driver to verify his license to own a firearm was improper); *People v. Robinson*, 748 N.E.2d 739, 741–46 (Ill. App. Ct. 2d Dist. 2001) (ruling that continued detention was improper where officer asked for consent to search a vehicle after: (1) the officer issued written warnings for a covered registration sticker and an object hanging on the rearview mirror; and (2) driver’s passing of a field sobriety test dispelled the officer’s suspicions of drunk driving); *People v. Ortiz*, 738 N.E.2d 1011, 1014–21 (Ill. App. Ct. 4th Dist. 2000) (holding continued detention improper where officer stopped a motorist for speeding, ran a warrant and criminal history check, returned the licenses, issued a warning ticket, and then asked for and received consent to ask a few questions, but was refused consent to search the vehicle).

381. *People v. Goeking*, 780 N.E.2d 829 (Ill. App. Ct. 2d Dist. 2002).

382. *Id.* at 831 (“It is difficult to imagine many cases in which a motorist would voluntarily remain at the scene of a traffic stop to engage the officer in casual conversation.”).

exit her car to determine whether she was intoxicated.<sup>383</sup> After concluding that she was not intoxicated, the officer issued a verbal warning and informed the driver that she was “free to go.”<sup>384</sup> As the driver returned to her car, the officer asked whether she had any “knives, guns, drugs, dead bodies, grenades, rocket launchers, anything that shouldn’t be in the vehicle.”<sup>385</sup> The Appellate Court of Illinois for the Second District found that, although the officer told the driver she was free to leave, he immediately questioned her about illegal items in her car.<sup>386</sup> This “at best sent defendant mixed signals,” and the court upheld the trial court’s finding that a reasonable person would not have felt free to leave in that situation.<sup>387</sup> Thus, *Goeking* demonstrates that even an oral “free-to-leave” announcement after the conclusion of the traffic stop will not justify a continued encounter with a motorist, nor will it constitute a consensual search.<sup>388</sup>

### *B. The Emergence and Extension of the Gonzalez Standard*

When the Supreme Court of Illinois in *Gonzalez* addressed the limits to police questioning during routine traffic stops, it did so without the benefit of clear guidance from the United States Supreme Court, which has not directly ruled on the issue.<sup>389</sup> Moreover, as Justice Thomas stated, the majority opinion gave little guidance as to how and when the *Gonzalez* test<sup>390</sup> should apply in the future.<sup>391</sup> However, a composite of *Gonzalez*, *Harris*, and *Bunch* provides a clearer picture of how the court views unrelated questioning during traffic stops. More importantly, though, the court’s decision in *Harris* demonstrates that the *Gonzalez* inquiry applies to other expansions of the scope of traffic stops and severely restricts police officers’ investigations during such stops.

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383. *Id.* at 830.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. See also *People v. Roberts*, 813 N.E.2d 748, 753–54 (Ill. App. Ct. 4th Dist. 2004) (finding warrant check invalid despite officer’s informing defendant he was free to leave); *People v. Hall*, 814 N.E.2d 1011, 1015 (Ill. App. Ct. 2d Dist. 2004) (finding officer’s questioning of defendant invalid despite informing defendant he was free to leave).

389. *Vazquez*, *supra* note 99, at 225 (stating that the United States Supreme Court should review the issue).

390. See *People v. Gonzalez*, 789 N.E.2d 260, 269–70 (Ill. 2003) (discussing that if a question is not reasonably related to the purpose of a stop and not justified by reasonable and articulable suspicion, the question is proper only if it did not impermissibly prolong the detention or change the fundamental nature of the stop).

391. *Id.* at 273 (Thomas, J., concurring).

### 1. The Limits of Questioning

Although officers asked similar questions in *Gonzalez*, *Harris*, and *Bunch*, the court found the questioning improper only in *Bunch*.<sup>392</sup> In *Gonzalez* and *Harris*, an officer asked the vehicle's passenger for identification.<sup>393</sup> In *Bunch*, an officer asked the passenger what his name was and where he was coming from.<sup>394</sup> As the court stated without analysis, neither question reasonably related to the traffic violation that prompted the initial stop.<sup>395</sup> In addition, neither question was independently supported by a reasonable, articulable suspicion of wrongdoing.<sup>396</sup>

The court's split decision cases arise from its analysis in the third step of the inquiry: whether the question prolongs the detention or alters the fundamental nature of the stop. The requests for identification in *Gonzalez* and *Harris* did not prolong the stop because the request came during the course of the traffic stop.<sup>397</sup> Also, the questions did not alter the fundamental nature of the stop because they were "facially innocuous"<sup>398</sup> and allowed the officer to identify a witness to the traffic violation.<sup>399</sup>

Similarly, in *Bunch*, the officer asked the defendant's name and where he was coming from—"facially innocuous questions" that did not fundamentally change the nature of the stop.<sup>400</sup> As Justice Thomas pointed out in his dissent, the questions could have related to *Bunch*'s travel plans, since he became a stranded passenger once the officer decided to tow the car.<sup>401</sup> The officer's questions then could be justified as "an objective concern any officer would have for a passenger who might be left stranded as a result of the driver's arrest."<sup>402</sup>

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392. *People v. Bunch*, 796 N.E.2d 1024, 1032–33 (Ill. 2003).

393. *Gonzalez*, 789 N.E.2d at 262; *People v. Harris*, 802 N.E.2d 219, 222 (Ill. 2003), *vacated sub. nom. Illinois v. Harris*, 125 S. Ct. 1292 (2005).

394. *Bunch*, 796 N.E.2d at 1027.

395. *Id.* at 1030; *Gonzalez*, 789 N.E.2d at 270.

396. *Bunch*, 796 N.E.2d at 1030; *Gonzalez*, 789 N.E.2d at 270.

397. *Id.*; *Harris*, 802 N.E.2d at 226.

398. *Gonzalez*, 789 N.E.2d at 270; *Harris*, 802 N.E.2d at 226.

399. *Id.* In *Gonzalez*, the court stated that the officer's "simple" request did not "suggest official interrogation" or "increase the confrontational nature of the encounter." *Gonzalez*, 789 N.E.2d at 270. However, it is not clear how the level of interrogation relates to the fundamental nature of a traffic stop, which is typically a brief encounter to address a traffic violation through a citation or warning. The more cogent reasoning is contained in *Harris*.

400. Although the court was silent on this prong of the inquiry, the comparison between *Bunch* and *Gonzalez* can be fairly made.

401. *Bunch*, 796 N.E.2d at 1038 (Thomas, J., dissenting).

402. *Id.* (Thomas, J., dissenting).

However, the key difference between the two situations is that the officer in *Bunch* asked the questions *after* the purpose for the stop had concluded.<sup>403</sup> When the officer asked Bunch the questions, the officer had already decided to arrest the driver and have the car towed.<sup>404</sup> This concluded the officer's handling of the traffic violations, and the purpose for the initial traffic stop was complete.<sup>405</sup> Thus, the officer's continued questioning prolonged Bunch's detention beyond the completion of the purpose of the stop.<sup>406</sup>

The rule that emerges from these three cases is that asking a passenger facially innocuous questions, such as his identity, during a traffic stop has a legitimate purpose and is most certainly permissible. Once the purpose of the traffic stop has concluded, however, any further questioning, no matter how simple and innocuous, prolongs the detention and is therefore improper.<sup>407</sup> Moreover, these cases clearly indicate that the "purpose" of the traffic stop is not to broadly investigate criminality, but rather to address the traffic violation that the officer witnessed.<sup>408</sup>

Illinois appellate courts have strictly construed the *Gonzalez* rule to severely limit investigations into drug activity or other criminal wrongdoing during traffic stops. For instance, a number of courts have easily found an officer's questioning to have altered the nature of the stop or prolonged the stop when the officer asked whether a motorist had any illegal items, including guns, drugs, or alcohol in the vehicle, and subsequently requested consent to search the vehicle.<sup>409</sup> In these

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403. *Id.* at 1031.

404. *Id.* at 1027.

405. *Id.* at 1031.

406. *Id.*

407. The court did seem to agree with the trial court's statement that there would be some legitimate reasons to have a conversation with a passenger in a similar situation, "including explaining to him the reason for the arrest and determining if defendant could be an alternative driver." *Id.* at 1030. Nonetheless, if the officer was not permitted to ask Bunch his name and place of departure, it is hard to imagine what questions would have been legitimate. *Id.*

408. *See* *People v. Cox*, 782 N.E.2d 275, 280 (Ill. 2002) (noting that the officer should have issued a warning or citation more expeditiously), *cert. denied sub nom.* *Illinois v. Cox*, 539 U.S. 937 (2003).

409. *See* *People v. Hall*, 814 N.E.2d 1011, 1015 (Ill. App. Ct. 2d Dist. 2004) (ruling that officer's questions and request to search the vehicle exceeded the scope of *Terry* because they followed the officers' completion of the traffic stop and the defendant was told he was free to go), *appeal denied*, 824 N.E.2d 287 (Ill. 2004); *People v. Lomas*, 812 N.E.2d 39, 46 (Ill. App. Ct. 5th Dist. 2004) (stating that unless the officers possess or subsequently develop reasonable, articulable suspicions of criminal activity, they must attend to the business of charging a traffic offense and confine their investigation to the minimal inquiries attendant to it); *People v. Jones*, 806 N.E.2d 722, 726 (Ill. App. Ct. 3d Dist. 2004) (noting that there was simply no reason for the officer to return to the vehicle with questions about guns or drugs instead of a completed traffic

cases, the courts have often noted that the officer's questions seemed calculated to elicit incriminating responses or otherwise resembled a "fishing expedition."<sup>410</sup>

In at least two cases, however, lower courts applying *Gonzalez* have upheld questioning related to drug activity. First, in *People v. Reatherford*,<sup>411</sup> an officer stopped a defendant for weaving across lanes of traffic and changing lanes without signaling.<sup>412</sup> The officer also knew from a credible informant that the defendant had been observed purchasing the ingredients for methamphetamine and saw the ingredients in the defendant's truck during the stop.<sup>413</sup> Therefore, the Appellate Court of Illinois for the Fourth District held that the officer had reasonable suspicion of criminal activity rendering it appropriate to ask where the defendant was coming from and where he was going.<sup>414</sup>

In *People v. Moore*,<sup>415</sup> the Appellate Court of Illinois for the Second District also held that an officer's questions were appropriate because the questions were reasonably related to the initial purpose of the traffic stop.<sup>416</sup> In *Moore*, an officer stopped the defendant for driving on the

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ticket after the defendant provided adequate identification and explained his reason for driving on the shoulder), *appeal denied*, 823 N.E.2d 972 (Ill. 2004); *People v. Marungo*, 800 N.E.2d 562, 568 (Ill. App. Ct. 2d Dist. 2003) (determining that the question to search not only prolonged any legitimate detention of the car to investigate a traffic violation, but also changed the fundamental nature of the encounter); *see also* *People v. Staple*, 803 N.E.2d 586 (Ill. App. Ct. 4th Dist. 2004) (analyzing a factual pattern similar to *Bunch* where the defendant was a passenger who was questioned after the conclusion of the traffic stop).

