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# 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?

## **Cover Page Footnote**

J.D. candidate, Fordham University School of Law, 2004; B.A., Communication, Villanova University, 2000. I would like to thank my family and friends for their love and support. I also sincerely thank Professor Daniel Richman for his valuable insights.

**THE SCOPE OF POLICE QUESTIONING  
DURING A ROUTINE TRAFFIC STOP:  
DO QUESTIONS OUTSIDE THE  
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*Bill Lawrence\**

**INTRODUCTION**

A police officer makes a routine traffic stop of a vehicle with a cracked windshield.<sup>1</sup> He questions the driver about the windshield and asks for the driver's license and registration.<sup>2</sup> While the officer checks the documentation, he asks the driver whether he has any illegal narcotics in the car.<sup>3</sup> The driver says 'no,' and the officer asks for consent to search the vehicle.<sup>4</sup> After the driver consents, the officer discovers cocaine on the driver's side of the car.<sup>5</sup>

In the prosecution for the possession of cocaine, the defendant argues that his consent was tainted by the officer's question about illegal narcotics because it was outside the scope of the original justification for the stop—the cracked windshield.<sup>6</sup> The defendant claims that the officer violated his Fourth Amendment rights<sup>7</sup> because the question about illegal narcotics gave rise to an unreasonable seizure.<sup>8</sup> A court agrees and rules that the consent was invalid and that the evidence must be suppressed.<sup>9</sup>

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1. This fact pattern is based on the facts from *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002).

2. *See Childs*, 277 F.3d at 949-50.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. U.S. CONST. amend. IV.

8. *See Childs*, 277 F.3d at 947-50.

9. *Id.*

The situation described above occurs frequently, with many courts ruling similarly to this one.<sup>10</sup> Accordingly, the issue this Note addresses is whether a police officer, during a routine traffic stop, violates a person's Fourth Amendment rights when the officer's questions stray from the original reason for the stop. Resolution of the issue pits privacy concerns against the state's interest in effective law enforcement.<sup>11</sup> With circuits split over the issue,<sup>12</sup> and the Supreme Court not yet plainly ruling on it,<sup>13</sup> this Note aims to provide a narrow solution to the problem.

Part I of this Note explains the Fourth Amendment reasonableness standard and discusses the line of Supreme Court cases from *Terry v. Ohio*<sup>14</sup> to *Florida v. Bostick*<sup>15</sup> that deal with the permissible scope of questioning during a stop. Part II introduces the split between the Fifth and Seventh Circuits and the Eighth, Ninth, and Tenth Circuits, highlighting the reasoning of the Seventh Circuit in *United States v. Childs*.<sup>16</sup> Further, Part II discusses the balance between privacy concerns and effective law enforcement and shows that the arguments are important because the Supreme Court has not yet directly ruled on the issue.<sup>17</sup> Part III of this Note proposes that courts consider the narrow holding in *Childs*. This Note concludes that in the routine traffic stop situation, effective police work outweighs the minimal privacy interest.

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10. See, e.g., *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001); *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001); *United States v. Ramos*, 42 F.3d 1160 (8th Cir. 1994); *United States v. Rodriguez-Diaz*, 161 F. Supp. 2d 627 (D. Md. 2001); *United States v. McSwain*, 29 F.3d 558 (D. Utah 1994). See generally U.S. Dep't of Homeland Security, THE QUARTERLY REVIEW ARTICLES 4 (describing an in-depth hypothetical situation that closely mirrors the introductory situation in an article about *Terry* stops for law enforcement officials), available at <http://www.fletc.gov/legal/articles.pdf>; Ronald Menaker, *Sloppy Police Work Undermines Drug Prosecution*, CHICAGO DAILY BULLETIN, Jan. 8, 2003, at 9 (describing case where officers exceeded *Terry* scope limitation and transformed a valid stop into an illegal arrest).

11. See, e.g., *Brown v. Texas*, 443 U.S. 47, 52 (1979) (analyzing the balance between privacy concerns and the public interest). See generally Robert Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 16 (2001) (discussing privacy concerns).

12. The Fifth and Seventh Circuits have taken a different position on the issue than the Eighth, Ninth, and Tenth Circuits. See *infra* Part II.

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

14. 392 U.S. 1 (1968).

15. 501 U.S. 429 (1991).

16. 277 F.3d 947 (7th Cir. 2002).

17. See *Robinette*, 519 U.S. at 36.

## I. THE FOURTH AMENDMENT REASONABLENESS STANDARD

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>18</sup> To trigger the protection of the amendment, an officer must commit an unreasonable search or seizure.<sup>19</sup> Problems arise, however, in determining whether an unreasonable search or seizure has occurred.<sup>20</sup> This Note centers on the seizure component within the context of a routine traffic stop.

Put simply, a seizure occurs if a police officer causes a reasonable person to feel as though he cannot walk away or terminate the encounter.<sup>21</sup> Within this definition, a routine traffic stop of a motor vehicle constitutes a limited seizure and may trigger the *Terry* doctrine.<sup>22</sup> Under the *Terry* doctrine, an officer may stop a suspect and detain her briefly to investigate reasonable suspicion of criminal activity.<sup>23</sup> Because the *Terry* doctrine may apply to motor vehicle stops as well, if, as in the introductory situation, a driver commits a traffic violation, a police officer may stop the driver for as long as it takes to write a ticket for the violation.<sup>24</sup> Moreover, the *Terry* doctrine provides that in determining whether a search or seizure was unreasonable, courts consider whether the original reason for the officer's actions was justifiable and whether it was reasonably related in scope to the original circumstances.<sup>25</sup>

18. U.S. CONST. amend. IV.

19. See *Terry*, 392 U.S. at 9.

20. See *id.*

21. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); see also *Terry*, 392 U.S. at 16 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

22. See *United States v. Holt*, 264 F.3d 1215, 1217 (10th Cir. 2001) ("[T]he analytical framework set forth in *Terry v. Ohio* applies to traffic stops." (citation omitted)).

23. *Terry*, 392 U.S. at 19-24.

24. *United States v. Daniel*, 804 F. Supp. 1330, 1334 (D. Nev. 1992) (holding that a traffic stop constitutes a limited seizure and falls within the "purview" of *Terry*). In fact, many vehicle stops are performed on the basis of probable cause that a traffic violation has occurred. See, e.g., *Whren v. United States*, 517 U.S. 806, 808-09 (1996) (involving probable cause of traffic violation when suspect failed to use turning signal); *United States v. Childs*, 277 F.3d 947, 949 (7th Cir. 2002) (finding probable cause of traffic violation of driving with a cracked windshield); *United States v. Murillo*, 255 F.3d 1169, 1172 (9th Cir. 2001) (finding probable cause for tailgating violation); *United States v. Ramos*, 42 F.3d 1160, 1161 (8th Cir. 1994) (finding probable cause for traffic violation based on seat belt violation). Although probable cause of a traffic violation supports most traffic stops, courts generally analyze the stops under *Terry*. See *Holt*, 264 F.3d at 1217 (applying *Terry* framework to traffic stop).

25. *Terry*, 392 U.S. at 18-19.

Issues arise when, during routine traffic stops, officers ask questions unrelated to the original reason for the stop.<sup>26</sup> Some courts hold that for an officer to justify questioning beyond the original reason for the stop, there must be reasonable suspicion of independent, criminal activity.<sup>27</sup> Other courts hold that officers may be justified asking questions outside the scope of the original reason for the stop so long as the questions do not prolong the stop.<sup>28</sup> Thus, the issue apparently turns on the length of the detention for some courts, while other courts take a bright-line approach and ban the questioning altogether.

Presented with the introductory scenario, then, a court must determine whether the officer committed an unreasonable seizure or if he simply asked a question.<sup>29</sup> To aid in this endeavor, a court may consider a line of cases that deals with general police questioning.<sup>30</sup>

In a non-custodial situation, a police officer may ask questions or request consent to search so long as the officer does not imply that the answers or consent are obligatory.<sup>31</sup> Moreover, reasonable suspicion is not a prerequisite to these questions.<sup>32</sup> For example, the *Bostick* court noted, “[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions.”<sup>33</sup> Along these lines, police officers may ask questions as long as they do not employ coercive tactics.<sup>34</sup> If an officer employs coercive

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26. E.g., *Childs*, 277 F.3d at 947-50; *Murillo*, 255 F.3d at 1169-72; *Holt*, 264 F.3d at 1215-21; *Ramos*, 42 F.3d at 1160-62.

