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Pennslyvania v. Mimms: Continued Erosion of Fourth Amendment Safeguards, 12 J. Marshall J. Prac. & Proc. 207 (1978)

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PENNSYLVANIA v. MIMMS: CONTINUED EROSION OF FOURTH AMENDMENT SAFEGUARDS

The fourth amendment to the United States Constitution guarantees to individuals freedom from unreasonable searches and seizures by the federal government.[1] This guarantee has been made applicable to the states through the fourteenth amendment.[2] One of the applications of the fourth amendment has been the exclusion of illegally obtained evidence at trial.[3] This "exclusionary rule" limits the power of police to search for and seize evidence. Since the role of police in society has increasingly become important with the continued rise of crime in our cities, effective law enforcement cannot be achieved unless the police possess some degree of authority to investigate criminal activity. One method used by police when investigating suspicious activity is the procedure known as stop and frisk.[4] This procedure involves a brief detention of a citizen for questioning and a limited search, usually initiated on less than probable cause.

The police practice of stop and frisk was officially recognized by the Supreme Court in *Terry v. Ohio*[5] as being within the "purview" of the fourth amendment.[6] In *Terry* the Court acknowledged that a valid stop and frisk is an exception to the warrant requirement contained in the fourth amendment.[7] The Court employed a dual inquiry test[8] to determine that the stop

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1. U.S. CONST. amend. IV, states:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Mapp v. Ohio, 367 U.S. 643 (1961) (fourteenth amendment made applicable to the state courts).

3. Weeks v. United States, 232 U.S. 383 (1914) (exclusionary rule first established in federal courts).

4. The police practice of stop and frisk is a procedure whereby officers detain suspicious citizens for questioning and, occasionally, a limited search is conducted. The initial stop is usually initiated on less than probable grounds. This law enforcement technique has been a matter of routine in every major police department in the country for many years. *See generally* LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 40, 42-43 (1968); Comment, *Stop and Frisk*, 63 NW. U.L. REV. 837 (1969).

5. 392 U.S. 1 (1968).

6. Terry v. Ohio, 392 U.S. 1, 19 (1968).

7. *Id.* at 20, 30.

8. *Id.* at 20.

and frisk procedure met the requirement of reasonableness contained in the fourth amendment. First, the Court focused on whether the officer's action was justified from the start;[9] secondly, the Court inquired whether the police action "was reasonably related in scope to the circumstances which justified interference in the first place."[10] Thus, the Court in *Terry* established that a frisk would be reasonable when the officer could infer from the circumstances that "criminal activity may be afoot" and that his safety was endangered.[11]

In the aftermath of *Terry*, the Supreme Court encountered a number of cases involving the permissible scope of a stop and frisk.[12] The outcome from these cases was that the reasonableness requirement in *Terry* was extended from reliance on the police officer's own observations to reliance on an unverified informant's tip.[13] Consistent with this trend, the Court has turned away from a case-by-case analysis in determining the reasonableness of a police officer's action to a broad expansion of the warrantless search exception of the fourth amendment.[14] The Court in subsequent cases has rationalized this intrusion upon the citizen's right to privacy by pointing to the need of law enforcement officials to have added security in their day-to-day encounters with citizens.[15]

Against this background the Supreme Court recently decided *Pennsylvania v. Mimms*.[16] The Court in *Mimms* held that the fourth amendment is not violated when a police officer orders a citizen out of his car for the purpose of issuing a traffic summons. Such action is reasonable under the fourth amendment because of the possible danger a police officer exposes himself to when he stops a citizen to issue a traffic summons. The significance of *Mimms* is threefold: first, the Court departed

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9. *Id.*

10. *Id.*

11. *See* 392 U.S. at 30.

12. *E.g.*, Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968); Peters v. New York, 392 U.S. 40 (1968). Both *Peters* and *Sibron* were companion cases to *Terry*, and were disposed of in the same opinion.

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

14. *See* Note, *The Supreme Court Gives the Green Light to Searches Incident to Traffic Arrests*, 27 U. MIAMI L. REV. 974 (1974); Note, *United States v. Robinson: Toward a Neutered Principle of the Exclusionary Rule*, 8 U.S.F.L. REV. 777 (1974); Note, *Personal Search of Suspect Incident to Custodial Arrest is Per Se "Reasonable" and Requires no Additional Justification*, 49 WASH. L. REV. 1123 (1974).

15. *See* United States v. Robinson, 414 U.S. 260 (1973); Adams v. Williams, 407 U.S. 143 (1972); *accord*, note 12 *supra*.

16. 434 U.S. 106 (1977).

from its prior holding of evaluating fourth amendment issues according to an individualized inquiry into the particular circumstances; second, the *Mimms* decision reiterates the Court's profound concern for police safety; and third, the Court now holds that once a police officer lawfully stops a citizen to issue a traffic summons, the additional intrusion of ordering the citizen out of his vehicle is inconsequential.

Prior to *Mimms* the question presented to the Court in deciding whether a police officer's intrusion into a citizen's privacy was violative of the fourth amendment, was to view the particular circumstances in each case and to ascertain according to the rationale enunciated in *Terry* whether the facts would indicate to a reasonable officer that "criminal activity might be afoot" or that his safety was endangered.[17] In *Mimms*, however, the Court addressed the question of whether or not an objective test should be applied where there are no observable facts present indicating criminal activity or threatening the officer's safety.