410. For instance, in *People v. Marungo*, 800 N.E.2d at 564, an officer witnessed the defendant's vehicle turn without signaling 100 feet from an intersection. Before the officers had an opportunity to activate their lights and pull the car over, the defendant had parked his car in a driveway in an area known for gang activity, walked to a residence about four houses away, looked at the officers, stood at the residence for a moment, and then returned to his car. *Id.* An officer then approached the defendant and rather than follow the protocol of a typical stop, asked him questions about what he was doing, and asked for consent to search his vehicle. *Id.* The Appellate Court of Illinois for the Second District held that the officer's questions were not justified by reasonable suspicion or any other prong of the *Gonzalez* test. *Id.* at 568. In addressing the officer's conduct, the court was troubled by the pretextual nature of the stop, as evidenced by the officer's delay in writing the ticket until after the defendant had arrived at the police station. *Id.* at 569. The court further stated, "It is clear that [the officer] was not interested in treating the encounter as a traffic stop. . . . [His] interest in searching the car, and his conversation with defendant about being in a gang-related neighborhood, showed that his intent [was] to conduct a criminal investigation." *Id.* at 568-69.

411. *People v. Reatherford*, 802 N.E.2d 340 (Ill. App. Ct. 4th Dist. 2003), *appeal denied*, 809 N.E.2d 1291 (Ill. 2004).

412. *Id.* at 348.

413. *Id.* at 350.

414. *Id.*

415. *People v. Moore*, 792 N.E.2d 836 (Ill. App. Ct. 2d Dist. 2003).

416. *Id.* at 842.

wrong side of the road at a high rate of speed.<sup>417</sup> The defendant, “nervous and shaking” when approached by the officer, was unable to produce identification.<sup>418</sup> According to the court, these facts, in connection with the large number of passengers in the vehicle (four), meant that the officer could reasonably “suspect that the defendant may have been under the influence of a controlled substance and/or alcohol, or that other criminal activity may have been in progress.”<sup>419</sup> Thus, the officer’s questioning about the presence of contraband and request to search the vehicle related to the circumstances that justified the interference in the first place.<sup>420</sup> The court’s reasoning in *Moore* is questionable in some respects, because it interprets the purpose of a stop more broadly than the initial traffic violation.<sup>421</sup> Furthermore, the decision essentially creates a per se rule permitting officers to investigate drug activity in the course of traffic stops involving erratic driving, which contradicts the Supreme Court of Illinois’ more stringent requirements for reasonable suspicion.<sup>422</sup>

## 2. Warrant and Criminal History Checks

Although the United States Supreme Court vacated the Supreme Court of Illinois’ decision in *Harris*, it simply remanded for reconsideration in light of its decision in *Caballes*.<sup>423</sup> Because *Harris* was based on an independent application of the *Gonzalez* test—and not on *Caballes*—it appears that the decision should be reaffirmed in the Supreme Court of Illinois. On the other hand, the United States Court may be suggesting that warrant checks, like canine sniffs, are sui generis and therefore do not implicate Fourth Amendment concerns at all. In that case, the United States Supreme Court will be forced to step into the fray once again and reverse an Illinois decision.

In its decision in *Harris*, the Supreme Court of Illinois indicated, first, that the court would not only apply its *Gonzalez* inquiry to police questioning, but also to other expansions of the scope of a traffic stop.<sup>424</sup>

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417. *Id.* at 841.

418. *Id.*

419. *Id.* at 841–42.

420. *Id.* at 842.

421. *See supra* notes 409–10 and accompanying text (clarifying the appropriate contours of an officer’s investigation pursuant to a routine traffic stop).

422. *See* *People v. Caballes*, 802 N.E.2d 202 (Ill. 2003) (concluding that the officer’s numerous observations did not amount to a reasonable suspicion of drug activity), *vacated sub nom.* *Illinois v. Caballes*, 125 S. Ct. 834 (2005); *see also supra* notes 318–26 and accompanying text (discussing the specific facts that the court held failed to justify a reasonable suspicion).

423. *Illinois v. Harris*, 125 S. Ct. 1292 (2005).

424. *People v. Harris*, 802 N.E.2d 219, 229 (Ill. 2003), *vacated sub nom.* *Illinois v. Harris*,

More importantly, the court's strongly-worded analysis seemingly makes it difficult for a police officer to justify any further investigation beyond the limited purpose of the traffic stop.

Both the *Harris* majority and the dissent agreed that, under *Gonzalez*, the warrant check did not reasonably relate to the purpose of the stop, which was to issue a citation for the driver's illegal left turn.<sup>425</sup> In addition, all of the justices agreed that no reasonable suspicion that the passenger was involved in criminal wrongdoing justified the warrant check.<sup>426</sup> Under the third *Gonzalez* inquiry, the majority could not determine whether the warrant check of the passenger impermissibly prolonged the stop.<sup>427</sup> However, the members of the court bitterly disagreed over whether the check altered the fundamental nature of the stop.<sup>428</sup> The *Harris* majority simply stated that the warrant check transformed the nature of the traffic stop into "an investigation of past wrongdoing by defendant."<sup>429</sup> The dissent, on the other hand—referring to the original language from *Gonzalez*, which prohibited "a general inquisition about past, present and future wrongdoing"<sup>430</sup>—did not believe that a computerized warrant check constituted a general inquisition.<sup>431</sup>

This conflict within the court is not easy to resolve. On one hand, many courts have included warrant checks among the permissible inquiries available during a routine traffic stop. For example, in *Michigan v. Summers*,<sup>432</sup> the United States Supreme Court noted that, during a *Terry* stop, an officer could utilize several investigative techniques, including communicating with others to "determine whether

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125 S. Ct. 1292 (2005).

425. *Id.* at 228; *Id.* at 234 (Fitzgerald, J., dissenting). Justice Fitzgerald correctly noted that a warrant check will "rarely, if ever, relate to the purpose of a routine traffic stop—issuing a warning or citation for an observed traffic violation." *Id.* at 234 (Fitzgerald, J., dissenting).

426. *Id.* at 227–28; *Id.* at 234 (Fitzgerald, J., dissenting).

427. *Id.* at 228 (Fitzgerald, J., dissenting). The officer conducted a warrant check of both the driver and the passenger at the same time. *Id.* at 223 (Fitzgerald, J., dissenting). However, the officer did not testify as to whose results were received first. *Id.* at 228 (Fitzgerald, J., dissenting). With respect to this fact, the majority opinion stated: "The warrant check performed on defendant could well have lengthened the duration of the detention if the officer had to wait for the results of the warrant check." *Id.* (Fitzgerald, J., dissenting). This suggests that if the officer had to wait *at all* for the results of the warrant check, the detention would have been impermissibly prolonged. Thus, the court seems to be strictly construing the rule against prolonged detentions.

428. *Id.* at 228; *Id.* at 233–34 (Fitzgerald, J., dissenting).

429. *Harris*, 802 N.E.2d at 228.

430. *Id.* at 233 (Fitzgerald, J., dissenting) (quoting *People v. Gonzalez*, 789 N.E.2d 260, 269 (Ill. 2003)) (emphasis added).

431. *Id.* at 233–34 (Fitzgerald, J., dissenting).

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

a person of that identity is otherwise wanted.”<sup>433</sup> In addition, Justice Freeman, in his *Cox* opinion, stated that an officer “may perform some initial inquiries, check the driver’s license, and conduct a speedy warrant check.”<sup>434</sup> Sweeping statements such as these suggest that warrant checks do not impermissibly broaden the scope of traffic stops.

Yet, many courts ruling on the issue have confronted only factual situations involving warrant checks of a driver or warrant checks of passengers independently justified by reasonable suspicion or a similar rationale. Few cases address a suspicionless warrant check of a passenger. According to *Gonzalez*, then, a “general inquisition” about a passenger’s possible wrongdoing is improper.<sup>435</sup> Justice Fitzgerald stated that the non-intrusive warrant check “cannot reasonably be deemed” a general inquisition.<sup>436</sup> For Justice Fitzgerald, the term “inquisition” seems to connote an overly harsh and intrusive interrogation from the motorist’s point of view.<sup>437</sup> However, the *Gonzalez* inquiry, formulated to restrict the scope of an investigatory stop, should properly focus on the *officer’s* conduct.<sup>438</sup> A more natural reading of “inquisition” yields simply an “inquiry” or “investigation.” The officer’s conduct in *Harris* indeed encompassed a general investigation into any wrongdoing committed by the passenger. To illustrate, if the officer had asked the passenger directly whether he was evading the judicial process, this would clearly be an investigation into any past criminality. This is essentially the same as transmitting the passenger’s information to a police dispatcher who makes a similar determination. Therefore, the warrant check on the passenger altered the fundamental nature of the stop and was improper.

The *Harris* majority’s strict interpretation of the *Gonzalez* inquiry to invalidate even “one of the most basic law enforcement techniques” calls other investigative techniques into question. As the dissent noted with harsh criticism, the court’s unqualified decision seems to prohibit warrant checks of drivers as well.<sup>439</sup> The court’s decisions have not

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433. *Id.* at 701 n.12 (quoting LAFAVE, *supra* note 14, at § 9.2).

434. *People v. Cox*, 782 N.E.2d 275, 279 (Ill. 2002) (citing a series of Illinois appellate court decisions), *cert. denied sub nom. Illinois v. Cox*, 539 U.S. 937 (2003). Justice Fitzgerald cited this statement in his *Harris* dissent. *Harris*, 802 N.E.2d at 234 (Fitzgerald, J., dissenting).

435. *People v. Gonzalez*, 789 N.E.2d 260, 269 (Ill. 2003).

436. *Harris*, 802 N.E.2d at 234 (Fitzgerald, J., dissenting).

437. Perhaps Justice Fitzgerald was equating “inquisition” with an intrusive inquiry resembling the infamous thirteenth century Spanish Inquisition.

438. The *Gonzalez* test examines whether an *officer’s* inquiry is related to the purpose of the stop, is justified by reasonable suspicion, prolongs the detention, or alters the nature of the stop. *Gonzalez*, 789 N.E.2d at 270.

