Oklahoma Law Review

Volume 55 | Number 4

1-1-2002

Criminal Procedure: *United States v. Holt*: The Exception to the Exception That Swallows the Rule

J. Michael Hughes

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I. Introduction

In *United States v. Holt*,[1] the en banc Tenth Circuit reversed its earlier panel decision, holding that it is not unreasonable within the meaning of the Fourth Amendment for a police officer to ask a vehicle's occupants questions regarding the presence of loaded weapons during a routine traffic stop.[2] Indeed, the officer may ask these questions without reasonable suspicion or probable cause.[3] The court found the questions to be justified on the grounds of officer safety.[4] The Tenth Circuit's decision represents an unwarranted and dangerous intrusion upon the Fourth and Fifth Amendment rights of citizens traveling on the nation's roadways. It removes important restrictions on police conduct pertaining to the scope of the seizures and the need for reasonable suspicion. By removing those requirements, the court effectively circumvented the *Terry* doctrine, which operates as the exception to the general rule that only probable cause justifies a police search or seizure.[5] In side-stepping the reasonable-suspicion exception to the probable-cause rule, the Tenth Circuit has cleared the way for law enforcement personnel to conduct suspicionless criminal investigations, searches, and seizures.

Part II of this note examines selected cases that gave rise to the principles governing traffic stops under the Fourth Amendment. It also analyzes the roles played by probable cause and reasonable suspicion during a routine traffic stop. Through illustration, Part II demonstrates how complex an ordinary traffic stop can become. It also shows the difficulty courts sometimes have keeping the distinct concepts in clear focus. Part III examines the *Holt* case itself and exposes the badly splintered majority's rationale. Part III also explores the dissent's reasoning. Interestingly, the *Holt* court specifically adopted a portion of the dissenting opinion as part of the majority pronouncement. Part IV provides an analysis of *Holt*. Subpart A demonstrates that the majority's logic and rationale were

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* This note received the 2001-2002 Harry Alley-Leroy Allen Prize for Best Case Note.

1. 264 F.3d 1215 (10th Cir. 2001) (en banc) (per curiam).
2. *Id.* at 1217-18.
3. *Id.* at 1217.
4. *Id.* at 1218.
5. Terry v. Ohio, 392 U.S. 1, 24 (1968).

seriously flawed. Subpart B explores the manifold problems *Holt* creates with regard to the Fourth Amendment and the *Terry* doctrine. Subpart C shows how the *Holt* court's decision implicates the Fifth Amendment right against self-incrimination. It also demonstrates the difference between *Holt* and *Berkemer v. McCarty*,[6] an important case dealing with self-incrimination and traffic stops.

II. The Current State of Confusion

A. History and Principle

In *Miranda v. Arizona*,[7] the U.S. Supreme Court held that whenever police subject a person to custodial interrogation, they must inform the person of certain rights guaranteed by the Fifth Amendment.[8] The court stated that if the police fail in this obligation, any inculpatory statements made will be inadmissible as evidence in a criminal trial[9] unless the government can meet the heavy burden of proving a knowing, intelligent waiver of constitutional rights.[10] The court specified that this requirement applies only in the case of custodial interrogation by the police.[11] Custodial interrogation is any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[12] The Court enacted those procedural safeguards to deter the practice of incommunicado interrogation in a police-dominated atmosphere.[13]

The Court decided *Terry v. Ohio*[14] two years later. The *Terry* Court created an exception to the long-standing rule that only probable cause justifies the search and seizure of a person.[15] The *Terry* Court held that if an officer has a reasonable suspicion that a person with whom she is dealing at close range is armed and dangerous, she may conduct a pat-down search of the individual's outer clothing to search for weapons.[16]

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6. 468 U.S. 420 (1984).
7. 384 U.S. 436 (1966).
8. *Id.* at 479.
9. *Id.* at 476.
10. *Id.* at 475.
11. *Id.* at 444; *see also* Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (concluding that *Miranda* safeguards come into play whenever police subject a person in custody to interrogation or its functional equivalent).
12. *Miranda*, 384 U.S. at 444.
13. *Id.* at 456.
14. 392 U.S. 1 (1968).
15. *Id.* at 24.
16. *Id.* at 30.

The basis for the search is "reasonable suspicion": "whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [her] safety or that of others was in danger."[17] The officer's reasonable suspicion must arise from specific facts, along with the reasonable inferences drawn from them, which she can articulate.[18] General suspicion or a hunch will not suffice.[19] The Court stated that a *Terry* search is reasonable if the officer's action was (1) "justified at its inception" and (2) "reasonably related in scope to the circumstances which justified the interference in the first place."[20]

Some years later, in *United States v. Sharpe*,[21] the Supreme Court held that the second requirement in the *Terry* analysis — the "scope" requirement — is actually a scope and duration requirement.[22] The Court declined to impose a strict time limit on *Terry* investigations.[23] Instead, it held that the proper inquiry is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."[24]

One must bear in mind that there are two distinct streams of reasonable suspicion that may be present in a *Terry* encounter. The first stream is that criminal activity is actually afoot or about to be.[25] That type of reasonable suspicion authorizes the officer to detain a person for questioning designed to confirm or dispel the officer's suspicions.[26] The other stream is that the detained individual is presently armed and dangerous, which provides the officer with authority to conduct a limited "frisk" for weapons.[27] These two types of reasonable suspicion are not interchangeable, although the suspicion that a person is involved in criminal activity might contribute to a reasonable suspicion that the person is also armed.[28]

17. *Id.* at 27.

18. *Id.* In requiring specific facts, the Court stated that the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 21 n.18.

19. *Id.* at 27.

20. *Id.* at 20.

21. 470 U.S. 675 (1985).

22. *Id.* at 685.

23. *Id.* at 686.

24. *Id.*

25. United States v. Swift, 220 F.3d 502, 506 (7th Cir. 2000); United States v. Brown, 188 F.3d 860, 864 (7th Cir. 1999); United States v. Caicedo, 85 F.3d 1184, 1189 (6th Cir. 1996); *see also Terry*, 392 U.S. at 22.

26. *Swift*, 220 F.3d at 506; *Brown*, 188 F.3d at 864; *Caicedo*, 85 F.3d at 1189.

27. United States v. Johnson, 170 F.3d 708, 713 (7th Cir. 1999); United States v. Jaramillo, 25 F.3d 1146, 1151 (2d Cir. 1994); United States v. Roach, 958 F.2d 679, 682 (6th Cir. 1992); United States v. Alvarez, 899 F.2d 833, 839 (9th Cir. 1990).

28. *See* United States v. Christmas, 222 F.3d 141, 143 (4th Cir. 2000); United States v.

The Supreme Court addressed both the *Miranda* and *Terry* doctrines in *Berkemer v. McCarty*.[29] *Berkemer* involved a DUI traffic stop in which an officer, without first reading the *Miranda* warnings, questioned a motorist about using intoxicants.[30] After the motorist admitted to the use of various substances, the officer arrested him.[31]

The *Berkemer* Court held that police must give *Miranda* warnings any time they arrest and take a person into custody, regardless of the "nature or severity" of the crime charged.[32] The Court found that a traffic stop is "more analogous" to a *Terry* stop than to a custodial arrest.[33] An officer must, therefore, limit his actions in scope and duration to the circumstances that justified the stop in the first place.[34] Under *Berkemer*, a person stopped by the police during a traffic stop, although not free to leave, is not "in custody" as envisioned by *Miranda*.[35] A motorist is hence not subjected to custodial interrogation during a traffic stop, so no *Miranda* warnings are required for questioning related to that event.[36] But if the motorist is arrested, the *Miranda* warnings are required before police may subject him to custodial interrogation.[37]

In *Whren v. United States*,[38] the Supreme Court held that an officer's decision to stop a vehicle is reasonable under the Fourth Amendment when the officer has "probable cause to believe that a traffic violation has occurred."[39] The Court stated that an officer's subjective intentions in pulling over a motorist are irrelevant to a Fourth Amendment analysis so long as the traffic stop itself is justified.[40] Under *Whren*, it is perfectly

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Smart, 98 F.3d 1379, 1385 (D.C. Cir. 1996); United States v. Barnes, 910 F.2d 1342, 1343-44 (6th Cir. 1990); United States v. Laing, 889 F.2d 281, 286 (D.C. Cir. 1989). *But see* Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979) (holding that where there is not reasonable suspicion of criminal activity or that the suspect is armed, officers may not stop the person for investigation nor conduct a frisk; nothing in *Terry* authorizes a general "cursory search for weapons").

29. 468 U.S. 420 (1984).

30. *Id.* at 423.

31. *Id.*

32. *Id.* at 434.

33. *Id.* at 439.

34. *Id.*

35. *Id.* at 440.

36. *Id.*

37. *Id.* at 434. For the present discussion, it is important to remember that the officer's questions in *Berkemer* related to the reason the motorist was stopped — driving under the influence — and not some other offense.

38. 517 U.S. 806 (1996).

39. *Id.* at 810.

40. *Id.* at 813.

acceptable for an officer to use the proverbial broken taillight to pull over a car when his actual intention is to investigate some other crime.