PENNSYLVANIA V. MIMMS — THE CASE

Facts

Two police officers observed Mimms driving an automobile with an expired license plate. The officer stopped the vehicle for the purpose of issuing a traffic summons. It was the officer's common practice that when approaching vehicles, he would order all drivers out of their cars. Accordingly, the officer asked Mimms to step out of his car and produce his operator's license. When Mimms alighted from the car, the officer noticed a large bulge under Mimms's jacket. Fearing that the bulge might be a weapon, the officer immediately frisked Mimms and discovered a loaded revolver in his waistband. Thereupon Mimms was arrested, indicted, and subsequently convicted for carrying a concealed weapon.

A motion to suppress the weapon on fourth amendment grounds was denied by the trial court. The Superior Court affirmed the conviction, and the Supreme Court of Pennsylvania granted allocatur.[18]

Pennsylvania Supreme Court

The Supreme Court of Pennsylvania reversed the lower court's decision and held that the policy of ordering all drivers

17. 392 U.S. 1, 22 (1968).

18. Allocatur is a latin term meaning it is allowed. It was formally used to show that an order or writ was allowed. BLACK'S LAW DICTIONARY 100 (rev. 4th ed. 1968).

stopped for traffic violations out of their vehicles violated the fourth amendment unless the officer's objective appraisal would indicate that the motorist was potentially dangerous.[19] The Pennsylvania Court relied on *Terry* as a basis for their reversal. The court noted that the *Terry* decision authorizing a stop and frisk was limited to situations where "a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot." The unusual conduct observed by the police officer in *Terry* involved two men who walked past the same store window and peered in approximately twenty-four times. These two men then walked to a nearby street corner and began conferring with a third man. The police officer suspected that the men had been "casing" the store, and only after these personal observations, did the police officer take steps that led to the stop and frisk.

Recognizing the narrow holding of *Terry*, the Pennsylvania court held that the stop and frisk of Mimms "was not initiated on the basis of an objective appraisal of the given circumstances but rather on a policy of ordering all drivers stopped for traffic violations out of their vehicles." The court pointed out that the officer in stopping Mimms could point to no observable facts that would indicate criminal activity. In fact, the officer testified that there was nothing unusual or suspicious about Mimms's behavior. The Commonwealth of Pennsylvania sought review of the state supreme court decision, and the United States Supreme Court granted the petition for certiorari.[20]

The United States Supreme Court Opinion

The Supreme Court reversed the Supreme Court of Pennsylvania. The *Mimms* Court held that a police officer who lawfully stops a motor vehicle for the purpose of issuing a traffic summons does not violate the fourth amendment's proscription against unreasonable searches and seizures when he orders the driver out of the vehicle, notwithstanding that the officer had no reason to suspect that he was in danger.

In reversing the Supreme Court of Pennsylvania, the Court in *Mimms* relied on its decision in *Terry*, in which the Court held that the intrusion upon an individual's right to privacy was justified on the grounds that the particular facts and circumstances present would indicate to a reasonable man that "criminal activity may be afoot."[21] Although the Court relied on *Terry*, it failed to view the particular facts in *Mimms* in relation to the

19. 471 Pa. 546, 370 A.2d 1157 (1977).
20. 434 U.S. 106 (1977).
21. 392 U.S. 1, 22 (1968).

further intrusion imposed when the officer ordered Mimms out of the vehicle. Instead, the Supreme Court relied solely on a balancing test.[22] In applying this test the Court emphasized its concern for police safety by holding that the risk an officer encounters when approaching a vehicle stopped for a traffic violation clearly outweighs the small intrusion upon the individual's privacy. By justifying this additional intrusion, the Court clearly departed from the reasoning used in its prior holdings. By examining the previous holdings, the proper background will be established against which *Mimms* should be analyzed in order to demonstrate its legal significance.

Prior Precedent

The specific requirement that probable cause be shown before the issuance of a warrant was a safeguard included in the Constitution. This restriction was embodied in the Constitution to insure that the decision of when the right of privacy must yield to a search would be placed in the hands of a judicial officer and not a peace officer.[23] Warrantless searches have been upheld where consent of the party has been obtained,[24] or where exingent circumstances are present.[25] Furthermore, the Supreme Court has created a limited number of specifically established judicial exceptions which recognize warrantless searches.[26] However, both warrant and warrantless searches conducted under the fourth amendment are measured against the standard of reasonableness.[27]

The drafters of the fourth amendment could not have foreseen the necessity of swift police action that is called for in today's society. To investigate individuals who appear suspicious, although probable cause is lacking, the police have commonly

22. 434 U.S. 106, 109 (1977).

23. Johnson v. United States, 333 U.S. 10 (1932).

24. *See* Stoner v. California, 376 U.S. 483 (1964).

25. *See* Warren v. Hayden, 387 U.S. 294 (1967).

26. *See* United States v. Robinson, 414 U.S. 218 (1973) (a full body search may be conducted incident to a custodial traffic arrest); Cupp v. Murphy, 412 U.S. 291 (1973) (warrantless search may be held where evidence is of a highly evanescent nature); Chimel v. California, 395 U.S. 752 (1969) (only the area within the arrestee's control may be searched); Terry v. Ohio, 392 U.S. 1 (1968) (a pat-down search may be conducted when an officer believes suspect is armed and dangerous and involved in criminal activity); Angello v. United States, 269 U.S. 20 (1925) (search incident to valid arrest required no warrant); Carroll v. United States, 267 U.S. 132 (1925) (a warrantless search may be conducted of an automobile if there is probable cause that it is being used for a felony).

27. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968); Schmerber v. California, 384 U.S. 757, 766 (1966); United States v. Ventresca, 380 U.S. 102, 105 (1965).

resorted to the practice known as stop and frisk.[28] Prior to the *Terry* decision, there was controversy over the validity of this police practice.[29] Proponents of stop and frisk viewed this procedure as merely investigative and hence not within fourth amendment safeguards.[30] Others argued that the stop and frisk procedure should be measured by the probable cause requirement of the fourth amendment,[31] and still others thought that the reasonableness requirement should apply.[32]

The Supreme Court answered this question in *Terry* wherein the Court established a new exception to the warrant requirement. The Supreme Court recognized for the first time that a stop and frisk came within the confines of the fourth amendment[33] and held that a frisk without a warrant is constitutional if performed within certain limitations. In delineating the permissible scope of a stop and frisk procedure, the *Terry* Court adopted a reasonableness test.[34] Chief Justice Warren, in delivering the opinion of the Court, stated that to ascertain the reasonableness of an officer's conduct the Court must balance the intrusion into the individual's privacy with the need for the search.[35] Justification for the intrusion into an individual's privacy would be adjudged according to the facts and circumstances of each particular case.[36] In evaluating the police conduct in relation to the circumstances, the Court adopted an objective standard: "Would the facts available to the officer at the moment of the seizure or search, warrant a man of reasonable caution in the belief that the action taken was appropriate?"[37]

The significance of the *Terry* decision is the emphasis the Court put on deciding stop and frisk cases according to the particular facts in each case. The court stated that when an officer observes unusual conduct which leads him to conclude that "criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous" he is entitled to conduct a limited pat-down search for his own or an-

28. *See* note 3 *supra*.
29. 392 U.S. 1, 16 (1968).
30. *See* Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. 393, 406 (1963).
31. Brief for Respondent at 21, Terry v. Ohio, 392 U.S. 1 (1968).
32. Brief for National District Attorney's Association as *amicus curiae* at 25, Terry v. Ohio, 392 U.S. 1 (1968).
33. *See* note 4 *supra*.
34. 392 U.S. 1, 19 (1968).
35. *Id.* at 21.
36. *Id.* at 22.
37. *Id.* at 21-22.

other's safety.[38]

On the same day as *Terry*, the Supreme Court decided two other warrantless search cases. In *Peters v. New York*[39] an officer pursued and stopped two men he suspected of being burglars. After receiving an unsatisfactory response from them, the officer frisked the men and felt a hard object on one of the two men which turned out to be burglary tools. The *Peters* Court upheld the frisk since there was probable cause to arrest. In *Sibron v. New York*,[40] however, the Court held there was no probable cause to arrest the defendant where the officer merely observed the defendant talk with six to eight known narcotics addicts in an eight-hour period. The Court looked to the specific facts of the case to see if the officers could infer that the defendant was armed and dangerous. Finding no facts in the record to indicate that the defendant was dangerous, the *Sibron* Court held that the search was not confined to the purpose of finding deadly weapons and therefore the search was unlawful.

A further extension concerning the legality of a stop and frisk was upheld by the Supreme Court in *Adams v. Williams*.[41] The *Adams* Court held that a police officer who conducts a stop and frisk based on an informant's tip that an occupant of an automobile possessed drugs and a weapon did not violate the fourth amendment. An unverified informant's tip was a sufficient basis for an officer's "reasonable" belief that the citizen is armed and dangerous, if the tip is supported by a sufficient "indicia of reliability."[42] The Court cited three factors to measure the indicia of reliability: first, the informant must be known to the officer; second, the informant must have provided the officer with information in the past; and third, the informant must personally give the information that is immediately verifiable at the scene.[43] Thus the standard set forth in *Terry*, that the reasona-

38. *Id.* at 30.

39. 392 U.S. 40 (1968). A frisk by a police officer was upheld when the officer heard noises at his apartment door and saw two strangers tiptoeing away. He pursued the men suspecting them to be burglars. Upon questioning them, he frisked one man and found burglary tools. The Court held that the search was lawful since the officer had probable cause to arrest.

40. 392 U.S. 40 (1968). An officer had observed the defendant for eight hours and saw him converse with at least six known narcotics addicts. Later the officer approached the defendant and said "you know what I'm after." The defendant reached into his pocket at which time the officer did the same and found heroin packets. The Court held that the search was unreasonable since it was not confined to a protective search for weapons.

41. 407 U.S. 143 (1972). A stop and frisk was upheld where officer acting on an informant's tip that occupant of a car was armed and dangerous and possessed drugs thrust his hand in car window and recovered a weapon, and later found drugs on the occupant.

42. *Id.* at 147.

43. *Id.* at 146-47.

bleness of a search depends upon the officer's personal observations, was expanded by the Court in *Adams* to include an unverified informant's tip.

The most recent cases prior to *Mimms* that involved the authority of the police in the area of search and seizure were *United States v. Robinson*[44] and the companion case of *Gustafson v. Florida*.[45] In these two cases a full body search was conducted by a police officer after a custodial arrest for a traffic violation. The Court in *Robinson* held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement . . . but is also a 'reasonable' search . . . ."[46] These opinions are significant because previously the Court had limited a search incident to an arrest to the area immediately within the arrestee's control.[47] This limitation had been justified on the grounds that there was a need first, to disarm the criminal for the protection of the officer, and second, to prevent the destruction of evidence of the crime.[48]

The decisions in *Robinson* and *Gustafson* reject the traditional narrow and limited exceptions to the warrant requirement and indicate a refusal by the Court to be restrained by the limitations set down in *Terry* for a stop and frisk. Although deciding that an arrest by a police officer gives him the authority to conduct a full search of the arrestee, the remaining question left unanswered is whether this authority could extend to police officers in a situation where the officer does not intend to make an arrest and does not fear for his own safety. This question was

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44. 414 U.S. 218 (1973). A police officer stopped Robinson for driving his automobile without a valid driver's permit. The officer placed defendant under arrest and frisked him; the officer reached into Robinson's coat pocket and found a crumpled cigarette package, the officer looked inside and found heroin capsules. The Court held that a full search incidental to a custodial arrest was lawful.