27. E.g., *Murillo*, 255 F.3d at 1174; *Holt*, 264 F.3d at 1220-21; *Ramos*, 42 F.3d at 1163-64.

28. *Childs*, 277 F.3d at 954; *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).

29. *Shabazz*, 993 F.2d at 436.

30. See *United States v. Drayton*, 536 U.S. 194 (2002); *United States v. Bostick*, 501 U.S. 429 (1991); *INS v. Delgado*, 466 U.S. 210 (1984).

31. *Delgado*, 466 U.S. at 216-17 (“But if the person refuses to answer and the police take additional steps—such as those taken in *Brown*—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.”).

32. *Bostick*, 501 U.S. at 434.

33. *Id.* at 434.

34. *Id.* In *Terry v. Ohio*, the Supreme Court alluded to the difference between police questioning and seizures, noting that “[o]bviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. 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.” 392 U.S. 1, 19 n.16 (1968).

tactics, however, the questions may give rise to an unreasonable seizure.<sup>35</sup>

Under this analysis, a police officer may ask questions freely of persons walking down the street.<sup>36</sup> *Bostick* makes this point.<sup>37</sup> In *Bostick*, police officers boarded a passenger bus for drug interdiction purposes.<sup>38</sup> After informing a passenger of their purpose on the bus and then questioning him, the passenger consented to a search of his bag.<sup>39</sup> The search produced narcotics.<sup>40</sup> At the trial, the defendant moved to suppress the narcotics evidence on grounds that the officer impermissibly seized him.<sup>41</sup>

The defendant argued that he was seized because after the police questioning, a reasonable person in his situation would not have felt free to leave.<sup>42</sup> The Florida Supreme Court ruled in the defendant's favor and adopted a *per se* rule that essentially, "police in Florida, as elsewhere, may approach persons at random in most public places, ask them questions and seek consent to a search, but they may not engage in the same behavior on a bus."<sup>43</sup>

The United States Supreme Court disagreed, holding that mere police questioning does not always constitute an impermissible seizure:

[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus. The Florida Supreme Court erred in adopting a *per se* rule.<sup>44</sup>

Although the defendant was not technically free to leave because he did not want to risk the bus leaving without him, the Court still said that the officer did not commit an unreasonable seizure.<sup>45</sup> The

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35. See *Terry*, 392 U.S. at 19 n.16.

36. Cf. *United States v. Childs*, 277 F.3d 947, 951 (7th Cir. 2002); *Bostick*, 501 U.S. at 439-40.

37. 501 U.S. at 439-40.

38. *Id.* at 431.

39. *Id.* at 431-32.

40. *Id.*

41. *Id.*

42. *Id.* at 433.

43. *Id.* (citation omitted) (summarizing the lower court's holding).

44. *Id.* at 439-40.

45. *Id.* at 436.

Court reasoned that the bright-line "free to leave" doctrine was inappropriate under these circumstances.<sup>46</sup>

The *Bostick* analysis of questions applies to non-traffic stop settings as well. Under *United States v. Laboy*, the Tenth Circuit plainly followed *Bostick* for a sidewalk encounter.<sup>47</sup> The defendant was walking down a sidewalk, across the street from where officers were conducting an undercover narcotics operation.<sup>48</sup> One of the officers motioned for the defendant to cross the street.<sup>49</sup> The officer asked the defendant if he had any drugs on him and the defendant said yes.<sup>50</sup> The officer then arrested the defendant.<sup>51</sup>

At trial, the district court granted the defendant's motion to suppress the evidence seized incident to the arrest, holding that reasonable suspicion did not support the seizure, which rendered it impermissible.<sup>52</sup> The Tenth Circuit Court of Appeals disagreed, however, relying heavily on *Bostick* for its conclusion, "As long as a reasonable innocent person, as opposed to a person knowingly carrying contraband, would feel free to leave, such encounters are consensual and need not be supported by reasonable suspicion of criminal activity."<sup>53</sup> Accordingly, the Tenth Circuit reversed the district court's suppression order, holding that the officer's initial questioning did not create an impermissible seizure.<sup>54</sup>

Similarly, the Southern District of Indiana determined that police questioning outside the traffic stop setting failed to create an impermissible seizure.<sup>55</sup> In *United States v. Steele*, officers spotted the defendant outside a building where a string of burglaries had recently occurred.<sup>56</sup> One officer walked over to the defendant and asked him a few questions, including one about the pouch he was wearing.<sup>57</sup> The defendant voluntarily opened the pouch and the officer then observed a handgun.<sup>58</sup> The officer arrested the defen-

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46. *Id.*

47. 979 F.2d 795, 798 (10th Cir. 1992).

48. *Id.* at 797-800.

49. *Id.*

50. *Id.* at 797-98.

51. *Id.* at 798.

52. *Id.*

53. *Id.*

54. *Id.* at 800.

55. See *United States v. Steele*, 782 F. Supp. 1301, 1313 (S.D. Ind. 1992).

56. *Id.* at 1303-04.

57. *Id.* at 1304.

58. *Id.*



dant, who then moved to suppress the evidence on grounds that it was the product of an impermissible seizure.<sup>59</sup>

The district court denied the motion to suppress. Citing *Bostick*, the court stated, “a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.”<sup>60</sup> The court went on to determine that questioning a person after the conclusion of an investigative stop still may be deemed consensual.<sup>61</sup> Following this reasoning, the court held the questioning did not create an impermissible seizure and the court therefore denied the defendant’s motion to suppress the evidence.<sup>62</sup>

And so, *Bostick* makes plain that in a non-custodial setting, police questioning does not necessarily equal an impermissible seizure, even though the person subjectively may not feel free to leave.<sup>63</sup> Thus, in discarding the per se “free to leave” doctrine, a *Bostick* analysis considers the totality of the circumstances surrounding the police questioning and looks to whether a reasonable person would feel free to decline the questioning.<sup>64</sup>

### A. The *Bostick* Analysis Applied To A Routine Traffic Stop

The issue becomes somewhat more complicated in the context of a custodial routine traffic stop.<sup>65</sup> Some courts have extended the *Bostick* reasoning to determine that a routine traffic stop is similar to the bus setting; that is, the person technically may not feel free

59. *Id.* at 1304-05.

60. *Id.* at 1309 (quoting *United States v. Bostick*, 501 U.S. 429, 439 (1991)).

61. *Id.* at 1310 (noting that “even after an investigative stop (a seizure) has concluded, an officer’s continued questioning of a person may be consensual if a reasonable person would no longer have felt detained.”).

62. *Id.* at 1313.

63. See *Bostick*, 501 U.S. at 439-40. The Supreme Court later affirmed *Bostick* in *United States v. Drayton*, holding:

Law enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means. If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.

536 U.S. 194, 200-01 (2002) (citations omitted).

64. See *Bostick*, 501 U.S. at 439-40.

65. See *United States v. Childs*, 277 F.3d 947, 950 (7th Cir. 2002).

to leave under the circumstances, but the option to decline answering an officer's question always remains.<sup>66</sup> Other courts view the circumstances differently and employ a strict *Terry* analysis to determine whether questioning outside the scope creates an unreasonable seizure.<sup>67</sup> The *Terry* analysis is more restrictive than the *Bostick* analysis, however, because it requires a scope limitation.<sup>68</sup> Accordingly, questions analyzed under *Terry* must fall within the scope of the original reason for the stop.<sup>69</sup> On the other hand, a *Bostick* analysis considers whether a reasonable person would feel free to decline the questioning.<sup>70</sup>

Opponents of the *Bostick* analysis, in the routine traffic stop setting, argue that *Bostick* created his own "sense of restraint" with his decision to travel by bus.<sup>71</sup> By contrast, in situations similar to that in the introduction, they argue that police conduct creates the "sense of restraint."<sup>72</sup> *Bostick*, therefore, is distinguishable from routine traffic stop cases.<sup>73</sup>

## II. THE CIRCUIT SPLIT AND THE SUPREME COURT STANCE

The issue this Note addresses emerges from the internal debate among the en banc judges of the Seventh Circuit Court of Appeals in *Childs*.<sup>74</sup> Here, police officer James Chiola stopped a vehicle because it had a severely cracked windshield.<sup>75</sup> Passenger Tommie Childs's obvious nervousness struck Chiola as strange.<sup>76</sup> Childs's nervousness led Chiola to stray from questions about the windshield to questions about drugs.<sup>77</sup> The issue before the court was whether Chiola exceeded the permissible scope of questioning and thereby created an impermissible seizure under the Fourth Amendment.<sup>78</sup>

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66. See, e.g., *id.* at 950-52; *United States v. Shabazz*, 993 F.2d 431, 437 (5th Cir. 1993).