The Court, in *City of Indianapolis v. Edmond*,[41] struck down a scheme of drug interdiction checkpoints. Unlike other checkpoints based on some aspect of roadway safety, which have won approval from the Supreme Court,[42] the checkpoints in *Edmond* were only for the purpose of interdicting illegal drugs.[43] The Court found that the checkpoints only served to further the government's general interest in crime control.[44] According to the Court, such roadblocks are unconstitutional because they are based on unparticularized suspicion and bestow "'standardless and unconstrained discretion'" on police officers at the checkpoints.[45] The *Edmond* case is relevant because (1) *Holt* involved the use of a roadway checkpoint that arguably was not based on highway safety concerns and (2) the Supreme Court decided *Edmond* at the same time *Holt* was pending before the Tenth Circuit.

B. Into the Abyss: Today's Fourth Amendment and the Traffic Stop

1. What Exactly Is a Traffic Stop?

The exact constitutional dimensions of a traffic stop remain undefined. The U.S. Supreme Court has held that a routine traffic stop more closely resembles a *Terry*-style investigatory stop than a custodial arrest.[46] Another view is that a traffic stop based on probable cause is actually a noncustodial arrest — a concept the Supreme Court has completely avoided, but which has some merit.[47] At a minimum, the Court has held

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41. 531 U.S. 32 (2000).

42. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding sobriety checkpoints at fixed locations in the interest of highway safety); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (suggesting that a brief, suspicionless stop at a fixed checkpoint to ensure satisfaction of licensing and registration requirements would be constitutional in the interest of highway safety).

43. *Edmond*, 531 U.S. at 40-41.

44. *Id.* at 41-42.

45. *Id.* at 39 (quoting *Prouse*, 440 U.S. at 661).

46. *See* Berkemer v. McCarty, 468 U.S. 420, 439 (1984); Michigan v. Long, 463 U.S. 1032, 1051 (1983); *Prouse*, 440 U.S. at 661; United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

47. That viewpoint maintains that routine traffic stops, based on an observed traffic violation, are actually arrests that do not result in the offender being taken into custody. Such a situation would result in a fourth category of police-citizen contact in addition to consensual encounters, investigatory stops, and custodial arrests. *See* David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143 (2000); *see also* Terry v. Ohio, 392 U.S. 1, 26 (1968) ("An arrest is the initial stage of a criminal prosecution."); United States

that a traffic stop is "'a "seizure" within the meaning of [the Fourth] Amendmen[t].'"[48]

The law appears to recognize two grounds upon which a police officer may use her official authority to stop a motorist on the road. The first ground — probable cause — exists when the officer reasonably believes that the particular motorist is violating a traffic law.[49] Once an officer has probable cause to believe that a motorist's conduct falls outside the law's accepted bounds, she may pull the motorist off the road and investigate the infraction, if any investigation is necessary.[50] The officer may ask questions related to the stop and run certain computer checks to ensure that the driver is legally entitled to operate the car and has satisfied the administrative registration requirements.[51] Based on the officer's probable cause, she may arrest the driver for the infraction,[52] issue a citation containing a promise to appear in court on a later date,[53] or release the motorist with a warning.

Second, reasonable suspicion of criminal activity can justify an officer pulling over a motorist.[54] This is the *Terry* doctrine on wheels. Reasonable suspicion exists when it is based on specific facts, along with the reasonable inferences that can be drawn from them, which the officer

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v. $404,905.00 in U.S. Currency, 182 F.3d 643, 648 (8th Cir. 1999) (stating that a traffic stop is "a form of arrest").

48. *Berkemer*, 468 U.S. at 436-37 (alterations in original) (quoting *Prouse*, 440 U.S. at 653); *accord* Whren v. United States, 517 U.S. 806, 809 (1996).

49. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); *Whren*, 517 U.S. at 810.

50. *Whren*, 517 U.S. at 810; *$404,905.00 in U.S. Currency*, 182 F.3d at 646-47. *But cf.* United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000) (holding that where there is no probable cause or reasonable suspicion, the officer has no right to detain the motorist or investigate the supposed violation).

51. *$404,905.00 in U.S. Currency*, 182 F.3d at 647.

52. *Atwater*, 532 U.S. at 354.

53. United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998); United States v. Gregory, 79 F.3d 973, 979 (10th Cir. 1996); United States v. Soto, 988 F.2d 1548, 1554 (10th Cir. 1993); *see also* Tanner v. Heise, 879 F.2d 572, 579 (9th Cir. 1989) (holding that, under Idaho law, when an officer has "reasonable and probable grounds" to disbelieve that the motorist will honor the written promise to appear in court, he may arrest the motorist and take him before a magistrate).

54. Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that without reasonable suspicion of a violation, a police officer's action in stopping a vehicle violates the Fourth Amendment); United States v. Ozbirn, 189 F.3d 1194, 1197 (10th Cir. 1999) (explaining that a traffic stop is reasonable under the Fourth Amendment if it is supported by "a reasonable articulable suspicion" that the motorist has violated a traffic or equipment regulation); *$405,905.00 in U.S. Currency*, 182 F.3d at 646 (stating that when police lack probable cause to make a traffic stop, "a purely investigative stop must be based upon at least . . . reasonable suspicion").

can articulate to someone else.[55] It may not be based on unparticularized suspicion, gut feeling, or hunch.[56] The reasonable suspicion must exist before the officer decides to stop the vehicle, and the officer must limit the ensuing investigation according to the suspicion that justified it.[57] The officer cannot conduct a general investigation to determine if *any* crime has been committed.[58]

2. Conducting the Traffic Stop: Things Always Seem to Pop Up

If during the course of the *Terry* investigation, the officer develops a reasonable suspicion that the person with whom she is dealing is armed and dangerous, she may take certain actions to protect her safety and that of others at the scene.[59] With such a suspicion, the officer may perform a "*Terry* frisk" of the driver and any or all of the passengers.[60] The officer may also "frisk" the vehicle's passenger compartment.[61] The Supreme Court has held that without reasonable suspicion the officer may nonetheless order the driver and/or passengers to get out of the car.[62] Other measures allowed without reasonable suspicion are ordering the driver and/or passengers to remain in the car[63] or ordering them to raise their hands.[64] The officer may shine her flashlight into the dark passenger compartment of the vehicle for her own safety[65] and may, if the vehicle has darkly tinted windows, open a door to determine if there is any danger.[66]

A probable-cause event and a *Terry* investigation often occur simultaneously during a traffic stop. One of the most perplexing difficulties in dealing with Fourth Amendment issues in the traffic-stop context is the Supreme Court's continuing refusal to clearly delineate the bounds of each

55. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968); *see also Prouse*, 440 U.S. at 663; *Ozbirn*, 189 F.3d at 1198; *Hunnicutt*, 135 F.3d at 1348; United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995).

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

57. *Id.* at 20.

58. *Id.* at 30 (holding that the officer's frisk was valid, in part, because it was limited and not "a general exploratory search for whatever evidence of criminal activity he might find").

59. *Id.* at 27.

60. *Id.*

61. Michigan v. Long, 463 U.S. 1032, 1049 (1983).

62. Maryland v. Wilson, 519 U.S. 408, 415 (1997); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).

63. Rogala v. District of Columbia, 161 F.3d 44, 53 (D.C. Cir. 1998).

64. United States v. Moorefield, 111 F.3d 10, 13 (3d Cir. 1997).

65. Texas v. Brown, 460 U.S. 730, 739-40 (1983) (plurality opinion).

66. United States v. Stanfield, 109 F.3d 976, 981 (4th Cir. 1997).

event. Instead, the Court relies on its statement that a traffic stop is "more analogous" to a *Terry* encounter than to a custodial arrest.[67] But the mere fact that a traffic stop is analogous to a *Terry* encounter does not necessarily mean that it *is* such an encounter. By blurring the lines between a probable-cause event and a *Terry* investigation, the Court also blurs the boundaries of acceptable police conduct.

A probable-cause traffic stop is essentially a course of action by the police in response to an observed traffic violation.[68] A *Terry* encounter, on the other hand, is an investigative procedure based on reasonable suspicion of criminal activity.[69] The entire point of a *Terry* encounter (from the police officer's perspective) is to find something that will generate probable cause, justifying an arrest.[70] One type of stop is reactive, the other is proactive. One is based on probable cause, the other on reasonable suspicion. The events are mutually exclusive. The probable cause of the traffic offense may not, under *Terry* principles, also serve as the reasonable suspicion of an investigative detention for some other offense.[71]

For the run-of-the-mill speeding ticket, no real investigation is necessary because speeding is, for the most part, a strict liability offense.[72] Once the

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67. Knowles v. Iowa, 525 U.S. 113, 117 (1998); Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

68. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); Whren v. United States, 517 U.S. 806, 810 (1996).

69. United States v. Hensley, 469 U.S. 221, 226 (1985); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975); Terry v. Ohio, 392 U.S. 1, 27 (1968).

70. In *Holt*, the trooper testified that his purpose in searching for the weapon was to discover a violation so he could arrest Holt. United States v. Holt, 264 F.3d 1215, 1232 (10th Cir. 2001) (Briscoe, J., dissenting).