45. 414 U.S. 260 (1973). The police stopped Gustafson for weaving across the median strip. Gustafson could not produce a valid driver's license and was arrested and taken into custody. The officer conducted a full body search and upon opening a cigarette package found marijuana cigarettes. Again, the Court validated the search since it was incidental to an arrest.

46. 414 U.S. 218, 235 (1973).

47. Chimel v. California, 395 U.S. 752 (1969). Police officers arrested Chimel at his home in connection with a burglary of a coin shop. After the arrest, the officers conducted a warrantless search of Chimel's house over his protests. The Court held that a search, which is incident to an arrest, is limited to the area within the immediate control of the arrestee. The Court defined the area within the arrestee's control as that to which the arrestee might reach for a weapon or evidence of crime.

48. *See, e.g.*, Angello v. United States, 269 U.S. 20 (1925). The Court approved a warrantless search to find evidence connected with the crime, as well as weapons. *See also* Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433, 434 n.12 (1969).

posed before the Court in *Pennsylvania v. Mimms*.[49]

ANALYSIS

Mootness and the Grant of Certiorari

Respondent Mimms opposed the grant of certiorari in this case. Mimms contended that there was no justiciable controversy since Mimms had already completed the three year maximum sentence imposed upon him.[50] Therefore, respondent concluded that the case was moot.[51] The respondent cited *St. Pierre v. United States*[52] as authority for the proposition that a federal court is without power to decide moot questions. The Court in *Mimms*, however, noted that the rule set down in *St. Pierre* was no longer applicable.[53]

After dismissing *St. Pierre* as authority, the *Mimms* Court referred to more recent cases that have allowed judicial review where there is a possibility that the defendant will suffer "collateral legal consequences"[54] despite the fact that the question is moot. Although these cases which allowed review involved the collateral effects on the defendant, the Court pointed out that the ability of a state to impose a sentence may have collateral effects upon the state itself.[55] Thus the Court in *Mimms* held the state was entitled to review and granted certiorari. After granting certiorari, the *Mimms* Court, in a per curiam opinion,[56] summarily reversed the judgment of Pennsylvania's highest court.

A summary reversal eliminates the need for oral arguments, and the decision rests solely on the basis of certiorari papers.[57]

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49. 434 U.S. 106 (1977).

50. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 2, Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977).

51. *Id.*

52. 319 U.S. 41 (1943). The Court held that service of sentence for contempt of court renders the case moot and case was therefore not reviewable.

53. 434 U.S. at 108 n.3.

54. *Id. See* Benton v. Maryland, 395 U.S. 784 (1969); Street v. New York, 394 U.S. 576 (1969); Sibron v. New York, 392 U.S. 40 (1968); Carafas v. LaValle 391 U.S. 234 (1968).

55. *Id.*

56. A per curiam opinion is a decision concurred in by the majority of the Court but does not disclose the author. BLACK'S LAW DICTIONARY 1244 (rev. 4th ed. 1968). It is interesting to note that an important fourth amendment decision was delivered by the Court in this manner. One cannot help but question why a Justice would decline to author this opinion.

57. The Court takes such summary action when a majority of the Court feel that the decision below is so clearly erroneous that oral argument would be a waste of time. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE §§ 5-12 (1969) [hereinafter cited as STERN & GRESSMAN]. Justice

In this type of disposition the respondent is at a great disadvantage. A brief in opposition to the writ is usually addressed to the question of why certiorari should not be granted; it does not focus on the merits of the case. If the merits are discussed, the treatment is brief and superficial. Since summary reversal does away with oral arguments, the respondent is deprived of the opportunity to argue to a greater extent the merits.[58] Mimms's brief in opposition to the writ is a good example. The brief is short in length and the substantive content of it is directed at why the Court should not grant certiorari.[59]

Both Justices Marshall and Stevens in their dissents state their discontent with the procedural aspects of the case besides disagreeing with the majority on the merits.[60] Justice Marshall asserts that this type of summary action by the Court involving such an important issue will not increase respect for the Court's work.[61] Justice Stevens points out that the Court decided *Terry* only after six months of deliberations, oral arguments, and extensive briefing.[62] He states that it is disturbing that the Court decided *Mimms* "almost casually." Finally, Justice Stevens mentions that full argument might have persuaded him to accept the majority's position that the interest in police safety required an extension of the *Terry* standard.[63] After quickly disposing of the procedural aspects, the majority directed their attention to the merits of the case.

The Court's Decision on the Merits

The Supreme Court began its analysis by narrowing the issue before the Court. The Court noted that its focus was on the intrusion on a citizen's right to privacy when requested by the police officer to get out of his vehicle once the vehicle was law-

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Brennan has emphasized that this practice should rarely be used in reviewing state court cases. The ordinary practice of the Court is not to reverse a state court decision without oral argument. *See* Brennan, *State Court Decisions and the Supreme Court*, 31 PA. BAR ASS'N Q. 393, 403 (1960).

58. *See* Brown, *The Supreme Court*, 1957 *Term Foreward: Process of Law*, 72 HARV. L. REV. 77, 79, 80, 82 (1958); *See also* STERN & GRESSMAN, *supra* note 57 at 187.

