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## A Silver Bullet: Should the Mere Presence of Ammunition Create a Reasonable Suspicion of Criminal Activity?, 48 J. Marshall L. Rev. 843 (2015)

Kyle Gruca

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# A SILVER BULLET: SHOULD THE MERE PRESENCE OF AMMUNITION CREATE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY?

KYLE GRUCA\*

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## I. INTRODUCTION

“No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life.”<sup>1</sup> U.S. District Court Judge Shira A. Scheindlin made this statement in *Floyd v. City of New York* when she ruled that the city needed to change its stop-and-frisk policies after finding that a large number of these investigatory stops violated the Fourth and Fourteenth

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\* The University of Illinois, B.A. in Political Science (2012); The John Marshall Law School, J.D. (2015).

1. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

Amendments.<sup>2</sup> Although not without its criticism,<sup>3</sup> the opinion discussed numerous instances where city police officers failed to meet the minimal constitutional requirements set out in *Terry v. Ohio*,<sup>4</sup> mainly an absence of reasonable suspicion,<sup>5</sup> and ultimately concluded that the city was liable for these violations.<sup>6</sup> In essence, Judge Scheindlin's ruling not only demonstrates an attempt to reel in abuses to citizens' individual rights,<sup>7</sup> but also provides a clear

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2. See *id.* at 561–62 (finding that of the nineteen stop-and-frisk cases examined at trial, nine were not based on reasonable suspicion and five more were deemed unconstitutional due to an invalid frisk); see also Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 13, 2013, at A1 (discussing Judge Scheindlin's opinion in *Floyd*). In *Floyd*, the court held that the New York City Police Department disregarded the Fourth Amendment in conducting investigatory stops because police officers found behavior to be suspicious too quickly and effectively eroded the legal standard required to conduct a stop-and-frisk search. *Id.* Instead of following the legal standard, Judge Scheindlin found the criterion used by police to be racially discriminatory. *Id.* For instance, a study used by Judge Scheindlin found that police stopped blacks and Hispanics disproportionately to whites, yet over 90% of those detained were released without the police officer finding a basis for a summons or arrest. *Id.*

3. See Goldstein, *supra* note 2, at A1 (mentioning former New York City Mayor Michael Bloomberg's vehement opposition to the decision while suggesting that Judge Scheindlin was biased and refused to give the city a fair trial); see also Joseph Goldstein, *Appellate Court Blocks Changes To Frisk Tactics*, N.Y. TIMES, Nov. 1, 2013, at A1 (explaining the Second Circuit's decision to grant a stay on the district court's decision and order the case to be randomly re-assigned). The Second Circuit, while not considering the merits of the decision, found that Judge Scheindlin exhibited an appearance of impartiality that "ran afoul" of the judicial code of conduct. *Id.* But see Joseph Ax, *N.Y. City to Seek Immediate Relief Preserving Stop-and-Frisk*, N.Y. TIMES (Nov. 7, 2013), <http://www.nytimes.com/reuters/2013/11/07/nyregion/07reuters-usa-newyork-stopandfrisk.html?ref=stopandfrisk> (discussing the position of newly elected New York City mayor Bill di Blasio who referred to the police tactics as racial profiling). Furthermore, di Blasio aides have stated that the new mayor will drop the city's appeal on the original ruling after being sworn into office. *Id.*

4. 392 U.S. 1, 16 (1968).

5. See I. Bennet Capers, *Moving Beyond Stop-and-Frisk*, N.Y. TIMES, Aug. 13, 2013, at A23 (noting that the decision announced what many already knew, mainly that police officers were basing stop-and-frisks on race, not the standard outlined in *Terry*). The point of the decision was not to end the "stop-and-frisk" police device, but demand officers to correctly follow the measure as outlined by *Terry* and other subsequent decisions. *Id.*

6. See *Floyd*, 959 F. Supp. 2d at 562 (finding the city liable for violations to the plaintiffs' Fourth Amendment rights because senior officials showed a "deliberate indifference" to police officers conducting these unconstitutional investigatory stop-and-frisks and that such unconstitutional conduct was so pervasive that they had the "force of law").

7. *Id.* at 563 (ordering a program that requires police officers to wear a "body-camera" while on duty, conduct a community-based remedial process, and retain independent monitor's to ensure stop-and-frisks are being conducted properly); see also Goldstein, *supra* note 3, at A1 (stating that the a "joint remedial process" would consist of community meetings meant to give a platform to the public to offer suggestions or express concerns on how to

example of how the warrant requirement and its exceptions, specifically the standard of reasonable suspicion, has been watered down over the past forty years.<sup>8</sup>

Similarly to *Floyd*, an Illinois case, *People v. Colyar*,<sup>9</sup> also illustrates a situation involving the abrogation and disregard for the Fourth Amendment and the *Terry* standard. Justice Burke, in a dissenting opinion, attempted to reinforce and restore the importance of the reasonable suspicion requirement to conduct a stop-and-frisk, as well as the constitutional demand it places on police officers.<sup>10</sup> However, the majority bypassed the legal standard and held that police officers were justified in conducting an investigatory stop-and-frisk because police officer safety was at issue when they observed a single bullet in a car's center console during a consensual encounter.<sup>11</sup>

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reform investigative tactics).

8. See George M. Dery III, *Unintended Consequences: The Supreme Court's Interpretation of the Second Amendment in District of Columbia v. Heller Could Water-Down Fourth Amendment Rights*, 13 U. PA. J. L. & SOC. CHANGE 1, 37–38 (2010) (suggesting that the Supreme Court has “watered down” the Fourth Amendment). For instance, in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court utilized an interest-balancing approach to the Fourth Amendment and essentially abandoned the requirement of reasonable suspicion in a case involving permanent checkpoints near the borders. *Id.* at 37. In rejecting individualized suspicion, the Court stated that to do so would be “impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.” *Id.* at 38; see also Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 790 (2000) (discussing the statistical misconception that “flight” upon seeing a police officer is a sufficient, common-sense basis of finding reasonable suspicion needed to initiate a *Terry* stop). Despite the Supreme Court's decision of finding reasonable suspicion to conduct a *Terry* stop as based on the defendant's flight as well as presence in a high crime area, a study released just prior to the ruling revealed that flight upon noticing a police officer is often a poor indicator of criminal activity. *Id.* at 786–92. In fact, the study indicated that in instances where flight was motivated by the presence of a police officer, the ratio of stops to arrest was 15.8:1. *Id.* at 791. However, when the category is narrowed to only include high crime areas, the stop to arrest ratio increased to 45:1. *Id.* This empirical data suggests that reasonable suspicion is becoming watered down to where even a negligible correlation between a benign behavior and criminal activity is enough to pass a Fourth Amendment challenge.

9. 996 N.E.2d 575, 584–85 (2013).

10. *Id.* at 599 (Burke, J., dissenting).

11. *Id.* at 585 (majority opinion) (ruling that the defendant's attorney conceded in oral argument that the police officer's actions were justified at its inception). The defendant's counsel made a statement that the police officer's were justified to order the defendant out of the car and therefore conceded the argument about the *Terry* stop. *Id.* at 599 (Burke, J., dissenting). However, the dissent points out that the defendant's counsel immediately corrected himself, emphasizing the difference between asking and demanding an individual to get out of the car. *Id.* The dissent argued that equating such a contradictory statement with a binding concession, especially in a criminal case, is

The dissenting opinion was concerned with the majority and special concurrence's opinions, contending that the police officers' failure to articulate a belief of reasonable suspicion of criminal activity, as required by *Terry*, served to further erode the protections guaranteed by the Fourth Amendment.<sup>12</sup> This Comment helps explain why the dissent's reasoning in *Colyar* establishes the appropriate analysis for cases involving circumstances indicating the possible presence of a firearm.

In Part II, this Comment discusses the various approaches courts have taken in Fourth Amendment cases before undergoing a thorough analysis of the *Terry* exception to the warrant requirement, which is imperative in understanding the issue presented in *Colyar*. Part III then looks at case law addressing factually analogous situations that indicate the possible presence of a firearm, but lack any suspicious behavior traditionally justifying a *Terry* stop.<sup>13</sup>

Finally, Part IV illustrates why the reasoning in this line of cases, similar to that of the *Colyar* dissent, should be followed before recommending steps police officers should take to avoid violating individual rights while still effectively fighting crime and protecting themselves.

## II. BACKGROUND

### A. *The Fourth Amendment: Warrant Requirement*

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against

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inappropriate. *Id.* This lack of a consensus on how to properly analyze the legal questions this case raises extended all the way back to the lower court. *See* *People v. Colyar*, 941 N.E.2d 479, 493 (Ill. App. Ct. 2010) *rev'd*, *People v. Colyar*, 996 N.E.2d 575 (2013) (deciding to affirm the circuit court's motion to suppress because the search was not supported by probable cause). Although the appellate court believed the police officers engaged in a lawful *Terry* stop, the court stated that a plain-view bullet, by itself, does not provide evidence of a crime without further knowledge that defendant was a felon or lacked a Firearm Owner's Identification [hereinafter “FOID”] card. *Id.*; *see also* 430 ILL. COMP. STAT. 65/2 (2013) (requiring an individual in Illinois to have a FOID card in order to acquire a firearm and firearm ammunition).

12. *Colyar*, 996 N.E.2d at 600 (Burke, J., dissenting); *see also* *Searches and Seizures*, CRIM. L. NEWS (30 No. 11 West's Crim. L. News 43) May 15, 2013, (explaining that the majority's decision would mean that even if a defendant possessed a valid FOID card, a police officer, with even less suspicion of criminal activity, could conduct a search because of concerns for police officer safety alone).

13. *See Colyar*, 996 N.E.2d at 588 (criticizing the dissent for a lack of support and failure to cite any material on point with their position). However, the cases cited by the majority, although concerning the presence of bullets, all contain some additional behavior or activity articulated by police officers that legitimized the initial stop. *Id.* at 590.

unreasonable searches and seizures.”<sup>14</sup> Its essential purpose is to impose a reasonableness standard on the decision of law enforcement to exercise its authority in order to ensure the privacy and security of individuals against arbitrary invasions.<sup>15</sup> However, “unreasonable” was not defined by the Framers of the Constitution; thus, within the Supreme Court’s discretion, it has the ability to form its own view on what limits should be imposed on the right to be free from governmental intrusions.<sup>16</sup>

Because the Supreme Court holds the discretion to define this right, debate has ensued on whether the Fourth Amendment should be read as one cohesive passage or two separate clauses.<sup>17</sup> One reading, advanced by the Supreme Court for most of the 20th century, claims that the “unreasonable search and seizure” clause should be read in conjunction with the “warrants” clause.<sup>18</sup> This “warrant-preference” view suggests that searches would be presumed reasonable only if pursuant to judicial authorization or falling within an exception to the warrant requirement.<sup>19</sup>

On the other hand, some Justices view the Fourth Amendment as containing two distinct clauses and the search

14. U.S. CONST. amend. IV.

15. See Thomas Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 558–59 (1999) (forwarding the notion that a broad reasonableness concept is implied in regulating all government search or seizures because if it is assumed that the Framers intended the Bill of Rights to be a comprehensive catalog of “our” rights, then it follows that the word “unreasonable” is the only term serving as a comprehensive standard); see also Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1134 (2012) (characterizing the pervasiveness of the reasonableness standard in regards to the Fourth Amendment). Reasonableness is the key term that guides an individual’s expectation of privacy as well as in guiding courts in deciding the validity of search-and-seizures pursuant to an exception to the warrant requirement. *Id.*

16. See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a), n.23 (5th ed. 2012) (providing examples of the various models the Court has used in measuring “reasonableness including the warrant preference model, the individualized suspicion model, [and] the totality of the circumstances test”).