71. Reasonable suspicion can grow to become probable cause when the officer's investigations confirm her suspicions. *See* United States v. Brown, 188 F.3d 860, 866 (7th Cir. 1999) (ruling that the suspect's behavior and other factors during a valid speeding stop gave rise to a reasonable suspicion that the suspect was armed; reasonable suspicion gave way to probable cause when officer found no weapons but drugs); United States v. Allegree, 175 F.3d 648, 650-51 (8th Cir. 1999) (holding that vehicle occupants' behavior during valid traffic stop gave rise to reasonable suspicion of narcotics possession that, in turn, gave rise to probable cause after investigation); United States v. Hunnicutt, 135 F.3d 1345, 1350 (10th Cir. 1998) (holding that evidence obtained during officer's investigative detention gave rise to probable cause to believe that motorist was in possession of narcotics, justifying more intrusive search of vehicle). These courts, however, did not allow officers to use the probable cause of the traffic stop to infer that the person was armed or in possession of illegal narcotics in any of these cases.

72. *See generally* Stanley v. Turner, 6 F.3d 399, 404 (6th Cir. 1993) (finding no culpable mental state required for involuntary (vehicular) manslaughter; the only mental state required was that of the underlying traffic offense; and violation of a traffic offense held

officer has evidence that the motorist was speeding, the infraction is complete without evidence of the defendant's intent. Offenses that fall within this category usually pertain to a specific instance of conduct, such as speeding, failure to use a turn signal, or defective taillight. The naked fact of the offense is all the evidence the officer needs, and no investigation is necessary to confirm the prohibited act.

Offenses speaking more to the condition of the driver, which are based on the overall quality of the person's driving rather than to any specific event, are more problematic and generally require investigation on the side of the road. It seems obvious that driving under the influence (DUI) generally cannot be proved without some interaction with the driver.[73] DUI stops are a common and illustrative example of an automobile *Terry* stop because a police officer generally will not have probable cause to arrest a driver for DUI until she observes that person's behavior.

3. Explanation Through Illustration

To set these principles in motion, assume that an officer pulls over a car. The officer stopped the car because of a generally recognizable pattern of driving, weaving in the lane, erratic speed changes, and unreasonably slow speed, which aroused her suspicion that the driver might be intoxicated. If the driving included no illegal acts, the stop is presumably based on a reasonable suspicion that the motorist is driving under the influence.[74] If the motorist committed a traffic offense in the officer's presence as part of his erratic driving, such as failure to signal, then the officer has probable cause based on the observed traffic violation to pull over the car.[75] The officer may simultaneously have a reasonable suspicion that the driver is intoxicated.

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negligence per se); United States v. McMillan, 820 F.2d 251, 258 (8th Cir. 1987) (discussing that, under South Dakota law, driving with a blood alcohol concentration in excess of the statutory limit is a strict liability offense).

73. *See generally* United States v. Gregory, 79 F.3d 973, 978 (10th Cir. 1996) (holding that probable cause did not exist where officer arrested driver for DUI with no investigation or meaningful observation of driver's behavior); Pecsenye v. Village of Park Forest, No. 94-C-5536, 1997 WL 102534, at *1, 3 (N.D. Ill. Mar. 3, 1997) (deciding that officer who had observed two traffic violations had probable cause to arrest the driver for DUI based on driver's behavior and responses to questions, which included roadside demonstration of gymnastics); Mason v. Stock, 955 F. Supp. 1293, 1304 (D. Kan. 1997) (finding that officer had probable cause to arrest driver based on observed driving, admission that he had been drinking, and observed behavior).

74. *See Terry*, 392 U.S. at 27 (defining reasonable suspicion as "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of experience").

75. Whren v. United States, 517 U.S. 806, 810 (1996).

As previously explained, no real investigation is required for the failure-to-signal charge. Based on probable cause, the officer can ticket the driver for that infraction regardless of anything else that happens.[76] The reasonable suspicion that the driver is intoxicated is what enables the officer to investigate whether or not that is true.[77] The officer may take reasonable steps to confirm or dispel her suspicion concerning the driver.[78] These measures may include observing that person's behavior, asking questions regarding where he has been and whether he has been drinking, and conducting roadside sobriety tests.[79] After a reasonable time, the officer must decide whether her investigation has produced probable cause to believe that the person was operating the car under the influence.[80] If the answer is yes, the officer may arrest the driver.[81] If the answer is no, the officer must allow the driver to continue on his way without further interference — other than a ticket for failing to signal.[82]

The two processes are separate. The officer may not import the probable cause of failure-to-signal as the reasonable suspicion of DUI without more. There must be something specific, which the officer can articulate as more than gut feeling or hunch, that makes the officer suspect that the driver is intoxicated.[83] Only then can the officer shift her focus from the probable-cause offense to the reasonable-suspicion investigation.

An officer may develop a reasonable suspicion about more than one thing during an encounter with a motorist. Assume that during the investigation into whether the driver is drunk, the officer detects the smell of marijuana smoke coming from inside the car. That creates an entirely new reasonable suspicion that there might be drugs in the car.[84] But again,

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76. If the state statutes categorize traffic violations as criminal offenses, the officer may also arrest the motorist based on the same probable cause that justified stopping the person for the purpose of writing a ticket. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

77. United States v. West, 219 F.3d 1171, 1176 (10th Cir. 2000); United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998); United States v. Soto, 988 F.2d 1548, 1554 (10th Cir. 1993).

78. United States v. Sharpe, 470 U.S. 675, 686 (1985); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975).

79. *See, e.g.*, Pennsylvania v. Bruder, 488 U.S. 9, 9-10 (1988); Berkemer v. McCarty, 468 U.S. 420, 423 (1984); Mason v. Stock, 955 F. Supp. 1293, 1304 (D. Kan. 1997).

80. *Sharpe*, 470 U.S. at 686; United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 647-48 (8th Cir. 1999); United States v. Ozbirn, 189 F.3d 1194, 1199 (10th Cir. 1999).

81. *See, e.g., Berkemer*, 468 U.S. at 423; *Ozbirn*, 189 F.3d at 1200; United States v. Worthington, 544 F.2d 1275, 1280 (5th Cir. 1977).

82. *West*, 219 F.3d at 1176; *$404,905.00 in U.S. Currency*, 182 F.3d at 648; *Ozbirn*, 189 F.3d at 1199.

83. Terry v. Ohio, 392 U.S. 1, 27 (1968).

84. *See, e.g.*, United States v. Brown, 188 F.3d 860, 865 (7th Cir. 1999); *Ozbirn*, 189

the two *Terry* investigations are separate and distinct. The officer could not claim that the reasonable suspicion that the driver was drunk justified the suspicion that there were drugs in the car without something specific — like the smell of marijuana smoke wafting from an open window.

This hypothetical illustrates just how complex a routine traffic stop can become. It also shows how easy it can be to lose sight of exactly which justification allowed the police to expand the investigation from a simple traffic infraction to something more serious. To maintain fealty to the *Terry* doctrine and the Fourth Amendment in the traffic-stop context, it is imperative that courts keep probable cause separate from reasonable suspicion and the different types of reasonable suspicion separate from each other. The consequences of failing to do so appear in decisions in which courts jumble the doctrines with confusing results.

4. Two Examples of Judicial Mix-and-Match

In *United States v. Botero-Ospina*,[85] the Tenth Circuit held that the *sole inquiry* in determining the reasonableness of a traffic stop is whether the officer had reasonable suspicion that a particular motorist violated a traffic regulation.[86] The court stated that if the officer's initial traffic stop, though justified by the officer's observation of a traffic infraction, is motivated by a desire to engage in a more serious criminal investigation, his inquiry is circumscribed by the *Terry* scope requirement.[87] The problem with such a holding is that reasonable suspicion cannot be the only determination of reasonableness in pulling over a car on the highway.[88] Many traffic violations are by their very nature proved by probable cause or nothing. Speeding is an example. An officer either observes the driver speeding or she does not. Once the driver pulls the car off the road, all the investigation in the world (short of a confession) will not prove that the driver was speeding on the road. The court's statement also erroneously implies that the reasonable suspicion of the initial traffic offense can be sufficient for any other inquiry that might arise during the stop.

F.3d at 1200; United States v. Corral, 823 F.2d 1389, 1393 (10th Cir. 1987).

85. 71 F.3d 783 (10th Cir. 1995).

86. *Id.* at 787.

87. *Id.* at 788.

88. *See* Whren v. United States, 517 U.S. 806, 810 (1996) (stating that the decision to stop a vehicle is reasonable when based on probable cause); United States v. Zubia-Melendez, 263 F.3d 1155, 1160 (10th Cir. 2001); United States v. Hunnicutt, 135 F.3d 1345, 1348 (10th Cir. 1998).