439. *Harris*, 802 N.E.2d at 234 (Fitzgerald, J., dissenting).

made any express distinctions between drivers and passengers in the context of traffic stops.<sup>440</sup> Under the *Harris* rationale, it is improbable that a warrant check of a driver would “directly relate[]” to the narrow purpose of a traffic stop, to investigate a traffic violation.<sup>441</sup> Also, an “investigation into past wrongdoing” certainly alters the fundamental nature of a stop.<sup>442</sup>

Resolution of the issue ultimately may hinge on two parts of the *Gonzalez* inquiry. First, an officer who conducts a warrant check *after* verifying license and registration information may impermissibly prolong the detention.<sup>443</sup> On the other hand, if a single search reveals information concerning the driver’s license, registration, and possible outstanding warrants, it is difficult to argue that the detention was prolonged in any way.

In addition, the answer may depend on the type of information stored in the police department’s database. Nonetheless, the warrant check of a driver may be justified under *Gonzalez* if an officer has reasonable suspicion. It is less clear whether the driver’s commission of a traffic infraction provides reasonable suspicion sufficient to conduct a warrant check. For instance, upon being stopped a driver may produce, in lieu of a driver’s license, a traffic ticket indicating that a court date has passed. This may generate reasonable suspicion that the driver did not attend that court date and therefore violated the law. The court’s opinion, though, suggests that officers must have independent reasonable suspicion of other criminal wrongdoing.<sup>444</sup> Thus, a warrant check of a driver seems to fail the *Gonzalez* test. Also, when considering the court’s restrictive tone and generally broad language, a challenge to a warrant check of a driver would likely be sustained.<sup>445</sup>

Although the court’s decision in *Harris* leaves the police with fewer investigative techniques at their disposal, the decision does not render

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440. See, e.g., *Gonzalez*, 789 N.E.2d at 263–64 (rejecting the state’s argument that the officer’s encounter with the vehicle’s passenger did not implicate the Fourth Amendment).

441. *Id.* at 227.

442. *Id.* at 228.

443. *Id.*

444. *Id.* at 227–28. The court referred to reasonable suspicion that the passenger “had committed or was about to commit a crime.” *Id.* at 227. This suggests that an independent “crime” is required to form the basis of reasonable suspicion.

445. An argument for permitting warrant checks of drivers relates to the officer’s safety concerns. As the dissent noted, “Officer safety is *always* at issue during a vehicle stop.” *Id.* at 234 (Fitzgerald, J., dissenting). However, in *Harris*, the court emphasized the fact that the officer there did not testify to any safety concerns, and therefore, it was irrelevant in the case. *Id.* at 229 n.4. Also, the court’s statement that a different set of circumstances could yield a different result further suggests that safety concerns will be decided on a case-by-case basis depending on the degree of safety concerns. *Id.*

police powerless. For instance, as one appellate court justice has noted, “*Harris* is an invitation for officers to jot down the license holder’s name or memorize it and run a warrant check *after* the traffic stop has concluded and the vehicle has departed.”<sup>446</sup> Indeed, because the driver would not be detained while the officer is conducting the warrant check, it is difficult to argue that the Fourth Amendment is implicated by the officer’s actions. However, until the motorist has departed, any computer checks beyond a license and registration check of the driver during a traffic stop probably will be deemed improper in Illinois courts.<sup>447</sup>

### C. Canine Sniffs and Caballes

If the United States Supreme Court had not granted certiorari in *Caballes*, the practice of conducting dog sniffs during traffic stops would have been virtually eliminated in Illinois. The Supreme Court of Illinois, using the *Gonzalez* test, concluded that dog sniffs altered the fundamental nature of traffic stops and therefore invariably required reasonable suspicion.<sup>448</sup> More importantly, the Supreme Court of Illinois’ decision indicated that officers would not be able to rely on weak facts and tenuous inferences to conjure up the requisite level of suspicion.<sup>449</sup> In evaluating the evidence known to the officers in *Caballes*, the Supreme Court of Illinois concluded that the air freshener, the lack of visible luggage, and the driver’s nervousness amounted to “nothing more than a vague hunch.”<sup>450</sup>

The reversal of the Supreme Court of Illinois’ decision in *Caballes* clearly alters Illinois law with respect to dog sniffs. Under the United States Supreme Court’s decision, an officer conducting a routine traffic

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446. *People v. Roberts*, 813 N.E.2d 748, 754 (Ill. App. Ct. 4th Dist. 2004) (Knecht, P.J., concurring). *See also* *People v. Grove*, 792 N.E.2d 819, 820–21 (Ill. App. Ct. 5th Dist. 2003) (finding stop justified where officer followed vehicle for seven blocks while, running a check on the license and registration, and consequently learned that registration had expired and license plate was registered to a different car).

447. *See* *People v. Heather*, 815 N.E.2d 1, 6 (Ill. App. Ct. 4th Dist. 2004) (holding warrant check of passenger improper), *appeal denied*, 2005 WL 182893 (Ill. Jan. 26, 2005); *Roberts*, 813 N.E.2d at 753 (finding warrant check of passenger improper); *People v. Torres*, 807 N.E.2d 654, 666 (Ill. App. Ct. 1st Dist. 2004) (pronouncing warrant check of defendant improper after police witnessed him arguing with a woman in a parked car), *appeal denied*, 823 N.E.2d 977 (Ill. 2004), *and cert. denied sub nom. Illinois v. Torres*, 125 S. Ct. 1603 (2005).

448. *People v. Caballes*, 802 N.E.2d 202, 204 (Ill. 2003), *vacated sub nom. Illinois v. Caballes*, 125 S. Ct. 834 (2005).

449. *Id.* at 204–05. *See also* *People v. Gilbert*, 808 N.E.2d 1173, 1180 (Ill. App. Ct. 4th Dist. 2004) (holding that presence in a high-drug activity area alone does not create reasonable suspicion to conduct a canine sniff).

450. *Caballes*, 802 N.E.2d at 205.

stop is never required to justify a sniff for narcotics with any suspicion whatsoever.<sup>451</sup> A motorist stopped for failing to wear a seat belt or for driving with a burned-out registration light is subject to a canine sniff, even without any indication that the car contains illegal substances. Moreover, as Justice Ginsburg noted in her dissent, the Court's decision clears the way for officers to use the dogs in many other situations.<sup>452</sup> For example, officers could walk trained dogs along parked cars or cars waiting at a stoplight, and a dog's positive response would invariably justify the officers' detention of the motorist to further investigate the presence of drugs.<sup>453</sup> In addition, there is little in the Court's opinion that would prevent officers from conducting dog sniffs along the exterior of garages or perhaps even residences.<sup>454</sup> Finally, the decision may authorize dog sniffs of *people* in a wide variety of public places, such as schools, courthouses, and bus stations.<sup>455</sup>

Despite the Court's seemingly broad ruling, however, the use of canines is not entirely without limits. Perhaps most importantly, the Court did not reject the outcome in *Cox*, an opinion that expressed concern with both the length of the traffic stop *and* the absence of suspicion to justify the dog sniff.<sup>456</sup> Although the Court did not explore the facts of that case, it did "assume" that a dog sniff during an "unlawful detention" would be unconstitutional.<sup>457</sup> This statement thus retains a significant limitation on officers' use of canines: namely, an officer who otherwise *prolongs* a traffic stop may not properly commence a dog sniff of the car.

With this limitation on police conduct, the implications of *Caballes* in Illinois are twofold. First, an officer who travels with a canine unit may use the canine during any legitimate traffic stop—provided that the investigation does not unreasonably prolong the stop. Second, where an officer must wait for a canine unit to arrive at the scene of a traffic stop, Illinois courts probably will closely scrutinize the circumstances surrounding the stop. In *Cox*, the Supreme Court of Illinois rejected a traffic stop that lasted fifteen minutes before the dog arrived on the

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451. *Caballes II*, 125 S. Ct. 834, 837–38 (2005).

452. *Id.* at 845–46 (Ginsburg, J., dissenting).

453. *Id.* (Ginsburg, J., dissenting).

454. In fact, during oral arguments before the Court, the State argued that it would be proper to walk a trained dog around a house in search of illegal drugs. Tr. of Oral Argument, *Illinois v. Caballes*, No. 03-923, 2004 WL 2663949, at \*10 (Nov. 10, 2004).

455. See *Caballes II*, 125 S. Ct. at 846 (Ginsburg, J., dissenting) (worrying that under the Court's decision, "canine drug sniffs [may be] entirely exempt from Fourth Amendment inspection," regardless of the context).

456. *Id.* at 837 (citing *People v. Cox*, 782 N.E.2d 275 (Ill. 2002)).

457. *Id.*

assumption that the officer was stalling at the scene of the stop.<sup>458</sup> Therefore, future defendants can still look to *Cox* when challenging evidence obtained from dog sniffs. When viewed in the context of the restrictive approach taken by the Supreme Court of Illinois in cases like *Brownlee* and *Harris*, Illinois courts can be expected to similarly suppress evidence obtained as a result of intrusive police conduct.<sup>459</sup>

#### *D. Tightening the Reins of Police in Traffic Stops*

While not directly expressed, language in the Supreme Court of Illinois' recent opinions involving traffic stops suggests the court's strong concerns with the investigative techniques police have used while making routine stops. For example, in *Cox*, the court implied that the officer stalled at the scene while waiting for the canine unit to arrive.<sup>460</sup> Also, in *Brownlee*, the court took issue with the unjustified detention leading up to what the State unsuccessfully argued was a consensual search.<sup>461</sup> These statements demonstrate that the court will no longer permit "fishing expeditions" during routine traffic stops.<sup>462</sup>

Previously, if a police officer wanted to know the contents of a person's car, he had a number of investigative techniques from which to choose in order to accomplish his goal. A police officer could follow a

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458. *People v. Cox*, 782 N.E.2d 275, 280 (Ill. 2002), *cert. denied sub nom. Illinois v. Cox*, 539 U.S. 937 (2003).

459. It also should be noted that *Caballes II* does not preclude an *evidentiary* challenge to the use of trained narcotics dogs. The reliability of the dogs' alerts, though not a factor in the Supreme Court of Illinois' decision, weighed heavily in Justice Souter's dissent. *Caballes II*, 125 S. Ct. at 839 (Souter, J., dissenting) (stressing that "[t]he infallible dog . . . is a legal fiction" before discussing the problems with using dogs as investigatory tools). In future cases, defendants could be expected to challenge the reliability of a dog's findings. *See, e.g., People v. Canulli*, 792 N.E.2d 438, 445 (Ill. App. Ct. 4th Dist. 2003) (holding that evidence of the use of laser technology to measure automobile speed required a hearing to determine the admissibility of the results).

460. *Cox*, 782 N.E.2d at 280 ("We have examined the record and find that it is devoid of circumstances which would justify the length of the detention. . . . Officer McCormick should have issued a traffic citation or warning ticket to defendant expeditiously. Had he done so, defendant would have left the scene of the traffic stop prior to the arrival of the canine unit.").