67. See, e.g., *United States v. Holt*, 264 F.3d 1215, 1220 (10th Cir. 2001); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994).

68. See *Terry v. Ohio*, 392 U.S. 1, 18-19 (1968).

69. *Id.*

70. See *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991).

71. See Whorf, *supra* note 11, at 15.

72. *Id.*

73. *Id.*

74. See *United States v. Childs*, 277 F.3d 947, 949 (7th Cir. 2002).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 949-50.

The Seventh Circuit held that an officer may question freely as long as the additional questions do not detain a person longer than necessary to investigate the original reason for the stop.<sup>79</sup> Under this view, police questioning outside the scope of the original reason for the stop does not create an unreasonable seizure unless it actually prolongs the stop.<sup>80</sup>

In contrast, the Eighth, Ninth, and Tenth Circuits have held that questioning must fall within the scope of the original justification for the stop, unless the officer discovers circumstances giving rise to an independent justification for questions outside that scope.<sup>81</sup> Otherwise, the questioning may create an unreasonable seizure under the Fourth Amendment.<sup>82</sup>

This circuit split focuses on the tension between effective police work and Fourth Amendment rights.<sup>83</sup> The full facts of *Childs* present a clear picture of this tension. Because this circuit split more directly addresses this Note's issue, it receives primary consideration over the Supreme Court's decision in *Ohio v. Robinette*,<sup>84</sup> which does not directly address the issue.<sup>85</sup>

### A. The Seventh Circuit and *Childs*

Officer Chiola had stopped Childs three days prior to the stop in question.<sup>86</sup> During that stop, a check revealed that Childs was wanted on an outstanding warrant, and his possession of marijuana added a drug offense to that charge.<sup>87</sup> Chiola noted that Childs's windshield was cracked, but did not issue a citation for the offense.<sup>88</sup> Nevertheless, he told Childs to fix the problem.<sup>89</sup>

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79. *Id.* at 954.

80. *Id.* at 953-54.

81. *See, e.g.*, *United States v. Murillo*, 255 F.3d 1169, 1174-75 (9th Cir. 2001); *United States v. Holt*, 264 F.3d 1215, 1220-21 (10th Cir. 2001); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994).

82. *See, e.g.*, *Murillo*, 255 F.3d at 1174-75; *Holt*, 264 F.3d at 1220-21; *Ramos*, 42 F.3d at 1163.

83. *Cf. Terry v. Ohio*, 392 U.S. 1, 9-10 (1968); Whorf, *supra* note 11.

84. 519 U.S. 33 (1996).

85. In *Robinette*, the Supreme Court focused on whether an officer should be required to tell a detained motorist he was free to leave before asking further questions. *Id.* at 39-40. This Note, however, addresses whether questions unrelated to the initial reason for a routine traffic stop that do not prolong the stop create an impermissible seizure. Therefore, because the following circuit cases address this Note's issue more directly, they garner its initial focus.

86. *See United States v. Childs*, 277 F.3d 947, 949 (7th Cir. 2002).

87. *Id.*

88. *Id.*

89. *Id.*

Three days later, Chiola saw the same car with the windshield still broken and he pulled it over again.<sup>90</sup> This time, however, Childs, who had been released on bail, was a passenger in the car and was not wearing his seatbelt.<sup>91</sup> While his partner performed a license and registration check, Chiola asked Childs three questions: 1) why he had not fixed the windshield; 2) whether he had any marijuana on him; and 3) whether he would consent to a search of the vehicle.<sup>92</sup>

Childs consented to the search and Chiola discovered crack-cocaine in the vehicle, which led to prosecution for possession with intent to distribute.<sup>93</sup> The court was left to determine whether Chiola's second question about the marijuana created an unreasonable seizure of Childs because the traffic stop was unrelated to drugs.<sup>94</sup>

Analyzing the situation, the majority noted the definitional problems of branding Chiola's marijuana question as an impermissible seizure under the Fourth Amendment, simply because Childs was in custody:

[T]he Supreme Court has held repeatedly that police may approach persons and ask questions or seek their permission to search, provided that the officers do not imply that answers or consent are obligatory.

. . . .

Are things different when the suspect is in formal custody? It is difficult to see why custody should turn an inquiry into a 'seizure.' Posing a question still does not meet the Supreme Court's definition of a seizure. Officer Chiola did not restrain Childs's liberty (or increase the severity of the existing restraint) by asking something that Childs could refuse to answer.<sup>95</sup>

The majority determined that because Chiola's question did not prolong the stop and because it was an effective means of police strategy, Chiola's question, although unrelated to the original justification for the stop, did not make Childs's seizure unreasonable.<sup>96</sup> The court held, therefore, that Childs's consent was valid.<sup>97</sup>

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 949-50.

95. *Id.* at 950 (citations omitted).

96. *Id.* at 954.

97. *Id.*

Prior to *Childs*, the Fifth Circuit laid the foundation upon which the Seventh Circuit majority based its decision. In *United States v. Shabazz*, the Fifth Circuit stated, "detention, not questioning, is the evil at which *Terry's* second prong is aimed."<sup>98</sup> Officers pulled over a vehicle for speeding.<sup>99</sup> While one officer performed a check on the drivers' licenses, the other officer questioned the defendants about their trip and eventually received consent to search the vehicle.<sup>100</sup> The search yielded narcotics.<sup>101</sup>

At the prosecution, the defendants moved to suppress this evidence as the product of an unreasonable seizure, arguing that the officer exceeded the scope of questioning.<sup>102</sup> The Fifth Circuit held that the officer's questions did not create an unreasonable seizure because they did not impermissibly extend the stop beyond the time otherwise necessary for a routine traffic stop.<sup>103</sup> The court noted, "Mere questioning . . . is neither a search nor a seizure."<sup>104</sup>

Thus, even though the officer's questions were unrelated to the original reason for the stop, the Fifth Circuit determined, "appellants cannot complain of questioning that took place during the pendency of a computer check. While appellants were under no obligation to answer the questions, the Constitution does not forbid law enforcement officers from asking."<sup>105</sup> Under *Shabazz*, the Fifth Circuit plainly considers length of detention as the crux upon which to judge the reasonableness of a routine traffic stop.<sup>106</sup>

In contrast to the Fifth and Seventh Circuits, the Eighth, Ninth, and Tenth Circuits have held that questions are seizures that require either some relation to the original reason for the stop or an independent source of reasonable suspicion.<sup>107</sup> For example, in

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98. 993 F.2d 431, 436 (5th Cir. 1993).

99. *Id.* at 433.

100. *Id.*

101. *Id.* at 434.

102. *Id.*

103. *Id.* at 437.

104. *Id.* at 436.

105. *Id.* at 437.

106. *Id.* New Jersey followed the *Shabazz* reasoning. See *State v. Pegeese*, 796 A.2d 934, 937 (N.J. 2002):

[W]e conclude that the continued detention of the driver and defendant by the troopers while they waited for the results of the registration and license checks was permissible, and their brief questioning concerning the recent whereabouts of the occupants during the short wait for these results did not violate either the state or federal constitutions.

107. See, e.g., *United States v. Murillo*, 255 F.3d 1169, 1174-75 (9th Cir. 2001); *United States v. Holt*, 264 F.3d 1215, 1220-21 (10th Cir. 2001); *United States v. Ramos*, 42 F.3d 1160, 1163-64 (8th Cir. 1994).