United States v. Hill[89] is another example of a court confusing these principles. In *Hill*, the Sixth Circuit stated that reasonable police conduct requires that "any subsequent detention after the initial stop must not be excessively intrusive in that the officer's actions must be reasonably related in scope to circumstances justifying the initial interference."[90] The *Hill* court uses words from the *Terry* decision to thwart its purpose by tying the subsequent investigative detention to the initial justification for the traffic stop.[91] A *Terry* investigation is not parasitic. It must stand on its own basis of reasonable suspicion and may not borrow the probable cause or reasonable suspicion of some other offense as *carte blanche* for any other suspicion that may arise.[92]

III. United States v. Holt

A. Case Facts and Procedural History

The police in Muldrow, Oklahoma, believed that Holt was transporting illegal drugs.[93] Acting on that belief, several Muldrow officers and an Oklahoma Highway Patrol trooper set up a roadblock on the road to Holt's house.[94] The officers stopped every car and checked every driver's license.[95] As Holt approached, the trooper observed that he was not

89. 195 F.3d 258 (6th Cir. 1999).

90. *Id.* at 264.

91. Even if the initial traffic offense is a factor in determining reasonable suspicion, an officer cannot automatically use it as reasonable suspicion. An officer's action in a *Terry* encounter must be "justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20 (1968).

92. *Id.* at 21.

93. United States v. Holt, 264 F.3d 1215, 1218 (10th Cir. 2001).

94. *Id.* The U.S. Supreme Court decided *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), after the district court in *Holt* rendered its judgment and during the pendency of the appeal. *Edmond* held that traffic checkpoints established only for the purpose of interdicting illegal drugs are unconstitutional because the purpose of such checkpoints is not distinguishable from the government's general crime-control interest. *Id.* at 48. Narcotics checkpoints subject innocent citizens to the "'standardless and unconstrained discretion'" of the officers at the roadblock, *id.* at 39 (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979)), who investigate crime with no individualized suspicion or probable cause, *id.* at 43. The *Holt* court left the parties free to develop the factual record and address *Edmond* on remand. *Holt*, 264 F.3d at 1218 n.2. The parties, thus, did not present the illegal roadblock issue to the Tenth Circuit.

95. *Holt*, 264 F.3d at 1218.

wearing his seatbelt.[96] The trooper told Holt to pull off the road and to sit in the front seat of his patrol car.[97]

The trooper took Holt's driver's license and was writing a warning for the seatbelt violation when he asked if there was anything in Holt's truck that he should know about, such as a loaded weapon.[98] Holt admitted to the presence of a loaded gun in the truck.[99] Holt did not claim that he had a permit to carry a concealed weapon, and the trooper did not ask.[100] The trooper then asked if there was anything else in the truck he should know about.[101] In response, "Holt stated, 'I know what you are referring to' but 'I don't use them anymore.'"[102] After further questioning, the trooper asked for and received Holt's consent to search the truck.[103] The trooper found the loaded gun, and the Muldrow officers found drugs and drug paraphernalia.[104]

The officers arrested Holt, who was subsequently indicted in federal court on drug and firearm charges. The district court granted his pretrial motion to suppress the statements to the trooper and the evidence found in the truck.[105] The United States then brought an interlocutory appeal to the Tenth Circuit. The issue before the Tenth Circuit was whether the trooper's questions regarding the existence of a loaded gun in the vehicle, without probable cause or reasonable suspicion, were reasonable under the Fourth Amendment.[106]

B. The (Barely) Majority Reasoning

To say that the Tenth Circuit was split in its decision is an understatement. The original panel produced a 2-1 decision affirming the district court's grant of the motion to suppress.[107] Judge Briscoe wrote the panel opinion, and Judge Ebel dissented. On rehearing, the tables were turned. Judge Ebel authored the en banc decision,[108] which reversed the

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96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 1219.
105. *Id.*
106. *Id.* at 1217.
107. United States v. Holt, 229 F.3d 931, 936 (10th Cir. 2000), *rev'd en banc*, 264 F.3d 1215 (10th Cir. 2001).
108. *Holt*, 264 F.3d at 1215.

panel. Three other judges joined that opinion.[109] Interestingly, the majority opinion specifically adopted portions of Judge Briscoe's dissenting opinion[110] and Judge Henry's concurrence.[111]

The court rejected Holt's contention that the trooper's question concerning loaded weapons in the truck was impermissible even though it admittedly was not founded on reasonable suspicion or probable cause.[112] The court examined the requirement of the Oklahoma Self-Defense Act[113] that all persons who are in lawful possession of a concealed weapon reveal that fact to the police when pulled over for a traffic stop.[114] The court used this provision to conclude that Oklahoma citizens who are lawfully carrying a loaded weapon have no reasonable expectation of privacy in possessing the gun because they must reveal that fact to a police officer.[115] Following that line of reasoning, the court further decided that because those in lawful possession have no reasonable expectation of privacy in the weapon, then clearly those in *unlawful* possession also have no reasonable expectation of privacy in possessing a gun.[116]

The *Holt* court followed established precedent that a traffic stop is a "seizure" within the meaning of the Fourth Amendment,[117] and that the reasonableness of a seizure under the Fourth Amendment is a balance of the government's interests versus those of the private citizen.[118] The court stated that it generally disfavors bright-line tests in Fourth Amendment analysis in favor of a totality-of-the-circumstances approach.[119] In such a balancing test, no single factor is determinative; the court considers all the objective facts to arrive at a decision.[120] The court also reiterated the established *Terry* criteria for traffic stops. It said that the reasonableness of such a search or seizure depends on whether the officer's actions were justified at the outset and whether they were reasonably related in scope to the circumstances that initially justified the intrusion.[121]

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109. Chief Judge Tacha and Judges Brorby and Kelly joined Judge Ebel's opinion. *Id.* at 1217 n.**.

110. *Id.* at 1227 n.1 (Briscoe, J., dissenting).

111. *Id.* at 1217 n.**.

112. *Id.* at 1226.

113. 21 OKLA. STAT. §§ 1290.1-1290.26 (2001).

114. *Holt*, 264 F.3d at 1222.

115. *Id.*

116. *Id.*

117. *Id.* at 1220.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

The court then balanced its conclusion — that neither those Oklahomans in lawful possession of a gun nor those in unlawful possession have a reasonable expectation of privacy — against the "legitimate and weighty" government interest in officer safety.[122] The court found that officer safety wins in every case,[123] allowing the officer to take the minimally intrusive step of simply asking the driver if there are weapons in the car.[124] The court also held that its balancing test weighs in the government's favor even when there is no particularized suspicion that the motorist is armed and even when the officer does not subjectively fear the motorist.[125]

The court made it clear that the motorist does not have to answer the officer's question.[126] If the motorist chooses to answer, any statement can be used just like any other voluntary admission in a traffic stop.[127] The court noted that a refusal to answer, standing alone, may not serve as the justification for a more intrusive search nor may the officer arrest the motorist for refusing to answer.[128] But the court's holding allows the officer to take reasonable safety precautions based on a refusal to answer, and the refusal may also "'alert the officer to the need for continued observation.'"[129] The court observed that police are skilled at detecting overly nervous or evasive responses, and so any answer — or no answer at all — may prove valuable to the officer.[130] Ultimately, the court held that once the officer has asked the question, he may take no further action without particularized reasonable suspicion.[131]

C. The Dissent's Reasoning

The portion of the dissenting opinion adopted by the en banc pronouncement addresses the scope and duration limitations of a traffic stop and is

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122. *Id.* at 1222.

123. *Id.* at 1226.

124. *Id.* at 1223.

125. *Id.* at 1226.

126. *Id.* at 1237 (Henry, J., concurring).

127. *Id.* at 1224. This flies in the face of existing Tenth Circuit precedent regarding the voluntariness of an encounter between a citizen and the police. For example, an officer may not lengthen the duration of the stop to engage in questioning beyond the purpose of the initial stop unless the encounter is consensual or based on an "objectively reasonable suspicion of illegal activity." United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998). So long as the officer retains the citizen's driver's license, the encounter is not consensual and must be based on reasonable suspicion. *Id.* (citing United States v. McKneely, 6 F.3d 1447, 1451 (10th Cir. 1993)).

128. *Holt*, 264 F.3d at 1224.

129. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring)).

130. *Id.*

131. *Id.* at 1237 (Henry, J., concurring).

based on *Terry* principles. The dissent, speaking for the court, specifically rejected the position taken by the Fifth Circuit in *United States v. Shabazz*,[132] which the United States urged the court to adopt in *Holt*.[133]

In *Shabazz*, the Fifth Circuit held that an officer's questioning, even on a subject unrelated to the traffic stop's purpose, is not itself a Fourth Amendment violation.[134] The court stated that so long as the duration of the officer's questioning on any topic does not exceed the duration of the stop, the questioning is not intrusive.[135] *Shabazz* relied heavily on the U.S. Supreme Court's statement in *Florida v. Bostick*[136] that "mere police questioning does not constitute a seizure."[137] The *Holt* dissent distinguished the factual situation in *Bostick* from that in *Holt*. The issue in *Bostick* was whether a seizure had taken place at all.[138] In *Holt*, a seizure plainly occurred. The *Holt* dissent was concerned that *Shabazz* removed the "scope" prong of the *Terry* analysis and focused only on the "duration" part of the equation.[139] The dissent argued that such a position runs counter to Supreme Court jurisprudence, which imposes limitations not only on the length of the detention but also on the manner in which it is conducted.[140]

The dissent, speaking for only four judges, then took exception to the majority's creation of another bright-line test in Fourth Amendment jurisprudence, especially given the Supreme Court's stated dislike of such analyses.[141] The dissent observed that to accord with precedent, an officer

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132. 993 F.2d 431 (5th Cir. 1993).