59. Respondent's brief in opposition to the writ was nine pages in length. Three out of the four questions presented dealt with why certiorari should not be granted. The fourth issue discussed by the respondent concerned the merits. However, this discussion is brief in comparison to the 19 page brief submitted by the petitioner along with another seven page reply memorandum.

60. 434 U.S. 106, 112 (Marshall, J., dissenting); *id.* at 115 (Stevens, J., dissenting).

61. *Id.* at 114.

62. *Id.* at 115.

63. *Id.* at 123 n.13.

fully stopped.[64] The initial intrusion resulting from the stop or pat-down was not in question.[65]

In reversing the holding of the Pennsylvania Supreme Court that the search violated the fourth amendment, the *Mimms* Court set forth two basic guidelines for analysis under the fourth amendment. First, it would determine if the police officer's action intruded upon a citizen's privacy by "the reasonableness in all the circumstances."[66] Second, in determining the reasonableness of the search, the Court would have to balance the intrusion into a citizen's privacy with the public interest.[67] Once a vehicle is lawfully stopped, the justification for further intruding upon a citizen's right of privacy would be balanced against the need for added security for law enforcement officials.

Reasonableness Test Abandoned

At the outset, the *Mimms* Court stated that the "touchstone" of its analysis under the fourth amendment is to consider the reasonableness of the intrusion in light of the surrounding circumstances.[68] The Court relied on its decision in *Terry* as the basis for determining reasonableness when confronted with a fourth amendment issue.[69] In *Terry* the Court specifically noted that certain facts alone do not give rise to anything suspicious.[70] The Court in *Terry*, however, pointed out that the officer did have reason to investigate the defendants' behavior, because he had thirty years of experience in the neighborhood where he observed the defendants "case out" a particular store more than twenty-four times.[71] Therefore, the specific circumstances in *Terry* justified the officer's actions.

Although recognizing the need of evaluating each intrusion into a citizen's privacy by examining the particular facts in each case, the Court failed to apply this test in *Mimms*.[72] The unique-

64. *Id.* at 109.

65. *Id.* at 111-12. The standard enunciated in *Terry* was whether the facts would indicate to a reasonable man that a frisk is necessary. Once the bulge in Mimms's jacket was noticed by the officer, the officer was justified in conducting the search.

66. *Id.* at 109.

67. *Id.*

68. *Id.* at 108-09.

69. *Id.* at 109.

70. 392 U.S. 1, 22 (1967).

71. *Id.* at 23.

72. 434 U.S. at 116. Justice Stevens, in his dissent stated: "More important, it appears to abandon 'the central teaching of this Court's Fourth Amendment jurisprudence'—which has ordinarily required individualized inquiry into the particular facts justifying every police intrusion—in favor of a general rule covering countless situations."

ness of the situation presented in *Mimms* should have signaled to the Court the need to apply the reasonableness test relied upon in *Terry*. In *Mimms* the officer stopped the vehicle because the license plates had expired and proceeded to issue a summons for violating the traffic code. There were no exigent circumstances to alert the officer that the driver was dangerous or involved in criminal activity; nor did the officer stop Mimms with the intent to arrest him as in *Robinson*.

Both in the lower courts and in the Supreme Court, Pennsylvania conceded that there was nothing unusual or suspicious about Mimms's behavior nor did the officer have any reason to fear for his own safety as was the case in *Terry*.[73] When the state acknowledged that the officer's action was not based on the fear that the driver was dangerous or involved in criminal activity, it failed to legitimize the need for the police officer's intrusion. A brief survey of relevant case law has established that the justification for an intrusion is dependent on the particular circumstances.[74] By not applying the reasonableness test of *Terry*, the *Mimms* Court departed from its prior holdings. The Supreme Court did note the concession by the state, but the Court did not inquire into whether the order to step out of the car was related to the initial stop. Instead, the Court in *Mimms* resorted to a balancing test.[75]

The Balancing Test

In determining whether a governmental intrusion upon a citizen's right to privacy is justified, the police action must be balanced against the citizen's interest to remain free from unreasonable searches and seizures. The fourth amendment does not contain a specific formula for determining reasonableness. In *Camara v. Municipal Court*,[76] however, the Court initiated a

73. *Id.* at 109.

74. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) (where the Court upheld the constitutionality of a pat-down frisk when the circumstances indicated that criminal activity was afoot and defendant might be armed and dangerous); Warden v. Hayden, 387 U.S. 294, 310 (1967) (Court upheld the validity of a warrantless search due to the fact that police were in hot pursuit of an armed felon); Gobart v. United States, 282 U.S. 344, 357 (1931) (prohibition agents, acting under color of an invalid arrest warrant and falsely claiming a search warrant, entered company's office, arrested two employees, and made a general search; the Court held there was no formula to determine reasonableness, but each case must be determined on its own facts and circumstances).

75. 434 U.S. at 109-11.

76. 387 U.S. 523 (1967). Camara was charged with violating a San Francisco Housing Code for refusing to allow a warrantless inspection of the ground floor quarters. Camara claimed the inspection ordinance was unconstitutional for failure to require a warrant. The Court held that in non-

balancing test to determine the reasonableness of a search by a housing inspector. After *Camara*, the Court has continued to use a balancing test when analyzing the constitutionality of searches.[77]

The *Mimms* Court relied solely on a balancing test to justify the police officer's actions. As precedent, the Court cited *United States v. Brignoni Ponce*[78] where a balancing test was employed to determine the constitutionality of border searches of automobiles. Relying on *Brignoni Ponce*, the Court in its analysis first examined the officer's interest in ordering Mimms out of the car. Ordering a motorist out of his car was the normal practice of the police officer. The state argued that this practice is legitimate because it provides additional protection to the police.[79] This contention was not questioned since the Court in *Mimms* reasoned that a face-to-face confrontation would lessen the opportunity for an assault upon the officer.

