The Legality of Prolonged Traffic Stops after *Herring*: Brief Delays as Isolated Negligence

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INTRODUCTION

The potential for a traffic stop by law enforcement is present every time a driver in the United States gets behind the wheel of a car. Traffic stops are a part of American culture[1] as well as an ever-present reality.[2] They are also a continuing focus of legal scholarship, with numerous legal experts writing about various facets of the traffic stop[3] and their validity under the Fourth Amendment's prohibition against "unreasonable searches and seizures."[4]

This Comment explores a small niche of the larger traffic stop universe, namely the constitutional validity of traffic stops where police (1) extend the length of the traffic stop beyond what is exclusively necessary for the original purpose of the stop and (2) lack any reasonable suspicion of further illegal activity. In addition, this Comment examines the admissibility of evidence gleaned from these traffic stops. There is currently a split among circuit courts regarding the reasonableness of such stops and the admissibility of evidence procured by police officers through these delays. The Eleventh Circuit has found any prolongation to be unreasonable while the Seventh Circuit (among others) has found such brief delays reasonable.[5] Although the

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1 American fiction (contemporary films like *Super Troopers*, *Little Miss Sunshine*, and *No Country for Old Men*; fictional stories such as *The Hitchhiker* by Roald Dahl), as well as nonfiction (*COPS*) consistently includes real or reenacted examples of traffic stops and the experiences of ordinary citizens caught up in routine law enforcement activities.

2 In 2005, approximately 43 million US residents over the age of sixteen had face-to-face contact with a police officer. Of that number, approximately 44 percent were involved in a traffic stop. See Matthew R. Durose, Erica L. Smith, and Patrick A. Langan, Bureau of Justice Statistics, *Contacts between Police and the Public*, 1 (DOJ Apr 2005), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp05.pdf (visited June 25, 2009). This represents almost one out of every ten Americans eligible to drive, an extraordinary annual amount of law enforcement contact by any measure.

3 In 2008 alone, a discussion of traffic stops occurred in forty-eight legal publications, journals and law reviews. See generally, for example, Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much Routine, Not Enough Fourth Amendment*, 102 Mich L Rev 1843 (2004).

4 US Const Amend IV.

5 Compare *United States v Pruitt*, 174 F3d 1215 (11th Cir 1999) with *United States v Childs*, 277 F3d 947 (7th Cir 2002) (en banc).

Supreme Court has discussed the issue tangentially,[6] circuit courts have continued to address the question of brief delays in their own ways, which recently led the Eighth Circuit to acknowledge the split in *United States v Peralez*.[7]

This Comment first argues that the circuit split over the reasonableness of prolongations can be resolved by examining *Arizona v Johnson*,[8] a recent Supreme Court decision on the issue of traffic stops. The Supreme Court's holding demonstrates that the justices continue to believe that prolongations are per se unreasonable. Therefore, this Comment argues that the Eleventh Circuit (holding brief delays unreasonable) is correct and that the Seventh Circuit, along with the Ninth Circuit and Tenth Circuit, is incorrect in holding that these brief delays are reasonable.

This Comment then argues that another recent Supreme Court decision also suggests that brief delays may fit within a new exception to the exclusionary rule,[9] which would therefore allow some evidence to be admitted despite the unreasonableness of the delay itself. Thus, courts should ask a second question about whether the government can nonetheless introduce evidence obtained through these unreasonable prolongations. Specifically, the Court appears willing to allow evidence into court from unreasonable searches if the unreasonableness is only due to "isolated negligence."[10] Under this isolated negligence test, a court could admit the evidence if the facts show that (1) the brief delay was due to negligence—not "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or sys-

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6 See *Illinois v Caballes*, 543 US 405, 410 (2005) (finding that an expansion of scope was valid where there was no extension of the traffic stop's length); *Muehler v Mena*, 544 US 93, 101 (2005) (finding that an expansion of scope through questioning during a detention was valid where there was no extension of the detention's length); *Arizona v Johnson*, 129 S Ct 781, 784 (2009) (holding that a patdown of passengers does not prolong a traffic stop because it relates to officer safety). These cases are examined in detail in Part I.

7 526 F3d 1115, 1120 (8th Cir 2008) ("[W]e acknowledge[] a split among the circuit courts as to whether an officer conducting a traffic stop based upon probable cause violates the Fourth Amendment 'by asking a few questions about matters unrelated to the traffic violation, even if this conversation briefly extends the length of the detention.'").

8 129 S Ct 781 (2009).

9 For an in-depth examination of the exclusionary rule and the impact of recent Supreme Court decisions on its validity, see Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J Crim L & Criminol 757 (2009).

10 See *Herring v United States*, 129 S Ct 695, 698 (2009) (admitting evidence where the police error was insubstantial, the value of exclusion for future deterrence was low, and the cost of excluding the evidence in the current case was relatively high). The term "isolated negligence" is an attempt to describe the type of police error that the *Herring* majority suggests should fit within the exception to the exclusionary rule.

temic negligence"[11]—and (2) there was no potential for "exclusion to deter wrongful police conduct."[12] Since brief prolongations arguably fit into this isolated negligence exception, this Comment scrutinizes the circuit split using this new test to understand how application of the isolated negligence standard might alter the current understanding and outcomes of traffic stop cases.

Finally, this Comment proposes that courts adopt this framework as a two-step process where the Fourth Amendment prolongation inquiry is followed by the isolated negligence scrutiny. By adopting this two-step approach, courts will continue to utilize a prolongation framework for determining the reasonableness of traffic stops—any delays are unreasonable—while also allowing courts to admit evidence from brief delays under limited circumstances. This solution would resolve the circuit split while potentially instituting a "safety valve" for courts to use under limited circumstances: courts would only exclude evidence where police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[13]

Part I of this Comment discusses the background against which the circuit split developed. This background includes the development of the current reasonableness standard for traffic stops, the traditional understanding of the exclusionary rule for evidence, and the most recent Supreme Court decisions in these areas of the law. Part II examines in detail the current split between the circuits over the reasonableness of brief delays. Part III then discusses the "isolated negligence" test and applies it to the current circuit split to understand the potential implications of utilizing the two-step approach instead of the traditional prolongation analysis alone. Finally, Part IV examines some of the potential benefits of using this standard in the future.

I. BACKGROUND: THE TRAFFIC STOP OVER TIME

A. The Origins of the Traffic Stop

Any discussion of traffic stops must begin with *Terry v Ohio*,[14] the case that established an officer's ability (and prerogative) to detain brief-

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11 Id at 702.
12 Id at 698.
13 Id at 702.
14 392 US 1 (1968).

ly a citizen where there is a "reasonable suspicion" of criminal activity.[15] While *Terry* dealt only with the ability of a police officer to patdown an individual for weapons after observing him casing a retail store, the *Terry* framework has become the model for a typical traffic stop.[16]

The *Terry* language most relevant to this discussion addresses the limits of brief investigative stops. The Court held that in order to determine "whether the seizure and search were 'unreasonable,'" the most important inquiry was whether the investigation "was reasonably related in scope to the circumstances which justified the interference in the first place."[17] This language is important in two different ways. First, it places limits on how far the police officer can extend the seizure and utilize the detainment. Second, it introduces a standard of "reasonableness" for judges to use when determining whether the scope and length of the seizure were improper.