17. The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and* no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. (emphasis added).

18. See *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding that warrantless searches are *per se* unreasonable unless they fall under one of the “few specifically established and well-delineated exceptions”). The decision in *Katz* also rules that that the Fourth Amendment protects people, not places, meaning an individual’s privacy may be protected by the Fourth Amendment even when out in public. *Id.* at 351; see also Davies, *supra* note 15, at 559 (proposing that choosing this approach helps ensure police officers will not abuse their authority by means of judicial oversight).

19. *Katz*, 389 U.S. at 357.

need only be analyzed using a “generalized-reasonableness” standard.<sup>20</sup> Nonetheless, despite the disagreement,<sup>21</sup> the Supreme Court has consistently followed the view that a warrantless search and seizure is *per se* unreasonable unless falling within one of the “well-delineated” exceptions to the warrant requirement.<sup>22</sup> One such exception to the warrant requirement is the investigatory stop-and-frisk, as discussed below.

## *B. The Terry Exception to the Warrant Requirement: Its Origin, Application, and Requisites*

### *1. Terry v. Ohio*

In *Terry v. Ohio*,<sup>23</sup> the Supreme Court established an exception to the Fourth Amendment’s requirement that a search and seizure is only valid if based on probable cause and executed with a warrant.<sup>24</sup> In *Terry*, an experienced police officer noticed

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20. See *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (advancing the theory that the test is whether a search was reasonable under the totality of the circumstances, not if procuring the search warrant was reasonable); *California v. Acevedo*, 500 U.S. 565, 583–84 (1991) (Scalia, J., concurring) (arguing that the analysis “should be . . . return[ed] to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded”). Justice Scalia suggests that the *per se* rule regarding a warrant requirement has no common law basis and only serves to confuse those who attempt to formulate rules of reasonableness “in light of changed legal circumstances.” *Id.*; see also Davies, *supra* note 15, at 559–60 (supporting the generalized reasonableness approach are those who believe police officers should be granted more authority to “aggressively” enforce laws).

21. See *Acevedo*, 500 U.S. at 582 (suggesting that the Court’s “jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone”); see also *Groh v. Ramirez*, 540 U.S. 551, 572 (2004) (Thomas, J., dissenting) (articulating that “the Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard”).

22. See *Acevedo*, 500 U.S. at 582–83 (discussing the many exceptions to the warrant requirement that have developed over the years to “enabl[e] a search to be denominated a [non] Fourth Amendment ‘search’” and thus the general warrant requirement need not be followed). Justice Scalia noted that although the “warrant-preference” theory won out, the victory seemed meaningless because the requirement is riddled with so many exceptions. *Id.*; see also *Warrantless Searches and Seizures*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 46 (2012) (listing exceptions to the belief that all searches are unreasonable if not based on probable cause and pursuant to a warrant). Valid exceptions to the warrant requirement, as long as they are determined to be reasonable, include investigatory stops, searches incident arrest, and consensual searches among many others. *Id.*

23. 392 U.S. 1 (1968).

24. See JOSEPH COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 4:41 (3d. ed. 2013) (stating that the Court constitutionally legitimized the stop-and-frisk technique in making its ruling in *Terry*). However, despite the new exception, the Supreme Court wanted to be clear by issuing another decision

two men repeatedly peering into a store window and then retreating to the street corner to confer.<sup>25</sup> After a brief conversation with a third individual, the police officer observed the two men continue “casing” the store for a while longer.<sup>26</sup> Finally, the police officer approached the men suspecting them of attempting to commit a robbery.<sup>27</sup> Fearing the men were armed, the police officer conducted a frisk, revealing a weapon.<sup>28</sup>

The defendants moved to suppress the weapon on the basis that it was discovered during an illegal search and seizure.<sup>29</sup> The Supreme Court upheld the lower court’s denial of the motion to suppress the weapon.<sup>30</sup> The Court approved of the police officer’s action in approaching the defendants because, looking cumulatively at the circumstances, it was appropriate to investigate possible criminal behavior.<sup>31</sup> Moreover, the invasion of the defendants’ personal privacy when conducting a weapons search was justified due to a reasonable belief that the defendants were armed and dangerous.<sup>32</sup> Ultimately, this decision validated the investigatory stop-and-frisk as an exception to the warrant requirement.<sup>33</sup>

## 2. *Terry’s Inapplicability: Consensual Encounter vs. Investigatory Detention*

Before undergoing any further analysis, as the decision in *Terry* points out,<sup>34</sup> the type of citizen-police encounter must be

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on the same day in *Sibron v. New York*, 392 U.S. 40 (1968), pointing out that *Terry* was not meant to serve as a “general license for . . . searches, but . . . must have constitutionally adequate grounds for doing so.” *Id.*

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

26. *Id.*

27. *Id.* at 6–7.

28. *Id.* at 7.

29. *Id.* at 7–8.

30. *Id.* at 8.

31. *See Terry*, 392 U.S. at 22–23 (holding that the police officer articulated facts that, when viewed together in the context of his thirty years of experience, indicate that a robbery was about to be committed). The search and seizure was held to be valid even though there was no probable cause because it is in the government’s interest to detect and prevent crime. *Id.*

32. *See id.* at 24–25 (finding the police officer’s belief to be reasonable that defendant was armed and dangerous because the officer articulated facts indicating a possible daylight robbery and “robbers” often use weapons to carry out their crimes). The Court noted here of a significant and more immediate interest in allowing a police officer the ability to protect himself and avoid taking unnecessary risks. *Id.*

33. *See id.* at 20 (announcing that a valid investigatory stop exists if justified at its inception *and* if reasonably related in scope to the circumstances justifying the detention).

34. *See id.* at 34 (White, J., concurring) (explaining explicitly that the Constitution puts no limit on police officers from asking an individual questions and that a person’s refusal to answer is alone insufficient to change



scrutinized. Not every interaction with police officers automatically amounts to an arrest or investigative detention, but it may simply be a consensual encounter. In the latter instance, an individual's Fourth Amendment rights are not implicated because a police officer is able to approach an individual on the street.<sup>35</sup> Consequently, it is perfectly acceptable for a police officer to ask individuals questions despite having no basis to suspect that a particular person is involved in any wrongdoing.<sup>36</sup>

The Fourth Amendment only requires evidence obtained invalidly to be suppressed<sup>37</sup> when an officer has in some way restrained a citizen's liberty, by means of physical force or a show of authority.<sup>38</sup> Therefore, if an individual would feel free to leave

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the manner of the interaction).

35. See *Florida v. Royer*, 460 U.S. 491, 497 (1983) (reiterating that a police officer has not violated a person's Fourth Amendment rights by "approaching an individual . . . [in] public, by asking . . . questions, or by offering in evidence . . . his voluntary answers").

36. See *United States v. Russ*, 772 F. Supp. 2d 880, 886 (N.D. Ohio 2011) (stating that law enforcement officers may initiate a consensual encounter with a citizen even without a suspicion of criminal activity); see also David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 59 (2009) (emphasizing that unlike most Fourth Amendment inquiries where the Supreme Court finds *per se* rules inapt, they have been more willing to label certain encounters that "never" constitute a seizure). The Court in a variety of contexts has held that questioning does not equate to seizure. *Id.* However, Kessler's article argues a different standard should be used to determine when a seizure has taken place rather than the Supreme Court relies on its own beliefs regarding a reasonable person. *Id.* at 60. Although empirical data would be helpful to solve this issue, the amount available is limited. *Id.* at 61.

37. See *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961) (reaffirming the *Weeks* doctrine which holds that evidence obtained through an illegal search and seizure must be barred in a federal prosecution); *Mapp*, 367 U.S. at 655 (extending the exclusionary rule in *Weeks*, that evidence obtained through an illegal search and seizure must be suppressed, to state courts). *Mapp* expressly overruled the holding in *Wolf*, which held that the exclusionary rule should not apply to the states through the Due Process Clause of the Fourteenth Amendment. *Id.* Furthermore, allowing prosecutors in state court to use illegally seized materials would undoubtedly "encourage disobedience to the Federal Constitution which it is bound to uphold." *Id.* at 658; see also LAFAVE, *supra* note 16, § 1.1(f) (discussing the major purposes of the exclusionary rule as being a deterrent to disregarding the Fourth Amendment, ensuring judicial integrity, as well as fostering trust in the government).

38. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (setting out a test on whether or not an individual has been seized). The Supreme Court held that "[a] person has been 'seized' . . . only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*; see also *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (referring to the *Mendenhall* test as "necessarily imprecise" since it functions to measure the coercive effect of police conduct; however, an individual's determination they have been restrained varies by both the at-issue conduct and setting the encounter occurs in). *But see California v. Hodari D.*, 499 U.S. 621, 626 (1991) (holding that a seizure does

during the encounter, the protection provided by the Fourth Amendment is inapplicable. In *United States v. Mendenhall*, the Supreme Court listed several factors that help indicate when an invalid seizure has occurred, including the threatening presence of several police officers, a display of a weapon by police officers, physical touching of the citizen, or the police officer's use of language or tone of voice indicating that compliance with a request may be compelled.<sup>39</sup> Thus, because the consequences of suppression of evidence or an eventual conviction hinge on minute details, determining what kind of encounter occurred is essential.

### 3. *Requirements for an Investigatory Stop-and-Frisk: Reasonable Suspicion*

Once it has been established that a police encounter either began as a detention or a consensual stop that developed into an investigatory *Terry* stop, a two-step reasonableness test is required to determine if a seized weapon can be introduced into evidence.<sup>40</sup> First, the police officer must reasonably suspect that criminal activity be afoot in order to “stop” the individual.<sup>41</sup> Secondly, the police officer must reasonably believe that the individual may be armed and dangerous in order to conduct a frisk.<sup>42</sup> This Comment will specifically focus on the constitutionality of the *Terry* stop, not the subsequent frisk.

Although some judges believe that the first reasonable suspicion requirement should be abandoned in undergoing a *Terry* analysis,<sup>43</sup> the Supreme Court and state legislatures<sup>44</sup> have

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not occur nor are Fourth Amendment protections triggered unless the defendant submits to the show of authority). In *Hodari*, the defendant disobeyed the police officers' order to “halt” and as he attempted to get away, discarded the cocaine in his possession. *Id.* at 629. The court held the failure to submit to a showing of authority meant defendant was not seized, and therefore, not entitled to have the evidence suppressed pursuant to the Fourth Amendment. *Id.*; see also *Brendlin v. California*, 551 U.S. 249, 254 (2007) (noting that a seizure must be intentional and not a result of an accident or “unknowing” act).

39. See *Mendenhall*, 446 U.S. at 554 (providing a non-exhaustive list of actions of police officers that would be sufficient to conclude seizure has taken place). However, if evidence of this kind is not found, ordinary and inoffensive contact between an individual and a police officer does not, “as a matter of law”, constitute a seizure. *Id.*; see also *Royer*, 460 U.S. at 497 (identifying oneself as a police officer is insufficient by itself to turn an encounter into a seizure).

40. This dual requirement is separate from the other two-step inquiry set out in *Terry*. See *Terry*, 392 U.S. at 20 (discussing the principle that a stop must be reasonable at its inception and be reasonably related in scope to the circumstances justifying the initial stop).

41. *Id.* at 30.