461. *People v. Brownlee*, 713 N.E.2d 556, 563 (Ill. 1999) ("Certainly *Robinette* does not stand for the proposition that, following the conclusion of a lawful traffic stop, officers may detain a vehicle without reasonable suspicion of any illegal activity and for any amount of time, so long as they ultimately request and obtain permission to search the car.").

462. Professor Maclin, criticizing judicial treatment of such fishing expeditions, stated:

The typical 'You don't have any guns or drugs in you car?' inquiry, which is immediately followed by the 'You won't mind, then, if I search your car?' inquiry, are not based upon a reasonable belief that contraband is inside a vehicle. Instead, this routine is part of a carefully scripted practice designed to exploit the vulnerable status of a motorist enmeshed in a police seizure.

Maclin, *The Decline*, *supra* note 53, at 187.

car until the driver committed a traffic violation, as in *Brownlee*, and then use his show of authority to gain consent to search the car.<sup>463</sup> If the driver did not consent, the motorist suffered detainment anyway, while the officer waited for a canine unit to arrive.<sup>464</sup> Dog sniffs, because they did not require suspicion to justify, were a powerful and often-used tool of law enforcement.<sup>465</sup> Thus, no matter what the motorist did, the officer could observe the contents of the car and thereby pressure the motorist to agree to a search; motorists found themselves ensnared in a Catch-22 situation.

The recent Supreme Court of Illinois decisions effectively stop all of these coercive techniques. As the court stated in *Cox*, the officer “should have issued a traffic citation or warning ticket to defendant expeditiously.”<sup>466</sup> This statement seems the ultimate standard set by the court for law enforcement officials in recent decisions. The court permits requests for identification or engaging in dialogue reasonably related to the traffic stop, as long as such requests or questions do not improperly prolong the stop. However, once the officer has issued a citation or warning, any further questioning or investigation will likely require the support of reasonable and articulable suspicion.

In essence, all of the decisions comprise a thorough explication of *Terry*'s scope inquiry. In *Gonzalez*, the court expressly held that the *Terry* scope requirement restricted both the length and manner of the investigatory stop.<sup>467</sup> The court, in that case, also developed a multi-part test that it has applied to virtually all aspects of a stop.<sup>468</sup> Under the final prong of the test, a court considers whether the officer's conduct improperly prolongs or fundamentally alters the nature of the stop.<sup>469</sup> The first part of this prong mirrors the court's previous decisions in *Brownlee* and *Gherna*, where the court found the *continued* detention of the defendants exceeded the proper scope of a *Terry* stop.<sup>470</sup> Thus, the Supreme Court of Illinois' examination of prolonged detentions preceded the development of the *Gonzalez* test. The court illustrated the

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463. *Brownlee*, 713 N.E.2d at 559 (noting that one officer stated he would stop the defendant's vehicle if the driver committed a traffic violation).

464. See *Vazquez*, *supra* note 99, at 231 (describing officers' ability to detain unconsenting motorists).

465. *Harris*, *supra* note 66, at 572 n.116.

466. *People v. Cox*, 782 N.E.2d 275, 280 (Ill. 2002), *cert. denied sub nom. Illinois v. Cox*, 539 U.S. 937 (2003).

467. *People v. Gonzalez*, 789 N.E.2d 260, 269 (Ill. 2003).

468. *Id.* at 270.

469. *Id.*

470. *People v. Gherna*, 784 N.E.2d 799, 811 (Ill. 2003); *People v. Brownlee*, 713 N.E.2d 556, 566 (Ill. 1999).

second part of the third prong in *Harris*, in which it ruled that the officer's warrant check of the defendant changed the fundamental nature of the stop into an investigation of prior wrongdoing.<sup>471</sup>

The United States Supreme Court's decision in *Caballes* did not overturn these landmark Illinois cases. As the Court explained, dog sniffs are *sui generis* and, therefore, their use is not prohibited by the Fourth Amendment.<sup>472</sup> Moreover, *Caballes* did not affect the Illinois courts' propensity to closely examine the circumstances of traffic stops and apply narrow limits to the scope of *Terry* stops. The *Gonzalez* test remains intact, meaning an officer may not unreasonably prolong or otherwise alter the fundamental nature of a traffic stop without reasonable suspicion.<sup>473</sup> In fact, as one recent appellate court noted, this scrutiny of traffic stops extends into credibility determinations:

The open use of traffic laws as a sheer pretense in order to fulfill an ambition to detain someone, and in order to conduct a warrantless search during that detention, is a factor to be weighed when testimony diverges over how events unfolded and led to an inevitable search of the motor vehicle. In weighing factual disputes over what happens after an obvious pretextual traffic stop, trial judges should be mindful of the officers' true purpose in making the stop, when they consider inconsistencies over the length of the detention and disputes over the events that led to the ultimate search.<sup>474</sup>

In short, Illinois police officers who engage in broad investigations into criminal activity during routine traffic stops now do so at the serious risk that their evidence will be suppressed as the result of a Fourth Amendment violation.

#### V. OTHER JURISDICTIONS' APPROACHES TO TRAFFIC STOP CASES

Illinois is not the only state seeking to determine the proper constitutional bounds of police conduct during traffic stops. A number of other states have relied on their state constitutions or a more expansive reading of the Fourth Amendment to reach decisions that protect motorists from intrusive investigative techniques. This Section will give examples of how other states have approached the same issues that Illinois courts have faced.

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471. *People v. Harris*, 802 N.E.2d 219, 228 (Ill. 2003), *vacated sub. nom. Illinois v. Harris*, 125 S. Ct. 1292 (2005).

472. *Caballes II*, 125 S. Ct. 834, 847 (2005).

473. *Gonzalez*, 789 N.E.2d at 269–70.

474. *People v. Lomas*, 812 N.E.2d 39, 44 (Ill. App. Ct. 5th Dist. 2004).

*A. New Federalism*

In response to the United States Supreme Court's narrowing of a number of constitutional rights, including the Fourth Amendment freedom from unreasonable searches and seizures, a number of state courts have begun to interpret their state constitutions in a way that offers greater protection of a citizen's rights.<sup>475</sup> Indeed, in the past thirty years, many state supreme courts have departed from the United States Supreme Court's analysis and developed a body of state constitutional law, leading to a legal development known as New Federalism.<sup>476</sup>

While the *Brownlee* line of cases are not specifically based on an interpretation of the Illinois Constitution, an undercurrent of New Federalism can be seen in these cases.<sup>477</sup> For instance, before issuing its decision in *Brownlee*, the Supreme Court of Illinois remanded the case to the appellate court with instructions to consider arguments based on the Illinois Constitution.<sup>478</sup> When the court issued its final opinion in

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475. BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 3 (1991). While the federal Constitution provides a "floor" for enforcement of constitutional rights, state courts are free to raise the "ceiling" of these rights through independent interpretations of their state constitutions. *Id.* at 4.

476. G. Alan Tarr, *The Future of State Supreme Courts as an Institution in the Law: The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1098 (1997). In fact, many state courts examine constitutional questions under their state constitutions before looking to the federal Constitution for answers. *Id.*; see also Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984) ("My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.").

Perhaps the leading advocate of New Federalism was United States Supreme Court Justice William J. Brennan, who argued that "the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986). On the other hand, critics of New Federalism have argued that the emerging practice is result-oriented and amounts to improper state court activism. See Michael D. Weiss & Mark W. Bennett, *New Federalism and State Court Activism*, 24 MEMPHIS ST. U. L. REV. 229, 259 (1994) (describing New Federalism's critics' view that state courts have acted improperly by relying on a result-oriented theory). In addition, one scholar has noted the fragmentation between legal systems resulting from New Federalism and the potentially adverse consequences in the area of criminal procedure. Ronald K. L. Collins, *The Once "New Judicial Federalism" and its Critics*, 64 WASH. L. REV. 5, 6 (1989).

477. For an argument that Illinois courts should re-examine their reluctance to rely on the Illinois Constitution to strengthen Fourth Amendment protections, see Professor O'Neill's article in this issue. Timothy P. O'Neill, 36 LOY. U. CHI. L.J. 895 (2005).

478. *People v. Brownlee*, 678 N.E.2d 1048, 1048-49 (Ill. 1997). On remand, the Appellate Court of Illinois applied the lockstep doctrine and decided the case under *Robinette*. *People v. Brownlee*, 687 N.E.2d 1174, 1178 (Ill. App. Ct. 4th Dist. 1997) (discussing *Ohio v. Robinette*,

*Brownlee*, Justice James Heiple's concurring opinion urged the court to explicitly base its holding upon the Illinois Constitution to protect it from federal review.<sup>479</sup> In addition, the court's independent reasoning and decreasing reliance on United States Supreme Court case law are facts that indicate New Federalist principles.<sup>480</sup> Furthermore, in *Cox*, the Appellate Court of Illinois had expressly ruled that its decision was required by article I, section 6 of the Illinois Constitution.<sup>481</sup> When the Supreme Court of Illinois affirmed the appellate court's judgment, it was unusually vague on the constitutional basis of its decision. Finally, and perhaps most importantly, the complete absence of any discussion of the lockstep doctrine in these cases may suggest that the justices are purposely avoiding the issue to prevent overruling it or distinguishing the current cases from earlier ones.<sup>482</sup>

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519 U.S. 33 (1996)).

Although the appellate court ruled against *Brownlee*, its opinion left open the possibility that the Supreme Court of Illinois could make the opposite ruling based on a policy decision. In fact, the court's language practically invited the Supreme Court to do so:

In view of the ever-increasing instances of claimed consents to search given by drivers in circumstances like those present here, we understand why the trial court, the Supreme Court of Ohio, and other courts have thought that requiring an officer to tell the detained driver that he is free to go before the officer may ask consent to search his vehicle might be appropriate to further important fourth amendment protections. *We repeat, however, that the policy judgment underlying the imposition of such a requirement should be made either by the Illinois legislature or our supreme court.*

*Id.* at 1179 (emphasis added).

479. *People v. Brownlee*, 713 N.E.2d 556, 566–67 (Ill. 1999) (Heiple, J., concurring). Under *Michigan v. Long*, the United States Supreme Court placed the burden on state courts to clearly indicate when a decision is based on independent state constitutional grounds. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

480. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97 (2000).

481. *People v. Cox*, 739 N.E.2d 1066, 1073 (Ill. App. Ct. 5th Dist. 2000).