Under Supreme Court jurisprudence, the *Terry* analysis applies to traffic stops despite the fact that many traffic stops occur after the officer has witnessed an actual traffic violation, thus giving the officer probable cause to effect a full custodial arrest.[18] While police officers have almost complete discretion as to whether to arrest a driver for a traffic infraction,[19] once a police officer has decided not to arrest the person, the stop has traditionally been required to conform to the principles of *Terry* under the Supreme Court's opinions in *Berkemer v McCarty*[20] and *Knowles v Iowa*.[21]

In *Berkemer*, the Court held that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest."[22] Even

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15 Id at 37 (Douglas dissenting) ("The term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.'"). The fact that this widely used term first arose in the dissent to *Terry* reflects the dramatically expanded powers the Court (and society) have afforded to the police over the last forty years.

16 See, for example, *United States v Holt*, 264 F3d 1215, 1230 (10th Cir 2001) ("[A] typical traffic stop resembles in character the investigative stop governed by *Terry* more closely than it does a custodial arrest."); *United States v Purcell*, 236 F3d 1274, 1277 (11th Cir 2001) ("Because a routine traffic stop is only a limited form of seizure, it is more analogous to an investigative detention than a custodial arrest . . . therefore we analyze the legality of these stops under the standard articulated in *Terry*.").

17 *Terry*, 392 US at 19–20.

18 See, for example, *Atwater v City of Lago Vista*, 532 US 318, 323 (2001) (holding that a police officer can effect a full custodial arrest for minor infractions).

19 For a broader discussion of the discretion officers have during traffic stops, see Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 Clev St L Rev 425, 426–27 (2003).

20 468 US 420 (1984).

21 525 US 113 (1998).

22 *Berkemer*, 468 US at 439 (citations omitted).

though the Court disavowed classifying all traffic stops as *Terry* stops in *Berkemer*,[23] it did state that since traffic stops are similar to *Terry* stops, they should generally be treated the same.[24] The lower courts have therefore almost uniformly based their analyses of traffic stops on the *Terry* framework.[25] In addition, the Supreme Court affirmed the use of the *Terry* framework in the subsequent case of *Knowles*, where the Court held that a search of the car after the issuance of a speeding ticket was unconstitutional, even though a full arrest would have authorized such a search.[26] Recent Supreme Court cases have continued to affirm *Terry* as the proper method of evaluating traffic stops.[27]

B. The Proper Scope of Traffic Stops

In *Florida v Royer*,[28] the Supreme Court established that in order to evaluate the validity of the traffic stop, a court must determine whether the investigation "was sufficiently limited in *scope* and *duration*."[29] If a court determined that the limits of either subset were violated, then the seizure was unlawful. This evaluation thus led lower courts to look both at the types of actions to which the detained defendant was subjected (the investigative scope) and at how long the individual was detained. This Part describes the way that these two limits on police action have changed over time.

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23 In a footnote, the Court wrote:

> No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

Id at 439 n 29.

24 See id at 439.

25 See, for example, *United States v Guerrero-Espinoza*, 462 F3d 1302, 1307 (10th Cir 2006); *United States v Brigham*, 382 F3d 500, 506 (5th Cir 2004) ("This court, following the Supreme Court, has treated routine traffic stops, whether justified by probable cause or a reasonable suspicion of a violation, as *Terry* stops."). But see *United States v Childs*, 277 F3d 947, 953 (7th Cir 2002) (breaking from precedent by focusing on the footnote in *Berkemer* as a reason for departing from *Terry*); *Berkemer*, 468 US at 439 n 29.

26 The Supreme Court has given several reasons for using *Terry* in the case of traffic stops, including decreased concerns for preservation of evidence and for officer safety. See *Knowles*, 525 US at 116 (describing the reasons a full search is not required in the context of traffic stops).

27 See *Arizona v Johnson*, 129 S Ct 781, 786–87 (2009) (affirming that traffic stops are governed by *Terry* under *Berkemer* and *Knowles*); *Herring v United States*, 129 S Ct 695, 707 (2009) (citing *Terry*).

28 460 US 491 (1993).

29 Id at 501 (emphasis added).

1. The investigative scope.

Royer's two-part analysis has not withstood the test of time. While as recently as 1998 the Supreme Court unanimously held that an officer could not expand the scope of an investigation beyond the original purpose of processing a speeding citation,[30] reflecting a longstanding belief that police officers could not "switch tracks" to a second line of investigation after detaining someone for a first line, this restriction is no longer valid.

The case of *Illinois v Caballes*[31] seriously weakened the investigative-scope limitation. This case stated that a canine unit could inspect a vehicle pulled over without reasonable suspicion so long as it did not prolong the traffic stop.[32] The dissent argued that the inspection was a violation of the Fourth Amendment due to the stop's expansion of investigative scope because the original stop was for speeding.[33] The majority brushed aside its traditional focus on investigative scope and instead focused on the fact that since the officer had not "extended the duration of the stop to enable the dog sniff to occur,"[34] such an inspection was not problematic.

While some observers hoped that this loosening of the restrictions on "detentions" was limited to canine inspections,[35] two months after *Caballes*, the Court, in *Muehler v Mena*,[36] signaled the end of investigative-scope scrutiny altogether.[37] *Mena* was a landmark case primarily because of what the Court did not deem worthy of examination. The Court held that once the defendant was in handcuffs for any justifiable reason, "mere police questioning"[38] did not have any inde-

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30 See *Knowles*, 525 US at 116.

31 543 US 405 (2005).

32 See id at 409–10 ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.").

33 See id at 420 (Ginsburg dissenting) ("*Terry,* it merits repetition, instructs that any investigation must be 'reasonably related in *scope* to the circumstances which justified the interference in the first place.'").

34 Id at 408.

35 Inspections by canine units historically had been considered sui generis and subjected to a very different analysis by courts. See *United States v Place*, 462 US 696, 707 (1983) ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.").

36 544 US 93 (2005).

37 See id at 95.

38 Id at 101, quoting *Florida v Bostick*, 501 US 429, 434 (1991) (holding that officers may ask questions of individuals without independently triggering any Fourth Amendment issues). The fact that the *Mena* Court cited *Bostick* is telling, given the sharp differences between the two situations. Whereas Iris Mena had been handcuffed in the garage of a home before being ques-

pendent effect on the seizure provided that the time of detainment was not extended.[39] In other words, instead of having to look into the scope and duration of a stop, as the Court had required since *Royer*, a court could now just look to duration. This reasoning continues to be applied by district courts; therefore, current Fourth Amendment analysis turns on whether the length of detention was unreasonably extended.[40]

2. The length of detention.

Given the lack of investigative-scope inquiry, the fundamental (and only) restriction on police discretion in traffic stops is that the duration of the stop cannot be unreasonably prolonged. One of the original remarks barring any prolongation during seizures was in *Michigan v Summers*,[41] where the Court, in a concluding footnote suggested that while the defendant's detention was reasonable, "a prolonged detention . . . might lead to a different conclusion."[42] Naturally, this opened the door to future challenges of detentions based solely on the duration of the seizure, and the dissent in *Summers* immediately raised the same question about what type of prolongation would trigger an unconstitutional seizure, including what criteria future courts should use for determining when a detention is prolonged.[43]

Several years later, the Supreme Court in *United States v Place*[44] established an outer limit for the length of detention. In *Place* the police had seized a man's luggage for over ninety minutes without probable cause.[45] The Court found that the prolongation itself "alone preclude[d] the conclusion that the seizure was reasonable in the absence of probable cause"[46] and recognized that "the brevity of the invasion of the individual's Fourth Amendment interests" was a factor that informed whether "the seizure [was] so minimally intrusive as to be justifiable on

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tioned about her immigration status, Terrance Bostick was questioned while he was a passenger on a bus at a scheduled stop. Compare *Mena*, 544 US at 96 with *Bostick*, 501 US at 431–32.