*United States v. Ramos* the Eighth Circuit held that an officer committed an unreasonable seizure when he asked suspects questions that exceeded the scope of the original justification for the stop.<sup>108</sup> A police officer pulled over a vehicle because one of the occupants was not wearing a seatbelt.<sup>109</sup> The officer performed a routine traffic stop and after returning the defendants' licenses, detained the defendants to ask them questions about guns and drugs.<sup>110</sup> The defendants denied possession of either and granted the officer consent to search the vehicle.<sup>111</sup> The search produced over 150 pounds of marijuana.<sup>112</sup>

The defendants moved to suppress the marijuana evidence because, they argued, the scope of the officer's questioning was not reasonably related to the circumstances that justified the stop.<sup>113</sup> The district court denied the motion to suppress the evidence on grounds that the officer had an objective basis under *Terry* to expand the scope of questioning.<sup>114</sup>

The Eighth Circuit Court of Appeals, however, did not believe that the officer had an objective basis to expand the questioning, holding:

If, however, no answers are inconsistent and no objective circumstances supply the trooper with additional suspicion, *the trooper should not expand the scope of the stop.*

. . . .

In the present case, for reasons we have explained, we believe that continuing to detain the defendants after their licenses and registration had been checked was a violation of the Fourth Amendment.<sup>115</sup>

Accordingly, because the defendants provided consistent answers and because their behavior accorded with innocence, the court held that the officer impermissibly seized the defendants.<sup>116</sup> Thus, the Eighth Circuit plainly requires reasonable suspicion to justify

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108. *See Ramos*, 42 F.3d at 1164.

109. *Id.* at 1161.

110. *Id.* at 1161-62.

111. *Id.* at 1162.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1163-64 (emphasis added).

116. *Id.* at 1164.

expanding the scope of questioning beyond the original reason for the stop.<sup>117</sup>

Similarly, in *United States v. Murillo* the Ninth Circuit held, “During a traffic stop, a police officer is allowed to ask questions that are *reasonably related in scope* to the justification for his initiation of contact.”<sup>118</sup> An officer pulled over a vehicle for tailgating.<sup>119</sup> The driver exhibited extreme nervousness, so the officer asked him questions about drugs and alcohol.<sup>120</sup> The driver eventually consented to a search of the vehicle, which turned up narcotics.<sup>121</sup> In the prosecution for possession of narcotics, the defendant moved to suppress the evidence on grounds that the officer exceeded the scope of questioning for the original reason for the stop—tailgating.<sup>122</sup>

The court stated that if an officer wants to broaden the scope of questioning, the officer “must articulate suspicious factors that are particularized and objective.”<sup>123</sup> Only after the officer provided a good number of these “suspicious factors” during his testimony did the court conclude he had reasonable suspicion to broaden the questioning.<sup>124</sup> Under this case, the Ninth Circuit plainly considers

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117. See, e.g., *United States v. Wheat*, 278 F.3d 722, 726 (8th Cir. 2001) (“If the investigatory stop is not justified by reasonable suspicion or if the investigating officers exceed the stop’s proper scope, any evidence derived from the stop is inadmissible at trial.”); *United States v. Jones*, 269 F.3d 919, 926 (8th Cir. 2001) (“Generally, an investigative detention must remain within the scope of the traffic stop to be reasonable.”). See generally *United States v. Duenas-Rosales*, No. 8: 02CR54, 2002 U.S. Dist. LEXIS 17171, at \*6 (Neb. Aug. 5, 2002) (“The scope of an officer’s questioning during a traffic stop is limited to circumstances that justified the stop initially.”).

118. See *United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001) (emphasis added). Among the factors the court required to broaden the scope of questioning were:

[E]xtreme nervousness, distinct lack of eye contact at crucial moments in their conversation, inability to explain his travel plans, elevated heart rate, and evidence of a long road trip in a short time frame in a rental car. It is well established that the district court should consider the totality of the circumstances to determine whether reasonable suspicion exists, including the officer’s ‘special training in narcotics surveillance and apprehension.’

*Id.* (citation omitted).

119. *Id.* at 1172.

120. *Id.* at 1172-73.

121. *Id.* at 1173.

122. *Id.* at 1174.

123. *Id.* (citation omitted); see also *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir. 1996) (“Questions asked during an investigative stop must be ‘reasonably related in scope to the justification for their initiation.’ An officer may broaden his or her line of questioning if he or she notices additional suspicious factors, but these factors must be ‘particularized’ and ‘objective.’” (quoting *United States v. Perez*, 37 F.3d 510 (9th Cir. 1994))).

124. *Murillo*, 255 F.3d at 1174.

questions outside the scope of the original reason for the stop to give rise to unreasonable seizures unless reasonable suspicion supports the questions.<sup>125</sup>

Following this reasoning, in *United States v. Holt*, the Tenth Circuit reached a somewhat obfuscating conclusion.<sup>126</sup> The officer in this case pulled over the defendant because he was driving without a seatbelt.<sup>127</sup> While the officer was writing the citation for the seatbelt violation, he asked the defendant whether there were any guns or narcotics in the vehicle.<sup>128</sup> The defendant stated that there was a loaded pistol in the car.<sup>129</sup> The officer subsequently asked for consent to search the vehicle and discovered narcotics.<sup>130</sup>

The defendant moved to suppress the evidence of the pistol and the narcotics because the officer, he claimed, exceeded the scope of permissible questioning.<sup>131</sup> The district court determined that although the officer asked the questions while writing the citation, the questioning formed an unreasonable seizure under the Fourth Amendment because it exceeded the scope of the original justification for the stop.<sup>132</sup> Moreover, the court stated, reasonable suspicion did not support the extension of questioning.<sup>133</sup>

Nevertheless, the en banc Tenth Circuit Court of Appeals reversed the district court's suppression orders, vacated the panel decision, and remanded the case for further proceedings.<sup>134</sup> The Tenth Circuit determined that during a routine traffic stop, a police officer may question the driver about the presence of loaded weapons, even in the absence of reasonable suspicion of the existence of such firearms.<sup>135</sup>

While the court justified this line of questioning in the name of police safety, it did not address whether questions not pertaining to police safety would be permissible.<sup>136</sup> Despite avoiding the question, the court hinted that such questioning may remain impermissible because of a scope limitation, stating, "[e]ven if we were to abandon *Terry* for this type of traffic stop, we are convinced we

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125. *Id.*

126. 264 F.3d 1215, 1217-18 (10th Cir. 2001).

127. *Id.* at 1218.

128. *Id.*

129. *Id.*

130. *Id.* at 1218-19.

131. *Id.* at 1219.

132. *See United States v. Holt*, 229 F.3d 931, 936-39 (10th Cir. 2000).

133. *Id.*

134. *See Holt*, 264 F.3d at 1215.

135. *Id.* at 1217.

136. *Id.* at 1226-27.



would still apply a scope requirement since, as indicated by the Supreme Court, the Fourth Amendment constrains the scope of all searches and seizures.<sup>137</sup> Thus, the Eighth, Ninth, and Tenth Circuits hold that police questioning during a routine traffic stop must be limited in scope to the original justification for the stop, unless supported by reasonable suspicion.

In sum, this circuit split centers on whether police questioning outside the scope of the original justification for the traffic stop gives rise to an impermissible seizure. For the Fifth and Seventh Circuits, questioning that falls outside the scope is permissible as long as the questioning does not prolong the stop.<sup>138</sup> Other decisions support this view.<sup>139</sup> Crystallizing the analysis in *United States v. Crain*, the Fifth Circuit held officers' questions were justified because they did not extend the duration of the stop.<sup>140</sup> The Fifth Circuit noted, "this Circuit holds that mere police questioning does not constitute a seizure. Further, when questioning takes place while officers are waiting for the results of a computer check—and therefore does not extend the duration of the stop—the questioning does not violate *Terry*."<sup>141</sup>

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137. *Id.* at 1230; see also *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988), *overruled on other grounds by* *United States v. Botero-Ospina*, 71 F.3d 783, 785 (10th Cir. 1995).

An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. When the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.

*Guzman*, 864 F.2d at 1519 (citations omitted).