42. *Id.*

43. See *United States v. McHugh*, 639 F.3d 1250, 1262 (10th Cir. 2011) (O'Brien, J., concurring) *cert. denied*, 132 S. Ct. 278 (2011) (arguing that the

continually reaffirmed this dual requirement.<sup>45</sup> Accordingly, despite important government interests in *Terry* situations,<sup>46</sup> such concerns, by themselves, are insufficient to find a valid stop-and-frisk in the absence of a reasonable belief that criminal activity may be afoot.<sup>47</sup>

When looking to see if the first inquiry in *Terry* is satisfied and determining if an investigatory detention is justified, specific, articulable facts and the rational inferences drawn from those facts must give rise to a reasonable suspicion that a person is committing a crime.<sup>48</sup> Moreover, due to the lesser nature of the intrusion, the level of reasonable suspicion required is much less than needed for probable cause to make an arrest.<sup>49</sup> However,

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requirement of reasonable suspicion that criminal activity may be afoot is an irrelevant distraction). Instead, the concurrence suggests that that correct inquiry should be whether the facts known by the police officer at that time would “warrant a man of reasonable caution in the belief that the action taken was appropriate.” *Id.*

44. See 725 ILL. COMP. STAT. 5/107-14 (2013) (codifying the standard set out by *Terry* that allow an officer to question an individual). To question an individual not under arrest, a police officer must “reasonably [infer] from the circumstances that the person is committing, is about to commit or has committed a [crime][.]” *Id.*

45. See *Terry*, 392 U.S. at 34, (Harlan, J., concurring) (adding that it should be made absolutely clear that the ability to frisk an individual for weapons is dependent on the reasonableness of the initial stop to investigate the suspicious behavior); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (reaffirming the requirement in *Terry* of reasonable suspicion in order to stop and detain an individual); *Illinois v. Wardlow*, 528 U.S. 119, 127–28 (2000) (discussing both prongs required for a valid *Terry* stop-and-frisk); *Arizona v. Johnson*, 555 U.S. 323, 330–31 (2009) (articulating the two-step process to determine the validity of a stop-and-frisk). In *Johnson*, the Supreme Court explicitly reaffirmed the notion of a two-step test by requiring the investigatory stop be lawful, which is “met in an on-the-street encounter . . . when . . . an officer reasonably suspects that the person apprehended is committing or has committed a [crime][.]” *Id.* at 326. The Court then stated that to go from the initial stop to a frisk the “officer must reasonably suspect that the person stopped is armed and dangerous.” *Id.* at 326–27.

46. See *Terry*, 392 U.S. at 22–24 (articulating that crime prevention and detection as well as the “immediate” concern of officer safety are the compelling interests that may justify the intrusion of a person’s privacy even without the existence of probable cause to make an arrest). The holding goes on to discuss the extent of armed violence and that many police officer deaths occur from injuries by firearm or knife. *Id.* at 24.

47. See *United States v. Dorlette*, 706 F. Supp. 2d 290, 299 (D. Conn. 2010) (concluding that “*Terry* and its progeny do not permit a police . . . officer to justify a stop [solely] on a concern for officer safety”); see also, e.g., *McHugh*, 639 F.3d at 1257 (mentioning in passing that reasonable suspicion would not have been established simply because a dispatcher told police that certain individuals were thought to have had a weapon in their car).

48. *Dorlette*, 706 F. Supp. 2d at 298.

49. See *Wardlow*, 528 U.S. at 123 (explaining that the “*Terry* stop is a far more minimal intrusion” and that reasonable suspicion does not require a showing of preponderance of the evidence but a “minimal level of objective justification”); *Alabama v. White*, 496 U.S. 325, 330 (1990) (contrasting

police officers must still be able to communicate the existence of circumstances indicating more than a mere “hunch” that criminal activity is afoot.<sup>50</sup>

Courts also note that even if the defendant’s behavior is compatible with an innocent explanation, it does not mean the investigatory stop is inappropriate.<sup>51</sup> Instead, a totality of the circumstances standard is used to determine if reasonable suspicion existed at the time the seizure took place.<sup>52</sup> Courts will also defer to trained law enforcement officers to distinguish between innocent and suspicious actions, while making its final judgment on an objective basis.<sup>53</sup> In conclusion, situations

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probable cause with reasonable suspicion by noting that the latter can be established by information different in quantity or content as well as from information that is less reliable).

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

51. *See* *United States v. Cortez*, 449 U.S. 411, 418 (1989) (stating that the process of determining whether reasonable suspicion exists deals with probabilities not certainties). The Court went on to expound that “practical people [reach] certain common-sense conclusions [regarding] human behaviors and . . . law enforcement officers” are permitted to do so as well. *Id.*; *see also* *Sokolow*, 490 U.S. at 10 (explaining that the principle of allowing possible innocent behavior to provide a basis for probable cause equally applies to a reasonable suspicion inquiry under *Terry*). In *Sokolow*, the Court pointed out the many seemingly innocuous circumstances such as paying with cash for two airplane tickets, traveling from Hawaii to Miami for only two days, failing to check any luggage, and traveling under a name not matching the one corresponding with the listed telephone number. *Id.* at 3. Taken separately, such facts may resemble the actions of an innocent traveler, but cumulatively, they created reasonable suspicion. *Id.* at 9.

52. *See, e.g.*, *Brown v. Texas*, 443 U.S. 47, 51–52 (1979) (declaring that it is not objectively reasonable to stop-and-frisk an individual solely on the basis of being present in a high crime area); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (reiterating that a refusal to cooperate, by itself, fails to provide police officers with the requisite level of reasonableness required by *Terry*). *But see, e.g.*, *Wardlow*, 528 U.S. at 124 (holding that presence in a high-crime area is insufficient by itself to create reasonable suspicion; however, it is still a relevant consideration when looking at the totality of the circumstances). In *Wardlow*, despite the defendant’s presence in an area known for narcotics trafficking, the reasonable suspicion requirement was met by the defendant’s flight upon seeing police officers. *Id.* The Court noted that the “nervous, evasive” behavior is relevant to reasonable suspicion analysis and such flight is the “consummate act of evasion.” *Id.*

53. *See* *United States v. Martinez-Cigarroa*, 44 F.3d 908, 912–13 (10th Cir. 1995) (citing a number of Supreme Court cases that support the principle that police officers and law enforcement officials should be granted deference in making a judgment on the existence of reasonable suspicion). The cases suggest that law enforcement officials should be allowed to utilize their training to be able to articulate the meaning of a certain action that may seem innocent to a layperson, but create reasonable suspicion in the eyes of a police officer. *Id.*; *see also* *Scott v. United States*, 436 U.S. 128, 138 (1978) (assessing whether a police officer’s subjective intent by itself can invalidate a search and seizure of an automobile or its occupants). The Court stated that simply because the reasons articulated by police officers did not create a reasonable suspicion in his own mind, “does not invalidate” a stop as long as the police

requiring a *Terry* analysis must always meet the requirement of reasonable suspicion that criminal activity may be afoot without regard to a suspicion that an individual is armed and dangerous.

### C. Application of *Terry* Requirements in *People v. Colyar*

Similar to many Fourth Amendment and *Terry* cases, *Colyar*<sup>54</sup> hinged on a determination of the reasonableness of the stop. In *Colyar*, police officers approached a vehicle parked in front of one of the entrances to a motel parking lot.<sup>55</sup> The police officers then asked the driver why he was parked in the entryway.<sup>56</sup> The two men in the vehicle responded that they were waiting to pick up a friend.<sup>57</sup> At this point, the defendant's Fourth Amendment rights were not implicated.<sup>58</sup> However, during this consensual encounter, one of the police officers shined his flashlight inside the vehicle and saw a single bullet in the center console.<sup>59</sup>

As a result, the police officers ordered both of the men out of the vehicle, handcuffed them, and then conducted a vehicle search.<sup>60</sup> The search revealed five more rounds of ammunition in the defendant's pocket, as well as a revolver under the vehicle's floor mat.<sup>61</sup> The defendant argued that this evidence was illegally

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officer's testimony would provide justification on an objective basis. *Id.*; Compare *State v. Baudhuin*, 416 N.W.2d 60, 63 (Wis. 1987) (holding that a police officer's subjective intent is irrelevant in determining the legality of the search and seizure), with *United States v. Lott*, 870 F.2d 778, 784 (1st Cir. 1989) (claiming that "an officer cannot have a reasonable suspicion that a person is armed and dangerous when he in fact had no such suspicion").

54. *People v. Colyar*, 996 N.E.2d 575 (2013).

55. See *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (pointing out that a routine traffic stop is a relatively brief encounter and more analogous to a *Terry* stop than a formal arrest). In situations like *Knowles*, the initial *Terry* stop is not at-issue. However, *Colyar* was not a traffic stop. See *Colyar*, 996 N.E.2d at 599 (Burke, J., dissenting) (concluding that the encounter between the defendant and police officers only escalated to a seizure when ordered out of the car).

56. *Colyar*, 996 N.E.2d at 579 (majority opinion).

57. *Id.* A third individual exited the motel and joined the driver and his passenger right when the police officers approached the vehicle, corroborating the answer provided to police. *Id.*

58. See *id.* (noting that the initial encounter was consensual because the police officers' vehicle did not block the defendant's car and no weapons were drawn).

59. *Id.*

60. See *Colyar*, 996 N.E.2d at 600 (Burke, J., dissenting) (concluding that the encounter only became a seizure, triggering the Fourth Amendment protection, when the defendant was ordered out of the car).

61. *Id.* at 596; see also *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (allowing police officers to search a passenger compartment of a vehicle during an investigatory stop). However, this does give police the authority to search a vehicle after *any* stop. *Id.* at n.1050.

obtained and should be suppressed because it was seized during an invalid *Terry* stop-and-frisk.<sup>62</sup> The majority ignored the argument regarding the initial detention,<sup>63</sup> and made its decision to validate the police officers' actions based on a concern for officer safety.<sup>64</sup>

However, the *Colyar* dissent agreed with the defendant, stating that without any suspicious behavior articulated by the police officers or an inquiry into whether the vehicle's occupants had a Firearm Owner's Identification (FOID) card, the mere presence of a single bullet did not provide the police officers with enough reasonable suspicion necessary to detain the defendant and his passenger.<sup>65</sup> Therefore, the dissent maintained that the evidence should be suppressed.<sup>66</sup>

These facts set up a difficult problem that lacks any on-point authority to guide judges in ruling on a motion to suppress.<sup>67</sup> That is, does a single round of ammunition, absent suspicious circumstances<sup>68</sup> and without inquiring into a defendant's eligibility to possess a weapon, create enough reasonable suspicion that criminal activity may be afoot?<sup>69</sup> As the dissent in *Colyar*

62. *Colyar*, 996 N.E.2d at 579.

63. *See id.* at 600 (Burke, J., dissenting) (discussing the majority's decision as well the disagreement among justice's on whether or not the validity of the detention was conceded at oral argument by the defendant's counsel).

64. *See id.* at 587 (holding that subsequent to the lawful detention, the police officers' search was justified because they possessed a reasonable belief that a gun was present that threatened their safety). The majority explained that police officer safety was implicated, justifying a limited search, because they were standing outside a running vehicle with three occupants, and observed a bullet in plain-view. *Id.* at 590.

65. *Id.* at 601 (Burke, J., dissenting).

66. *Id.*

67. *See id.* at 588 (majority opinion) (noting a lack of case law in support of the dissent). However, the majority in *Colyar* goes on to list a number of cases in support of its own position, which are not on-point. *Id.* at 590.