39 See *Mena*, 544 US at 101 (noting that the trial court and court of appeals did not find that the defendant's time in custody was in any way extended by the questioning).

40 See, for example, *United States v Francis*, 2005 WL 1645597, *2 (11th Cir) (explaining that the seizure during a traffic stop is "governed" by *Terry* but that a court should only inquire as to whether there was an extension in duration, not whether there was an expansion in scope).

41 452 US 692 (1981).

42 Id at 705 n 21.

43 Id at 712 n 5 (Stewart dissenting).

44 462 US 696 (1983).

45 Id at 699, 708–09.

46 Id.

reasonable suspicion."[47] The Court therefore identified duration as an objective measure that might make any search unreasonable.

Following *Place*, the Court in *United States v Sharpe*[48] again emphasized that a seizure can last only as long as the investigation requires, but with the added requirement that officers quickly investigate the initial reason for the stop.[49] In *Sharpe*, a twenty minute detention was not unreasonable, in part because the defendant had driven evasively so as to raise create additional suspicion,[50] and also because the Court found that the officers had acted as quickly as possible to "diligently pursue their investigation."[51] The stop was not deemed prolonged since there was "no evidence that the officers were dilatory in their investigation."[52] This holding established what has become the most critical analysis for courts, namely that there can be no prolongation of the detention beyond what is reasonably necessary for an officer to diligently complete the original purpose of the seizure.[53]

The subsequent *Caballes* and *Mena* decisions demonstrate the ultimate result of the emphasis on preventing unreasonable prolongation (while ignoring an examination of scope): officers have vast discretion about what occurs during the stop as long as it occurs during a traffic stop of reasonable length and any unrelated investigation does not measurably lengthen the stop.[54] In addition, more recent cases demonstrate how the lower courts have reacted to this new jurisprudence. These courts, for example, have stated that "[i]n light of the Supreme Court's decision in *Mena*, a trooper can validly ask questions *during* a lawful traffic stop that are unrelated to the stop."[55]

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47 Id.

48 470 US 675 (1985).

49 Id at 675–76.

50 See id at 687–88. Although the Court did not address the issue, the reckless maneuver by the driver also arguably violated at least one traffic statute, thereby creating probable cause for the detention as well.

51 Id at 685.

52 *Sharpe*, 470 US at 687.

53 See *Johnson*, 129 S Ct 781, 788 (2009) (noting that a traffic stop is not made unreasonable by inquiries that do not measurably increase the length of time of the stop).

54 Id at 783.

55 *Guerrero-Espinoza*, 462 F3d at 1308 n 6 (10th Cir 2006) (citations omitted) (finding that the officer's additional questioning constituted an unlawful detention of the defendant where it prolonged the traffic stop). One possible consequence of this approach is that departments can potentially manipulate their procedures in order to create longer gaps between the beginning of the probable cause stop and the conclusion of the reasonable inquiry. This would accomplish the goal of delaying a stop without a prolongation. For example, a department could establish additional paperwork requirements while utilizing tandem cruisers, which would have the effect of lengthening stops while providing one officer with free rein to ask questions while another officer completed the paperwork. Indeed, the Supreme Court's holdings appear to allow longer traf-

The most recent Supreme Court cases have continued to emphasize that any prolongation will make the search unreasonable and have faithfully adhered to the "no prolongation" rule of *Summers* and *Sharpe*. The best example of this adherence is in *Johnson*, where the Court repeated its commitment to the longstanding principles of *Terry* and then reiterated that "inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, *so long as the inquiries do not measurably extend the stop's duration*."[56] The Court has therefore continued to support the *Mena* analysis as the proper way of determining the reasonableness of traffic stops.

Thus, Supreme Court decisions suggest that prolongations are the evil that courts must protect citizens against. In light of *Caballes*, *Mena*, and *Johnson*, the Court appears to prefer police actions that occur quickly and, more importantly, wishes to discourage law enforcement from seizing citizens for any amount of time greater than necessary to investigate the initial reason for the stop.[57]

C. The Implications of Prolongations

Once a court finds that an officer has indeed prolonged the traffic stop without probable cause, the next question is what remedies are available to the wronged defendant. While damages are available if the defendant can prove an injury,[58] the most significant consequence is the likely exclusion of the evidence from the prosecution's case in chief.[59] Traditionally, such evidence must be excluded (whether in fed-

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fic stops so long as officers treat all citizens equally and do not delay the conclusion of a traffic stop after all required procedures are completed. For one example of possible delay tactics, see generally Melissa L. Bilchik, Byndloss v. State*: Expanding an Officer's Investigative Opportunities during a Traffic Stop at the Expense of an Individual's Freedom*, 66 Md L Rev 1068 (2007) (examining a probable cause traffic stop where the duration was significantly prolonged due to a computer malfunction at the precinct).

56 *Johnson*, 129 S Ct at 783 (emphasis added).

57 However, as with all *Terry* stops, the police can extend the stop if there is additional reasonable suspicion that justifies further detention and investigation.

58 See 42 USC § 1983 (creating a cause of action against officials who violate federal rights while acting under color of state law); *Hudson v Michigan*, 547 US 586, 597–98 (2006) (discussing the possible civil remedies in addition to or in the alternative to exclusion of evidence); *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 US 388, 390 (1971) (finding that defendant had a cause of action against the government for violation of his rights under the Fourth Amendment).

59 See *United States v Leon,* 468 US 897, 910 (1984). See also *Herring*, 129 S Ct at 707 (Ginsburg dissenting) ("The exclusionary rule, it bears emphasis, is often the only remedy effective to redress a Fourth Amendment violation.").

eral[60] or state courts[61]) since, as stated in *Terry*, "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation."[62] Unless the police can show that the prolongation has some underlying justification, the evidence typically is excluded.[63]

Yet the exclusion of evidence is not necessarily preordained by a Fourth Amendment violation alone.[64] The exclusionary rule's main purpose is to deter improper police conduct,[65] and thus the Court has distinguished between cases where the police officer's actions were the source of the violation and those cases where the officer's actions were not the source of the violation.[66] The consequence of this fact-specific scrutiny into admissibility is that courts have generally viewed Fourth Amendment analysis as comprised of two distinct steps: (1) scrutiny as to whether the defendant's rights were violated; and (2) inquiry as to whether the evidence could be admitted despite the unreasonableness of the search.[67]

II. THE CIRCUIT SPLIT OVER BRIEF DELAYS

The split between the circuits regarding the constitutional validity of brief delays in traffic stops has developed slowly over the last dec-

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60 See *Weeks v United States*, 232 US 383, 392 (1914) (establishing the idea of the exclusionary rule for when evidence is obtained through improper procedure by federal agents). See also *Elkins v United States*, 364 US 206, 219 (1960) ("The Federal Courts themselves have operated under the exclusionary rule of *Weeks* for almost half of a century.").