138. See, e.g., *United States v. Childs*, 277 F.3d 947, 952 (7th Cir. 2002); *United States v. Shabazz*, 993 F.2d 431, 437-38 (5th Cir. 1993).

139. See *United States v. Davis*, 61 F.3d 291, 300 (5th Cir. 1995) (holding that questions outside the scope did not create an impermissible seizure because the defendant was detained no longer than the usual time necessary to issue a speeding ticket); *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994); *United States v. Sanders*, 846 F. Supp. 42, 45 (E.D. Tex. 1994) (holding that officers may question suspects on matters wholly unrelated to the original reason for the stop without violating the Fourth Amendment); *Edmond v. State*, No. 14-01-00386-CR, 2002 Tex. App. LEXIS 2486, at \*10 (Apr. 4, 2002) ("Our holding is consistent with prior decisions like *Shabazz*, which identify the duration of detention as the key determinate of reasonableness under *Terry* and its progeny. Because we have already established appellant's detention was not unreasonably prolonged in this case, questioning appellant regarding drugs was permissible.").

140. See *Crain*, 33 F.3d at 485.

141. *Id.* at 485 (citations omitted).

In contrast, the Eighth, Ninth, and Tenth Circuits prefer a bright-line approach,<sup>142</sup> which does not permit the questioning to exceed the scope of the original reason for the stop.<sup>143</sup> Other decisions support this view as well, but with an underlying attention paid to the actual length of the detention instead of questioning.<sup>144</sup>

In *United States v. Rodriguez-Diaz*, the District of Maryland held that an officer violated the Fourth Amendment when he asked the defendant questions unrelated to the original reason for the stop—a seatbelt violation.<sup>145</sup> The court determined, “Officer Shull’s decision to ignore the seat belt violation he had observed committed by the front seat passenger and to proceed, instead, to conduct an investigation into the lawfulness of defendant’s possession and operation of the vehicle, unreasonably prolonged the defendant’s detention.”<sup>146</sup>

And so, although the circuits sharply conflict on the issue and may draw support for their views from other decisions, the Supreme Court has not yet definitively ruled on it. The closest the Court has come to addressing the issue was with its decision in *Ohio v. Robinette*.<sup>147</sup>

### B. The Supreme Court and *Robinette*

In *Robinette*, a police officer stopped a driver for speeding.<sup>148</sup> The officer performed a routine license and registration check, but before letting the driver leave, he asked, “One question before you get gone: Are you carrying any illegal contraband in your car? Any

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142. It should be noted, however, that the Supreme Court disfavors bright-line approaches to Fourth Amendment issues and instead prefers a balancing test. See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

143. See, e.g., *United States v. Murillo*, 255 F.3d 1169, 1172 (9th Cir. 2001); *United States v. Holt*, 264 F.3d 1215, 1217 (10th Cir. 2001); *United States v. Ramos*, 42 F.3d 1160, 1161 (8th Cir. 1994).

144. See *United States v. McSwain*, 29 F.3d 558, 561 (10th Cir. 1994) (holding that officer committed unreasonable seizure by detaining suspect after original reason for the routine traffic stop); *United States v. Rodriguez-Diaz*, 161 F. Supp. 2d 627, 628 (D. Md. 2001).

145. *Rodriguez-Diaz*, 161 F. Supp. 2d at 633.

146. *Id.*; see also *State v. Carty*, 790 A.2d 903, 908 (N.J. 2002).

Because the motorist cannot leave the area before the search is completed, unless it is terminated earlier, the detention associated with roadside searches is unlike a ‘mere field interrogation’ where an officer may question an individual ‘without grounds for suspicion.’ Roadside consent searches are instead more akin to an investigatory [stop] that does involve a detention. Such a stop traditionally has required reasonable and articulable suspicion.

*Carty*, 790 A.2d at 908 (citations omitted).

147. 519 U.S. 33 (1996).

148. *Id.* at 35.

weapons of any kind, drugs, anything like that?”<sup>149</sup> The driver said, “No,” and then the officer asked for and received consent to search the vehicle.<sup>150</sup> The search turned up marijuana and other narcotics.<sup>151</sup>

The defendant moved to suppress this evidence at the prosecution for possession.<sup>152</sup> The lower court denied the suppression motion, but the appellate court reversed and the Supreme Court of Ohio affirmed the reversal.<sup>153</sup> The Supreme Court of Ohio held that after the officer, “had determined in his own mind not to give Robinette a ticket, the detention then became unlawful.”<sup>154</sup> The court held that officers must inform suspects of their right to refuse to consent.<sup>155</sup>

The Supreme Court reviewed the issue, noting that reasonableness is the “touchstone” of the Fourth Amendment and that reasonableness is measured by “examining the totality of the circumstances.”<sup>156</sup> Citing *Bostick*, the Court stated that it has “consistently eschewed bright-line rules” in Fourth Amendment cases.<sup>157</sup> Accordingly, the Court reversed the Ohio Supreme Court and remanded for further proceedings.<sup>158</sup>

The Seventh Circuit applied *Robinette* to reach its decision in *Childs*. As in *Robinette*, the Seventh Circuit noted that the Fourth Amendment requires reasonableness.<sup>159</sup> Along these lines, the court determined that questions, although outside the scope of the original justification for the stop—that do not create any inconvenience—do not cause a reasonable stop to become unreasonable.<sup>160</sup> The *Childs* court went on to state: “Any doubt about this

149. *Id.* at 35-36.

150. *Id.* at 36.

151. *Id.*

152. *Id.*

153. *Id.* at 36-37.

154. *Id.* at 38.

155. *Id.* at 36.

156. *Id.* at 39.

157. *Id.* at 39 (“And again, in *Florida v. Bostick*, when the Florida Supreme Court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of ‘all the circumstances surrounding the encounter.’” (citations omitted)).

158. *Id.* at 40.

159. *United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002).

160. *Id.*

Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics that may burden the public - for all suspects (even the guilty ones) may protect themselves fully

understanding of questions during traffic stops is dispelled by *Ohio v. Robinette*.<sup>161</sup> The Seventh Circuit reasoned that because the Supreme Court rejected Ohio's bright-line rule that an officer must advise a suspect that he is free to leave before proceeding with further questions, it "necessarily rejected the broader contention that unrelated questions may not be asked at all."<sup>162</sup>

Although the Supreme Court reached its *Robinette* decision by an eight-to-one margin, the dissent merits consideration. In dissent, Justice Stevens was troubled by the timing of the questioning because it occurred after the routine traffic stop had come to an end and was outside the scope of the original reason for the stop.<sup>163</sup>

[B]y the time *Robinette* was asked for consent to search his automobile, the lawful traffic stop had come to an end; *Robinette* had been given his warning, and the speeding violation provided no further justification for detention. The continued detention was therefore only justifiable, if at all, *on some other grounds*.<sup>164</sup>

Justice Stevens argued that because no articulable facts gave rise to reasonable suspicion of separate criminal activity, the officer's continued detention of the suspect created an impermissible seizure.<sup>165</sup>

Thus, while Justice Stevens expressed concern about the possibility of an impermissible seizure, the majority's lack of concern for this possibility, according to the Seventh Circuit, leads to the conclusion that the Court rejected the idea that unrelated questions may not be asked at all.<sup>166</sup>

Nevertheless, some scholars contend that *Robinette* does not at all address the issue of whether an officer may expand the scope of questioning beyond the original justification for the stop.<sup>167</sup> According to one scholar, "the core issue raised by the *Robinette* facts remains undecided by the U.S. Supreme Court: following a routine traffic stop, does law enforcement's non-traffic related questioning of a motorist, including a request to search, amount to a Fourth

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by declining to answer. Nor do the questions forcibly invade any privacy interest or extract information without the suspects' consent.

*Id.*

161. *Id.*

162. *Id.*

163. See *Robinette*, 519 U.S. at 50 (Stevens, J., dissenting).

164. *Id.* (emphasis added).

165. *Id.*

166. See *Childs*, 277 F. 3d at 954.

167. See e.g., Whorf, *supra* note 11, at 13; see also George M. Dery III, "When Will This Traffic Stop End?": *The United States Supreme Court's Dodge of Every Detained Motorist's Central Concern - Ohio v. Robinette*, 25 FLA. ST. U. L. REV. 519, 519 (1998).