482. See *People v. Harris*, 802 N.E.2d 219, 223–36 (Ill. 2002) (failing to refer to the lockstep doctrine in invalidating a warrant check on a defendant-passenger), *vacated sub. nom.* *Illinois v. Harris*, 125 S. Ct. 1292 (2005); *People v. Cox*, 782 N.E.2d 275, 279 (Ill. 2002) (including only a passing reference to the lockstep doctrine in decision holding the dog-sniff test impermissible), *cert. denied sub nom.* *Illinois v. Cox*, 539 U.S. 937 (2003). The opinions of Justice Freeman in *Harris* and *Cox*, for instance, are more sweeping and demonstrate a lesser regard for federal precedent. See *Harris*, 802 N.E.2d at 223–36 (relying on the Supreme Court of Illinois' *Gonzalez* test to invalidate a warrant check); *Cox*, 782 N.E.2d at 280–81 (ignoring, for example, the United States Supreme Court's decision in *United States v. Place*). On the other hand, the opinion of Justice Fitzgerald in *Gonzalez* as well as Chief Justice McMorrow's opinion in *Gherna* are somewhat less sweeping and give relatively greater consideration to United States Supreme Court authority. See *People v. Gonzalez*, 789 N.E.2d 260, 268–69 (Ill. 2003) (citing to a number of federal cases in upholding officer's request for identification from passenger); *People v. Gherna*, 784 N.E.2d 799, 805–12 (Ill. 2002) (acknowledging the Supreme Court's autonomy when deciding that the officers were justified in conducting an investigatory stop of the defendant). Thus, Justice Freeman and Chief Justice McMorrow may represent opposing sides in a New Federalism debate among the usual four-member court majority. Compare *Harris*, 802 N.E.2d at

Unlike the vague approach taken by the Supreme Court of Illinois in *Brownlee* and its progeny, some states have restricted police authority during traffic stops and have clearly expressed their reliance, in similar cases, on state constitutional grounds.<sup>483</sup> It is widely understood that reliance on state constitutional grounds provides broader protection for individual citizens against the grand, and often intrusive, powers of law enforcement.<sup>484</sup> For example, in *State v. Carty*,<sup>485</sup> the Supreme Court of New Jersey relied solely on the New Jersey Constitution<sup>486</sup> in ruling that law enforcement officers are required to have a reasonable suspicion that criminal activity is afoot before asking for consent to search an individual's automobile after a valid traffic stop.<sup>487</sup> In affirming the appellate court's grant of the defendant's motion to suppress evidence, the New Jersey Supreme Court found that the reasonable suspicion standard, hailing from its state constitution, serves "the prophylactic purpose of preventing the police from turning routine traffic stops into a fishing expedition for criminal activity unrelated to the lawful stop."<sup>488</sup>

Similarly, the Colorado Supreme Court, in *People v. Haley*,<sup>489</sup> announced that article II, section 7 of the Colorado Constitution<sup>490</sup>

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223–36 (looking to end heavy reliance on Illinois state law), and *Cox*, 782 N.E.2d at 280–81 (ignoring great deference to Illinois decisions as opposed to the United States Supreme Court decision), with *Gherna*, 784 N.E.2d at 805–12 (citing the United States Supreme Court precedent in the court's reasoning).

483. See Tarr, *supra* note 476, at 1098 (discussing the manner in which state supreme courts began to rely on their state constitution).

484. LATZER, *supra* note 475, at 4. See *State v. Rankin*, 92 P.3d 202, 204 (Wash. 2004) ("It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution" (quoting *State v. Jones*, 45 P.3d 1062 (Wash. 2002))).

485. *State v. Carty*, 790 A.2d 903 (N.J. 2002).

486. Specifically, the court looked to article 1, paragraph 7 of the New Jersey Constitution, which provides for protection against unreasonable searches and seizures and in cases of consent searches has been interpreted to mean that "any consent given by an individual to a police officer to conduct a warrantless search must be given knowingly and voluntarily." *Carty*, 790 A.2d at 907 (citing *State v. Johnson*, 346 A.2d 66 (N.J. 1975) (rejecting the federal standard enunciated by the United States Supreme Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973))). See N.J. CONST. art. 1, par. 7 (discussing searches and seizures in a provision similar to the Fourth Amendment of the United States Constitution).

487. *Carty*, 790 A.2d at 905. The driver was stopped for speeding in a rental car, for which the driver could not produce proper identification and registration. *Id.* at 905. The failure to produce identification combined with what appeared to be nervous behavior by both the driver and defendant-passenger aroused the officer's suspicions, ultimately leading to the driver signing a consent form to search the vehicle, which revealed nothing, and pat-down searches of both revealing cocaine on defendant's person. *Id.* at 905–06.

488. *Id.* at 905.

489. *People v. Haley*, 41 P.3d 666 (Colo. 2001).

490. The Colorado Constitution provides that "[t]he people shall be secure in the persons, papers, homes and effects, from unreasonable searches and seizures." COLO. CONST. art. II, § 7.

provided much broader protection for the rights of its motorists than the constitution.<sup>491</sup> In this case, three defendants sought protection from law enforcement officers who pulled the driver over for following the car in front of it too closely.<sup>492</sup> After reviewing the appropriate license and registration, the officer did not write a citation or ticket for the traffic violation and told them they were free to go.<sup>493</sup> Nevertheless, the officer summoned narcotics-trained canines to sniff around the car ultimately alerting them to contraband.<sup>494</sup> In rejecting the State's argument that this case falls under the United States Supreme Court's ruling in *United States v. Place*,<sup>495</sup> the court explicitly distinguished airport and bus<sup>496</sup> searches of luggage from automobile searches. Colorado's highest court concluded that "a dog sniff search of a person's automobile in connection with a traffic stop that is prolonged beyond its purpose to a drug investigation intrudes upon a reasonable expectation of privacy requiring reasonable suspicion of criminal activity."<sup>497</sup>

In June 2004, the Washington Supreme Court, in *State v. Rankin*,<sup>498</sup> garnered sweeping support from its state constitution in two consolidated cases where an officer stopped a car for a minor traffic violation.<sup>499</sup> In *Rankin*, the officer in each case requested identification

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491. *Haley*, 41 P.3d at 671. The court cites to a number of Colorado Supreme Court cases that similarly found the state constitution's protections are broader than the federal Constitution's protections under the Fourth Amendment. *Id.* *But see* *People v. Rodriguez*, 945 P.2d 1351, 1358–59 (Colo. 1997) (en banc) ("Our law concerning searches and seizures is extensively developed. With respect to the issues raised by this case we view the Colorado and United States Constitutions as co-extensive and therefore follow federal precedent as well as our own.").

492. *Haley*, 41 P.3d at 669.

493. *Id.* at 669–70.

494. *Id.*

495. *United States v. Place*, 462 U.S. 696 (1983) (holding a dog-sniff of luggage while defendant was detained at an airport is not a search subjected to traditional Fourth Amendment limitations because an individual does not have a heightened expectation of privacy in the odors emanating from his luggage).

496. The court referred to *People v. Ortega*, 34 P.3d 986 (Colo. 2001), a case decided on Fourth Amendment grounds, where a canine-sniff was employed on a Greyhound bus traveling across state lines. *See Haley*, 41 P.3d at 671–72 (discussing searches at airports and buses and addressing Fourth Amendment issues in these instances).

497. *Haley*, 41 P.3d at 672.

498. *State v. Rankin*, 92 P.3d 202 (Wash. 2004); *see also* *State v. McKinnon-Andrews*, 846 A.2d 1198, 1202 (N.H. 2004) (looking to the New Hampshire Constitution and *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), in finding reasonable suspicion where the motorist immediately exited his car upon being stopped by police, because the motorist's conduct implied that he did not want the officer to see the inside of his car).

499. James Rankin was the passenger in one of the consolidated cases, in which the driver was stopped for "roll[ing] over a marked stop line." *Rankin*, 92 P.3d at 203. Kevin Staab was a passenger in the second case where the driver was pulled over for failure to have a license plate

of the passenger<sup>500</sup> without any reason to believe they were engaging in criminal behavior.<sup>501</sup> The court ruled that article I, section 7<sup>502</sup> of the Washington Constitution prohibits such police conduct because it invaded the “private affairs” of a vehicle’s *passengers*.<sup>503</sup> Indeed, the court concluded that the officers exceeded their authority in “seizing” passenger identification “for the sole purpose of conducting a criminal investigation” without a reasonable suspicion of ongoing criminality.<sup>504</sup> Moreover, the court made it starkly clear that although law enforcement officers may have a conversation with passengers, they may not, without violating the state constitution, turn the encounter into an investigation without a reason for such an invasion of their privacy.<sup>505</sup>

As these cases illustrate, some states deem an independent analysis of state constitutional issues necessary to strike a balance between individual rights and police authority. Federalism principles permit a state court to rely on its state constitutional protections afforded their citizens in order to insulate their citizens’ rights from potentially abusive state law enforcement authorities. This is particularly effective in the context of traffic stops where the United States Supreme Court has been reticent to seriously consider fundamental freedoms. More importantly, basing decisions on state constitutional grounds may help protect them from federal review.

#### *B. An Examination of Aggressive Police Conduct Nationwide*

There are a considerable number of jurisdictions, unlike Illinois, that do not seem to insist on a reasonable suspicion in order to engage in police action not directly related to the traffic stop, including the use of canines, conducting warrant checks, and otherwise prolonging the vehicle occupants’ detention.<sup>506</sup> On the other hand, there are a

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light. *Id.* at 204.

500. *Id.* at 203–04.

501. *Id.* at 207.

502. The Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST. art. 1, § 7.

503. *Rankin*, 92 P.3d at 207.

504. *Id.*

505. *Id.*

506. *See, e.g.*, *United States v. Brigham*, 382 F.3d 500 (5th Cir. 2004) (finding reasonable suspicion unnecessary for officer’s questions about travel plans and request to run computer check on license and registration because it was within the scope of lawful traffic stop for tailgating); *United States v. Gregory*, 302 F.3d 805 (8th Cir. 2003) (holding that dog sniff of car’s exterior was not a search and that reasonable suspicion was not required to conduct a brief scan for drugs at end of traffic stop for following car ahead too closely); *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (determining that officer’s questioning of motorist about drugs during valid traffic stop for cracked front windshield was not a seizure and did not require reasonable

significant number of jurisdictions that, in one way or another, agree with the Illinois approach that reasonable suspicion is required before police may prolong or alter the nature of the stop. In many of these cases, the individual facts in each case play the most important role in ascertaining reasonable suspicion and, as such, the legality of police conduct.<sup>507</sup> The following discussion focuses on a variety of jurisdictions that appear sympathetic to the necessity for reasonable suspicion when a police inquiry exceeds the initial basis for a traffic stop.<sup>508</sup>

### 1. Consensual Encounters, Searches, and Continued Detentions

Many courts have considered a number of cases requiring evaluation of the validity of a routine traffic stop turned into an investigatory stop for criminality.<sup>509</sup> Drug interdiction techniques are commonplace and have been employed in response to the government's "war on drugs" since the early 1980s.<sup>510</sup> *Brownlee* is illustrative of the typical dialogue that can occur between an officer and a motorist during a routine traffic stop turned consensual search.<sup>511</sup> The consent to search approach taken by law enforcement to justify searches of detained motorists for past criminality erases the critical protections afforded by the Fourth

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suspicion); *State v. De La Rosa*, 657 N.W.2d 683 (S.D. 2003) (pronouncing that the simultaneous presence of drug dog during detention of motorist for failing to use left turn signal did not require reasonable suspicion of criminality); *State v. England*, 19 S.W.3d 762 (Tenn. 2000) (ruling "canine sweep around the perimeter of a legally detained vehicle does not constitute a search and thus need not be supported by probable cause or reasonable suspicion" as long as stop is not prolonged by unreasonable delay).