61 See *Mapp v Ohio*, 367 US 643, 660 (1961) (extending the exclusionary rule to improperly obtained evidence in state trials).

62 392 US at 29.

63 This idea of exclusion due to prolongation reflects the fruit of a poisonous tree doctrine. *Nardone v United States*, 308 US 338, 341 (1939). See also *Wong Sun v United States*, 371 US 471, 488 (1963) (reviewing the evidence against multiple defendants in light of improper arrests by federal agents and admitting some evidence while excluding other evidence).

64 See *Leon*, 468 US at 910–11 ("We have declined to adopt a *per se* or 'but for' rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest.").

65 As the Court wrote in *United States v Calandra*, 414 US 338 (1974), the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Id at 348.

66 These exceptions have traditionally dealt with objectively good faith behavior by police and errors from judicial officers. See, for example, *Leon*, 468 US at 913 (finding that the magistrate judge had erred in authorizing the warrant but that the evidence gleaned by the arresting officers should not subsequently be excluded).

67 See, for example, *Hudson*, 547 US at 592 ("In other words, exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression.").

ade. Yet it was not until 2007 that a sister circuit recognized the split.[68] Part II describes the origins of the circuit split and recent cases that have widened the divide over the reasonableness of delays.

A. The Eleventh Circuit against Any Delays

In acknowledging the split over the validity of brief prolongations of traffic stops, the Eighth Circuit pointed to the Eleventh Circuit, and particularly to *United States v Pruitt*,[69] for the bright-line rule that no unrelated investigation may extend a detention, even a detention based on probable cause that some other violation has occurred.[70] In *Pruitt*, the officer delayed writing out a traffic ticket in order to ask questions of the defendant and wait for a canine unit to arrive.[71] The court stated that the police officer should only have asked questions "directed to securing [defendant's] license, registration and insurance papers. . . . In such circumstances, additional 'fishing expedition' questions . . . are simply irrelevant, and constitute a violation of *Terry*."[72] The court suppressed the evidence obtained by the canine unit that subsequently arrived because the canine was requested only after the defendant's refusal to answer the unrelated questions.[73]

Although *Pruitt* represents ancient jurisprudence relative to the other cases in this split (it was published in 1999), more recent cases in the Eleventh Circuit consistently uphold this bright-line rule regarding both unrelated lines of questioning and delays while waiting for the arrival of canine units.[74]

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68 See *United States v Olivera-Mendez*, 484 F3d 505, 510 (8th Cir 2007).

69 174 F3d 1215 (11th Cir 1999).

70 *United States v Peralez*, 526 F3d 1115, 1120–21 (8th Cir 2008).

71 *Pruitt*, 174 F3d at 1218.

72 Id at 1221. The fact that the *Pruitt* court cites *Terry* despite the probable cause of the police officers for the traffic violation is in line with *Knowles*.

73 Id.

74 For cases where the Eleventh Circuit found traffic stop delays unlawful, see *United States v Perkins*, 348 F3d 965, 971 (11th Cir 2003) (holding a delay unlawful where the officer had to wait for a canine unit and asked questions completely unrelated to the purpose of the traffic stop); *United States v Boyce*, 351 F3d 1102, 1107 (11th Cir 2003) (finding that police unlawfully extended the detention of the defendant by asking questions unrelated to the traffic stop and requesting additional unnecessary computer checks). For cases where the Eleventh Circuit found traffic stop delays lawful, see *United States v Hernandez*, 418 F3d 1206, 1210 (11th Cir 2005) (finding the detention lawful despite delays due to reasonable suspicion); *United States v Purcell*, 236 F3d 1274, 1278 (11th Cir 2001) (holding that there was no prolongation of the traffic stop where the officers had to wait for the results of a criminal history check on the defendants). See also *United States v Ramirez*, 476 F3d 1231, 1237 (11th Cir 2007) (affirming that the *Pruitt* standard for unlawful delay is still good law while finding that it was inapplicable in this case since the defendant consented to a search).

B. Circuit Courts That Have Allowed Brief Delays

In contrast to the rule set forth by the Eleventh Circuit, several circuits have allowed police officers to ask additional unrelated questions, briefly delay the traffic stop, or wait for canine units during or after the conclusion of the traffic stop.

1. The Seventh Circuit's position on traffic stop prolongations.

The most important case allowing brief prolongations of traffic stops is *United States v Childs*.[75] The case is important not only because it was the first circuit case to allow brief delays unsupported by reasonable suspicion, but also (more critically) because every other circuit case allowing brief delays has cited *Childs* for support.[76] In *Childs*, one officer asked a single question while another officer was walking to the other side of the vehicle, creating a delay. The court held that "the fourth amendment does not require the release of a person arrested on probable cause at the earliest moment that step can be accomplished"[77] and that the delay, "if any, was short—not nearly enough [time] to make the seizure 'unreasonable.'"[78]

The *Childs* court raised two justifications for this position. First, it held that since traffic stops based on probable cause are subject to slightly different rules (referencing the exception noted in *Berkemer*[79]), a court is not required to utilize the traditional reasonableness standards of *Terry* for probable cause stops. The court further justified its holding by referencing the Supreme Court's language in *Atwater v City*

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75 277 F3d 947 (7th Cir 2002) (en banc).

76 For indicators of the influence that *Childs* has had on subsequent cases with similar fact patterns, see, for example, *United States v Turvin*, 517 F3d 1097, 1103 (9th Cir 2008) (affirming a conviction over an appeal turning on delays caused by questions asked during the writing of the ticket); *United States v Alcaraz-Arellano*, 441 F3d 1252, 1259 (10th Cir 2006) (affirming a conviction premised on an appeal based upon a warning ticket that took two minutes to write); *United States v Burton*, 334 F3d 514, 518 (6th Cir 2003) (affirming a conviction of a driver initially stopped for ignoring a "no parking" sign who eventually received a ten-year sentence as a result of narcotics and firearm possession discovered during that stop).

77 *Childs*, 277 F3d at 953–54.

78 Id at 953. Interestingly, the original panel had found as a factual matter that there was no prolongation. See *United States v Childs*, 256 F3d 559, 564 (7th Cir 2001), vacd en banc 277 F3d 947 (7th Cir 2002). The concurring judge in *Childs* therefore suggested that the *Childs* en banc majority was more interested in establishing an expansive rule on police power than in ruling on the facts in front of it. *Childs*, 277 F3d at 954 (Cudahy concurring) ("[T]he majority has declined to follow the course of judicial restraint and to answer, or even pose, the question that would likely make the rest of its discussion superfluous.").