68. *See* LAFAYE, *supra* note 16, § 9.5(g) (examining the types of behavior and surrounding circumstances that help police officers form a reasonable belief that criminal activity may be afoot). Observations of a person making a concerted effort to avoid police contact, including headlong flight, as well as appearing nervous or agitated are generally factored into an objective analysis of reasonable suspicion. *Id.* Police also can properly consider textual considerations such as being in a high-crime area, whether the individual "fits" into the area they are found, if the individual is associated with a certain group, time of day, or if a person has prior criminal record. *Id.* Such circumstances cannot be the sole reason articulated to justify a detention, but taken together and coupled with additional information can give rise to the minimal threshold required to conduct a *Terry* stop. *Id.*

69. *See Colyar*, 996 N.E.2d at 600 (Burke, J., dissenting) (noting that defendant was not in a high-crime area, although it was dusk, it was only 8:45pm, no one called to complain of suspicious activity, defendant's answer to the officer's question was consistent with the observation of a third individual exiting the motel and entering the car, nor did defendant make furtive movements or appear nervous). *But see id.* at 591 (Thomas, J., special concurrence) (approaching the analysis similarly to dissent but reaching an

points out, although it is logical to assume that the presence of ammunition indicates the possible presence of a weapon, owning a firearm is not *per se* illegal.<sup>70</sup> Due to the lack of case law on point, analogous situations dealing with the possible presence of a weapon without further suspicious behavior must be analyzed. However, precedent reveals a divide among both state and federal courts.

### III. ANALYSIS

This Part looks to a series of cases that, while not an identical match, mirror the problem and difficulty presented in the *Colyar* situation. Each case examined below involves circumstances that indicate the presence of a weapon, but where police officers lack facts suggesting the possession is illegal. Unlike *Terry*, the police officers in these situations do not suspect any crime is being committed other than possessing a weapon, an act that is not *per se* illegal.

The cases discussed below involve innocuous circumstances, and range from tips to police to a police officer's personal observations of a weapon or items associated with a weapon. Ultimately, as in *Colyar*, these decisions attempt to answer the question as to when an individual can be detained against his will when all the police officer reasonably suspects is the presence of a weapon. The analysis of the cases shows that state and federal courts take different approaches to answer this question.

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opposite conclusion). Rather than being "absolutely benign," the concurring Justice concluded that the urban, dusk setting, with three individuals, parked in a running car, and blocking the entrance would give rise to reasonable suspicion upon observing the ammunition. *Id.* at 592. Therefore, the relevant issue, according to the concurrence and dissent, lacking certainty is whether the mere sight of a single bullet provided the police officers with the reasonable suspicion of criminal activity required to seize defendant under *Terry*. *Id.* at 602 (Burke, J., dissenting).

70. *See id.* at 601 (reasoning that a bullet provides no information on whether a gun is present, whether it cased, if defendant was a felon, or had a FOID card). *See* 720 ILL. COMP. STAT. 5/24-1.6 (stating that the crime the state suggested defendant was suspected of committing was aggravated unlawful use of a weapon [hereinafter "AUUW"]). Under the statute, AUUW is committed when one knowingly carries a firearm in a vehicle and it is uncased, immediately accessible, either loaded or unloaded but ammunition is immediately accessible, and the owner does not possess a valid FOID card. *Id.*; *see also infra* note 172 and accompanying text (discussing the *Aguilar* decision where the AUUW statute mentioned in *Colyar* was found to be unconstitutional).

### A. *The Third Circuit: A Burden Shifting Approach and Statutory Interpretation*

The Third Circuit has tried to resolve the issue of how to analyze a situation where police officers receive information indicating that an individual may possess a weapon, but there are no facts regarding suspicious activity or illegality. In *United States v. Ubiles*,<sup>71</sup> an anonymous informant told police officers that the defendant possessed a weapon at a public festival.<sup>72</sup> The informant did not describe any suspicious behavior and the police officers did not notice anything unusual, indicating possible criminal activity, as they approached the defendant.<sup>73</sup> However, the police officers stopped the defendant and the subsequent frisk revealed a weapon.<sup>74</sup>

In ruling to suppress the evidence, the court stated that the police officers had no reason to suspect criminal activity was afoot.<sup>75</sup> Despite the police officer's belief the defendant was carrying a firearm, the court reasoned that possession of a weapon, by itself, is not a crime in the Virgin Islands.<sup>76</sup> Therefore, the court held that an allegation that a person possesses a weapon does not justify a stop as proscribed by *Terry*, absent relevant additional information.<sup>77</sup>

However, a few years later, in *United States v. Gatlin*,<sup>78</sup> the

71. 224 F.3d 213 (3d Cir. 2000).

72. *Id.* at 215.

73. *See id.* (emphasizing that the anonymous informant only described the defendant's clothing and appearance, but did not relay to police officers how he knew the man had a weapon or if he was acting unusual). Moreover, when the police officers approached the defendant, he did not act suspiciously, even after they initiated a conversation, nor could they tell that the defendant was carrying a weapon at all. *Id.*

74. *See id.* (noting that the weapon's possession in this instance was illegal because the serial number was eradicated and the firearm was unregistered). However, the police officers did not know these facts at the time of the arrest. *Id.*

75. *Id.* at 217.

76. *Id.* The court indicated that the result may have been different if the police officers had articulated facts that allude to the gun being defaced or unlicensed, or if the defendant acted in a manner consistent with some other crime. *Id.* at 218; *see also* 23 V.I. CODE ANN. tit. 454, § 3 (2012) (recognizing that a firearm may be lawfully possessed and transported in the Virgin Islands by a bona fide resident provided they have a license to do so).

77. *See Ubiles*, 224 F.3d at 217–18 (concluding that to hold otherwise, even assuming the tip was completely reliable, would deprive the defendant of exercising his right guaranteed by law to possess a gun in public). The court analogizes this scenario to a situation where an informant told police officers that defendant had a wallet and proceeded to stop him for this reason. *Id.* at 218. A subsequent search may reveal the wallet contained counterfeit bills, a crime, but it would be illogical to justify a stop on the fact that he possessed a wallet. *Id.*

78. 613 F.3d 374 (3d Cir. 2010).



opposite result was reached. In *Gatlin*, a known and reliable informant called the police to inform them that the defendant was carrying a weapon in his front coat pocket.<sup>79</sup> The police officers responding to this tip approached an individual matching the informant's description and, without asking any questions, drew their guns and handcuffed the defendant.<sup>80</sup>

In arguing the motion to suppress, the defendant contended that the tip did not indicate that he was engaged in criminal activity or lacked a concealed carry license.<sup>81</sup> Even though the circumstances did not include factors typically associated with suspicion of criminal activity,<sup>82</sup> the court held that the tip, by itself, was sufficient because having a concealed weapon is presumptively illegal in Delaware.<sup>83</sup> Therefore, because having a license is an affirmative defense to possessing a weapon according to the state statute, police officers were allowed to presume a crime was being committed in this context.<sup>84</sup>

The Third Circuit elaborated on these inconsistent holdings stemming from an identical set of circumstances. In *United States v. Lewis*,<sup>85</sup> a case mirroring *Ubiles* and *Gatlin*,<sup>86</sup> the court

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79. *See id.* at 376–77 (describing the defendant's location, skin color, height, and specifically that he was wearing "a Chicago Cubs hat, a black hooded jacket and black blue jeans"). The police officers stopped an individual wearing a Chicago Cubs hat and matching the other descriptions given by the informant. *Id.*

80. *Id.* at 377. Only after this initial confrontation did one of the police officers recognize the defendant from prior interactions in the Delaware probation system. *Id.*

81. *Id.*

82. *See id.* at 378 (pointing out the unique character of this case in that, besides the tip, it lacked the characteristics that create reasonable suspicion such as being late at night in a high-crime area known for shootings or involve an attempt to flee from police); *see also* *United States v. Valentine*, 232 F.3d 350 (3d Cir. 2000) (containing a similar set-up to both *Ubiles* and *Gatlin*, but reaching a different result based on further additional suspicious circumstances articulated by officers). In *Valentine*, officers spotted the defendant who matched the anonymous informant's description of a man in possession of weapon. *Id.* at 352. However, the result hinges on the fact that the encounter occurred "late at night, in a high crime area," and defendant began to walk away once the patrol car arrived on the scene. *Id.* at 357.

83. *Gatlin*, 613 F.3d at 378. The presumption in Delaware law is the distinguishing feature from this case to *Ubiles*. *Id.* Since the defendant matched the description from the tip, the investigatory stop was justified because at that moment, police officers had the required level of reasonable suspicion that the crime of carrying a concealed firearm was being committed. *Id.* at 379.

84. *Id.* at 378; *see also* DEL. CODE ANN. tit. 11, § 1442 (2010) (stating that having been issued a valid license is a defense to carrying a concealed deadly weapon); *id.* at § 305 (asserting that it is the defendant's burden prove an affirmative defense and set forth the facts necessary to bring himself within a certain exemption).

85. *See United States v. Lewis*, 672 F.3d 232, 239 (3d Cir. 2012) (describing the similarities between *Gatlin* and *Ubiles* in that the only evidence was a tip of firearm possession).

explicitly stated that unlike the Virgin Islands, where carrying a firearm is presumptively legal, Delaware's statute presumes that an individual does not have a license to carry a concealed firearm.<sup>87</sup> This approach examines how the statute is construed, and whom the legislature intended to prescribe the burden of proof at trial.<sup>88</sup>

Other courts also utilize the reasoning of the Third Circuit in situations involving a possible firearm, but contain otherwise benign circumstances.<sup>89</sup> For example, in *Minnesota v. Timberlake*,<sup>90</sup> an identified citizen called police and said she saw two individuals exit their vehicle, that one of them dropped an object appearing to be a weapon, and then quickly drove off.<sup>91</sup> Police officers spotted and pulled over the same vehicle minutes later.<sup>92</sup> The subsequent vehicle search revealed a semiautomatic

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86. *See id.* at 234 (concerning a tip from a reliable source that there were firearms in a certain vehicle, although the conversation did not reveal how the informant knew this information or provided information about firearms' legal status). Police officers pulled over the vehicle matching the informant's tip and ordered the defendant and passenger out of his car with only the limited information available to them. *Id.* During the ensuing interaction between the defendant and the police officers, a frisk was initiated and a weapon was seized. *Id.* at 235.

87. *Id.* at 240.

88. *Compare Lewis*, 672 F. 3d at 240 (noting that it is the government's burden to prove that the defendant did not have a license for the seized firearm), *with Gatlin*, 613 F.3d at 378 (placing the burden on the defendant to establish that he had a license to carry a concealed weapon); *see also* Jon S. Vernick et al., *Technologies to Detect Concealed Weapons: Fourth Amendment Limits on A New Public Health and Law Enforcement Tool*, 31 J.L. MED. & ETHICS 567, 573 (2003) (proposing competing theories as to when a concealed firearm should be considered contraband). The "permissiveness of licensing theory" which would require law enforcement officers in "shall-issue" states, where getting a license is relatively easy, to have more knowledge than just that a particular individual may be carrying a weapon. *Id.* On the other hand, the article discusses a "burden of evidence theory" where police could operate from the presumption that a weapon is possessed illegally and is therefore contraband. *Id.* at 574. At the time Vernick's comment was written, the research suggested that of the twenty one states answering who the burden to prove licensure in on, twelve states placed the burden on the defendant, six states placed the burden on the state, and conflicting case law existed in the three additional states. *Id.*

89. *See GeorgiaCarry.Org, Inc. v. Metro. Atlanta Rapid Transit Auth.*, No. CIV.A 109-CV-594-TWT, 2009 WL 5033444, \*4-5 (N.D. Ga. 2009) (concluding that since having a license is an affirmative defense to the crime of boarding public transportation with a concealed weapon, a police officer, upon only seeing defendant holster and completely cover his weapon, was justified in conduct an investigatory stop).