507. For instance, in *Brownlee*, although the facts appeared to mirror those in *Robinette*, the Supreme Court of Illinois was able to carve out a factual distinction that supported greater protections for the defendant-passenger because there was no reasonable suspicion to justify his continued detention. See also *infra* Part III.A.1 (exploring the *Brownlee* decision).

508. In fact, some suggest that individual rights have taken a back seat to unfettered police authority on the balancing scale. One justice sitting on the Supreme Court of South Dakota noted in his dissent in *State v. Kenyon*, 651 N.W.2d 269, 277–78 (2002) (Amundson, J., dissenting): "It appears as though citizens no longer possess any constitutional rights the moment they seat themselves in their vehicles and start down the public roads and highways. Today, Fourth Amendment jurisprudence simply encompasses too many buzzwords, which have swallowed the protections created by our forefathers." *Id.*

509. See Whorf, *supra* note 29, at 41–52 (discussing states that have placed restrictions on police authority to broaden the scope of a routine traffic stop into an investigation for drugs).

510. See *id.* at 5 (asserting that police officers do not actually stop motorists for traffic violations, but to further the war on drugs and, consequently, detain a vast majority of drivers that are innocent beyond the traffic violation).

511. See *People v. Brownlee*, 713 N.E.2d 556, 559 (Ill. 1999) (detailing the officer's inquiry to search for more alcohol after failing to issue a citation before obtaining the defendant's consent); see also Whorf, *supra* note 29, at 2–3 (outlining the typical sequence of events during a traffic stop turned consensual search).

Amendment.<sup>512</sup> As previously discussed, consensual searches hinge on whether the defendant consented “freely and voluntarily.”<sup>513</sup> Therefore, the *Mendenhall* “free to leave” test, based on a totality of the circumstances test, is used to determine the volition of a motorist’s consent.<sup>514</sup>

In one case, *State v. Green*,<sup>515</sup> the Maryland Court of Appeals ruled that the defendant voluntarily consented to a search of his vehicle after a routine traffic stop for speeding.<sup>516</sup> After the officer issued a traffic ticket and returned the defendant’s license and registration—and thus, after the completion of the stop—the officer then told the defendant he was “free to go.”<sup>517</sup> However, the officer continued the questioning, asking the defendant whether he had guns or contraband in his car, to which the defendant replied, “No.”<sup>518</sup> The officer subsequently asked for consent to search the defendant’s person and car and the defendant replied, “Sure. Go ahead,” which consequently led the officer to discover cocaine and marijuana and to radio for a back-up officer out of concern for his safety.<sup>519</sup>

In deciding whether the officer’s conduct was proper, the court looked to its decision in *Ferris v. State*,<sup>520</sup> which set out a laundry list of factors that would aid in the determination of whether the police-citizen encounter was consensual.<sup>521</sup> The court applied the factors to the

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512. See *supra* Part II.A.3 (discussing the United States Supreme Court case law concerning searches and concluding that a police officer does not have to inform a citizen that he has the right to refuse consent and can freely leave).

513. See *supra* Part II.A.3 (outlining the United States Supreme Court’s treatment of consensual searches, such as the holding in *Schneckloth v. Bustamonte* that consent must merely be given freely and voluntarily).

514. See *supra* notes 47–52 and accompanying text (presenting the facts of the *Mendenhall* case, outlining the examples the Justice Stewart gave in determining if a reasonable person would believe that he was free to leave, and concluding that the proper question is if a person feels free to decline an officer’s requests).

515. *State v. Green*, 826 A.2d 486 (Md. 2003).

516. *Id.* at 501.

517. *Id.*

518. *Id.*

519. *Id.* at 489–90. The officer testified that he was concerned for his safety “especially because of the ‘area,’ ‘it was extremely dark out,’” and the defendant was larger in size than he was “with a ‘history of violence with hand guns.’” *Id.* at 490.

520. *Ferris v. State*, 735 A.2d 491 (Md. 1999).

521. *Id.* at 496. The factors listed by the court include:

[T]he time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person’s documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that

circumstances in the case and interpreted the officer's behavior while questioning the defendant as non-threatening because he "asked" rather than "ordered," and while awaiting a second officer as back-up the officer and the defendant engaged in "casual conversation" where the officer explained the reason for the delay.<sup>522</sup> Based on these factors, the court concluded that a "reasonable person in [the defendant's] position would have felt free to terminate the encounter and decline [the officer's] request to search his car."<sup>523</sup> As a result, the defendant's encounter with the officer was not a seizure subject to the Fourth Amendment and the defendant voluntarily consented based on the totality of circumstances.<sup>524</sup>

In *State v. McKinnon-Andrews*,<sup>525</sup> decided by the New Hampshire Supreme Court, the defendant was pulled over for failing to make a stop at a stop sign.<sup>526</sup> The defendant pulled into a restricted area near a hospital parking lot and exited his car to approach the officer, who, suspicious about such behavior, told the defendant to return to his car.<sup>527</sup> After the defendant produced his New Hampshire driver's license, the officer ran a check and discovered that the defendant's car was registered in Rhode Island; the defendant explained he had borrowed the car from a friend and that he was headed to the New Hampshire Department of Corrections to pay restitution.<sup>528</sup> The officer noted that the defendant had taken an uncommon route, and then asked the defendant if there was anything in the car he should know about, to which the defendant replied, "What, like drugs? No, you want to check?"<sup>529</sup> The search produced a cigar box containing a scale and measuring spoon covered in cocaine powder.<sup>530</sup>

The New Hampshire Supreme Court adopted the test used in *Gonzalez* by the Supreme Court of Illinois and found that the officer's questioning regarding the contents of the defendant's car was not related to the initial purpose for the stop under the first *Gonzalez*

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he or she was not free to leave.

*Id.* at 502.

522. *Green*, 826 A.2d at 499.

523. *Id.* at 501.

524. *Id.* The court later added that defendant's fifteen to twenty minute detention between his consent and the search of his car did not invalidate defendant's consent. *Id.* at 503.

525. *State v. McKinnon-Andrews*, 846 A.2d 1198 (N.H. 2004).

526. *Id.* at 1200.

527. *Id.*

528. *Id.*

529. *Id.*

530. *Id.*

inquiry.<sup>531</sup> However, applying the second prong of the *Gonzalez* test, the court found the officer's questioning supported by a reasonable suspicion, specifically, the officer inferred that the defendant initially got out of his car because the "[defendant] was concerned about the officer viewing the car's contents."<sup>532</sup> The court ultimately held that the officer's conduct did not violate the New Hampshire or Federal Constitution.<sup>533</sup>

Some courts view continued detentions in the context of routine traffic stops appropriate when the initial basis for the stop is complete and further inquiry or investigation is supported by a reasonable suspicion of criminality.<sup>534</sup> Also, when a motorist is pulled over for an ordinary traffic violation, courts generally hold that the defendant's refusal to consent to a search cannot provide the basis for reasonable suspicion.<sup>535</sup>

For example, the South Carolina Court of Appeals, in *State v. Williams*,<sup>536</sup> held that an officer lacked reasonable articulable suspicion of criminality when he detained a vehicle occupant beyond the purpose of the traffic stop, a possible insurance violation.<sup>537</sup> The court first determined that the driver and the defendant-passenger were not free to leave when an officer told them, "[B]efore you leave, let me ask you a few questions."<sup>538</sup> In addition, the court considered the coercive nature

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531. *Id.* at 1203.

532. *Id.* at 1203–05.

533. *Id.* at 1204–05. The court noted that reasonable suspicion could be based on behavior that is either "guilty [or] innocent" on its face. *Id.*

534. *See, e.g.*, *United States v. Rodriguez-Diaz*, 161 F. Supp. 2d 627 (D. Md. 2001) (holding that the officer had authority to issue the seat belt violation that prompted the stop, but could not ignore that violation simply to conduct an investigation of unlawful possession without individualized support); *State v. Williams*, 571 S.E.2d 703 (S.C. Ct. App. 2002) (affirming trial court's decision to grant motion to suppress because the officer's actions after the completion of a traffic stop violated the defendant's Fourth Amendment rights when the officer did not have a reasonable, articulable suspicion to support continued detention).

535. *See, e.g.*, *United States v. Boyce*, 351 F.3d 1102 (11th Cir. 2003) (holding that the officer's decision to detain the defendant and call a drug dog was impermissibly based on the defendant's refusal to give the officer consent to search his car); *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997) (holding that the defendant's refusal to consent to search his car could not be considered as a suspicion when it was the only event that occurred after the traffic stop).

536. *State v. Williams*, 571 S.E.2d 703 (S.C. 2002).

537. *Id.* at 710. In *Williams*, the driver provided the officer with his driver's license, which revealed a previously suspended license for drug possession, and he got out of car as requested by officer. *Id.* at 705–06. While the driver was being questioned, the officer radioed for a K-9 patrol unit. *Id.* at 706. Upon the unit's arrival, a second officer asked the defendant-passenger questions, receiving answers that were inconsistent with the driver's previous answers to the same questions. *Id.* at 706. The officers then obtained oral consent to search the contents of defendant-passenger's suitcase located in the trunk of the car, which led to the discovery of marijuana. *Id.*

538. *Id.* at 709.

of the encounter,<sup>539</sup> to support the fact that the defendant was “sufficiently intimidate[ed]” by the circumstances to demonstrate his freedom to leave was restricted.<sup>540</sup> Concluding that the encounter constituted a seizure, the court found the officer’s discovery that the defendant’s driver’s license had previously been suspended for a drug-related offense “was in no way probative of a present crime, and thus could not serve as the basis for a reasonable suspicion.”<sup>541</sup>

In *State v. Kenyon*,<sup>542</sup> however, the Supreme Court of South Dakota held that the continued detention of the defendant until the arrival of narcotics-trained canines after a routine traffic stop for a broken rear brake light arose from a reasonable suspicion.<sup>543</sup> In that case, the court noted that the defendant appeared visibly nervous, was sweating and slurring his speech, and appeared to be under the influence of a stimulant.<sup>544</sup> Also, the court rejected the defendant’s contention that the detention had been prolonged because it lasted twenty-five minutes.<sup>545</sup>

In Massachusetts, determining the permissible scope of a routine traffic stop turns on proportionality.<sup>546</sup> This means that the “level of intrusiveness of the police conduct” must correlate proportionally to the

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539. The court considered “the presence of two uniformed patrol officers in marked, flashing vehicles, one of them part of a K-9 unit,” that the detention of the driver and defendant-passenger lasted between twenty-five and forty minutes, the officer’s testimony that such encounters typically last between nine and eleven minutes, the forced questioning of each separately while the drug dog stood next to the driver, “and the seemingly innocuous but immediate transition from the valid traffic stop such that [the driver] and [defendant] may not have realized the initial seizure had ended.” *Id.*

540. *Id.*

541. *Id.* at 710.