79 See note 23.

of Lago Vista[80] and *Ohio v Robinette*.[81] While these Supreme Court decisions dealt with the ability of officers to arrest citizens for minor offenses and the need for officers to signal when a traffic stop had terminated, the *Childs* court determined that the holdings of those cases were dispositive on the question of whether brief delays were reasonable.[82]

As a second justification for its decision, the Seventh Circuit argued that disallowing brief delays for questions would have a deleterious effect on countless law enforcement operations: "What happened here must occur thousands of times daily across the nation. Officers ask persons stopped for traffic offenses whether they are committing any other crimes. That is not an unreasonable law-enforcement strategy."[83] This second justification suggests that the court did not want to deter officers from engaging in this behavior, and that it wanted to prevent the fruits of their labor from being automatically excluded. The court, aware of the exclusionary rule, wanted to find a way to allow officers to do their jobs without the fear that some small mistake—such as an errant question while the stop was concluding—would doom their efforts.[84]

Childs has been followed by numerous decisions in the Seventh Circuit,[85] most recently by *United States v Dixie*,[86] where the court stated that an "incremental delay"[87] for questioning was not unreasonable since *Childs* was the "controlling precedent" and the delay was only for a few seconds.[88] While there are a number of critics of the decision,[89]

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80 532 US 318, 355 (2001) (holding that police officers can arrest someone for any violation of the law, even if the penalty for the violation does not include actual jail time).

81 519 US 33, 39–40 (1996) (holding that a defendant in a traffic stop need not be advised that he is "free to go" before his consent to search the vehicle will be recognized as voluntary).

82 Scholars have questioned whether these cases actually support the *Childs* court's holding. See, for example, LaFave, 102 Mich L Rev at 1865–73 (cited in note 3) (arguing that *Childs* ignores Supreme Court precedent and "waters down" the Fourth Amendment by allowing courts to go down a "slippery slope"). The *Robinette* decision in particular appears to be a shaky foundation for *Childs*. In that case, the Supreme Court only held that additional questions do not create a per se unlawful detention, not that these questions are in fact permissible. The Court therefore merely remanded the case to the Ohio Supreme Court, which subsequently *did find* that the prolongation was unreasonable. See *Ohio v Robinette*, 685 NE2d 762, 768 (1997) (finding that the officer "did not have any reasonably articulable facts or individualized suspicion to justify Robinette's further detention in order to ask to search his car").

83 *Childs*, 277 F3d at 954.

84 Id.

85 See, for example, *United States v Muriel*, 418 F3d 720, 726 (7th Cir 2005) (affirming the reasonableness of the traffic stop's duration).

86 2008 WL 5101326 (WD Ind).

87 Id at *5.

88 Id at *4.

89 For example, Judge Richard Cudahy, in his concurrence, wrote that the *Childs* majority could have reached the same result without implying a monumental shift in Fourth Amendment

Childs signals a clear shift by the court towards allowing slight delays in traffic stops and appears to have become an established precedent in the Seventh Circuit and a significant influence on several other circuits.

2. The Ninth Circuit follows *Childs*.

The Ninth Circuit also rejected the *Pruitt* bright-line rule against delays in *United States v Turvin*.[90] In *Turvin*, which was decided in early 2008,[91] a police officer stopped writing a traffic citation and turned on the tape recorder "solely for the purpose of asking [Sean] Turvin about drugs and for [ ] consent to search his vehicle," which delayed the conclusion of the traffic stop by the amount of time it took to stop the ticket processing in order to ask the questions.[92] The circuit court reversed a district court's finding that a brief delay by the police to ask questions about drug paraphernalia resulted in an unlawfully prolonged detention. The appellate court expressly questioned whether delaying the "ticket-writing process to ask a few questions unrelated to the purpose of the traffic stop, thereby prolonging, for at least a few moments, the duration of that otherwise legal stop, turn[ed] the initially lawful stop into an unlawful detention."[93] The court then applied the "totality of the circumstances test" to reverse the district court.[94]

The *Turvin* majority specifically cited *Childs* to justify its holding that extra questions extending the time of the stop did not "unreasonably prolong the duration of the stop."[95] The court also noted that it did not want to "draw an arbitrary and unjustified line between constitutional

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jurisprudence simply by finding that reasonable suspicion was present, thereby allowing additional questioning. See *Childs*, 277 F3d at 954 (Cudahy concurring). Judge Cudahy went on to suggest that the court is purposefully trying to create an expansive new principle and intentionally not following "the path of judicial restraint." Id. In the *Childs* dissent, Judge Ilana Rovner argued that that the officer had no reasonable suspicion and thus the citizen should have been allowed to leave. Id at 961 (Rovner dissenting). Scholars have also criticized the decision. See, for example, Tracey Maclin, *Police Interrogation during Traffic Stops: More Questions Than Answers*, Champion 34, 37 (Nov 31, 2007) (arguing that the brief delay exception to the "no prolongation rule" is flawed since there is no way of policing it or ensuring that innocent drivers are not harassed).

90 517 F3d 1097 (9th Cir 2008).

91 *Turvin* was so recent that *Peralez* did not recognize it as part of the split. However, it represents one example of how brief delays have been found reasonable by circuit courts.

92 517 F3d at 1101 (quoting from the magistrate judge's final report).

93 Id.

94 Id.

95 Id at 1104.

and unconstitutional conduct."[96] Subsequent cases in the Ninth Circuit have also cited *Childs*,[97] thus reflecting the importance of that decision.

Turvin is also notable for its sharp departure from Ninth Circuit precedent. The district court holding in the case[98] had followed the traditional jurisprudence, most clearly stated in *United States v Chavez-Valenzuela*,[99] which required the court to exclude evidence procured in traffic stops where law enforcement had prolonged the stop beyond the time necessary to process the traffic violation.[100] Judge Richard Paez, in his dissent in *Turvin*, also recognized the sharp break from precedent and argued that nothing in *Mena* or its previous decisions required a deviation from longstanding precedent: "Without much explanation or analysis, the majority is persuaded by and adopts the Seventh Circuit's approach in [*Childs*]"[101]

3. The Tenth Circuit allows brief delays in traffic stops.

Finally, the Tenth Circuit has also refused to "make a time and motion study of traffic stops,"[102] holding in *United States v Alcaraz-Arellano*[103] that brief delays that prolong traffic stops do not make lawful stops suddenly unlawful.[104] In *Alcaraz-Arellano*, the court determined there to be prolongation when the ticket-writing or questioning

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96 *Turvin*, 517 F3d at 1103.

97 See, for example, *United States v Lopez-Rojo*, 2008 WL 2277495, *8 (D Nev) ("Thus, in view of the Ninth Circuit's agreement with the Seventh Circuit's reasoning and result in *Childs*, the court concludes that the delay while [the officer] obtained defendant's consent was well within constitutional limits.").

98 *United States v Turvin*, 442 F Supp 2d 796, 799 (D Alaska 2006), revd, 517 F3d 1097 (9th Cir 2008).

99 268 F3d 719 (9th Cir 2001).

100 Id at 725 (holding that the police unlawfully prolonged a traffic stop by continuing to ask questions because the defendant was "nervous"). Perhaps unsurprisingly, this older jurisprudence had cited to the Eleventh Circuit decision in *Pruitt* for the idea that a police officer conducting "'fishing expedition' questions about [the defendant's] travel plans and his occupation" unreasonably extended the defendant's detention. See *Chavez-Valenzuela*, 268 F3d at 724.

101 *Turvin*, 517 F3d at 1108 (Paez dissenting). Judge Paez went on to write, "As I read *Chavez-Valenzuela*, . . . when an officer prolongs a traffic stop with expansive questioning, the extended duration must be supported by reasonable suspicion." Id.

102 *United States v Patterson*, 472 F3d 767, 776 (10th Cir 2006), vacd on other grounds by *Patterson v United States*, 129 S Ct 989 (2009).