90. 744 N.W.2d 390 (Minn. 2008).

91. *Id.* at 392.

92. *See id.* (failing to mention any suspicious behavior nor did the vehicle commit a traffic violation that would have given the police officer the authority to conduct a valid stop).

handgun under the passenger seat.<sup>93</sup>

In arguing the motion to suppress, the defendant did not dispute the caller's reliability, but argued that since a private citizen in Minnesota may carry a gun in public legally, a police officer must be aware of additional evidence that makes its possession illegal.<sup>94</sup> However, the court held that the tip that the defendant possessed a weapon created enough reasonable suspicion, by itself, to justify the stop.<sup>95</sup> In interpreting the applicable state statute,<sup>96</sup> the court reasoned that the language "without a permit" created an affirmative defense to the weapon's illegal possession.<sup>97</sup> As a result, the stop of the defendant's vehicle was justified. Like *Gatlin*, this exception to criminal liability places a burden on the defendant, rather than the government, to provide evidence that he had a permit.<sup>98</sup> Accordingly, the stop of the defendant's vehicle was justified and required no further inquiry by the police.<sup>99</sup>

Even though these cases demonstrate an attempt to set up a logical framework in analyzing a *Colyar* situation, the following section provides examples of decisions where the court put the burden on police officers to articulate facts suggesting more than mere possession.

### *B. An Alternative Approach: Requiring Specific, Articulable Facts Beyond Possession of a Weapon*

Unlike the "presumption of illegality" analysis utilized by the Third Circuit, other courts have focused on the knowledge and actions of police officers in regards to activity that is not *per se* illegal. These cases examine both tips to police as well as observations made by the police officers themselves.

#### *1. Tips to Police Officers*

In *United States v. Wali*,<sup>100</sup> police officers received an anonymous tip providing a description of an individual who was said to be carrying a weapon.<sup>101</sup> After spotting the individual

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93. *Id.*

94. *Id.* at 394. The defendant argued that the police officers could only find reasonable suspicion if they could articulate a belief he did not have a valid permit or that some other criminal activity was afoot warranting a stop. *Id.*

95. *Id.* at 397.

96. See MINN. STAT. ANN. § 62A.714(1)(a) (2009) (criminalizing the possession of a weapon by a private citizen in a vehicle or public place "without first having obtained" a proper permit).

97. *Timberlake*, 744 N.W.2d at 394–95.

98. *Id.* at 395.

99. *Id.* at 397.

100. 811 F. Supp. 2d 1276 (N.D. Tex. 2011).

101. *Id.* at 1279.

matching the description, police officers ordered the man to the ground with their guns unholstered.<sup>102</sup> A frisk revealed a weapon and the defendant was charged with being a felon in possession of a firearm.<sup>103</sup> However, in moving to suppress the weapon, the defendant argued that the tip described only potentially illegal activity.<sup>104</sup>

The court held that the anonymous informant's tip was not sufficient to provide reasonable suspicion.<sup>105</sup> Specifically, the court reasoned that even if the police officers reasonably suspected a weapon to be present, there was no indication that the defendant lacked a valid license, was a convicted felon, or fell within an exception to carrying a firearm prior to his detention.<sup>106</sup> In essence, the arresting police officers "jumped the gun."<sup>107</sup>

The ruling in *Wali* naturally flows from the prior decision in *United States v. Roch*.<sup>108</sup> In *Roch*, a confidential informant told police officers that a particular individual was planning on "passing" forged checks and was going "to kill" the next cop he saw.<sup>109</sup> The information included the defendant's location as well as the belief that this person was armed and a felon.<sup>110</sup> In response, federal agents began observing the defendant at a motel, but noticed no suspicious activity.<sup>111</sup> Upon seeing the defendant exit the motel and drive off, the agents ordered police to stop the defendant's vehicle, which was subsequently searched, revealing a firearm.<sup>112</sup>

In appealing the denial of his suppression motion, the defendant argued that the police officers had no reasonable suspicion to seize or arrest the defendant, because they lacked

102. *Id.*

103. *Id.*

104. *See id.* at 1281 (describing activity that is *per se* illegal as being "absolutely" against the law, such as narcotics possession). Unlike narcotics, a weapon can be possessed legally in a number of different circumstances. *Id.* at 1280.

105. *See id.* at 1284 (mentioning that the tip failed to provide information about the defendant's status as a felon or if he had a valid concealed carry license).

106. *Id.* *See* TEX. PENAL CODE ANN. § 46.02, 46.15(b)(2) (2011) (penalizing handgun possession unless the individual is on his own premises, walking to their own vehicle, or has a valid license to carry such a weapon).

107. *See Wali*, 811 F. Supp. 2d at 1284 (implying that the police officer's acted on nothing more than an unparticularized suspicion or hunch). The court noted the result would be different if police officers observed the defendant attempting to flee, holding the gun in his hand, or making any furtive movements. *Id.* at 1284–85.

108. 5 F.3d 894 (5th Cir. 1993).

109. *Id.* at 896.

110. *See id.* at n. 1 (reasoning that the defendant was a felon because informant told police officers he had seen a number of "prison-grade tattoos").

111. *Id.*

112. *Id.*

specific, articulable facts regarding his status as a felon.<sup>113</sup> The court noted that neither the agents conducting surveillance nor the local police officers saw the defendant commit a crime, display questionable behavior, or violate any traffic laws.<sup>114</sup> Moreover, even if the informant was reliable, the authorities failed to corroborate the tip regarding the driver's identity or his felonious status.<sup>115</sup> Therefore, without corroboration indicating criminal activity was afoot, no reasonable suspicion existed to detain defendant on activity that was not *per se* illegal.<sup>116</sup>

Likewise, in *Commonwealth v. Couture*,<sup>117</sup> as the defendant drove off, a convenience store clerk alerted police that an individual had a firearm hanging out of his back pocket.<sup>118</sup> Police officers spotted the vehicle matching the clerk's description and approached with guns drawn.<sup>119</sup> After detaining the defendant, they discovered a weapon under the front seat of the vehicle.<sup>120</sup> Only after reading the defendant his rights did the police officer ask if he had a valid license to carry the firearm.<sup>121</sup>

In affirming the decision to suppress the weapon, the court reasoned that since the defendant did not threaten the store clerk,

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113. See *Roch*, 5 F.3d at 897 (pointing out that without a reasonable suspicion that the defendant was a felon, defendant could presumably legally possess a weapon).

114. *Id.* at 897–98.

115. See *id.* at 899 (lamenting that the police officers did not put forth “any effort” to run a title check of the defendant's vehicle's license plates or examine the guest list of the motel that could have revealed information about the defendant's status). Moreover, the agents and police officers did not see any tattoos on the defendant before making the stop. *Id.* Essentially, the record indicates that when the police officers approached the defendant, they gathered no information that corroborated the informant's tip prior to ordering the defendant to the ground at gunpoint. *Id.* Therefore, without articulating facts to suggest the defendant was a felon, lacked a license, displayed suspicious behavior, or other suspicious circumstances, the court's implicitly holds that the police officers acted on nothing more than a hunch, which is insufficient to find a valid *Terry* stop. *Id.*

116. Compare *id.* (distinguishing *Roch* from a similar Supreme Court case where the suspected criminal activity the government acted on was a possession of a firearm by a felon and the conduct would not have been against the law if there was meaningful information to suggest the defendant was in fact a felon), with *Adams v. Williams* 407 U.S. 143, 147 (1972) (holding that a tip, about a specific individual carrying narcotics and a weapon, was sufficient to justify the detention of a person when the information was provided by a reliable informant and the situation took place late at night in a high-crime area). The *Roch* court noted a significant difference in the two cases by stating that in *Adams*, the information justifying reasonable suspicion of criminal activity involved narcotics possession, which is *per se* illegal. *Roch*, 5 F.3d at 899.

117. 552 N.E.2d 538 (Mass. 1990).

118. *Id.* at 539.

119. *Id.*

120. *Id.*

121. *Id.*

linger outside the store, or display any other suspicious behavior, police had no justification to stop the vehicle.<sup>122</sup> The court held that a police officer's suspicion that an individual is carrying a weapon, by itself, does not create a belief that the possession of the weapon is illegal.<sup>123</sup> Furthermore, in deciding this case, the court explicitly rejected the argument that reasonable suspicion may be based on the presence of a firearm by itself, since having a license is a valid defense.<sup>124</sup>

## 2. A Police Officer's Own Observations

Although the following cases arise in a different context, they are equally illustrative of the principle that police officers must point to facts indicating *illegal* possession of a weapon, not simply that a weapon is present. For instance, although *People v. Parra*<sup>125</sup> involved a legal traffic stop,<sup>126</sup> the court found the police officer's

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122. *See id.* at 540 (concluding that all the police officers used to justify their actions was that they believed a man was in public with a handgun).

123. *See Couture*, 552 N.E.2d at 541 (extending the court's analysis from probable cause and emphasizing that the reasoning is equally applicable in an investigatory stop scenario). The court's decision seems to suggest that had the firearm license issue been discussed prior to "seizing" the defendant, then the outcome may have been different. *Id.*; *see also* Commonwealth v. Toole, 448 N.E.2d 1264, 1268 (Mass. 1983) (finding no probable cause to search a vehicle when the police officers found ammunition and an empty holster on the defendant after stopping the vehicle pursuant to an outstanding warrant). According to a state statute, since the warrant was for an unrelated crime and provided no grounds to conduct a vehicle search, the police officers needed an independent basis to justify their actions. *Id.* at 1267. However, the court concluded that although an empty holster and ammunition created a reasonable belief that there was a gun nearby, having a weapon is not necessarily a crime. *Id.* at 1268. Because the police did not learn that the defendant had no firearm identification card until after the search and did not bother to ask whether he had a license to carry a firearm, the evidence was suppressed. *Id.*

124. *See Couture*, 552 N.E.2d at 182 (declining to give credence to the government's argument that it is unreasonable that a police officer needs to show more than a prosecutor must prove to obtain a conviction since licensure is an affirmative defense and places the burden on the defendant to prove he has a license, not the state). The court rejected this proposition and stated that such reasoning "applies in the context of [a] trial[.]" *Id.* However, it is inappropriate and unfair to allow police officers to detain individuals who exhibit no suspicious behavior for "merely being seen in public with a handgun" without even asking if they have a valid license. *Id.* at 182–83. Allowing such behavior "makes an open target of every individual who is lawfully carrying a handgun." *Id.* at 183; *see also* MASS. GEN. LAWS ANN. ch. 269, § 10 (2006) (criminalizing the possession of a firearm "except as provided" and among the exceptions include having a valid license to do so).

125. 817 N.E.2d 141 (Ill. App. Ct. 2004).