133. *Holt*, 264 F.3d at 1228 (Briscoe, J., dissenting).

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

135. *Id.*; *see also* United States v. Sharpe, 470 U.S. 675, 687 (1985) (focusing the reasonableness inquiry of a traffic stop on the duration of the stop).

136. 501 U.S. 429 (1991).

137. *Id.* at 434.

138. In *Bostick*, Florida sheriff deputies boarded a bus at a stop and randomly asked passengers for consent to search luggage. *Id.* at 431. Despite the cramped confines of a bus and the fact that Bostick might not have felt free to leave, the Court strongly implied, without actually deciding, that the officers had not "seized" him for Fourth Amendment purposes. *Id.* at 437. Thus, the encounter was consensual, and the officers' questioning without reasonable suspicion or probable cause was not unreasonable. *Id.* at 434.

139. United States v. Holt, 264 F.3d 1215, 1229 (10th Cir. 2001) (Briscoe, J., dissenting).

140. *Id.* at 1230 (Briscoe, J., dissenting); *see also Sharpe*, 470 U.S. at 690 (Marshall, J., concurring) ("Even a stop that lasts no longer than necessary to complete the investigation for which the stop was made may amount to an illegal arrest if the stop is more than 'minimally intrusive.'") (quoting United States v. Place, 462 U.S. 693, 703 (1983)); Florida v. Royer, 460 U.S. 491, 500 (1983) ("[T]he investigative methods employed [by the police] should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.").

141. *Holt*, 264 F.3d at 1230-31 (Briscoe, J., dissenting); *see* Ohio v. Robinette, 519 U.S.

must base a *Terry* encounter on reasonable suspicion, which, in turn, she must base on specific, objective facts.[142] The dissent asserted that the objective facts of *Holt* indicated absolutely no officer safety issue and no reasonable suspicion that Holt might be armed.[143]

IV. The Majority's Reasoning and Conclusion Are Flawed

A. Courts Cannot Use the Oklahoma Self-Defense Act as the Standard for Expectations of Privacy in Oklahoma

The *Holt* court based its decision on an interpretation of the Oklahoma Self-Defense Act (OSDA).[144] By the court's reading, because of a provision in the OSDA that applies to OSDA licensees, no one in the state of Oklahoma has a reasonable expectation of privacy in possessing a concealed weapon.[145]

The majority of Oklahoma statutory law pertaining to firearms is found in title 21, chapter 53 of the Oklahoma Statutes. That chapter contains the OSDA, the Oklahoma Firearms Act of 1971, and several general prohibitions pertaining to the carrying of weapons of various types, including handguns, as well as penalties for violations.[146] These general prohibitions — applicable to all Oklahoma citizens — also make illegal other aspects of weapon possession, sale, and transfer. The Oklahoma Firearms Act of 1971[147] establishes certain exceptions to the general prohibition against carrying weapons that apply to all the state's citizens. Included among its provisions are the definitions of various types of firearms,[148] conditions under which any citizen may carry a firearm,[149]

33, 39 (1996) (stating that the Court has "consistently eschewed bright-line rules" in favor of a totality-of-the-circumstances test based on objective facts in determining Fourth Amendment reasonableness).

142. *Holt*, 264 F.3d at 1230 (Briscoe, J., dissenting); *see also* Delaware v. Prouse, 440 U.S. 648, 654 (1979); Terry v. Ohio, 392 U.S. 1, 21 (1968); Beck v. Ohio, 379 U.S. 89, 96 (1964).

143. *Holt*, 264 F.3d at 1231 (Briscoe, J., dissenting).

144. 21 OKLA. STAT. §§ 1290.1-1290.26 (2001).

145. *Holt*, 264 F.3d at 1222.

146. Chapter 53 is comprised of sections 1271.1 through 1290.26. Among its provisions is section 1272, which makes it "unlawful for any person to carry upon or about his or her person, or in a purse or other container belonging to the person" various types of weapons, including firearms, knives, certain types of clubs, metal knuckles, "or any other offensive weapon, whether such weapon be concealed or unconcealed." 21 OKLA. STAT. § 1272 (2001). Violation of section 1272 is punishable as a misdemeanor. *Id.* § 1276.

147. *Id.* §§ 1289.1-1289.26.

148. *Id.* §§ 1289.3-1289.5.

149. *Id.* § 1289.6.

conditions under which any citizen may have a firearm in a vehicle,[150] restrictions on weapon modifications,[151] restrictions on the use of body armor,[152] and restrictions on the possession or use of certain types of ammunition.[153]

The OSDA[154] is a group of statutes held separate from the rest of the statutory law pertaining to firearms. The OSDA does not apply to all Oklahomans. The language of the statute itself and the organization of other Oklahoma firearms statutes indicate that the OSDA is an exception to the general law applicable to all citizens on the possession and use of firearms. The OSDA functions to grant special privileges to certain qualified Oklahomans. In exchange, licensees are bound by higher standards of responsibility and accountability in the carrying and possession of concealed handguns. The Oklahoma legislature took great pains to distinguish the body of law that applies to the citizenry at large from that which applies only to OSDA licensees. The following samples of Oklahoma statutes illustrate this point.

Title 21, section 1290.8(B), is part of the OSDA. It requires all persons who have a concealed-weapon license to have that permit plus another form of state photo identification with them at all times when they are actually carrying a concealed weapon.[155] This requirement applies only to OSDA licensees and not to the general public. Criminal penalties and administrative sanctions apply if the licensee fails to meet the higher requirements.[156]

In contrast, title 21, section 1289.7, is part of the Oklahoma Firearms Act of 1971. It allows any Oklahoma citizen, other than a convicted felon, to transport a rifle, shotgun, or pistol in a vehicle so long as the weapon is unloaded and in plain view, in a firearms carrying case that is in plain view, or in an exterior locked compartment, including the trunk.[157] Section

150. *Id.* §§ 1289.7, 1289.13.

151. *Id.* § 1289.18.

152. *Id.* § 1289.26.

153. *Id.* § 1289.21.

154. *Id.* §§ 1290.1-1290.26.

155. The statute requires that "[t]he [licensee] shall be required to have possession of his or her valid handgun license and a valid Oklahoma driver license or an Oklahoma State photo identification at all times when in possession of an authorized pistol." *Id.* § 1290.8(B).

156. Failure to comply with the requirements of section 1290.8(B) is punishable under the general provision for the unlawful carrying of a weapon, section 1272. *Id.*

157. The terms of the statute provide:

> Any person, except a convicted felon, may transport in a motor vehicle a rifle, shotgun or pistol, open and unloaded, at any time. For purposes of this section "open" means the firearm is transported in plain view, in a case designed for

1289.7 also specifically addresses the situation in which a person who has a concealed-weapon permit is riding in the same car with a person who does not. If the licensee is carrying a concealed weapon or has concealed a weapon in the car, the nonlicensee is not guilty of illegally possessing a weapon so long as the licensee is either in the vehicle or nearby.[158] Here the legislature placed an OSDA-based exception into a provision of law applicable to all Oklahomans.

Title 21, section 1289.9, makes it a crime for any Oklahoma citizen to carry or use a firearm under the influence of drugs or alcohol.[159] That statute also provides that if a person convicted of violating section 1289.9 is also an OSDA licensee, administrative penalties will apply in addition to the punishment that flows from the misdemeanor charge of carrying or using a weapon under the influence.[160] The extra penalties include an additional fine and suspension of the OSDA license.[161] This section places additional accountability upon OSDA licensees based on the same level of responsibility expected from all citizens.

The statute that caught the attention of the court in *Holt* was title 21, section 1290.8(C).[162] The terms of that section require a person carrying a concealed weapon by virtue of an OSDA license to reveal that fact to any law enforcement officer when the licensee "first comes into contact with [the officer] during the course of any arrest, detainment, or routine traffic

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carrying firearms, which case is wholly or partially visible, in a gun rack mounted in the vehicle, in an exterior locked compartment or a trunk of a vehicle.

Id. § 1289.7.

158. Section 1289.7 states:

Any person who is an operator of a vehicle or is a passenger in any vehicle wherein another person who is licensed . . . to carry a concealed handgun and is carrying a concealed handgun or has concealed the handgun in such vehicle, shall not be deemed in violation of the provisions of this section provided the licensee is in or near the vehicle.

Id.

159. The statute reads as follows:

It shall be unlawful for any person to carry or use shotguns, rifles or pistols in any circumstances while under the influence of beer, intoxicating liquors or any hallucinogenic, or any unlawful or unprescribed drug, and it shall be unlawful for any person to carry or use shotguns, rifles or pistols when under the influence of any drug prescribed by a licensed physician if the aftereffects of such consumption affect mental, emotional or physical processes to a degree that would result in abnormal behavior.

Id. § 1289.9. Violation of this statute is punished as a misdemeanor. *Id.* § 1289.15.

160. *Id.* § 1289.9.