103 441 F3d 1252 (10th Cir 2006).

104 Id at 1260. Although *Alcaraz-Arellano* is not the best example of this proposition because there was reasonable suspicion in that case to support the prolongation, *Peralez* identifies it as representative of the Tenth Circuit's position in the circuit split. See *Alcaraz-Arellano* at 1260 (finding that the police officer had reasonable suspicion of other criminal activity at the point when he handed the license back to the defendant).

could have been performed slightly faster.[105] The Tenth Circuit confirmed this position in *United States v Valenzuela*,[106] where the court again repeated the view that officers "may ask questions outside the scope of the traffic stop so long as the questions do not *appreciably* prolong the length of the stop."[107] Unfortunately, the court did not define the term "appreciably," suggesting that the standard for determining the validity of a traffic stop remained the "'horseshoes rule' i.e., that just being close counts."[108]

* * *

Looking at all of the cases where the courts have found brief delays reasonable, one significant aspect that stands out is the courts' explicit concern for the likely consequences of finding the delays unreasonable. Because they are aware that the exclusionary rule will almost certainly apply, courts appear willing to find the delays reasonable despite the apparent contradiction with Supreme Court precedent. Yet there could be another way to reach these courts' preferred outcome without straining the understanding of prolongations or creating a circuit split. In the next Part, this Comment argues that in light of recent Supreme Court jurisprudence, courts could achieve their preferred outcomes by applying a two-part test that maintains the unreasonableness of brief delays while adopting the "isolated negligence" exception to the exclusionary rule. This new standard would address the concerns of courts that do not want to exclude evidence obtained through minimal deviations from proper police procedure.

III. RESOLVING THE CIRCUIT SPLIT: BRIEF DELAYS AS UNREASONABLE PROLONGATIONS AND THE ISOLATED NEGLIGENCE TEST

This Part argues that the circuit split can be resolved by following the Eleventh Circuit's line of reasoning—all delays, whether miniscule or time-consuming, are unreasonable. However, after this first reasonableness inquiry is completed, this Part argues that a second step is necessary—that courts should examine whether the exclusionary rule applies in light of the newly broadened exception to the exclusionary rule, as described in *Herring v United States*.[109] In *Herring*, the Court

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105 Id at 1259.
106 494 F3d 886 (10th Cir 2007).
107 Id at 890 (emphasis added).
108 LaFave, 102 Mich L Rev at 1871 (cited in note 3).
109 129 S Ct 695 (2009).

introduced new limitations on the exclusionary rule as a way of allowing the admission of evidence where only minor police error occurred.[110] Since there is a plausible argument that brief delays in traffic stops caused by negligence fit into this exception, this second step could help to resolve the current circuit split between courts over the reasonableness of brief delays.

Part III.A first provides several justifications for siding with the Eleventh Circuit. Part III.B then examines the isolated negligence exception described in *Herring* and discusses how a version of isolated negligence fits into the narrative of traffic stops. Finally, Part III.C applies this new two-part test to the cases of the circuit split to understand how the test might affect the outcomes of briefly delayed traffic stops.

A. Brief Delays Are Unreasonable

There are several reasons that the Eleventh Circuit's strict interpretation of brief delays is correct. First, any other interpretation runs against a long line of Supreme Court cases on the subject. As stated in Part I, while the Court has consistently required that courts remain flexible due to the "fact-specific nature of the reasonableness inquiry,"[111] it has nevertheless strictly interpreted the prolongation aspect of the Fourth Amendment. The Eleventh Circuit's holding and reasoning tracks the Supreme Court's reasoning. Furthermore, in the years since the Seventh Circuit outlined its reasons for allowing brief delays, multiple Supreme Court rulings have in fact suggested the contrary viewpoint. As the Court wrote in *Mena*, a case two years after *Childs*, a seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."[112] In addition, in January 2009, the Court reiterated in *Johnson* that a seizure does not occur unless the police inquiries "measurably extend the duration of the stop."[113] *Johnson* was decided a year after the Ninth Circuit decided *Turvin*, which undercuts any argument that the Ninth Circuit's opinion reflects an updated understanding of *Mena* or *Caballes*. In short, these Supreme Court opinions leave little room for maneuvering around their central proposition that any delays are unreasonable prolongations.

Second, the justifications that *Childs* raised for allowing brief delays have not been embraced by the Court. While *Childs* (and *Turvin*)

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110 Id at 701–04.

111 *Robinette*, 519 US at 39.

112 *Mena*, 544 US at 101, quoting *Caballes*, 543 US at 407.

113 129 S Ct at 788.

argue that the Supreme Court's *Berkemer* opinion allows longer delays in probable cause stops, the Court itself has not embraced this exception. For example, in 2009, Justice Ruth Bader Ginsburg wrote for a unanimous Court that "most traffic stops, this Court has observed, resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*."[114] The Court did not distinguish between probable cause and reasonable suspicion stops as far as what liberties an officer can take with the citizen's time. This language suggests that the Court, if electing to directly address this circuit split, would likely disagree with those courts finding brief delays reasonable under the Fourth Amendment.

Yet this cannot be the end of the inquiry. Even though brief delays should continue to be held unreasonable, there is nevertheless a second step regarding the exclusion of evidence that the Supreme Court's decisions suggest is appropriate for the traffic stop analysis.

B. The Isolated Negligence Test

In *Herring*, the Supreme Court first referenced the idea of isolated negligence as a potential theory for determining the admissibility of evidence when there are minor deviations from proper procedure.[115] In that case, the police apprehended the defendant based on a warrant for his arrest and discovered illicit drugs and a weapon in his possession.[116] However, subsequent inquiry revealed that the warrant was not valid—it had expired several months earlier—and that the sheriff's department had improperly kept the warrant on file due to a "mixup."[117] The Supreme Court affirmed the Eleventh Circuit's denial of the defendant's motion to suppress, and stated that exclusion should only take place where it has the power to "deter wrongful police conduct" and that errors such as "*isolated negligence* attenuated from the arrest itself" should not lead to exclusion of the evidence.[118]

This "isolated negligence" turned on the fact that the Court found the error to be negligent but not "reckless or deliberate," and therefore not worth the cost of exclusion.[119] The Court emphasized that unreasonable searches do not "necessarily mean that the exclusionary

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114 Id at 786 (quotations marks omitted).
115 129 S Ct at 698.
116 Id (noting that the defendant Herring was found "with the gun and drugs").
117 Id.
118 Id (emphasis added).
119 *Herring*, 129 S Ct at 700.

rule applies."[120] In fact, the Court stated its intention that, prospectively, evidence should only be excluded based on "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[121] If the "error . . . [did] not rise to that level," then evidence procured through that error should not be excluded.[122] The Court suggested that this balancing act allowed for the flexibility expected in Fourth Amendment analysis, and that evidence exclusion must "be weighed against the substantial social costs exacted by the exclusionary rule."[123]

This broadening of the exception to the exclusionary rule signals a significant change in the strength of the exclusionary rule. Where police officers previously had to ensure perfect adherence to proper procedure to prevent exclusion of evidence, the door is now open for minor mistakes. As Professor Jeffrey Fisher explained, "[The Court is] chopping off the arms and the legs"[124] of traditional protections against unreasonable searches; yet this loosening of the standard can potentially provide courts with an additional tool in the context of brief delays.