126. *See* Thomas Fusco, *Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following Lawful Stop for Traffic Offense, to Investigate Matters Not Related to Offense*, 118 A.L.R. FED. 567 (originally published in 1994) (providing a supplement of cases whether the police

subsequent actions unjustified.<sup>127</sup> After pulling over the defendant's vehicle for a traffic violation,<sup>128</sup> the police officer approached and asked for his information.<sup>129</sup> The driver and his passenger never made furtive movements or acted suspiciously.<sup>130</sup> However, the police officer noticed latex gloves in a compartment box when the defendant reached for his registration.<sup>131</sup> The police officer, due to the area he was patrolling, knew that gang members often use latex gloves in hand gun crimes.<sup>132</sup> However, the police officer also noticed a gun registration card in the defendant's wallet as he removed his driver's license.<sup>133</sup>

The police officer then returned to his vehicle and checked the defendant's driver's license to determine if any outstanding warrants existed or if he was a known gang-member.<sup>134</sup> None of the inquiries proved fruitful, and despite the absence of additional evidence,<sup>135</sup> the police officer ordered the defendant and his passenger out of the vehicle and conducted a search, revealing a weapon.<sup>136</sup> After his subsequent arrest, the defendant filed a motion to quash arrest and suppress evidence, which was then granted by the trial court.<sup>137</sup>

On appeal, the court noted that even though the circumstances indicated a weapon was quite possibly present, they did not create reasonable suspicion that the defendant was carrying a weapon illegally. Therefore, the defendant's detention

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officer's detention of a individual after conducting a traffic stop to investigate unrelated matters were valid). Police officers must restrict their detention of occupants of vehicle who committed a traffic violation to no more than asking for license, registration, and "a few perfunctory questions." Beyond this, police officers must be able to articulate specific facts giving rise to an inference of a reasonable suspicion of criminal activity. *Id.* Otherwise, the situation becomes analogous to a consensual encounter that turned into an unlawful *Terry* stop.

127. *See Parra*, 817 N.E.2d at 144–45 (explaining that a traffic stop is analogous to a *Terry* investigative stop and reasonableness of a such a stop is analyzed under *Terry* principles). Here, although the initial stop was justified at its inception because of the traffic violations, the police officer's actions still must be "reasonably related to scope to the circumstances that justified the [initial] interference." *Id.* at 145. The Court stated that if the questioning was not related to the purpose of the initial stop, the police officer must have suspicion of some other criminal activity to justify his action. *Id.*

128. *See id.* at 143 (stating that the defendant was properly pulled over for failing to use his turn signal prior to turning at an intersection, failing to stop at a stop sign, and then rapidly accelerating).

129. *Id.* at 144.

130. *Id.*

131. *Parra*, 817 N.E.2d at 144.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.* (discussing the "suspicious" circumstances that the government argued justified the police officer's continued detention of the defendant).

136. *Id.*

137. *Parra*, 817 N.E.2d at 144.

was unreasonable.<sup>138</sup> The court reasoned that the facts, taken individually or cumulatively, did not justify the police officer's questioning; thus, the discovery of the weapon was tainted.<sup>139</sup>

Another recent decision involving a police officer's observation of potentially criminal activity is *Mackey v. State*.<sup>140</sup> In *Mackey*, a police officer patrolling a high crime area spotted a weapon protruding from the defendant's pants.<sup>141</sup> The police officer approached the defendant without his weapon drawn and asked if "he had anything on him?"<sup>142</sup> The defendant answered, "No."<sup>143</sup> At that point, the police officer detained and frisked the defendant, revealing the weapon.<sup>144</sup>

The Florida Supreme Court affirmed the lower court's decision to deny the defendant's motion to suppress.<sup>145</sup> It found that because the police officer articulated that the defendant was lying about having a weapon and the location was known for illegal drugs and firearms, the police officer demonstrated reasonable suspicion justifying the detention.<sup>146</sup> The court stressed that the outcome should be determined by the totality of circumstances.<sup>147</sup>

138. *See id.* at 146 (emphasizing that the police officer had no knowledge of whether or not the defendant was a gang member and that simply being present in a high-crime area cannot independently justify a stop). Moreover, continuing to detain the individual because a FOID card was displayed is inappropriate because it punishes those who comply with the law. *Id.*; *see, e.g.*, 720 ILCS 5/24-1.8 (making it illegal for gang members to possess a weapon outside one's own home).

139. *Parra*, 817 N.E.2d at 145.

140. *Mackey v. State*, 124 So. 3d 176 (Fla. 2013).

141. *Id.* at 179.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.* at 185 (affirming on different grounds than the appellate court). The appellate court concluded that because having a license to carry a firearm is an affirmative defense, once a police officer believes an individual possesses a firearm, there is enough reasonable suspicion to conduct a *Terry* stop. *Id.* at 181.

146. *Mackey v. State*, 124 So. 3d at 184. The court agreed that licensure is an affirmative defense, rather than an element of the crime of carrying a concealed weapon. *Id.* at 181. However, according to the court, this distinction is not dispositive in analyzing the validity of a stop. *Id.* The court expounded that such stops "can . . . solely [be addressed] by . . . United States Supreme Court [precedent] and the totality of the circumstances present [in] this case." *Id.*

147. This holding resolved a "certified" inter-district conflict created by the appellate court's ruling regarding the question of whether a weapon, by itself, is a sufficient justification to initiate an investigatory stop. *Id.* at 179. *Compare Mackey v. State*, 83 So. 3d 942, 946-47 (Fla. App. 2012), *aff'd on other grounds, Mackey*, 124 So. 3d 176 (affirming the trial court's decision to suppress evidence because the applicable statute includes licensure as an affirmative defense and therefore the police officer's actions were justified once he saw the firearm on the defendant's person), *with Regalado v. State*, 25 So. 3d 600, 606-07 (Fla. App. 2009) (upholding the decision to suppress evidence



Unlike the Third Circuit approach, these decisions reflect the belief that the burden is on police officers to articulate facts that amount to more than a “hunch” that certain activity is criminal, when the activity is not *per se* illegal. Essentially, this analysis starts from a “presumption of legality”<sup>148</sup> and then requires the government to present facts creating a reasonable inference such possession may be illegal.

### C. *The Competing Approaches and Colyar*

In situations involving weapons possession, an activity that is not *per se* illegal and lacks any articulated suspicious behavior, courts have taken divergent approaches. On one hand, an element versus affirmative defense analysis has been used to determine the validity of a *Terry* stop, thereby establishing a “presumption of illegality” in certain courts. However, other courts have required police officers to articulate additional facts that reasonably suggest that the possession is illegal, essentially suggesting a “presumption of legality.” This latter view is in line with the *Colyar* dissent<sup>149</sup> and the following proposal will provide support for adopting this mode of analysis.

## IV. PROPOSAL

The *Colyar* dissent and its approach to a *Terry* stop should be followed in situations where a weapon is reasonably suspected to be present, due to the presence of a bullet, but involving otherwise

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because the police officer did not observe any suspicious behavior or know whether the defendant had a permit to carry the weapon subsequent to receiving a tip that the defendant possessed a weapon even though there was a noticeable bulge). The *Regalado* court reasoned that handgun possession is not illegal *per se* and without additional facts, none of which the tip or the independent investigation provided, suggesting the possessions illegality, the police officer had no authority to conduct a *Terry* stop. *Id.* at 607. The Florida Supreme Court distinguished *Mackey* from *Regalado* on the basis that in the former, the defendant lied after being approached in a non-threatening, consensual encounter while in the latter, the police officer stopped the defendant at gunpoint solely from the belief he was carrying a firearm. *Mackey*, 124 So. 3d at 185. Therefore, no conflict exists and *Regalado* is line with the Florida Supreme Court’s reasoning. *Id.*

148. See STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 8:8 (2013) (arguing that the possession of a firearm “does not give rise to any presumption of criminality”). Moreover, the National Firearms Act treats traditional firearms as “perfectly innocent, legal items” which millions of Americans possess legally. *Id.*

149. See *supra* note 65 and accompanying text (discussing the reasoning of the *Colyar* dissent and the argument that reasonable suspicion did not exist under the totality of the circumstances because no articulated facts pointed to the illegality of possession).

benign circumstances.<sup>150</sup> Beyond the inherent flaws in the approach adopted by the Third Circuit in validating a *Terry* stop,<sup>151</sup> this proposal focuses on why the “presumption of legality” approach should be followed.

For instance, this approach logically flows from the Supreme Court’s explicit refusal to create a firearms exception. Moreover, a “presumption of legality” approach is consistent with the fundamental nature of the right to keep and bear arms. Finally, this Part proposes a few simple procedures to help police officers avoid making the same errors as the police officers in the cases above, while still allowing police officers to make a quick, yet valid decision on whether or not to detain an individual after observing a bullet. Essentially, this proposal supports the idea that police officers should start from an assumption that a weapon is possessed legally and then work backwards in an effort to identify specific, articulable facts that reasonably suggest such possession is illegal.

#### A. *A Firearms Exception: The Rationale for its Rejection Supports a Presumption of Legality*

In *Florida v. J.L.*,<sup>152</sup> the Supreme Court expressly rejected the idea of permitting an investigatory detention pursuant to the sole belief that a weapon may be present.<sup>153</sup> Although *J.L.* presents a different factual scenario,<sup>154</sup> the rationale for rejecting

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150. This factual scenario is what is referred to in the remainder of this article as a “*Colyar* situation.”

151. See Robert Leider, *May I See Your License? Terry Stops and License Verification*, 31 QUINNIPIAC L. REV. 387, 424–25 (2013) (proposing that “[r]egardless of whether the legislature classifies [licensure] as an element or a defense, the statute permits and prohibits exactly the same conduct [and] this means that what constitutes ‘reasonable suspicion’ should be the same in either case.”). In arguing against this “formalistic” approach, the article describes both a practical and theoretical problem. *Id.* at 428. First, as a practical matter, this element versus affirmative defense approach gives the legislature the power to authorize police to stop anyone engaging in a licensable activity. *Id.* at 429. However, allowing an “expansion of permissible searches [simply] by shifting elements to defenses undermines the very privacy interests that *Terry* . . . s[ought] to protect by requiring ‘reasonable suspicion’ of criminal activity.” *Id.* From a theoretical standpoint, such an approach misinterprets the definition of a crime because no matter how the statute is construed, ultimately “a person is engaged in criminal activity only if th[at] person has satisfied the elements and no defense makes the action permissible.” *Id.* at 428.

152. 529 U.S. 266 (2000).

153. See *id.* at 272 (refusing to adopt the position that the *Terry* analysis should be modified to allow a stop when a tip alleges the possession of a firearm, even without an assertion of illegality).

154. See *id.* at 258–59 (concerning the reliability of an anonymous tip to police that a particular individual, standing on a bus corner and wearing a plaid shirt, was carrying a gun).

the “firearms exception” is equally applicable to the situation where a bullet is the sole justification for a *Terry* stop. A *Colyar* situation, like *J.L.*, deals with circumstances indicating the possible presence of a firearm; however, neither situation involves any evidence of illegal possession.<sup>155</sup>

Therefore, to condone a *Terry* stop in a *Colyar* situation would be to implicitly adopt an automatic firearms exception. However, adopting such an exception, without any suspicion of illegal activity would “rove too far.”<sup>156</sup> For instance, in the case of an anonymous tip, individuals wishing to harass others could simply call police and falsely report that an individual is carrying a firearm.<sup>157</sup> Here, police officers would effectively be permitted to harass any individual where the attenuating circumstances have some sort of relationship with a weapon.<sup>158</sup>

This rationale naturally leads to another problem, namely, a “slippery slope” dilemma. For instance, it would be difficult to keep such an exception strictly confined to items having a more “direct”

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155. *See id.* at 272 (holding that the anonymous tip, although reliable regarding a particular person’s identity, provided no reliability regarding an assertion of illegality). Therefore, even if a weapon may have been present, police had no justification for a *Terry* stop when the contextual considerations involved no reasonable suspicion of illegality. *Id.* at 268. *See supra* note 67 and accompanying text (discussing the benign circumstances in *Colyar*).