161. *Id.*

162. United States v. Holt, 264 F.3d 1215, 1222 (10th Cir. 2001).

stop."[163] Failure to comply is a misdemeanor.[164] By its very terms, this provision applies only to OSDA licensees and not to the general public. It is part of the heightened responsibility and accountability the state demands in exchange for the license to carry a concealed weapon. Section 1290.8(C) applies only to a relatively small portion of Oklahoma citizens. By holding the entire population to that stricter standard, the Tenth Circuit eliminates *any* expectation of privacy for *all* Oklahoma citizens in the possession of a concealed weapon.

Further, the requirements of section 1290.8(C) do not apply in all situations, even for OSDA licensees. In any situation other than an "arrest, detainment, or routine traffic stop,"[165] the licensee is not required to divulge that he is carrying a concealed weapon. If a licensee were to encounter a police officer walking down the street, he thus would not be required to reveal that he was carrying a gun unless he were detained or arrested.[166] His possession of the gun would remain private.

The provision of the Oklahoma Statutes that most soundly refutes the majority's position is found in title 21, section 1290.8(E), which specifically establishes an expectation of privacy in the possession of a concealed weapon for OSDA licensees. Section 1290.8(E) states that "[n]othing in [the OSDA] shall be construed to authorize a law enforcement officer to inspect any weapon properly concealed without probable cause that a crime has been committed."[167] Although the statute requires the licensee to reveal the presence of the weapon, the officer must have probable cause before ordering the licensee to produce the weapon for inspection. Short of that, the citizen in lawful possession of a handgun expects that possession to remain private. By the terms of the statute, even a reasonable suspicion of criminal activity is not sufficient to enable the officer to inspect a properly

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163. The relevant text provides:

> It shall be unlawful for any person to fail or refuse to identify the fact that the person is in actual possession of a concealed handgun pursuant to the authority of the Oklahoma Self-Defense Act when the person first comes into contact with any law enforcement officer of this state or its political subdivisions or a federal law enforcement officer during the course of any arrest, detainment, or routine traffic stop.

21 OKLA. STAT. § 1290.8(C) (2001).

164. *Id.* Administrative sanctions also apply. *Id.*

165. *Id.*

166. Similarly, the statute would not require a motorist in a car to reveal the presence of the concealed weapon to the officer when the situation was not an arrest, detainment, or routine traffic stop. An example of such a situation might be an officer stopping to offer assistance to a motorist on the road.

167. *Id.* § 1290.8(E).

concealed weapon.

The OSDA does not apply to all Oklahomans. The legislature intended that body of law to remain separate from the rest of the law that applies to all citizens. Furthermore, it took great pains to structure the statutes so as to keep the two bodies of law separate. Moreover, the OSDA does not require licensees to reveal the presence of concealed weapons under all circumstances. It specifically forbids officers from requiring production of a weapon without probable cause. All of these factors point to the conclusion that the OSDA does not remove the reasonable expectation of privacy that licensees have in the possession of their weapons.

B. The Majority Holding Creates Irreconcilable Conflicts with the Fourth Amendment

Before examining the ramifications of *Holt*, it is important to recognize what situations *Holt*'s facts do *not* present. First, it is not a situation comparable to that examined in *Whren v. United States*,[168] in which the Court held that an individual officer's subjective intentions are not relevant to the Fourth Amendment validity of a traffic stop based on probable cause.[169] The issue in *Whren* was whether the police had unconstitutionally seized a car during a traffic stop because their ulterior motive was to search for drugs.[170] The Supreme Court held that so long as there was probable cause based on the observed traffic violation, the seizure of the car and motorist was valid.[171]

Holt was plainly not wearing his seatbelt.[172] The trooper was justified in ordering Holt to pull off the road and writing him a warning citation. Holt did not protest the validity of the stop.[173] His contention was that the trooper impermissibly expanded the scope of the traffic stop investigation by asking questions about unrelated criminal activity without reasonable suspicion or probable cause.[174]

The situation in *Holt* is also not the situation that the Supreme Court encountered in *City of Indianapolis v. Edmond*,[175] but only because of unfortunate timing. In *Edmond*, the Court held that fixed checkpoints that function only to serve the government's general crime-control interest are

168. 517 U.S. 806 (1996).
169. *Id.* at 813.
170. *Id.* at 808.
171. *Id.* at 810.
172. United States v. Holt, 264 F.3d 1215, 1218 (10th Cir. 2001).
173. *Id.* at 1218 n.2.
174. *Id.* at 1217.
175. 531 U.S. 32 (2000).

unconstitutional.[176] The Supreme Court decided *Edmond* after the district court rendered its decision in *Holt*, and the issue was not adequately presented to the Tenth Circuit.[177] Under *Edmond*, Holt might have argued that the checkpoint on the road to his house existed solely for the purpose of stopping him and searching his car for drugs or drug paraphernalia. The Tenth Circuit stated in *Holt* that the parties were free to develop more fully the factual record and address the *Edmond* issue on remand.[178]

1. The Court's Holding Eviscerates the Terry Doctrine

The court's ruling in *Holt* operates as a bright-line exception to the *Terry* doctrine.[179] According to *Holt*, regardless of any particularized suspicion or lack thereof, and regardless of the reason the motorist was stopped, a police officer is allowed to ask about weapons in the car.[180] This exception, based on officer safety, creates sweeping changes in the *Terry* doctrine.

The court's decision in *Holt* eliminates the need for particularized reasonable suspicion. It allows the officer to question the vehicle's occupants about the presence of guns because of the dangers associated with those weapons.[181] But on its face, the court's decision would not allow officers to question motorists about the presence of other illegal contraband in the car without reasonable suspicion or probable cause[182] — a limitation founded upon the *Terry* doctrine.

The problem is this: in *Holt*, the weapon itself was contraband. A grand jury indicted Holt on a federal firearms charge.[183] Although the record does not specifically state as much, it would seem a safe assumption that the major piece of evidence used to prove that charge's elements was the weapon itself. The rule announced in *Holt* allows police officers to engage

176. *Id.* at 42.

177. *Holt*, 264 F.3d at 1218 n.2.

178. *Id.*

179. *Id.* at 1226.

180. *Id.*

181. *Id.* at 1223.

182. *Id.* at 1226 n.5; *see also* United States v. Purcell, 236 F.3d 1274, 1277 (11th Cir. 2001) (quoting *United States v. Holloman*, 113 F.3d 192, 196 (11th Cir. 1997), for the proposition that a traffic stop must be limited in both scope and duration in that it must not last "'any longer than necessary to process the traffic violation' unless there is articulable suspicion of other illegal activity"); United States v. Ozbirn, 189 F.3d 1194, 1199 (10th Cir. 1999) (stating that an officer may engage in questioning unrelated to the purpose of the traffic stop only if there is probable cause, consent, or, "at a minimum," reasonable suspicion); United States v. Turner, 928 F.2d 956, 959 (10th Cir. 1991) (stating that when an officer retains possession of the motorist's driving license, there must be reasonable suspicion before the officer may ask questions about drugs or weapons).

183. *Holt*, 264 F.3d at 1219.

in random, suspicionless criminal investigations because the contraband sought also happens to be dangerous to the officer.

In *United States v. Brown*,[184] the Seventh Circuit held that although the confrontation between the citizen and the police officer is fraught with danger for the officer, that fact alone cannot justify a pat-down of the citizen.[185] The court stated that the case law simply does not support the proposition that officers may frisk the occupants of *any* car stopped for a traffic violation.[186] Under *Terry* principles, "[a]n officer is not justified in conducting a general exploratory search for evidence under the guise of a stop-and-frisk."[187]

These statements apply fully in Holt's situation — a *verbal* pat-down — in which the police interrogate a motorist regarding a criminal matter outside the scope of the traffic stop. A police officer is not justified in questioning the occupants of a car about a criminal matter unrelated to the traffic stop without a reasonable suspicion that criminal activity is ongoing or about to occur.[188] Despite the possible presence of danger, the officer simply is not constitutionally empowered to conduct a general exploratory search under the guise of the *Terry* doctrine.[189] The Tenth Circuit turns that doctrine on its ear in *Holt* by stating that the possible presence of danger constitutionally empowers the officer to interrogate the motorist without suspicion.[190]

The determination of a traffic stop's Fourth Amendment reasonableness under the *Terry* doctrine is a two-part analysis — scope and duration.[191]

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184. 188 F.3d 860 (7th Cir. 1999).

185. *Id.* at 864; *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000) ("[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.").

186. *Brown*, 188 F.3d at 864; *see also* Pennsylvania v. Mimms, 434 U.S. 106, 110 n.5 (1977) (stating that the authority of an officer to order the driver out of a car does not imply that the officer may frisk the occupants of any car stopped for a traffic violation; the justification for ordering the driver out arose from an "independent reason to suspect criminal activity and present danger" and not the mere fact that the driver had committed a traffic violation).

187. *Brown*, 188 F.3d at 866.

188. *See* United States v. Foley, 206 F.3d 802, 806 (8th Cir. 2000) (stating that "an officer may properly expand the scope of his investigation as reasonable suspicion dictates"); United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998) (holding that questions unrelated to the purpose of the stop are justified only if the officer has reasonable suspicion or the consent of the person questioned); United States v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir. 1994) (holding that an officer may question the driver in a matter unrelated to the traffic stop only where there is "an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring" or where the driver consents to the questioning).