In *Terry*, however, almost the opposite rationale was used by the Court to justify a frisk. The *Terry* Court reasoned that because of the frequent face-to-face encounters between citizens and law enforcement officials, an officer is justified in conducting a frisk only when there is "criminal activity afoot" and the officer fears for his safety.[80] Justice Stevens, in his dissent in *Mimms*, pointed out that the majority does not support the assumption that an officer's safety is enhanced by a face-to-face confrontation. In fact, certain experts of human behavior have

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emergency situations, as was present here, a warrant should be obtained. However, the Court stated that to determine if a search is reasonable they must weigh the governmental interest against the individual's right to privacy.

77. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 21 (1968); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

78. 422 U.S. 873 (1975). The U.S. Government's Border Patrol stopped a vehicle near the Mexican border, and questioned the occupants about their immigration status and citizenship. The only reason for stopping the vehicle was because the occupants appeared to be of Mexican descent. The Court held that the stop was unreasonable under the fourth amendment. In determining that the stop violated the fourth amendment, the Court applied the balancing test established in *Camara*.

79. 434 U.S. at 110.

80. 392 U.S. 1 (1968). The Court in *Terry* repeatedly emphasized that their holding was a narrow one, contingent on the circumstances. The Court stated:

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating *at close range* is armed and dangerous to the officer or to others it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24 (emphasis added).

explicitly advised against this type of confrontation.[81]

In further examining the officers interest, the Court relied heavily on dicta in *Terry*. The *Mimms* Court cited *Terry* for the statement that police officers need not take unnecessary risks in the performance of their jobs.[82] The Court concluded that an officer's safety "is both legitimate and weighty."[83] Although the *Terry* Court recognized that unnecessary risks need not be taken by law enforcement officials, the Court was concerned with the specific facts in *Terry*. Those facts can easily be distinguished from the facts in *Mimms*. In *Terry*, the officer who performed the frisk had knowledge from personal observation to believe that the person with whom he was dealing was armed and dangerous. The officer in *Terry* had watched the two men walk past the store window and peer in twenty-four times. The officer in *Mimms*, however, freely admitted that he neither observed any unusual circumstances nor suspected Mimms to be dangerous.

In upholding the frisk in *Terry*, the Court concluded that outlawing the frisk where an officer with thirty years experience suspects three men to be "casing" a store would have exposed officers to unnecessary risks in their day-to-day street encounters. In comparison, the officer in *Mimms* conceded that the only reason he asked the driver to step out of his car was because it was his practice to do so.[84] Furthermore, the officer admitted that he was not fearful for his safety.

In his dissent, Justice Stevens points out that the danger associated with law enforcement can never be totally eliminated.[85] Surely, approaching an individual whom an officer suspects to be dangerous is a more serious confrontation than the common occurrance of approaching a citizen to issue a traffic summons. No one would deny that an officer needs to eliminate as many risks as possible when confronting a suspected criminal. However, the Court in *Mimms* fails to make this distinction. The

81. 434 U.S. at 119. Justice Stevens in discussing the validity of the police study used by the majority stated:

> [T]hey lend no support to the Court's assumption that ordering the routine traffic offender out of his car significantly enhances the officer's safety. Arguably, such an order could actually aggravate the officer's danger because the fear of a search might cause a serious offender to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed.

82. *Id.* at 110. The majority quoted *Terry*: "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. [392 U.S. at 23]."

83. 434 U.S. at 110.

84. *Id.* at 109-10.

85. *Id.* at 120.

Court equates the average traffic violator with the suspected dangerous criminal. The Court in *Mimms* supports its reasoning on the need to provide law enforcement officials with added protection in all confrontations between the law and citizens.

In re-emphasizing the risks that are attendant with a police officer's job, the Court relied on a police study that had been cited in *Adams v. Williams*.[86] According to the statistics of this study, approximately 30% of assaults on police officers occurred when an officer approached a suspect in an automobile.[87] However, both the dissents in *Robinson*[88] and *Mimms*[89] questioned the majority's reliance on this particular study. The Supreme Court was cognizant of the fact that the study did not indicate whether the assaults had occurred during the issuance of a traffic summons. Nevertheless, the Court stated that they would not accept the argument that less danger was involved when a police officer stops a citizen for a traffic violation.[90] The Court turned to *Robinson* where it acknowledged that a significant number of police officers are murdered when making traffic stops.[91] The simple fact that the Supreme Court relied on a statistical study, which was not precisely on point, illustrated its profound concern for police safety and lack of concern for individual rights.

The Court in *Mimms* strengthened the officer's interest by stating that an officer who stands on the driver's side of the vehicle exposes himself to passing traffic and accidental injury. The Court suggested that both the safety of the officer and the driver

86. 407 U.S. 143 (1972).

87. *Id. See* Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L. 93 (1963).

88. 414 U.S. at 255, wherein Mr. Justice Marshall in his dissent stated:

> The majority relies on statistics indicating that a significant percentage of murders of police officers occurs when the officers are making traffic stops. But these statistics only confirm what we recognized in *Terry*—that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded."