156. *J.L.*, 529 U.S. at 272. *See, e.g., Colyar*, 996 N.E.2d at 601 (Burke, J., dissenting) (describing a number of plausible scenarios where a bullet could be present and have absolutely nothing to do with criminal activity).

157. *Id.*; *see also* Mark W. Malone, *Florida v. J.L.: The United States Supreme Court Departs from Its Recent Pattern of Strengthening the Hand of Law Enforcement—A Warning Against Overly Aggressive Law Enforcement*, 27 OKLA. CITY U. L. REV. 475, 489 (2002) (discussing the defendant’s argument in *J.L.* that such an exception would also give police the ability to phone in an anonymous tip themselves and then seize an individual in order to avoid any scrutiny as to the basis of their own suspicions).

158. Such unwarranted harassment is already pervasive and any additional erosion could further damage the nominal amount of trust certain communities already have in the police. *See* Jeffrey Fagan, *Stop and Frisk: Updated Data Confirms Earlier Findings of Rights Violations*, CENTER FOR CONSTITUTIONAL RIGHTS (2012), *available at* <http://www.ccrjustice.org/files/Fagan-2012-summary-FINAL.pdf> (analyzing stop-and-frisk statistics in New York City from January 2010 through July 2012). This report suggests that over 95,000 stop-and-frisks conducted by the New York City Police Department lacked a reasonable, articulable suspicion and do not pass Fourth Amendment muster. *Id.* Moreover, merely 6% of stops resulted in an arrest while only .12% of the total number of stops led to the seizure of a weapon. *Id.*; *see also* Nahal Zamani, et. al., *Stop and Frisk: The Human Impact*, CENTER FOR CONSTITUTIONAL RIGHTS, July 2012, *available at* <http://stopandfrisk.org/the-human-impact-report.pdf> (discussing the negative consequences of the aggressive police tactics used in New York City have not only on individuals but communities as a whole). In fact, giving law enforcement officers more authority to “protect the people” could have the reverse affect by damaging police-community relations to a point where public safety is at even greater risk and that “present polices are actually killing people.” *Id.*

relationship with firearms.<sup>159</sup> Although bullets may lead to a suspicion that one possesses a weapon, police could certainly cite countless items leading to a similar belief.<sup>160</sup> Consequently, as the Supreme Court held in *J.L.*, such an exception in a *Colyar* situation would be too expansive and potentially dangerous to individual rights.<sup>161</sup>

This does not mean that when a weapon is potentially present, police officers may never initiate a detention.<sup>162</sup> However, a *Colyar* situation, involving such innocent details, certainly would not qualify as such a grave threat as to allow an intrusion without suspicion of criminal activity.<sup>163</sup> In fact, the Supreme Court also noted that public safety does not warrant a firearm's exception in

159. See Malone, *supra* note 157, at 489–90 (recognizing the legitimate concern of the Supreme Court that adopting a “firearms exception” could lead to suspicion-less searches based on “bare-boned” allegations of carrying narcotics because of a relationship between carrying drugs and weapons).

160. See *supra* notes 123–32 and accompanying text (discussing the “suspicious” presence of latex gloves in *Parra*, an item the officer said is used in handgun grimes by gang-members). Even in an extreme example, items such as “blunt wrapper” could theoretically lead a police officer to presume the possession of narcotics, and by association, a weapon, thereby justifying a stop. See generally, Nate Nieman, *When Bullets Don't Always Lead to Guns: Analysis of People v. Colyar*, NORTHERN LAW BLOG (Jan. 14, 2011), <http://www.northernlawblog.com/2011/01/when-bullets-dont-always-lead-to-guns.html> (comparing bullets to a “blunt wrapper” in the sense in the sense that either could be “legal or illegal, depending on the circumstances”).

161. See Edward W. Krippendorf, *Florida v. J.L.: To Frisk or Not to Frisk; the Supreme Court Sheds Light on the Use of Anonymous Tipsters As A Predicate for Reasonable Suspicion*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 161, 193 (2002) (explaining that the Supreme Court has required “more than simple ‘innocent details’ a[s] necessary . . . corroboration under the totality of the circumstances”).

162. See *J.L.*, 529 U.S. at 273 (emphasizing that the decision to not adopt a “firearms exception” may not hold up under a different set of circumstances, but fail to define what specifically would be required to abandon the requirements of *Terry*). The Court used the hypothetical of a bomb threat to describe a situation needing less indicia of reliability in order to seize an individual. *Id.* at 273–74; see also Jason Kyle Bryk, *Anonymous Tips to Law Enforcement and the Fourth Amendment: Arguments for Adopting an Imminent Danger Exception and Retaining the Totality of the Circumstances Test*, 13 GEO. MASON U. CIV. RIGHTS L.J. 277, 304 (2003) (discussing the use of a sliding scale approach and in instances where there is an increased danger to the public, a tip that a person is armed, should tip in favor of permitting a stop). Stops can also be conducted without the requisite level of reasonable suspicion when a person's individual privacy expectations are lessened, such as in public schools or airports. *Id.* Extending the reasoning to a *Colyar* situation, if police saw an item associated with a “more dangerous” device or taking place in a more sensitive area, rather than isolated in a motel parking lot, an intrusion may be justified.

163. See Leider, *supra* note 151, at 412 (focusing the article's analysis on what constitutes reasonable suspicion of criminal activity in licensing cases in the context of carrying a weapon in public). This issue was chosen in part because the Supreme Court “h[as] n[ever] held that individuals carrying weapons in public have a diminished expectation of privacy.” *Id.* at 413.

such situations, because *Terry* presently contemplates such concerns by requiring only a minimal amount of reasonable suspicion of criminal activity compared to the probable cause standard.<sup>164</sup>

Comparing *J.L.*'s rationale for rejecting a firearm's exception to a *Colyar* situation, it follows that police officers should start from a "presumption of legality" and then work to find facts supporting a reasonable inference that such possession may be illegal. This burden is not onerous,<sup>165</sup> but should require more than just a belief that a weapon is present.

### B. *The Second Amendment: A Presumption of Legality as a Matter of Policy in Relation to a Terry Stop*

Within the past few years, the Supreme Court has handed down several decisions regarding the meaning of the Second Amendment.<sup>166</sup> In *District of Columbia v. Heller*,<sup>167</sup> then in *McDonald v. City of Chicago*,<sup>168</sup> the Supreme Court ruled that the Second Amendment grants an individual the right to keep and bear arms for the purpose of self-defense inside one's own home,<sup>169</sup> and that this individual liberty is equally applicable to the states through the Fourteenth Amendment.<sup>170</sup> However, due to the limited nature of these rulings, the scope of the Second Amendment remains unresolved.<sup>171</sup> In the aftermath of these

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164. See Malone, *supra* note 157, at 496 (stating that in *J.L.* the Court decided that *Terry* "st[ruck] the proper balance between an officer's safety concerns and the privacy guaranteed by the Fourth Amendment"). In essence, *J.L.* serves as a reminder to law enforcement "that the Fourth Amendment is important and must be followed." *Id.*

165. See Leider, *supra* note 151, 422–24 (suggesting that a greater amount of direct evidence is necessary to conduct a stop based on reasonable suspicion that a person is unlicensed, when there is a "statistical likelihood" that a person is licensed to engage in the activity). Conversely, direct evidence of absence of a license would not be necessary when the situation leads to a strong inference of illegal activity. *Id.* at 423. For instance, in *Adams*, a known, reliable informant told officers that the defendant had drugs and a gun in his car at 2:15 a.m. *Id.* Therefore, under the totality of the circumstances, a reasonable suspicion existed that the weapon was being unlawfully carried. *Id.* Ultimately, even if the "statistical likelihood" of a gun being possessed is more likely than not illegal, the Supreme Court has still required that the facts show that a person lacks the license or the eligibility to possess a weapon. *Id.* This standard is not difficult to meet, but requires more than a showing that a weapon may be present.

166. U.S. CONST. amend. II. The Second Amendment states, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *Id.*

167. 554 U.S. 570 (2008).

168. 561 U.S. 742 (2010).

169. *Heller*, 554 U.S. at 635.

170. *McDonald*, 561 U.S. at 748.

171. See *Heller*, 554 U.S. at 626 (stating that the opinion does not

cases, some courts have extended the fundamental right of self-defense to exist outside the home as well.<sup>172</sup>

Given this Second Amendment jurisprudence, it is illogical, as a matter of policy, to have a fundamental right to keep and bear arms for self-defense both inside one's home and in public, yet hold that even when one does nothing to suggest criminal activity, an intrusion is justified.<sup>173</sup> To condone such police conduct, in completely innocuous circumstances, would make the Second Amendment meaningless.<sup>174</sup> In fact, Justice Alito wrote in *McDonald* that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms

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"undertake an exhaustive historical analysis today of the full scope of the Second Amendment"). Thus, the opinion only applies to right to keep and bear arms in one's home for the purpose of self-defense. *Id.* at 635.

172. See *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (answering the unresolved question of "whether the Second Amendment creates a right of self-defense outside the home"). In invalidating an Illinois statute, Judge Posner looked to the language of *Heller* and *McDonald* and concluded that the Supreme Court's reasoning that self-defense is *most* acute inside one's home, does not imply that it is not acute outside the home. *Id.* at 935–36. For instance, the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* (quoting *Heller*, 554 U.S. at 392). Thus, the right must extend into the public to some extent because confrontations are not limited to one's home. *Id.* at 936. From a practical standpoint, it makes no sense to establish such an "arbitrary difference" between inside and outside a home. *Id.* It would be illogical to allow the individual who lives in a in an up-scale, secure apartment building to legally possess a loaded gun, but deny the person walking on the sidewalk in a "rough neighborhood" the same right to self-defense. *Id.* at 937; see also *People v. Aguilar*, 2 N.E.3d 321, 326–27 (Ill. 2013) (adopting the *Moore* court's holding that "the [second] amendment confers a right to bear arms for self-defense, which is as important outside the home as inside") (quoting *Moore*, 702 F.3d at 942). The Supreme Court of Illinois found that since the Supreme Court and Seventh Circuit held that self-defense is the "central component" to the Second Amendment, yet the applicable statute served as a flat-ban to possessing a weapon outside one's home, it must be ruled unconstitutional on its face. *Id.* at 327. But see *Constitutional Law – Second Amendment – Seventh Circuit Strikes Down Illinois's Ban on Public Carry of Ready-to-Use Firearms. Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901 (7th Cir. 2013), 126 HARV. L. REV. 2461 (2013) (criticizing the *Moore* court for failing to engage in a full historical inquiry). This article suggests that the majority in *Moore* incorrectly focused on only the right to bear arms. *Id.* at 4266. Moreover, several important principles were overlooked in *Moore*, including the drafters "special concern for protecting the home from governmental intrusion [and] drafters conce[ption] of a judiciary that gave substantial deference to considered legislative judgments." *Id.*

173. See WARRANTLESS SEARCH LAW DESKBOOK § 8:4 (2014) (discussing *Wardlow's* conclusion that reasonable suspicion existed not because the defendant ignored police officers, something he has a constitutional right to do, but the manner in which he chose to do so). The act of ignoring a police officer would not be enough to create reasonable suspicion because "the mere exercise of a constitutional right cannot, in and of itself, give rise to suspicion which negates the ability to exercise that right." *Id.*

174. The right to possess a weapon would be akin to possessing marijuana.

among those fundamental rights necessary to our system of ordered liberty.”<sup>175</sup>

However, these holdings do not imply that weapons can be brought anywhere or that legislators cannot pass significant regulation on carrying firearms.<sup>176</sup> Furthermore, the Supreme Court has previously found safety concerns to be sufficient to permit a restriction of recognized, fundamental rights.<sup>177</sup> For example, the Supreme Court has allowed certain liberties to be restricted in times of imminent danger.<sup>178</sup> However, in this instance, carrying a weapon fails to provide such an immediate threat.<sup>179</sup>

Ultimately, allowing a *Terry* stop in a *Colyar* situation,<sup>180</sup>

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175. *McDonald*, 561 U.S. at 778.