189. *Brown*, 188 F.3d at 866.

190. United States v. Holt, 264 F.3d 1215, 1226 (10th Cir. 2001).

191. *See* United States v. Childs, 256 F.3d 559, 564 (7th Cir. 2001); United States v.

While not going as far as the Fifth Circuit in *Shabazz*, the Tenth Circuit in *Holt* nonetheless managed to circumvent the scope prong of the analysis. Under *Holt*, a police officer is *always* justified in expanding the scope of a traffic stop to ask about weapons in the car because of the *possibility* that they might be present.[192] The officer, previously limited in her questioning to matters related to the stop, is now free to interrogate the motorist on a completely unrelated topic to ensure her own safety. The interrogation need not be supported by probable cause or reasonable suspicion.[193] Such a rule is clearly at odds with precedent concerning the *Terry* doctrine.

In *United States v. Childs*,[194] the Seventh Circuit applied the *Terry* doctrine's scope prong to invalidate a police search and seizure of drugs.[195] *Childs* represents the opposing position to the Fifth Circuit in *Shabazz*. In *Childs*, two officers pulled over a motorist for driving with a badly cracked windshield.[196] While one officer dealt with the driver, the other asked the passenger if he had any marijuana in the car.[197] The passenger denied having drugs.[198] The officer asked for consent to search him.[199] As the passenger got out of the car, he placed a partially open cigarette package on the seat. The cigarette package contained drugs in plain view.[200] Significantly, that same officer had arrested that same person for drug possession just three days earlier.[201]

The *Childs* court held that the officer's questioning of the passenger, without reasonable suspicion or probable cause to believe that the passenger was committing any offense at that particular time, exceeded the permissible scope of the traffic stop.[202] The court stated that because *Terry* principles govern a traffic stop the impermissible questioning resulted in an unconstitutional search and seizure.[203] While there were some factors present that an officer could combine with others to generate reasonable suspicion,

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Ozbirn, 189 F.3d 1194, 1199 (10th Cir. 1999); United States v. Hill, 195 F.3d 258, 264 (6th Cir. 1999); United States v. Mendez, 118 F.3d 1426, 1429 (10th Cir. 1997); United States v. Jones, 44 F.3d 860, 871 (10th Cir. 1995).

192. *Holt*, 264 F.3d at 1226.
193. *Id.*
194. 256 F.3d 559 (7th Cir. 2001).
195. *Id.* at 564.
196. *Id.* at 561.
197. *Id.* at 561-62.
198. *Id.* at 567.
199. *Id.* at 562.
200. *Id.*
201. *Id.* at 561.
202. *Id.* at 566.
203. *Id.* at 564.

such as nervousness and a known criminal record, the court said that those two factors standing alone did not justify the police action.[204] The court also stated that of all the factors that an officer could combine to generate reasonable suspicion, additional questioning outside the investigative detention's scope is not one of them.[205]

In *Holt*, the Tenth Circuit has once again turned accepted *Terry* principles inside-out. Instead of requiring an officer to point to a reasonable, individualized, articulable suspicion to justify questioning that goes beyond a traffic stop's scope, the *Holt* court does away with the suspicion requirement altogether. The court bypasses all the possible arguments addressing the quality of the officer's suspicion — whether it was reasonable, individualized, and more than mere hunch — to hold that suspicion *is not an issue at all* because of the danger posed by the *mere possibility* that a weapon might be in the car. By removing any requirement of individualized suspicion, the Tenth Circuit has gutted the *Terry* doctrine and trampled over the Fourth Amendment.

2. Oklahoma Citizens Have a Reasonable Expectation of Privacy in Possessing a Concealed Handgun

As earlier explored, the *Holt* court relied on strained and incorrect logic to conclude that citizens who have a license to carry a concealed handgun have no reasonable expectation of privacy in that weapon's possession.[206] The Tenth Circuit managed to reach this conclusion despite clear statutory language establishing a privacy expectation based on the more stringent probable-cause requirement instead of reasonable suspicion.[207] Walking a little farther down that path, the court went on to say that because those in lawful possession have no privacy interest, those who are in *unlawful* possession likewise have no privacy interest in possessing a concealed weapon.[208] This ruling effectively removes *every* concealed weapon from the Fourth Amendment's protection. To take the words of the court at their face value, no Oklahoma citizen is protected against an unreasonable search and seizure of a concealed handgun because there is no reasonable expectation of privacy in its possession.

The Tenth Circuit's ruling is based on a profoundly dangerous position that has no logical stopping point. Practically anything can become a dangerous weapon in the hands of a determined individual. Although the

204. *Id.* at 565.
205. *Id.* at 566.
206. United States v. Holt, 264 F.3d 1215, 1222 (10th Cir. 2001).
207. *See* 21 OKLA. STAT. § 1290.8(E) (2001).
208. *Holt*, 264 F.3d at 1222.

Holt court founded its decision on safety considerations, the fact remains that the weapon was contraband.[209] Weapons are not the only type of contraband that can be dangerous to police officers. For example, many of the chemicals used to manufacture methamphetamine, standing alone and especially in combination, are inherently dangerous. These chemicals are explosive and flammable as well as toxic.[210] Because the officer is allowed to ask about the presence of one type of contraband because it is dangerous, it follows that she should also be able to ask about other types of dangerous contraband to protect her own safety.

There can be no denying that firearms present especially difficult problems for police officers during the performance of their duties. But in its attempt to blanket the police in judicial protection, the Tenth Circuit leaves average citizens' rights in the cold. As this new rule expands with successive interpretations, there is a likely possibility that its focus will shift away from the fact that the contraband is dangerous and towards the fact that the contraband is illegal. By following the Tenth Circuit's logic in *Holt*, one can easily imagine a situation in which American citizens will have *no reasonable expectation of privacy in anything illegal.* While some may believe that such a state of affairs should not alarm those who abide by the law, it is very dangerous because the law is always changing. Under a broad interpretation of *Holt*, the constitutional rights of all citizens, acting lawfully and unlawfully alike, become directly dependant upon an item's status as legal or illegal. The legislature, by enacting laws that determine what is

209. *Id.* at 1232 (Briscoe, J., dissenting). The dissent points out testimony by the Highway Patrol trooper stating that he was not at all concerned for his own safety or for that of other officers at the scene. His interest in obtaining the gun was to "make sure it [wa]s loaded or that there [wa]s a violation" so that he could "issue a citation or take the subject into custody." *Id.*

210. *See* Uniform Controlled Substances Act, 21 U.S.C. § 802 (34)-(35) (2000) (providing a comprehensive list of chemical precursors used in the manufacture of illegal drugs); Tamara B. Maher, *Legal Liabilities Faced by Owners of Property Contaminated by Clandestine Methamphetamine Laboratories: The Oregon Approach*, 27 WILLAMETTE L. REV. 325, 326 n.10 (1991) (listing over thirty-four chemical substances found in methamphetamine labs, including sodium cyanide, hydrochloric acid, sulfuric acid, chloroform, ethyl ether, and methanol); Paul Morris, Fouse v. State: *The Arkansas Nighttime Search Rule — Helping Make Arkansas the Country's Number One Producer of Methamphetamine*, 53 ARK. L. REV. 965, 978 (2000) (listing the dangers associated with the chemicals used in the methamphetamine manufacturing process, such as fire, explosion, poison gas, and hazardous waste contamination; discussing the requirement for hazardous material training for meth-lab cleanup crews); Charles C. Sinnard, *Growing Crime: The Rising Use of Fertilizer for Illegal Purposes and the Need for Stricter Regulations Concerning Its Sale and Storage*, 4 DRAKE J. AGRIC. L. 505, 507 (1999) (discussing the use of anhydrous ammonia in the methamphetamine manufacturing process).

legal and not legal, thus would have direct control over constitutional rights. Such a state of affairs is clearly contrary to the purpose and spirit of the Fourth Amendment, and, indeed, to the Constitution as a whole.

C. Holt Creates Conflicts with the Fifth Amendment

Berkemer v. McCarty[211] established that a person is not "in custody," for *Miranda* purposes, during a routine traffic stop, and so police need not give *Miranda* warnings for questioning related to the purpose of the stop.[212] *Holt* is clearly distinguishable from *Berkemer* on its facts. The police in *Berkemer* limited the questioning to the offense for which the driver was pulled over — driving under the influence.[213] For those questions, the Supreme Court held that no *Miranda* warning was required.[214]

On the other hand, the situation in *Holt* involved questioning completely outside the detention's scope. Police stopped Holt for failure to wear a seat belt. The questioning concerned illegal weapons possession. Such a situation implicates the Fifth Amendment even though Holt was not formally arrested at the time the question was asked.[215] The officers detained Holt inside the trooper's car, unable to leave or terminate the encounter even if he had tried, and the officers directly questioned Holt on a criminal matter unrelated to the traffic stop with no reasonable suspicion or probable cause.[216] Other facts specific to *Holt* include that the detainee was at a police roadblock, surrounded by other officers immediately outside the car who were there expressly for the purpose of catching him transporting drugs.[217] Although not the exact type of situation the court designed *Miranda* to deter, this *was* an interrogation in a police-dominated environment, outside the public view, and Holt was not free to terminate the encounter and leave.[218] The purpose of the encounter, and specifically of

211. 468 U.S. 420 (1984).