While the circumstances of *Herring* are not perfectly on point, there are a number of similarities that suggest this analysis is appropriate in considering brief delays of traffic stops. First, the Court noted as a background assumption that the search and seizure was facially unreasonable as the premise for the holding before nonetheless allowing the evidence.[125] Even if the circuit split is resolved in favor of the Eleventh Circuit's reasoning, determining that the search is unreasonable is only a first step.

A second reason that this test is appropriate is that brief delays sometimes (though not always) take the form of a procedural "mistake" that a court might want to construe as a "mixup," which should not doom the investigation. While *Herring* only discussed isolated negligence with respect to warrants, the opinion's language included "sweeping suggestions that all sorts of police carelessness should not require . . .

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120 Id, citing *Illinois v Gates*, 462 US 213, 223 (1983) (explaining that the appropriateness of applying the exclusionary rule is context-specific and separate from whether Fourth Amendment rights were violated).

121 *Herring*, 129 S Ct at 702.

122 Id.

123 Id at 702 n 4 (quotation marks omitted).

124 See David G. Savage, *Who's Policing the Fourth Amendment? Two Cases Push the Unevenly Enforced Exclusionary Rule Closer to Repeal*, 95 ABA Journal 19, 19–20 (April 2009).

125 *Herring*, 129 S Ct at 699 ("[W]e accept the parties' assumption that there was a Fourth Amendment violation.").

that juries be barred from considering 'all the evidence.'"[126] In fact, one magistrate judge, discussing *Herring* in the context of an incorrect affidavit, interpreted this language as effecting a major shift for courts: "'Paradigm shift' is a trite and often meaningless phrase, but it might be an apt description of the Supreme Court's recent curtailment of the exclusionary rule as illustrated by *Herring v. United States*."[127]

1. Negligence in the context of brief delays.

Although *Herring* is relatively new, the language and initial interpretations suggest a broad reading of how the isolated negligence test can be applied. This Part explores how a court could determine negligence in the context of traffic stop delays and whether a court could distinguish between a negligent delay and a deliberate or reckless one as part of the isolated negligence test.

Traditionally, an act was negligent if the expected cost of an accident outweighed "the burden of adequate precautions."[128] Similarly, the modern definition states that an actor is negligent if "the actor does not exercise reasonable care under all the circumstances."[129] In contrast, reckless conduct has been defined as "wanton misconduct" or "wrongdoing that is aggravated."[130] While this difference may appear subtle, courts are well versed in distinguishing between the two types of conduct, given that these terms are a fundamental part of both criminal law and torts law. In addition, because there are relatively clear procedures for police officers to follow during traffic stops and many patrol cars contain data collection devices,[131] courts have, at the very least, both the ability to distinguish between these types of delays and evidence on-hand for evaluating the circumstances of traffic stops.

Applying these terms to brief delays, a court could find that a brief delay was caused by negligence where police behavior unintentionally caused the delay despite demonstrated precautions by the law

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126 Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, NY Times A1 (Jan 31, 2009) (quoting Chief Justice John Roberts's majority opinion).

127 *United States v Thomas*, 2009 WL 151180, *8 (WD Wis).

128 *United States v Carroll Towing Co*, 159 F2d 169, 173 (2d Cir 1947).

129 Richard A. Epstein, *Cases and Materials on Torts* 209 (Aspen 9th ed 2008), citing Restatement (Third) of Torts § 3 (2005) (surveying attempts to define negligence).

130 Restatement (Third) of Torts ch 1 § 2 (2005) (exploring terms related to recklessness in Comment a).

131 In 2003, over 60 percent of all local police and sheriff's vehicles contained video cameras. This totaled over 66,000 video cameras operated by law enforcement. See Bureau of Justice Statistics, *State and Local Law Enforcement Statistics*, 1 (DOJ 2009), online at http://www.ojp.usdoj.gov/bjs/sandlle.htm (visited June 29, 2009).

enforcement officer. For example, if the police officer worked quickly to process the ticket but in the midst of questioning or writing the ticket forgot to radio dispatch until he had already written the citation, a court might allow evidence from this brief delay since the delay was not caused by the officer's recklessness. Additionally, a brief delay might be caused by negligence where two officers were working together to question a driver and passenger but mistakenly failed to coordinate who was going to write the ticket and only realized their mistake a few minutes into the stop. In both of these cases, a court might allow the evidence since the officers demonstrated intent to conduct the traffic stop properly but had a "mixup" that delayed the termination by a few minutes.

In contrast, a reckless or deliberate delay would occur where the officer asked unrelated questions based on an unsupported hunch or delayed writing the citation to wait for the arrival of a canine unit without any reasonable suspicion of drugs—even if these delays lasted less than a minute. If the officer intended to create the delay on his or her own initiative or took actions that any reasonable person would objectively have realized in advance would create a delay, then that conduct could be wanton misconduct or reckless conduct flouting the prolongation rule.

Concededly, the distinctions are somewhat amorphous since an officer's actions could be admissible or inadmissible depending on the officer's state of mind. However, as in other areas of the law, the officer's acts serve as objective indicators of the state of mind.[132] This concern is also mitigated by the fact that the Supreme Court explicitly stated that the isolated negligence test would examine the officer's actions and only prohibit "evidence obtained by flagrant or deliberate violation of rights."[133] This language suggests that the justices both (1) want courts to look to the mindset of officers and (2) believe that this inquiry is feasible.

Another potential issue with the isolated negligence test is its relationship to a department's official procedures. Were a police department's policy to require more paperwork, this would have the effect of briefly delaying traffic stops without any ability for the isolated negligence test to prevent this type of misconduct. Yet this concern is a red herring because the isolated negligence test only applies to the *second* step of a prolongation inquiry. As noted in Part I, there are already multiple incentives for police departments to alter their poli-

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132 See, for example, *United States v Tykarsky*, 446 F3d 458 (3d Cir 2006) (noting that objective evidence can support a finding about a criminal defendant's state of mind).

133 *Herring*, 129 S Ct at 702, quoting Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal L Rev 929, 953 (1965).

cies in order to game the *first* step in the prolongation inquiry.[134] In fact, while this issue appears to be significant on its face, the isolated negligence test has little to no impact on the incentives that departments already have to relax their procedures under the Supreme Court's decisions in *Mena* and *Atwater*. Given that the police are able to arrest anyone on probable cause and that officers already have the incentive to prolong stops while they wait for canine units, the application of the isolated negligence test might actually *reduce* the amount of unnecessary paperwork that police procedures require. By this reasoning, departments might expect that courts would give them the benefit of the doubt where a slight prolongation occurred while processing a citation and questioning the driver.

2. Isolation in the context of brief delays.

An equally important consideration is how to apply the idea of isolation in the context of brief delays. The majority and dissenting opinions in *Herring* provide widely different, yet equally plausible, interpretations of how a given procedural error can be isolated, both of which would suggest that brief delays fall within this isolated negligence exception.

Looking at the majority's language, the Court addressed the question of isolation within the framework of substantiality: "[T]he question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."[135] While this language, on its face, suggests that only police errors substantially separated from the arrest would fall within this exception, a closer examination of the language suggests that, at least in dicta, the justices are prepared to expand the types of evidence admitted into court.