176. *See Heller*, 554 U.S. at 626–27 (ruling that the right to keep and bears arms is not absolute). Restrictions against possession by a felon or mentally ill, prohibitions against carrying a weapon in “sensitive places,” and placing conditions on selling firearms are all presumptively lawful. *Id.* However, following the *Colyar* dissent’s line of thinking, it does not make sense to stop a person without an inkling regarding the individual’s status as a felon or mental illness or gang-membership or to hold that one’s own car is a “sensitive place.”

177. *See* Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POLICY 951, 1005–31 (2011) (discussing the different contexts in which individual liberties have been restricted, thereby illustrating the “unprecedented analysis” the Court used in deciding *Heller*, which may allow an *ex ante* infringement of a constitutional right based on empirical data, that “may or may not happen”). Before *Heller*, the Court approved of the infringement of liberties in a variety of contexts described as a “triumvirate” of standards that set out to balance social cost and individual liberty. *Id.* at 1005. Specifically, infringements have been permitted by the Court when a threat is imminent, when a person’s previous conduct reveals a propensity towards future violence, and when a cognizable but not imminent threat exists, an infringement may be permitted while being subjected to enhanced judicial scrutiny. *Id.* at 1004–05.

178. *See, e.g.,* *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 569–72 (upholding the defendant’s conviction and the law’s constitutionality for calling a police officer a “damned Fascist” and a “God damned racketeer” because one’s right to freedom of speech can be infringed when the speech includes “insult[s] or ‘fighting’ words . . . which by their very . . . tend to incite an immediate breach of the peace”); *see also* Blackman, *supra* 177, at 1006 (discussing the Court’s application of minimal judicial scrutiny in cases infringing individual rights when in response to an imminent threat).

179. *See* Blackman, *supra* 177, at 1032–33 (comparing the mere possession of a weapon to the possession of ideas about calling others fascists and racketeers). Fundamentally, “mere possession is far too attenuated to permit a[n] . . . infringement of a constitutional right with limited judicial scrutiny.” *Id.*

180. A stop in such circumstances ignores the standard of *Terry* that requires specific, articulable facts that create a reasonable suspicion that criminal activity may be afoot. *Terry*, 392 U.S. at 21; *see also* *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (holding that “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose”). Justice O’Connor specifically mentioned a particular reluctance in recognizing an

where an intrusion is based solely on a belief that a weapon may be present, would imply that police officers should treat weapons as illegal *per se*,<sup>181</sup> something explicitly held to be unconstitutional.<sup>182</sup> Therefore, it is wise to begin from a “presumption of legality” and then require police officers to articulate specific facts creating a reasonable suspicion of non-licensure, ineligibility, or some other crime before detaining an individual. Again, the level of suspicion needed is minimal,<sup>183</sup> but must not be based only on a “hunch” that a weapon may be present.

### C. *Three Practice Tips to Avoid the Colyar Dilemma*

Undoubtedly, this approach may cause concern for police officer safety,<sup>184</sup> but the following tips will help police officers protect themselves and still allow for a quick, valid decision on

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exception to the general rule of individualized suspicion in circumstances where the government’s primary purpose is to pursue general crime control ends. *Id.* at 43; *see also* *Samson v. California*, 547 U.S. 843, 865, n.6 (2006) (Stevens, J., dissenting) (arguing in favor of individualized suspicion by stating that “[i]f high crime rates were grounds enough for disposing of Fourth Amendment protections, the Amendment long ago would have become a dead letter”).

181. *See Heller*, 554 U.S. at 628–29 (holding that banning a handgun from one’s home for the purpose of self-defense would fail to constitutional muster under any standard of scrutiny). This sentiment would apply outside the home as well, according to *Moore and Aguilar*.

182. *See id.* at 636 (stating that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table . . . includ[ing] the absolute prohibition of handguns”). In elaborating on enumerated rights, Justice Scalia opined that “[t]he very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Id.* at 634. *See generally* Dery, *supra* note 8, at 38 (suggesting that the *Heller* court would be against dismissing the individualized suspicion requirement in Fourth Amendment analysis because constitutional guarantees should not be vulnerable to a judges’ current assessments of a right’s “usefulness”).

183. *See United States v. Whitley*, 680 F.3d 1227, 1235 (10th Cir. 2012) (finding reasonable suspicion when a police officer conducted a records check revealing that the defendant was a felon after receiving a tip of a firearm and ammunition in the defendant’s company vehicle as well as a tip that the defendant was seen load a dead antelope into a vehicle).

184. *See* National Press Releases, *Law Enforcement Officers Killed and Assaulted, 2012*, FBI (Oct. 28, 2013), <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2012-statistics-on-law-enforcement-officers-killed-and-assaulted> (providing data on the police officers killed in the line-of-duty in 2012). Last year, according to FBI statistics, ninety-five officers were killed in the line-of-duty. *Id.* Felonious act accounted for forty-eight of those deaths, and all but four offenders used a firearm. *Id.* Specifically, twelve officers were killed during an arrest situation, eight while investigating suspicious persons or circumstances, and another eight were killed conducting a traffic pursuit/stop. *Id.*



whether to detain an individual in a *Colyar* situation. When attempting to initiate a consensual conversation with individuals sitting in a car, police officers should: (1) run a check on the vehicle's license plate; (2) be vigilant of the surrounding contextual circumstances and the individual's behavior; and (3) ask the individual for a gun license when the police officer suspects a weapon may be present.

These tips all serve the purpose of legitimizing a *Terry* stop and avoiding the suppression of crucial evidence. First, by running a license plate check, a police officer can attain evidence justifying a stop before ever approaching a vehicle.<sup>185</sup> For instance, a police officer would be authorized to conduct a *Terry* stop if the vehicle's owner had a suspended license.<sup>186</sup> However, if a police officer has no reason to detain an individual based on a license plate check, in a consensual encounter the police officer should utilize their training and focus in on the details.

Although this applies in any situation, the police officers must be extremely cognizant of the neighborhood they are patrolling, the time of day, and an individual's behavior among other factors.<sup>187</sup> The police officer must articulate specific facts, but the

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185. See *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1152 (9th Cir. 2007) (holding that running a computerized check of person's license plate does not constitute a search demanding adherence to the Fourth Amendment). The court reasoned that because a license plate is in plain view, it would be illogical to think one's privacy was violated when a police officer uses that information to verify the owner and status of the vehicle. *Id.* at 1151. Moreover, such a check is not intrusive and for the most part, a drive does not know if one has even occurred. *Id.*; see also Laura Scarry, *License Plates Checks*, LAW OFFICER MAGAZINE (July 1, 2008), <http://www.lawofficer.com/article/magazine-feature/license-plate-checks> (discussing the lack of need for probable cause or reasonable suspicion to run a computer check of a license plate number because a motorist has no expectation of privacy regarding the number).

186. See *Armfield v. State*, 918 N.E.2d 316, 321 (Ind. 2009) (citing cases from a variety of state supreme courts that have held a *Terry* stop is appropriate if a police officer knows the registered owner of vehicle has a suspended license, and a police officer has no reason to suspect that the owner of the vehicle is not the driver). Therefore, once the license check of a particular revealed the owner had a lifetime suspension of his driver's license, the police officer had grounds to conduct a *Terry* stop. *Id.* at 318.

187. Compare *United States v. Brown*, CRIM. 11-193, 2012 WL 5905206, \*13-14 (W.D. Pa. 2012) (finding reasonable suspicion of illegal possession of a weapon based on the totality of the circumstances when police officers witnessed the defendant make furtive movements consistent with placing a weapon under a car seat, combined with the fact this all occurred late at night in an area known for shootings), with *United States v. See*, 574 F.3d 309, 313-14 (6th Cir. 2009) (finding no reasonable suspicion because the police officer justified his stop of a parked car based solely on time of day, presence in a high crime area, an instruction to pay-attention to loiterers, three men in the vehicle, the car was parked in a dimly lit area far from an apartment building, and no front license plate). In *See*, the police officer acted despite no tip or complaint, no individual attempted to flee, and without suspecting any

threshold is minimal,<sup>188</sup> and such contextual considerations may provide a police officer rational belief that a weapon is possessed illegally, once suspecting that a weapon may be present. For example, if police officers noticed an individual had a tattoo associated with a particular gang, upon seeing a bullet, the police officer would likely have enough suspicion for a stop based solely on the presence of a weapon.<sup>189</sup>

Finally, if the surrounding circumstances are truly benign, a police officer should simply ask the individual for a valid gun license upon seeing an item reasonably indicating the presence of a weapon.<sup>190</sup> Based on the answer and his behavior in response to this question, a police officer should have enough information to determine whether a detention is warranted or allow the person to carry on his day. By no means is this list exhaustive, but these three simple tips will help promote a proper balance between police officer safety and an individual's right to be free from arbitrary invasions.

## V. CONCLUSION

Although times have certainly changed since *Terry* was decided in 1968, disregarding the safeguards put in place by the Constitution is not an option. In particular, an individual should not be subjected to arbitrary invasions without *any* evidence of criminal activity. Even if faced with a situation where a weapon may be present, a police officer should still adhere to the requirements necessary to effectuate a proper *Terry* stop. Therefore, police officers should start from a “presumption of

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individual of a specific crime. *Id.* at 314. Although having no front license plate may have justified the police officer's actions as a traffic infraction, the vehicle had temporary tags, which are issued just for the back plates and the police officer did not testify a reason why not having the “tags” arose suspicion. *Id.*

188. *See supra* note 49 and accompanying text (discussing the minimal amount of reasonable suspicion necessary to initiate a investigatory detention).

189. *See, e.g., Gang Related Legislation by Subject: Gangs and Weapons*, NATIONAL GANG CENTER, <http://www.nationalgangcenter.gov/legislation/weapons> (listing state statutes that restrict and criminalize the use and possession of weapons by gang-members). *But see Parra*, 817 N.E.2d at 145 (finding latex gloves, often used by gang-members in hand-gun crimes, would be insufficient to find reasonable suspicion because of the numerous non-criminal reasons that explain the gloves' presence in the vehicle). However, considering the presence of a FOID card, *Parra* is distinguishable from a situation where a police officer notices an individual wearing clothes or having a tattoo associated with gang-membership and then seeing a bullet in plain-view.

190. *See Couture*, 552 N.E.2d at 539–40 (suggesting that the outcome may have been different if the police officer asked for a valid gun license prior to detaining the defendant rather than after making the seizure).

legality” and then continue to investigate until they can articulate facts supporting a reasonable inference that such possession is illegal. This process involves minimal suspicion, but not a mere “hunch.” At the end of the day, gun violence is a serious problem requiring immediate action, but to grant police officers virtually unlimited authority is not the solution.