212. *Id.* at 440.

213. *Id.* at 423.

214. *Id.* at 442.

215. United States v. Holt, 264 F.3d 1215, 1218 (10th Cir. 2001).

216. *Id.*

217. *Id.*

218. *See* Pennsylvania v. Muniz, 496 U.S. 582, 595 (1990) (quoting *Doe v. United States*, 487 U.S. 201, 213 (1988), for the proposition that the privilege against self-incrimination operates "'to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government'"); *Berkemer*, 468 U.S. at 433 ("The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the "'inherently compelling pressures'" generated by the custodial setting itself, "'which work to undermine the individual's will to resist,'" and as much as

the questioning, was to get Holt to say that he was doing something illegal. In other words, its purpose was to induce Holt to make a statement against himself. The Fifth Amendment is designed to prevent exactly that sort of activity by law enforcement officials.

D. The Holt Decision Makes the Constitutional Rights of Citizens Contingent upon the Subjective Belief of the Police

When a police officer asks a stopped motorist if there are weapons in the car, she is essentially asking the following question: are you presently committing a crime for which I can arrest you and put you in jail? To this question, there are four possible answers.

First, if the motorist answers in the affirmative, the police may use the statement just as any other voluntary statement in a traffic stop.[219] Assuming that there is no permit to carry a concealed weapon, the officer now has probable cause to believe that the motorist is illegally in possession of a gun. In other words, the motorist has just confessed to a crime and will probably find himself under arrest.

Second, the motorist is not required to answer the officer's question.[220] The concurrence in *Holt* is emphatic that police may not use a refusal to answer as the basis for an arrest or a more intrusive search without reasonable suspicion.[221] But because the purpose of the officer's question was the protection of her own safety, the *Holt* court holds that the motorist's refusal to answer may alert the officer to the need for additional safety precautions.[222] In a traffic stop based on *Terry* principles, such precautions can include a pat-down search of the driver and passengers as well as a "frisk" of the surfaces inside the passenger compartment.[223] The effect, if not the letter, of the court's position is that a refusal to answer is sufficient *vel non* to generate reasonable suspicion for *Terry*-style safety-related searches.

Third, the motorist can deny possessing a weapon.[224] Once that occurs,

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possible to free courts from the task of scrutinizing individual cases to try and determine, after the fact, whether particular confessions were voluntary.") (footnotes omitted) (quoting Minnesota v. Murphy, 465 U.S. 420, 430 (1984)); United States v. Gale, 952 F.2d 1412, 1415 n.4 (D.C. Cir. 1992) (holding that where officers had reasonable suspicion that person was in possession of illegal drugs, *Miranda* warnings were not required before questioning during an investigative detention).

219. *Holt*, 264 F.3d at 1224.

220. *Id.* at 1237 (Henry, J., concurring).

221. *Id.*

222. *Id.*

223. Knowles v. Iowa, 525 U.S. 113, 118 (1998).

224. *Holt*, 264 F.3d at 1224.

there are two possible results: either (1) the officer will believe the motorist or (2) she will not. If the officer believes the motorist, then the traffic stop should proceed as one would expect. The motorist will receive a citation for the traffic infraction, be told to have a nice day, and be sent on his way.

More problematic is the situation in which the officer does not believe the motorist's negative response. Under the court's rubric, such disbelief would heighten the officer's awareness of the need for safety precautions,[225] possibly resulting in reasonable suspicion that the person is armed and dangerous, and the *Terry* searches would be available. Hopefully the court would require the officer to have specific and articulable reasons why she did not believe the motorist, but even so, the officer would have *unrestrained discretion* on the side of the road subjectively to believe or disbelieve and to adjust her conduct accordingly.[226]

Courts have repeatedly held that the subjective state of the individual officer is immaterial in Fourth Amendment analysis.[227] But the *Holt* rule places the officer's subjective belief or disbelief precisely at the collision point between the government's interest and the citizen's constitutional rights. The fate of the motorist who denies having a weapon in the car depends completely upon the belief, disbelief, or whim of the officer on the side of the road. Such a state of affairs plainly runs afoul of the Fourth Amendment and the Constitution by making citizens' rights dependent upon the officer's subjective belief rather than upon the law.

The final possible answer, and the most problematic, is the invocation of the right to counsel.[228] If the motorist refused to answer the question

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225. *Id.*

226. While the Tenth Circuit's holding *requires* the subjective mindset of the officer to enter into the decision of what will happen on the side of the road, the court also indicates that such subjective matters do not play a role in *any* Fourth Amendment analysis. *Id.* at 1225. The subjective mindset of the police officer either enters into the analysis or it does not. The court cannot have it both ways. In an attempt to explain why subjective considerations should not be relevant to a Fourth Amendment analysis, the court says "'most police officers . . . would act out of a host of different, instinctive, largely unverifiable motives — their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.'" *Id.* (quoting New York v. Quarles, 467 U.S. 649, 656 (1984)). That statement defines precisely why the *Holt* decision is constitutionally flawed: at least at some point, it relies on the subjective belief or disbelief of the officer on the street with nothing more. The court should not claim on one hand to avoid reliance on police officers' subjective inclinations in constitutional analysis and then at the same time hand down a ruling which in fact *relies* upon such considerations.

227. *See* Ohio v. Robinette, 519 U.S. 33, 38 (1996); Whren v. United States, 517 U.S. 806, 813 (1996); Berkemer v. McCarty, 468 U.S. 420, 442 (1984); United States v. Murray, 89 F.3d 459, 462 (7th Cir. 1996); United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995).

228. The court did not consider this option. The Fifth Amendment right to counsel was

without counsel present, the officer would be placed in a rather interesting predicament. Such a statement would likely be treated as a refusal to answer, so the safety-related *Terry* searches would seem to be in order.[229] Yet the motorist did not actually refuse to answer. He has merely delayed the answer until the arrival of counsel. Does the motorist have a Fifth Amendment right to counsel during a traffic stop?[230] Are the officer and the motorist going to wait on the side of the road for an attorney to show up? If so, that would seem to implicate the duration prong of the *Terry* traffic-stop analysis.[231] Would such a lengthy traffic stop rise to the level of "custody" for the purposes of *Miranda*?[232] Or should the officer simply arrest the motorist for the traffic violation[233] and search the car incident to the arrest?[234] As demonstrated, the court's decision creates far more questions than answers.

V. Conclusion

The Tenth Circuit's ruling allows the police to accomplish in the name of officer safety what they ordinarily could not. The court has subverted the Constitution with an exception that makes constitutional that which is, and always has been, unconstitutional. This exception slices deep into Supreme Court Fourth Amendment jurisprudence, and it implicates the basic Fifth Amendment right against self-incrimination. In order to be reasonable under the Fourth Amendment, police must base the seizure of a person for the purpose of investigating a criminal matter on reasonable suspicion, as

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established as another layer of procedural safeguards in the *Miranda* warning. As such, the right likely becomes active only when a suspect is subjected to custodial interrogation, as defined by *Miranda* and its progeny. *See* McNeil v. Wisconsin, 501 U.S. 171, 176-77 (1991); Edwards v. Arizona, 451 U.S. 477, 485 (1981).

229. Knowles v. Iowa, 525 U.S. 113, 118 (1998).

230. *See Robinette*, 519 U.S. at 38; *Whren*, 517 U.S. at 813; *Berkemer*, 468 U.S. at 442; *Murray*, 89 F.3d at 462; *Botero-Ospina*, 71 F.3d at 787.

231. *See* Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion); United States v. West, 219 F.3d 1171, 1176 (10th Cir. 2000); United States v. Hill, 195 F.3d 258, 264 (6th Cir. 1999); United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998).

232. *See Berkemer*, 468 U.S. at 440 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam), in holding that *Miranda* safeguards come into play when a person's "freedom of action is curtailed to a 'degree associated with formal arrest'"); Miranda v. Arizona, 384 U.S. 436, 478 (1966) (deciding that a person is in custody when authorities have deprived him of his freedom in any significant way); United States v. Shabazz, 993 F.2d 431, 437 (5th Cir. 1993) ("A prolonged investigative detention may be tantamount to a de facto arrest.").

233. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

234. *See* New York v. Belton, 453 U.S. 454, 460 (1981); United States v. Robinson, 414 U.S. 218, 235 (1973).

defined by relevant case law. The decision in *Holt*, to the extent it allows police officers to conduct arbitrary criminal investigations with neither reasonable suspicion nor probable cause, runs counter to the Fourth Amendment and must not stand. To use the words of U.S. Supreme Court Justice McReynolds in 1925,

> The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; . . . in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.'[235]

J. Michael Hughes

235. Carroll v. United States, 267 U.S. 132, 163 (1925) (McReynolds, J., dissenting) (quoting Sir William Scott in Le Louis, 2 Dods. 210, 257, 165 Eng. Rep. 1464, 1479 (1817)).