89. 434 U.S. at 118. Justice Stevens in his dissent emphatically points out that the majority is basing its conclusion that police officers encounter danger when they stop citizens for a minor traffic violation on one statement from a police study. Further, he points out that the study does not establish what the risks are that are specifically associated with traffic stops.

90. *Id.* at 110.

91. The dissent not only noted that the police study relied on by the majority was not on point, but expressed added concern that there was no opportunity for full argument in *Mimms*. Justice Stevens points out that in *Terry* there was six months of deliberation, full argument and unusually elaborate briefing. Furthermore, Justice Stevens notes that full argument on the need for additional police safety might convince him that the majority of the Court was correct. *See* 434 U.S. at 115-23.

would be enhanced if the inquiry was held with both individuals standing on the shoulder of the road.[92] After examining the interests of the officer, the *Mimms* Court in applying its balancing test had to consider next the citizen's interest to be free from arbitrary interference by law officers.

De Minimus Intrusion

In one paragraph, the Court dismissed the intrusion into the driver's personal liberty as "de minimus."[93] The Court reached this conclusion on the fact that the driver had already been lawfully detained, and the only question remaining was whether the driver would be detained in his car or outside of it. The Supreme Court reasoned that Mimms was exposing "very little more of his person"[94] than he exposed from initially being stopped by the officer. The Court described the further request of the officer as a "mere inconvenience"[95] and held that when balanced against the officer's safety, the individual's interest could not prevail.

In its analysis of the citizen's expectation to privacy, the Court suggests that the initial lawful stop was the significant intrusion into the individual's privacy.[96] The further intrusion of getting out of one's car is incidental to the original stop and hence, is de minimus. The Court compares the officer's request in *Mimms* to the "pat-down" in *Terry* and concludes that it was neither a serious intrusion upon the individual's sanctity nor did it rise to the level of a "petty indignity."[97]

The majority opinion in *Mimms* begs the question of whether an initial intrusion on a citizen's right to privacy allows the officer to make further intrusions. This question, however, has already been answered by the Supreme Court in *Chimel v. California*.[98] The Court in *Chimel* expressly dismisses the idea that once a police officer makes an initial intrusion upon a citizen's right to privacy, any accompanying search is inconsequential. The *Chimel* Court states that "[w]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of

92. *Id.* at 111.

93. Taken from the latin term *de minimis non curat lex* meaning the law does not care for, or take notice of, very small or trivial matters. BLACK'S LAW DICTIONARY 482 (rev. 4th ed. 1968).

94. 434 U.S. at 111.

95. *Id.*

96. *Id.*

97. *Id.*

98. 395 U.S. 752 (1969).

a warrant that the fourth amendment would otherwise require."[99] Thus the decision in *Mimms* implicitly overrules the holding in *Chimel*. Furthermore, it now appears that the Court will sanction further intrusions upon a driver's personal liberty once he has been lawfully detained by a police officer for the purpose of issuing a traffic violation.

THE IMPACT OF MIMMS

On remand from the Supreme Court, the Supreme Court of Pennsylvania reversed Mimms's conviction on a ground unrelated to the search issue.[100] The state court instead rested its decision on state law.[101] This decision, however, should not be considered surprising. To the contrary, the Pennsylvania court has followed the example of an increasing number of state courts who have relied on state constitutions or state laws in order to afford increased protection to the criminally accused.[102]

This trend of state courts relying upon state law in protecting the individualized liberties of the criminally accused began after the Court's decisions in *Robinson* and *Gustafson*. Shortly

99. *Id.* at 766.

100. The court reversed Mimms's conviction during the last week of March, 1978. The basis for the reversal was a potentially prejudicial statement that was made during the trial. The prosecutor questioned a defense witness about Mimms's religious affiliation, a matter not raised in direct examination of the witness. Commonwealth v. Mimms, 477 Pa. 553, 385 A.2d 334 (1978).

101. The Pennsylvania legislature has provided in the Act of April 23, 1909, P.L. 140, § 3, PA. STAT. ANN. tit. 28, § 313 that "no witness shall be questioned, in any judicial proceeding concerning his religious beliefs; nor shall any evidence be heard on the subject, for the purpose of affecting either his competency or credibility."

102. *See* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (officers conducted full search incident to an arrest as was sanctioned by the Supreme Court in *Robinson*. The state court held that under the state constitution only a search for weapons would be reasonable);State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974) (state court rejected *Robinson* and held a search incident to an arrest is limited to one for weapons or fruits of the crime under the state constitution); People v. Beaveis, 393 Mich. 554, 227 N.W.2d 511 (1975) (state court held that warrantless eavesdropping by an electronic transmitter violated state constitution, however, the Supreme Court held there was no violation of the fourth amendment in a similar situation in United States v. White, 401 U.S. 745 (1971)); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975) (The Supreme Court allowed use of constitutionally infirm statements to impeach the credibility of a defendant's trial testimony. On remand the state court held the use of the statement was prohibited by the state constitution);State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (Supreme Court held an inventory procedure by police not violative of the fourth amendment. On remand, the state court held that the procedure was unreasonable under state constitution). *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

after these two decisions, the state courts of Hawaii[103] and California[104] held that the Court's decision in *Robinson* was unpersuasive, and limited the search after an arrest to one for weapons or for fruits or implements of the crime. These state courts based their decisions on the search and seizure provisions of their state constitutions. There have been countless other decisions where state courts have declined to follow the requirements set forth by the Supreme Court.[105] Apparently state courts have even anticipated contrary rulings by the Court and accordingly, have rested their decisions solely upon state grounds in order to avoid reversal.[106]

The dissenting opinions in *Mimms* note that the Court's decision could easily be eluded by the Pennsylvania court if the state court on remand based its decision on adequate state grounds.[107] Consequently, the final decision by the Court in *Mimms* should have little impact on the national level. However, the pattern of state courts relying upon state law to broaden the rights of the criminally accused can be expected to continue.