542. *State v. Kenyon*, 651 N.W.2d 269 (S.D. 2002). *See also* *United States v. Lebrun*, 261 F.3d 731, 732–34 (8th Cir. 2001) (holding continued detention while awaiting narcotics-trained dog sniff of rental car stopped for “routine traffic stop” was lawful because driver and passengers all appeared “exceptionally nervous” and increasingly so as officer’s questioning of all occupants about travel plans continued, they all gave “vague and confused answers” to the questions, which gave rise to a reasonable suspicion that they were transporting narcotics).

543. *Kenyon*, 651 N.W.2d at 274–75.

544. *Id.* at 274.

545. *Id.* at 275; *cf* *United States v. Rodriguez-Diaz*, 161 F. Supp. 2d 627, 633–34 (D. Md. 2001) (determining that an officer violated the Fourth Amendment when he questioned defendant about the contents of his car because the questioning exceeded the scope of the initial basis for the stop, namely, that the front passenger was not wearing his seatbelt; officer had no individualized suspicion based on nervousness, and conflicting stories as to who consented to a search of the vehicle).

546. *See generally* *Commonwealth v. Sinforoso*, 749 N.E.2d 128, 133 (Mass. 2001) (finding reasonable suspicion that narcotics or other contraband were located in a “hidden compartment” in the car where an officer had observed a switch, which the officer believed commonly operated secret compartments for hiding drugs in cars).

officer's reasonable suspicion.<sup>547</sup> For instance, in *Commonwealth v. Sinforoso*,<sup>548</sup> a decision by the Supreme Judicial Court of Massachusetts, an officer stopped a motorist for speeding through a red light.<sup>549</sup> In that case, the officer had observed weapons on the floor of the vehicle, noticed a "switch" that led to a hidden compartment concealing narcotics and found the driver's and passenger's inconsistent responses to the same questions suspicious.<sup>550</sup> The court found that the officer had acted in a manner "proportional to the escalating suspicion that emerged over the course of the stop."<sup>551</sup>

## 2. Warrant Checks

Law enforcement officers routinely conduct warrant checks in conjunction with traffic stops.<sup>552</sup> Although the Supreme Court of Illinois in *Harris* extended the *Gonzalez* three-step inquiry to limit this police practice of conducting warrant checks during ordinary traffic stops, not all courts agree with the outcome in Illinois.<sup>553</sup> For example, in *State v. Miller*,<sup>554</sup> a case decided by the Supreme Court of Louisiana, the driver of a rental car was stopped for unlawfully crossing over the right-hand fog line of the road, whereupon the officer immediately requested the driver's license and rental agreement.<sup>555</sup> The officer's computer check revealed that the name of the primary driver on the rental agreement was the driver's "cousin," whom the officer learned had been arrested for possessing a large amount of marijuana.<sup>556</sup> The court ruled the computer check permissible because the officer's conduct stemmed from reasonable suspicion.<sup>557</sup> Also, the officer's questioning did not prolong the detention because it was reasonably

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547. *Id.* at 132 (quoting *Commonwealth v. Williams*, 661 N.E.2d 617, 621 (Mass. 1996)).

548. *Sinforoso*, 749 N.E.2d 128.

549. *Id.* at 131.

550. *Id.* at 131–33.

551. *Id.* at 132–33.

552. See LAFAVE, *supra* note 14 § 9.2(f) n.153 (citing a substantial number of cases when a law enforcement officer kept a person pulled over to determine if he was wanted by the police).

553. See *id.* (citing various cases that take approaches different than the Supreme Court of Illinois).

554. *State v. Miller*, 798 So. 2d 947 (La. 2001) (per curiam).

555. *Id.* at 948.

556. *Id.* at 949. The cousin had been arrested for possession of 50 to 2000 pounds of marijuana. *Id.*

557. *Id.* at 948, 950. Although the officer did not notice any criminal activity afoot, the driver appeared extremely nervous, was trembling, and told the officer that she had been driving from Atlanta to Houston for business while popping caffeine pills to stay awake, which amounted to reasonable suspicion to detain for computer check. *Id.* Consequently, backup and a drug dog were called after she refused to allow the officer to search her car. *Id.* at 949.

related to the officer's suspicions and "although not brief, [it] did not transform the encounter into a *de facto* arrest."<sup>558</sup>

In *United States v. Simmons*,<sup>559</sup> the United States Court of Appeals for the Eleventh Circuit addressed the validity of a warrant check. The court considered the propriety of the length of a police officer's continued detention of a driver after a stop for running a stop sign in a car with tinted windows.<sup>560</sup> After obtaining his license and registration, the officer called for a drug dog when the defendant refused to consent to a search of his car; the subsequent dog sniff alerted the police to cocaine and guns.<sup>561</sup> The officer then ran a computer check for outstanding warrants.<sup>562</sup> The check revealed that although the defendant had a valid license and registration, a man with the same first and last name and physical description of the defendant, but different birth date and geographic location of residence, was wanted for writing a bad check.<sup>563</sup> The court reversed the district court's ruling that the detention was unconstitutionally prolonged "*beyond* the time it normally takes to write a traffic citation."<sup>564</sup> Instead, the Eleventh Circuit concluded that the seventeen to twenty-six minute detention following the stop did not violate the Fourth Amendment because the discrepancies between the defendant and the description in the arrest warrant sufficiently raised the level of reasonable suspicion.<sup>565</sup>

Courts frequently find valid warrant checks where the officer conducting the traffic stop has reason to believe the vehicle might be stolen.<sup>566</sup> However, in an analogous federal case, the court reproved an

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558. *Id.* at 950–51. The court considered the fact that while awaiting the arrival of a drug dog, the "physical intrusiveness of respondent's detention did not intensify as the duration of the stop expanded to accommodate the trooper's growing suspicions of criminal activity." *Id.* at 950.

559. *United States v. Simmons*, 172 F.3d 775 (11th Cir. 1999).

560. *Id.* at 776.

561. *Id.* at 776–77.

562. *Id.* at 777. The officers repeatedly called the dispatcher to send a canine unit because they had initially been informed that canines were not available until a certain time of day. *Id.* at 776–77.

563. *Id.* at 777.

564. *Id.* at 777, 780. The district court considered the results of the warrant check "ambiguous information" that did not support reasonable suspicion. *Id.* at 777–78.

565. *Id.* at 778–80. The discrepancies were not "fatal" to the "articulable suspicion" that the warrant might be for the defendant. *Id.* at 779.

566. *See, e.g., United States v. Brigham*, 382 F.3d 500, 508 (5th Cir. 2004) (determining check of license and registration for outstanding warrants was appropriate because officer had reasonable suspicion to believe car could have been stolen when after stopping defendant-driver of rental car for tailgating, lease documents revealed name of a fifty-year-old female as lessee and none of the vehicle occupants resembled a 50-year-old woman); *State v. Reynolds*, 890 P.2d 1315, 1320 (N.M. 1995) (holding warrant check of pickup truck driver stopped for individuals dangerously hanging their feet over the tailgate too close to the road, was proper where the

officer for conducting an unwarranted *criminal history check*.<sup>567</sup> In 2001, the United States Court of Appeals for the Fifth Circuit ruled that an officer's criminal history check while detaining a motorist after a stop for a *possibly* expired vehicle registration sticker and tinted windows constituted an unreasonable seizure.<sup>568</sup> Acknowledging the valid registration sticker, the officer told the defendant that he still had to check the legality of the level of tinting on the windows.<sup>569</sup> The officer then ran a criminal history check through his computer while determining that the window tint complied with relevant law.<sup>570</sup> The results of the computer check revealed that the defendant had a history of prior felony and misdemeanor convictions.<sup>571</sup>

The district court denied the defendant's motion to suppress because it found that law enforcement officers may detain a motorist for five to fifteen minutes and may ask questions unrelated to the initial purpose of the stop, despite the prohibition of unrelated questioning under *Terry*.<sup>572</sup> Under *Royer*, the Fifth Circuit found that once the officer's suspicions had been "verified or dispelled, the detention must end," or else the officer must have a reasonable suspicion to press on.<sup>573</sup> Indeed, the court concluded that the officer exceeded the scope of the stop when he conducted the criminal history check *after* determining the validity of the registration sticker but *before* checking the legality of the tinted windows because he had no reasonable suspicion to conduct the history

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defendant failed to produce any identifying documentation for the vehicle and the check revealed the truck had been stolen).

567. See *United States v. Valdez*, 267 F.3d 395, 398 (5th Cir. 2001) (finding no evidence to support the police officer's claim of reasonable suspicion that would permit a criminal history check and further detention). But see *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1996) (holding criminal history check proper but recognizing that such a check often "take[s] longer to process than the usual license and warrant requests"); *United States v. McRae*, 81 F.3d 1528, 1536 (10th Cir. 1996) (finding criminal history check reasonable police conduct because it occurred at the same time as the computer check of defendant's license and registration).

568. *Valdez*, 267 F.3d at 398.

569. *Id.* at 396.

570. *Id.* At this point, while still awaiting the results of the criminal history check, the officer asked defendant if he had any weapons, to which defendant replied he had a loaded gun in the passenger seat and a rifle in the trunk. *Id.*

571. *Id.* at 396-97.