Amendment 'seizure' of that person?"<sup>168</sup> This scholar asserts that no reasonable person in Robinette's position would have felt free to leave under the circumstances.<sup>169</sup> Therefore, because the officer's questions exceeded the scope of the original justification for the stop, the questions created an impermissible seizure.<sup>170</sup> Despite his opinion, this scholar agrees with the Seventh Circuit's reading of the *Robinette* decision: "The routine traffic stop turned consent search, as far as U.S. Supreme Court rulings go, remains a viable drug interdiction technique."<sup>171</sup>

Another scholar has taken it upon himself to address the issue in *Robinette* directly.<sup>172</sup> He argues that the Court failed to address *Robinette's* core issue as well, but contends that if the Court adhered to some of its earlier reasoning it would have determined that Robinette was impermissibly seized. He notes:

The first relevant fact is the prior existence of a seizure of Robinette's person. The very fact of a pre-existing seizure enhanced the police dominance of the situation, and, therefore, increased the potency of all the other factors pointing toward the restriction of Robinette's liberty. Not only was Robinette stopped, he had been advised by an officer in a marked patrol cruiser that the officer observed him violate the law.<sup>173</sup>

Thus, under a totality of the circumstances analysis, involving the seamless transition from a legal seizure based on a routine traffic stop to a consent search and police dominion over the scene, officers impermissibly seized Robinette.<sup>174</sup>

Nevertheless, as the *Robinette* decision shows, the Court has consistently weighed the balance in favor of law enforcement over privacy interests in this area of the law.<sup>175</sup> Accordingly, *Robinette*

168. Whorf, *supra* note 11, at 13.

169. *See id.* at 14.

Those circumstances included commencement of the encounter through a dramatic show of authority (namely, a closely following police car with flashing lights) effectuating the initial seizure of the vehicle and its occupants; and a continuing seizure of the motorist through a demand for driver's documents, a time lapse for a warrant check, and the issuance of a citation or warning (all of this occurring while the motorist is detained, more often than not, in the din of a high-speed roadway).

*Id.*

170. *See id.* at 14-15.

171. *Id.* at 16.

172. *See* Dery, *supra* note 167, at 555.

173. *Id.*

174. *See id.* at 555-62.

175. *See, e.g.,* *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Whren v. United States*, 517 U.S. 806, 813 (1996); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

supports the *Childs* holding.<sup>176</sup> The Seventh Circuit explained how the Supreme Court's reasoning in *Robinette* applies to *Childs*:

*Robinette* thus approves exactly what *Childs* says may not occur: Questions during a routine traffic stop that do not concern the purpose of the stop (and are not supported by any other suspicion), yet extend the stop's duration. . . . By rejecting the position of the state court in *Robinette*, the Supreme Court of the United States necessarily rejected the broader contention that unrelated questions may not be asked at all.<sup>177</sup>

Thus, as *Childs* makes plain, *Robinette*'s precedential effect is to support the proposition that questions unrelated to the original reason for a traffic stop do not necessarily constitute an unreasonable seizure.<sup>178</sup>

### C. Effective Police Strategy v. Fourth Amendment Rights

A significant undertone to the seizure issue is the balance between the state's interest in enforcing its laws and a person's privacy interest.<sup>179</sup> This balance usually tilts in favor of the person's privacy interest.<sup>180</sup> Nevertheless, courts remain mindful of excessive limitations on effective police work.<sup>181</sup>

The right to be free from unreasonable searches and seizures is among the most sacred.<sup>182</sup> But often, seizures may involve a limited detention, less intrusive than a formal arrest.<sup>183</sup> Under this scenario, in *Brown v. Texas*, the Court pointed out that courts must determine the reasonableness of the seizure by balancing between, "the public interest and the individual's right to personal security free from arbitrary interference by law officers."<sup>184</sup>

Courts employ this balance to avoid arbitrary invasions on a person's privacy interest at the sole discretion of a police officer.<sup>185</sup>

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176. Compare *Robinette*, 519 U.S. at 39-40, with *United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002).

177. *Childs*, 277 F.3d at 954.

178. *Id.*

179. See *Brown v. Texas*, 443 U.S. 47, 52 (1979).

180. See *id.* at 52.

181. See *id.* at 51.

182. See *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

183. See *Brown*, 443 U.S. at 50.

184. *Id.* at 50 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)) (noting that a court must weigh the "gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.>").

185. *Id.* at 51.

Accordingly, the *Brown* Court noted, “[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”<sup>186</sup>

i. *The Privacy Interest Argument*

Weighing this balance, the privacy interest argument maintains that when officers ask questions outside the scope of the original reason for the routine traffic stop, they impermissibly intrude upon the person’s Fourth Amendment rights.<sup>187</sup> Under this view, when the officer’s questions stray from the original reason for the stop and eventually lead to consent to search the vehicle, the officer severely interferes with the driver’s dignitary interests. One scholar notes the severity of the intrusion upon a person’s dignitary interests:

Therefore, during the delay by the roadside, the vehicle’s occupants, young and old, will wait by the side of the highway (or, occasionally, in the police cruiser). The wait may occur at any hour, in any weather, with cars and trucks roaring by. The wait by the side of the highway occurs in conditions resembling a sort of sterile and impersonal gauntlet of speeding vehicles where the din and air turbulence add to the unsettling surrealism of the surrounding. Disorienting would, at a minimum, be a fair description of the effect on people in this setting. Motorists and their passengers have additionally described their ‘fear, anger and humiliation’ arising from standing at the side of the highway during a routine traffic stop turned consent search.<sup>188</sup>

Because questions outside the scope of the original reason for the routine traffic stop confuse the driver’s expectations as to what may occur during a stop, the questions become an enormous intrusion on the driver’s dignitary interests.<sup>189</sup> The Tenth Circuit noted, “[M]otorists ordinarily expect to be allowed to continue on their

186. *Id.*

187. *Cf. Whorf, supra* note 11.

188. *Id.* at 19.

189. *See id.* at 18.

After the routine traffic stop has occurred, the degree to which it is intimidating may be minimized by two factors according to the U.S. Supreme Court. First, the motorist likely presumes that the stop will be temporary and brief. It is likely to last long enough for police to collect and check driver’s documents and to write a citation or issue a warning. Second, the stop takes place in the public view of passers-by. For the motorist who de-

way once the purposes of a stop are met. The government's general interest in criminal investigation, without more, is generally insufficient to outweigh the individual interest in ending the detention."<sup>190</sup>

The previously mentioned scholar further states that the phenomena of the routine traffic stop turned consent search for drug interdiction purposes occurs frequently, thus expanding the intrusion on privacy and dignitary concerns.<sup>191</sup> Another scholar argues that "government should intrude upon our privacy and security only so much as is necessary for it to do its job."<sup>192</sup>

## ii. *The Law Enforcement Argument*

On the other side of the balance, the law enforcement argument avers that questioning beyond the scope of the original reason for the stop serves a strong state interest—drug interdiction.<sup>193</sup> Under this view, the state's interest in expanding the questioning plainly

clines to answer questions, the public nature of the encounter reduces the motorist's fear of abuse by police.

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However, in the context of the routine traffic stop turned consent search, neither of these factors has the effect of minimizing the enormous intrusion of the encounter.

*Id.*

190. *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (citations omitted).

191. *See Whorf*, *supra* note 11, at 18-21.

Other evidence also supports the proposition that the routine traffic stop turned consent search occurs with great frequency. In 1992, the Orlando Sentinel obtained videotapes of over one thousand typical routine traffic stops, conducted on Interstate 95 by the Sheriff's Department in Volusia County, Florida, in which officers sought consent to search. Further north on Interstate 95, even in the nation's smallest state, reports of drug seizures from the routine traffic stop turned consent search are common. In *Robinette* itself, one member of the Court noted that 'Ohio's courts observed that traffic stops in the State were regularly giving way to contraband searches.' In fact, the officer who conducted the routine traffic stop turned consent search of Robinette had testified at one suppression hearing that he requested consent to search in 786 traffic stops in a single year. Since all but a few of such requests are invariably granted, even from motorists who are carrying contraband, the 786 requests undoubtedly resulted in almost the same number of searches.