The significance of state courts basing their judgments upon state rather than federal law cannot be denied. This approach indicates a deliberate attempt by state courts to circumvent the holdings of recent Supreme Court decisions that have restricted the rights of accused persons. This view is illustrated by the Supreme Court of Hawaii in *State v. Kaluna* wherein the court states:

> While this results in a divergence of meaning between words which are the same in both the federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law . . . .[108]

The decisions of the United States Supreme Court are to be accorded respect and great consideration. Still, these decisions only establish the minimum standards that the states are required to observe in the criminal process. State courts are free to expand these standards, and recent decisions demonstrate a

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103. State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

104. People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

105. *See* note 102 *supra*.

106. Burrows v. Superior Ct., 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974) (The state court held that under state law bank depositors have a privacy interest in their bank records to invalidate disclosure by the bank to the police. The Supreme Court held the contrary in United States v. Miller, 425 U.S. 435 (1976)).

107. 434 U.S. 106, 114-15, 116-17 (1977).

108. 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974).

willingness on the part of the state courts to do so, even in lieu of a Supreme Court decision holding otherwise. The state courts have undertaken the role of determining the outside boundaries of constitutional protections afforded accused persons, rather than following the minimal standards imposed upon them by the federal courts.

With respect to the scope of the holding in *Mimms* in *Jones v. United States*[109] the Court of Appeals for the District of Columbia recently rejected the Government's argument that a police officer is justified in ordering all occupants out of a car although the initial stop was not based on the standards set forth in *Terry*. The government contended that under the holding in *Mimms*, a police officer, once he had occasion to speak with the occupants of a car, could order them out of the vehicle for his own protection. *Jones* presented the court with no facts or circumstances[110] which would indicate that "criminal activity was afoot." Absent such facts that would warrant the initial intrusion, the government's reliance on *Mimms* was adjudged ill-founded.

The appellate court held that *Mimms* did not support the government's position. The *Jones* Court distinguished *Mimms* on the facts presented in the instant case and concluded that *Mimms* in no way sanctions such action by a police officer.[111] In fact, the court in *Jones* noted that the Supreme Court had specifically stated that their decision in *Mimms* does not allow a police officer to order occupants out of their cars on every occasion in which he may have a reason to speak to them.[112] Reversing the lower court and refusing to expand the *Mimms* doctrine, the *Jones* Court summarized its decision in stating that "[t]o hold otherwise would allow the government to bootstrap its way to a full blown seizure in the absence of articuable facts indicating that criminal activity is afoot. . . ."[113]

109. Jones v. United States, 24 CRIM. L. REP. (BNA) 2026 (D.C. Cir. Sept. 18, 1978).

110. In *Jones*, a police officer working the night shift in an area with a recent incidence of crime came across the defendant and a passenger sitting in a car with the dome light on. The car was parked in the rear of a building and the passenger was smoking a cigarette. As the officer approached the vehicle the passenger made a quick movement as though he was hiding something. The officer believed it to be "some type of weapon" and ordered the occupants out of the car. Shortly thereafter the officer noticed some green weed and pinkish pills. The defendant was convicted of possession of marijuana after his motion to suppress was denied. *Id.*

111. *Id.* at 2027.

112. *Id.*

113. *Id.*

CONCLUSION

The *Mimms* decision signifies the Supreme Court's continued concern for police safety and lack of concern for individual rights. The fourth amendment guarantees to citizens the freedom from unreasonable searches and seizures.[114] However, the Court's failure in *Mimms* to determine the reasonableness of a search or seizure by examining the particular circumstances deprives individuals of the basic safeguard embodied in the fourth amendment. A police officer is no longer required to explain his actions, rather he has the discretion to decide whether or not an individual's right to be left alone will be intruded upon. The possibility for abuse in this area can be endless. As Justice Stevens so carefully points out in his dissent, "[s]ome citizens will be subjected to this minor indignity while other—perhaps those with more expensive cars, or different bumper stickers, or different colored skin—may escape it entirely."[115]

While the Supreme Court continues to diminish the rights of the accused, the state courts have begun to afford increased protection to these individuals. The decision by the Supreme Court of Pennsylvania on remand reaffirms the trend of state courts to base their decisions on state law so that they are virtually immune from Supreme Court review.

Furthermore, at least one court has viewed the *Mimms* decision narrowly.[116] The court refused to expand *Mimms* by allowing a police officer to order occupants from a vehicle whenever he has occasion to speak with them. In light of recent Supreme Court decisions eroding the protection of fourth amendment safeguards, one can only hope that the state courts will continue to look to their state constitutions to provide citizens with the basic rights the fourth amendment was established to protect.

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114. *See* note 1 *supra*.

115. 434 U.S. 106, 122 (1977).

116. Jones v. United States, 24 CRIM. L. REP. (BNA) 2026 (D.C. Cir. Sept. 18, 1978). *But see* Rakus v. Illinois, 47 U.S.L.W. 4095 (Dec. 5, 1978). Where the Supreme Court seems to have further eroded fourth amendment safeguards. In this case the Court held that the defendants did not have the right to invoke the protection of the exclusionary rule where they were merely passengers in a car. Thus, the exclusionary rule may now be invoked only where the defendants have a legitimate expectation of privacy in the invaded place.