572. *Id.* at 397. The district court cited *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), which "'guaranteed' officers a five to fifteen minute window" for traffic stop detentions. *Id.* In evaluating the propriety of the police conduct here, the Fifth Circuit also looked to *Terry* for guidance, applying *Terry's* two-pronged scope inquiry. *Id.* at 397-98. *Terry* asks: (1) whether the officer's action was justified at its inception; and (2) whether the search or seizure was reasonably related in scope to the circumstances that justified the stop in the first place. *Id.* at 398 (citing *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968))

573. *Id.* (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

check.<sup>574</sup>

### 3. Questioning Passengers

Vehicle passengers enjoy a greater expectation of privacy than a driver in the case of ordinary traffic infractions. In *Commonwealth v. Torres*,<sup>575</sup> decided by the Supreme Judicial Court of Massachusetts, an officer discovered several plastic “baggies” of cocaine after searching a vehicle stopped for speeding.<sup>576</sup> After questioning the driver, the officer looked to the defendant-passenger, who at that point stood at the rear of the automobile, and hand-gestured a request for his wallet, which the defendant produced.<sup>577</sup> Inside the wallet, along with the defendant’s valid driver’s license, the officer noticed what appeared to be drug transactions noted on slips of paper.<sup>578</sup> Based on these suspicions, the officer then directed his attention back to the driver, still sitting inside the car, and asked if there were drugs in the car, to which the driver replied, “No, there’s no drugs, search.”<sup>579</sup> In reviewing the search, the court acknowledged the well-settled law in Massachusetts that “a police inquiry in a routine traffic stop must end on the production of a valid license and registration” absent individualized suspicion of criminal wrongdoing.<sup>580</sup> Recognizing that the police inquiry in this case exceeded the initial purpose for the stop when the officer decided to question the defendant-passenger, the court concluded that the officer’s suspicions had been dispelled once he learned the identity of the defendant-passenger and validity of the driver’s license and registration.<sup>581</sup> Therefore, the officer did not have reasonable suspicion to question the defendant-passenger.<sup>582</sup>

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574. *Id.* See also *United States v. Dortch*, 199 F.3d 193 (5th Cir. 1999) (finding that, although the initial stop was legitimate, the officers went beyond the scope of the stop by detaining the motorist after the computer check was completed).

575. *Commonwealth v. Torres*, 674 N.E.2d 638 (Mass. 1997).

576. *Id.* at 639–40. When the officer approached the passenger side of the car and knocked on the window to get defendant-passenger’s attention, defendant immediately got out of the car. *Id.* at 640. The officer became suspicious and inquired why defendant was getting out of the car, to which defendant, with some hesitation, informed the officer he did not speak English. *Id.*

577. *Id.* Despite learning that the driver’s license and registration were valid, the officer’s suspicions were aroused when he discovered that the driver lived in a neighborhood known for drug activity, and was born in a Latin American source country for cocaine. *Id.*

578. *Id.* at 640–41.

579. *Id.* at 641. The officer also discovered, after a pat-down search of his person, that the driver possessed a beeper, which driver stated was a gift from a friend since he could not afford it due to being unemployed. *Id.*

580. *Id.* at 642.

581. *Id.* at 641–43.

582. *Id.*

In another case, *State v. Affsprung*,<sup>583</sup> a New Mexico Court of Appeals found the defendant-passenger's encounter with police during a routine traffic stop for a license plate light that did not function properly was not consensual.<sup>584</sup> The officer requested identification from the driver and the defendant-passenger, claiming that it was his customary practice to do so for safety purposes.<sup>585</sup> He then conducted a "wants and warrants check" on their identification, which led the officer to discover that the defendant had a warrant issued for his arrest.<sup>586</sup> In applying *Mendenhall's* "free to leave" test here, the court, much like the Supreme Court of Illinois in *Gonzalez, Bunch*, and *Brownlee*, did not distinguish between detentions of drivers and passengers during ordinary traffic stops.<sup>587</sup> The court rejected the State's contention that "a passenger, as opposed to a driver, is stopped merely by virtue of being in the vehicle and is therefore not detained in a manner that would invoke the Fourth Amendment."<sup>588</sup> The court observed that *Mendenhall* and *Delgado* dealt with a federal drug investigation at an airport and a "factory survey," respectively, and stressed that the encounter in this case "was the everyday, ordinary occurrence of a motorist stop for a traffic violation."<sup>589</sup> The court viewed the request for passenger identification as "part of the officer's ongoing investigatory detention."<sup>590</sup> According to the court, what affects the driver similarly affects the passenger because "a reasonable passenger would [not] feel free to leave the area [or to] refuse the officer's request for identification."<sup>591</sup> Thus, the officer's pre-trial testimony that the driver and the defendant-passenger could not freely leave implied that they had no choice but to consent to the officer's requests for identification.<sup>592</sup>

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583. *State v. Affsprung*, 87 P.3d 1088 (N.M. Ct. App. 2004).

584. *Id.* at 1090, 1094.

585. *Id.* At the motion to suppress hearing, the officer testified that safety was his primary concern in requesting defendant-passenger's identification along with the driver's identification "because '[y]ou have to identify who you're dealing with' . . . 'things can occur for any little reason.'" *Id.* at 1040. The officer also admitted that as he wrote the traffic citation "neither the driver nor defendant was free to leave." *Id.*

586. *Id.*

587. *See id.* at 1091-92 (finding continued detention of both drivers and passengers to constitute a seizure under the Fourth Amendment which requires reasonable and articulable suspicion to be permitted to continue).

588. *Id.* at 1091.

589. *Id.* at 1093 (citing *United States v. Mendenhall*, 446 U.S. 544 (1980) and *INS v. Delgado*, 466 U.S. 210 (1984)).

590. *Id.*

591. *Id.* Quite logically, the court attributed this to the fact that an officer would not "likely tolerate a passenger's refusal to give the information followed by the passenger leaving the area." *Id.* at 1094.

592. *Id.*

The court concluded that the encounter here was indeed not consensual, noting that the officer's asserted safety concern as the basis for the investigation was not enough to conclude otherwise.<sup>593</sup> Moreover, the court characterized the stop as an unlawful investigative detention insufficiently supported by reasonable suspicion of criminal wrongdoing to justify the continued detention beyond the reason for the stop.<sup>594</sup> Finally, the court aptly concluded that "[t]o permit law enforcement officers to ask for and to check out passenger identification under these circumstances opens a door to the type of indiscriminate, oppressive, fearsome, authoritarian practices and tactics of those in power that the Fourth Amendment was designed to prohibit."<sup>595</sup>

As the foregoing discussion of cases from other states indicates, many jurisdictions have embraced legal approaches to curb aggressive police action during a routine traffic stop. Some of these states have specifically required reasonable suspicion for the officer to expand the scope of the investigation. More importantly, though, many of these courts have demonstrated a willingness to closely examine the facts without distorting them to uphold the police conduct. Without defying United States Supreme Court authority, these courts have managed to breathe life once again into the Fourth Amendment and protect motorists in their jurisdictions.

## VI. CONCLUSION

A number of commentators and judges have become concerned with the increasing ability of law enforcement officials to convert a routine traffic stop into a broad investigation into drugs, rocket launchers, lawn equipment, or any topic an officer desires. While the United States Supreme Court has largely limited its review to relatively narrow issues, such as a motorist's knowledge of his right to refuse a consensual search or, more recently, whether a dog sniff must be justified by reasonable suspicion, the Supreme Court of Illinois has re-examined traffic stops using the basic standards governing investigatory stops embodied in *Terry v. Ohio*. In so doing, the Supreme Court of Illinois has restricted the scope of traffic stops to the initial purpose of the stop. Thus, even though the United States Supreme Court has reversed the Supreme Court of Illinois' decision in *Caballes*, it ruled on the narrow issue presented to the Court. This leaves intact other Illinois decisions that have effectively eliminated most consensual searches, unfettered

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593. *Id.*

594. *Id.*

595. *Id.* at 1095.

questioning, and warrant checks on passengers, as well as the decisions of other states that have begun to chip away at similar law enforcement conduct during routine traffic stops.

TABLE OF CASE CROSS-REFERENCES

| <b>Case Name</b>                        | <b>Regional Reporter</b>             | <b>Illinois Reporter</b>               |
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| <i>People v. Gilbert</i>                | 808 N.E.2d 1173 (Ill. App. Ct. 2004) | 347 Ill. App. 3d 1034 (4th Dist. 2004) |
| <i>People v. Brownlee</i>               | 674 N.E.2d 503 (Ill. App. Ct. 1996)  | 285 Ill. App. 3d 432 (4th Dist. 2004)  |
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| <i>People v. Kelly</i>                  | 802 N.E.2d 850 (Ill. App. Ct. 2003)  | 344 Ill. App. 3d 1058 (2d Dist. 2003)  |
| <i>People v. Lomas</i>                  | 812 N.E.2d 39 (Ill. App. Ct. 2004)   | 349 Ill. App. 3d 462 (5th Dist. 2004)  |
| <i>People v. Marungo</i>                | 800 N.E.2d 562 (Ill. App. Ct. 2003)  | 344 Ill. App. 3d 287 (2d Dist. 2003)   |
| <i>People v. Mendoza</i>                | 599 N.E.2d 1375 (Ill. App. Ct. 1992) | 234 Ill. App. 3d 826 (5th Dist. 1992)  |

| <b>Case Name</b>             | <b>Regional Reporter</b>             | <b>Illinois Reporter</b>              |
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| <i>People v. Mitchell</i>    | 650 N.E.2d 1014 (Ill. 1995)          | 165 Ill. 2d 211 (1995)                |
| <i>People v. Moore</i>       | 792 N.E.2d 836 (Ill. App. Ct. 2003)  | 341 Ill. App. 3d 804 (2d Dist. 2003)  |
| <i>People v. Murray</i>      | 560 N.E.2d 309 (Ill. 1990)           | 137 Ill. 2d 382 (1990)                |
| <i>People v. Ortiz</i>       | 738 N.E.2d 1011 (Ill. App. Ct. 2000) | 317 Ill. App. 3d 212 (4th Dist. 2000) |
| <i>People v. Reatherford</i> | 802 N.E.2d 340 (Ill. App. Ct. 2003)  | 345 Ill. App. 3d 327 (4th Dist. 2003) |
| <i>People v. Roberts</i>     | 813 N.E.2d 748 (Ill. App. Ct. 2004)  | 349 Ill. App. 3d 972 (4th Dist. 2004) |
| <i>People v. Robinson</i>    | 748 N.E.2d 739 (Ill. App. Ct. 2001)  | 322 Ill. App. 3d 169 (2d Dist. 2001)  |
| <i>People v. Rush</i>        | 745 N.E.2d 157 (Ill. App. Ct. 2001)  | 319 Ill. App. 3d 34 (2d Dist. 2001)   |
| <i>People v. Staple</i>      | 803 N.E.2d 586 (Ill. App. Ct. 2004)  | 345 Ill. App. 3d 814 (4th Dist. 2004) |
| <i>People v. Strawn</i>      | 569 N.E.2d 269 (Ill. App. Ct. 1991)  | 210 Ill. App. 3d 783 (4th Dist. 1991) |
| <i>People v. Tillman</i>     | 116 N.E.2d 344 (Ill. 1953)           | 1 Ill. 2d 525 (1953)                  |
| <i>People v. Tisler</i>      | 469 N.E.2d 147 (Ill. 1984)           | 103 Ill. 2d 226 (1984)                |
| <i>People v. Torres</i>      | 807 N.E.2d 654 (Ill. App. Ct. 2004)  | 347 Ill. App. 3d 252 (1st Dist. 2004) |
| <i>People v. White</i>       | 770 N.E.2d 261 (Ill. App. Ct. 2002)  | 331 Ill. App. 3d 22 (2d Dist. 2002)   |