*Id.* (citations omitted)

192. Dery, *supra* note 167, at 567.

193. *See, e.g., United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002).

Officers ask persons stopped for traffic offenses whether they are committing any other crimes. That is not an unreasonable law-enforcement strategy, either in a given case or in gross; persons who do not like the question can decline to answer. Unlike many other methods of enforcing the criminal law, this respects everyone's privacy.

*Id.*



outweighs the seemingly insignificant privacy interest in not being asked these questions.<sup>194</sup> Furthermore, questioning of this nature does not create an impermissible stop and thereby trigger Fourth Amendment protection because the questions add nothing to the length of the stop.<sup>195</sup> The Fourth Amendment does not ban police questioning; it guards against unreasonable detentions.<sup>196</sup>

In cases involving this similar balance, the Supreme Court has weighed the balance in favor of a state's interest in enforcing its laws.<sup>197</sup> For example, in *Whren v. United States*, the Court determined that an officer's subjective intentions did not make a suspect's continued detention illegal, as long as objective circumstances justified the detention.<sup>198</sup> And, in *Schneckloth v. Bustamonte*, the Court held that proof of a suspect's knowledge of the right to refuse consent was not necessary for demonstrating voluntary consent.<sup>199</sup> Additionally, as previously mentioned, in *Robinette* the Court held that an officer did not have to tell a suspect that he was free to leave after the officer wrote the citation.<sup>200</sup>

### III. A NARROW SOLUTION

This Note proposes that courts should consider the *Childs* holding to determine whether questions outside the scope of the original justification for the stop—that do not prolong the stop—create impermissible seizures. The following points support application of the *Childs* holding.

#### A. *Bostick or Terry?*

Courts generally employ a *Terry* analysis to determine whether a seizure is unreasonable for Fourth Amendment purposes.<sup>201</sup> Nevertheless, the Seventh Circuit questioned whether a *Terry* analysis is appropriate for determining whether questions asked outside the scope of the original reason for a routine traffic stop create an impermissible seizure.<sup>202</sup> In *Childs*, the Seventh Circuit was perplexed by the assertion that a police officer may ask questions

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194. *See, id.*

195. *See United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).

196. *Id.*

197. *See Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Whren v. United States*, 517 U.S. 806, 813 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973).

198. *Whren*, 517 U.S. at 813.

199. *Bustamonte*, 412 U.S. at 227-28.

200. *Robinette*, 519 U.S. at 39-40.

201. *See, e.g., United States v. Holt*, 264 F.3d 1215, 1217 (10th Cir. 2001).

202. *See United States v. Childs*, 277 F.3d 947, 951 (7th Cir. 2002).

freely of someone walking down the street and of someone in practical, although not technical custody, such as the circumstances in *Bostick*.<sup>203</sup> Nevertheless, officers may not ask questions of someone in actual police custody.<sup>204</sup> Thus, employing an identical *Terry* analysis to all traffic stops troubled the Seventh Circuit:

Handling all traffic stops identically is at once too demanding and too lax. Treating checkpoint stops as if they were *Terry* stops supported by reasonable suspicion gives the officers too much discretion over drivers who arrive at roadblocks or security screening points. Treating arrests on probable cause as if they, too, were *Terry* stops gives the officers too little discretion. A person stopped on reasonable suspicion must be released as soon as the officers have assured themselves that no skullduggery is afoot. Probable cause, by contrast, justifies a custodial arrest and prosecution, and arrests are fundamentally different from *Terry* stops. Persons who are arrested may be taken to the station house for booking, even if the only penalty for the offense is a fine (as it is for failure to wear a seat belt). In other words, arrested persons (unlike those stopped at checkpoints, or on reasonable suspicion) need *not* be released as quickly as possible. What is more, a person stopped on probable cause may be searched fully, while a person stopped on reasonable suspicion may be patted down but not searched.<sup>205</sup>

And so, putting aside the *Terry* catchall analysis, in the introductory situation a court may want to consider a *Bostick* analysis of the situation. In *Childs*, as in *Bostick*, the defendant was not technically free to leave, but at all times he maintained the right to refuse police questioning.<sup>206</sup> The *Childs* court noted that questioning outside the scope of the original reason for the routine traffic stop, “is not an unreasonable law-enforcement strategy, either in a given case or in gross; *persons who do not like the question can decline to answer.*”<sup>207</sup> Hence, a *Bostick* analysis may be more appropriate.

Nevertheless, opponents of the *Bostick* analysis, for this type of situation, argue that *Bostick* is entirely distinguishable from the facts in *Childs*.<sup>208</sup> Because *Bostick* affirmatively decided to travel on the bus, he placed himself in a situation where he would not feel

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203. *Id.*

204. *Id.*

205. *Id.* at 952 (citations omitted).

206. See *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991).

207. See *Childs*, 277 F.3d at 954 (emphasis added).

208. See Whorf, *supra* note 11, at 15.

free to leave.<sup>209</sup> In *Childs*, on the other hand, police officers created the situation where Childs felt he was not free to leave because they legally seized him for the traffic violation.<sup>210</sup> Because of this distinction, they argue, a *Terry* analysis is more appropriate than a *Bostick* analysis.<sup>211</sup>

Despite these arguments, the *Bostick* analysis is more appropriate to determine whether questions outside the scope of the original reason for the stop—that do not prolong the stop—create an impermissible seizure because *Bostick* is more analogous to this situation.

Opponents of the *Bostick* analysis for this situation fail to address that Childs essentially created the initial seizure by disobeying the traffic laws.<sup>212</sup> Had Childs simply fixed the windshield and fastened his seatbelt, the officers probably never would have pulled him over in the first place.<sup>213</sup> Because Childs brought the initial seizure upon himself, therefore, a *Bostick* analysis of whether Childs would have felt free to decline police questioning is more appropriate than a *Terry* analysis.

209. *Id.*

210. *Id.*

211. *See id.*

[T]he circumstances of the routine traffic stop turned consent search make almost impossible that which was highly unlikely anyway; namely, that any reasonable person would feel free to ignore direct police questioning about illegal activity, especially when police have just exerted the authority of a forcible traffic stop and detention.

*Id.*; see also *United States v. Holt*, 264 F.3d 1215, 1220 (10th Cir. 2001).

We have consistently applied the principles of *Terry v. Ohio*, to routine traffic stops. Under *Terry*, the reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' Thus, we assess the reasonableness of a traffic stop based on an observed violation by considering the scope of the officer's actions and balancing the motorist's legitimate expectation of privacy against the government's law-enforcement-related interests.

*Holt*, 269 F.3d at 1220.

212. *See Childs*, 277 F.3d at 949.

213. *Id.* Note that under this analysis, the likelihood of pretextual stops may increase. See Whorf, *supra* note 11, at 22-23 (hypothesizing that the routine traffic stop turned consent search occurs 163,000 times annually across the nation). Nevertheless, the Supreme Court has determined that pretextual traffic stops do not necessarily violate the Fourth Amendment. See *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). Thus, any possible increase in the likelihood of pretextual traffic stops as a result of this analysis fails to weaken support for the analysis because the Supreme Court has explicitly ruled that such pretextual stops do not violate the Fourth Amendment. *See id.* Presumably, an increase in permissible pretextual stops would not reverse *Whren*.

Further, a *Bostick* analysis is more reasonable than a *Terry* analysis under the Court's totality of the circumstances approach to Fourth Amendment problems.<sup>214</sup> Because the Court dislikes bright-line rules in Fourth Amendment cases,<sup>215</sup> and because a *Terry* analysis would necessarily ban all questioning outside the scope of the original reason for the stop,<sup>216</sup> a *Bostick* analysis more accurately employs consideration of the totality of the circumstances.<sup>217</sup>

### B. Detention or Mere Questioning: Which Is It?

The Eighth, Ninth, and Tenth Circuits have held that questions that exceed the scope of the original reason for a routine traffic stop create impermissible seizures unless reasonable suspicion of independent criminal activity supports the questions.<sup>218</sup> For these circuits, questioning itself may create an impermissible seizure. On the other hand, for the Fifth and Seventh Circuits, the length of the detention determines whether a seizure is impermissible.<sup>219</sup> It follows that questioning itself, for these circuits, does not create an impermissible seizure; length of time is the key component.<sup>220</sup> Thus, as noted before, the issue turns on the length of the detention for some courts, while other courts take a bright-line approach and ban the questioning altogether.<sup>221</sup>

Nevertheless, courts that take a bright-line approach tend to focus on the length of the detention as well.<sup>222</sup> For example, in *Ramos* the court held that the continued detention of the defendants "after their licenses and registration had been checked was a violation of the Fourth Amendment."<sup>223</sup> Although the court initially focused its problem on the scope of questioning, a closer reading of

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214. See *Ohio v. Robinette*, 519 U.S. 33, 40 (1996).

215. See *Id.* at 39.

216. See *Terry v. Ohio*, 392 U.S. 1, 20-24 (1968) (noting the required scope limitation).

217. See discussion *infra* Part III.C.

218. See *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001); *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001); *United States v. Ramos*, 42 F.3d 1160 (8th Cir. 1994).

219. See *United States v. Childs*, 277 F.3d 947, 952 (7th Cir. 2002); *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).

220. See *Shabazz*, 993 F.2d at 436.

221. See *supra* Part I.

222. See, e.g., *Holt*, 264 F.3d at 1215; *Ramos*, 42 F.3d at 1160.

223. See *Ramos*, 42 F.3d at 1164.

the case shows that the underlying issue that made the seizure impermissible was that the questioning prolonged the detention.<sup>224</sup>

Similarly, in *Holt* the court focused its attention on the scope of questioning but also addressed the detention problem, stating:

Motorists ordinarily expect to be allowed to continue on their way once the purposes of a stop are met. The government's general interest in criminal investigation, without more, is generally insufficient to outweigh the individual interest in ending the detention. . . . Further delay is justified only if the officer has reasonable suspicion of illegal activity or if the encounter has become consensual.<sup>225</sup>

Along these lines, the *Childs* holding addresses the detention concerns and clarifies the role of questioning. By holding that an officer may ask questions unrelated to the original reason for the stop as long as the questions do not prolong the stop, the Seventh Circuit made clear that questions do not create impermissible seizures by themselves.<sup>226</sup> Accordingly, questions may only *contribute* to an impermissible seizure by prolonging the detention.<sup>227</sup> Similarly, the Fifth Circuit in *Shabazz* determined that "Mere questioning . . . is neither a search nor a seizure."<sup>228</sup> The court went on to conclude that questions outside the scope of the original reason for the stop do not constitute an unreasonable seizure because they do not impermissibly extend the stop beyond the time necessary for a routine traffic stop.<sup>229</sup>

Thus, the Fifth and Seventh Circuits' view of the issue may be squared with the Eighth, Ninth, and Tenth Circuits' view. The Fifth and Seventh Circuits speak to the same evil as the Eighth, Ninth, and Tenth Circuits—prolonged detention.<sup>230</sup> Because the facts in *Childs* and *Shabazz* show that questioning outside the scope did not prolong the detention, the only item left to create an impermissible seizure would be the questioning.

But the Supreme Court consistently has held that questions are not seizures.<sup>231</sup> In a similar situation, therefore, because the questions do not prolong the stop and because questions are not

224. *Id.*

225. *See Holt*, 264 F.3d at 1221.

226. *See United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002).

227. *Id.*

228. *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).

229. *Id.* at 437-38.

230. *Compare, e.g., Childs*, 277 F.3d at 952-54, *with Shabazz*, 993 F.2d at 436.

231. *See Florida v. Bostick*, 501 U.S. 429, 439-40 (1991); *INS v. Delgado*, 466 U.S. 210, 216-17 (1984); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

seizures, the Eighth, Ninth, and Tenth Circuits would have little choice but to consider the *Childs* holding for future cases.

### C. *Privacy Interest v. Effective Law Enforcement*

Some scholars have noted that certain police questioning may intrude upon a person's privacy interest.<sup>232</sup> They paint a sordid picture where the officer's questions lead to an embarrassing and traumatic experience.<sup>233</sup> In this example, innocent motorists stand along the side of a vast interstate highway as other cars speed by dangerously close.<sup>234</sup>

Nevertheless, this picture is inaccurate. As noted in *Childs*, motorists may simply decline to answer an officer's question if it exceeds the scope of the original reason for the stop.<sup>235</sup> As the *Childs* court reasoned, if an officer freely may ask questions of someone walking down the street and of someone in practical custody, such as on a bus, the officer should be able to ask questions of someone in actual custody.<sup>236</sup> If a person feels free to decline an officer's questioning, because the officer does not employ coercion, and if that questioning does not prolong the stop, the officer does not intrude upon the person's Fourth Amendment rights.<sup>237</sup> Moreover, because the questioning is not intolerably intrusive, the state's interest in drug interdiction strongly outweighs a person's minimal privacy interest in not being asked questions outside the scope of the original reason for the stop, if the questions do not prolong the stop.<sup>238</sup>

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232. See Dery, *supra* note 167, at 521-28 (discussing cases similar to *Ohio v. Robi-*  
*nette*, 519 U.S. 33 (1996)); Whorf, *supra* note 11, at 16-24.

233. See Whorf, *supra* note 11, at 19.

234. *Id.*

235. See *United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002).

By asking one question about marijuana, officer Chiola did not make the custody of *Childs* an "unreasonable" seizure. What happened here must occur thousands of times daily across the nation: Officers ask persons stopped for traffic offenses whether they are committing any other crimes. That is not an unreasonable law-enforcement strategy, either in a given case or in gross; persons who do not like the question can decline to answer. Unlike many other methods of enforcing the criminal law, this respects everyone's privacy.

*Id.*

236. *Id.* at 954.

237. See *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991).

238. See *Brown v. Texas*, 443 U.S. 47, 52 (1979) (noting the balancing test).

### D. *Childs* Is Consistent With *Robinette*

The decision in *Robinette*, along with *Whren* and *Bustamonte*, indicate that the Supreme Court is heading in the direction of the *Childs* holding. Through *Robinette*, *Whren*, and *Bustamonte*, the Court has determined that: 1) officers need not always inform suspects that they are free to go before consent to search could be deemed voluntary;<sup>239</sup> 2) an officer's subjective intentions do not make continued detention illegal, as long as objective circumstances justify the detention;<sup>240</sup> and 3) proof of knowledge of the right to refuse consent was not necessary for demonstrating voluntary consent.<sup>241</sup>

In the introductory situation, therefore, the officer did not have to tell the defendant that he was free to go after the officer wrote the citation.<sup>242</sup> In addition, even if the officer intended from the outset to question the defendant about narcotics, as long as the officer had an objective basis for stopping the defendant, this would be fine.<sup>243</sup> Finally, the officer would not even have to show that the defendant knew that he had the right to refuse to consent.<sup>244</sup>

Because the Court has consistently weighed the balance in favor of the state's interest in this area of Fourth Amendment jurisprudence, it is highly unlikely that the Court would not permit an officer to ask questions outside the original reason for the stop as long as the questions did not prolong the stop.<sup>245</sup>

### CONCLUSION

Courts should consider the *Childs* holding when dealing with questions that fall outside the scope of the original reason for the stop. Under a *Bostick* analysis, mere questioning does not create an impermissible seizure. Moreover, even the courts that express problems with the scope of questioning eventually direct their attention to the length of the detention. And if length of detention is the evil the Fourth Amendment seeks to protect against, then questions that do not prolong the detention should not create an impermissible seizure.

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239. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996).

240. *Whren v. United States*, 517 U.S. 806, 813 (1996).

241. *Schneekloth v. Bustamonte*, 412 U.S. 218, 234 (1973).

242. See *Robinette*, 519 U.S. at 39-40.

243. See *Whren*, 517 U.S. at 813.

244. See *Bustamonte*, 412 U.S. at 234.

245. See *United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002).

Further, the state interest in drug interdiction outweighs the minimal privacy interest and the Supreme Court disfavors bright-line rules. In addition, *Childs* remains consistent with the direction of the Court in *Robinette*.

For the foregoing reasons, courts should consider the *Childs* holding to determine whether questions that fall outside the scope of the original reason for a routine traffic stop that do not prolong the stop create an impermissible seizure.