The best interpretation focuses on the sequence of the Court's statements. The Court first stated that the exclusionary rule "turns on the culpability of the police and the potential of exclusion to deter wrongful conduct."[136] Only after making that first statement did the Court state that the incorrect warrant satisfied that broader criteria. By interpreting the two clauses as the "greater includes the lesser ar-

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134 See note 55 and accompanying text.

135 129 S Ct at 698 (emphasis added).

136 Id.

gument,"[137] the opinion suggests that many other sets of facts would also satisfy the new exclusionary rule. This opens up the possibility that the crucial inquiry is not about arrest warrants or proximity but more generally about whether the conduct is culpable and substantial enough to warrant deterrence. While this Comment has utilized the term "isolated negligence," an equally plausible takeaway from *Herring* could be that the new exclusionary rule is fundamentally about "efficiently deterrable police negligence," that is, negligence where the benefits of exclusion outweigh the costs.

A less persuasive interpretation is that the error must merely be isolated from the "arrest" itself, where the arrest is the act of pulling over the car for probable cause or reasonable suspicion. Since any brief delay necessarily deals with the interactions of the officer after the conclusion of the probable cause stop, this interpretation could support applying the isolated negligence test to traffic stop prolongations. However, this would require an exceedingly broad definition of isolation.

As an alternative understanding of isolation, the *Herring* dissent focuses on whether the error is isolated in the sense that it occurs infrequently:

> It is not altogether clear how "isolated" the error was in this case. When the Dale County Sheriff's Department warrant clerk was first asked: "[H]ow many times have you had or has Dale County had problems, any problems with communicating about warrants," she responded: "Several times."[138]

This interpretation suggests that what matters most for exclusion is whether the officers are making the same error in numerous instances. Unfortunately, there is no data on the frequency of brief delays and the large gaps in the circuit split do not necessarily mean that brief delays are rare. Rather, brief delays may happen quite frequently without being litigated. Where the police officer finds no illicit material, the detained citizen might choose to move on rather than pursue a remedy. Even if the police officer found drugs or weapons, plea deals might eliminate many cases from the docket. However, even if brief delays were common, the isolated negligence would still be available for admitting evidence where a law enforcement department could prove that the brief delays were not the product of "recurring or sys-

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137 See generally Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L Rev 227 (discussing the popularity of this argument by various judges as well as its logical strengths and fallacies).

138 129 S Ct at 706 n 2 (Ginsburg dissenting).

temic negligence."[139] In other words, we would expect that adopting this test would encourage the right behavior from departments that wished to get the benefit of the doubt from courts.[140]

These understandings of isolation—the majority's idea of the efficiently deterrable negligence and the dissent's focus on whether the negligence is recurring—both allow for application of this exclusionary inquiry to traffic stops. As this Comment demonstrates in Part III.C, using this test as the second step after the prolongation analysis would help to resolve the split by creating a uniform outcome on the constitutional question while giving courts more flexibility as to whether the evidence should be admitted.

C. Applying the Isolated Negligence Test to Brief Delays

The isolated negligence test reiterates the Supreme Court's belief that suppression of evidence "is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct."[141] In order to understand how the isolated negligence test might affect typical prolongation cases in the future, this Comment applies the test to the cases from the circuit split to illustrate how the results from these cases differ under the proposed two-part test.

Looking first at the decision in *Childs*, applying the isolated negligence test would likely result in the same outcome and allow the introduction of evidence in the case. In *Childs*, the brief delay was due to a single question asked by one officer while the other officer was walking to the other side of the vehicle. The government could therefore argue that the delay was not deliberate or reckless but negligent and that the officers did not demonstrate any intent to delay the termination of the traffic stop. Additionally, there would be little to no deterrent value to excluding this evidence, since there is no real reason to deter the behavior at issue—asking a question while the other officer is walking around the vehicle (perhaps to observe the questioning).[142]

Excluding the evidence in *Childs* would have hurt the interests of justice without creating a clear rule that would have guided officers the

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139 Id at 702 (Roberts).

140 We would also expect that watchdog organizations would begin closely scrutinizing available traffic stop data to ensure that courts had adequate information for determining which departments should receive the benefit of the doubt.

141 *Herring*, 129 S Ct at 698.

142 The exact circumstances of the brief delay in *Childs* are ambiguous, which only supports the minimal deterrent effects of excluding the evidence in this case. See *Childs*, 277 F3d at 953.

next time that two officers faced the task of running routine traffic stops in tandem. As the Court stated in *Herring*, "[T]he benefits of deterrence must outweigh the costs,"[143] and under the circumstances in *Childs*, excluding the evidence of drugs would have had only minimal instructive value to officers in general while greatly benefiting the defendant.[144]

Childs also demonstrates how the deterrence value of the exclusionary rule should not be overstated. While all behavior is deterrable if the penalties are high enough, the *Childs* case is an excellent example of the decreasing marginal returns on exclusion. By excluding the evidence in *Childs*, a court would certainly force officers to take more precautions and reduce the likelihood of accidental delay, yet significant costs would be incurred as a result. First, the current case would probably have to be dismissed, hurting the integrity and public confidence in the criminal justice system. Second, and more importantly, such a holding would force law enforcement officers to spend more time looking over their shoulders and double or triple checking to make sure that questions were not asked after their partner had started to walk away. This could lead to a serious distraction for officers and a potential safety concern, not to mention a potentially slower process for many future traffic stops. The *Herring* majority acknowledged the decreasing marginal value of deterrence when responding to the dissent's chief argument:

> We do not quarrel with Justice Ginsburg's claim that "liability for negligence . . . creates an incentive to act with greater care," and we do not suggest that the exclusion of this evidence could have *no* deterrent effect. But our cases require any deterrence to "be weighed against the 'substantial social costs exacted by the exclusionary rule,'" and here exclusion is not worth the cost.[145]

While Chief Justice John Roberts was evaluating the circumstances of a mistaken warrant, this type of reasoning parallels the concerns a court like *Childs* might have. The question is not whether a given exclusion would have *no* deterrent effect but whether the given exclusion's value is "worth the cost."[146] In *Childs*, where the defendant was a suspected drug trafficker, it most definitely was not.

Looking next at the Tenth Circuit, the circumstances of *Alcaraz-Arellano* suggest that the outcome in that case would have been iden-

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143 129 S Ct at 700, citing *United States v Leon*, 468 US at 897, 910 (1984).

144 See 277 F3d at 949.

145 Id at 702 n 4 (citations omitted).

146 Id.

tical under the isolated negligence test. The evidence would have been admitted into court despite the brief delay because in that case the prolongation was only due to the fact that the ticket-writing and questioning could have been performed thirty seconds faster.[147] The evidence would likely be allowed under the new test because the officer did not demonstrate any intent to delay the traffic stop. In fact, the officer delayed the termination because he was adhering to the new questioning guidelines that the Supreme Court had created in *Mena*.[148] Perhaps the officer was not as adept at simultaneously writing and speaking as the court might hope, but the delay was not the type of delay that signaled intent or recklessness.

Furthermore, exclusion of this evidence would probably not deter future questioning during ticket-writing, since *Mena* explicitly allows questioning during traffic stops, and officers would presumably continue to ask questions while writing the citations regardless of the outcome of the case. Finally, even if there was some deterrent value to this exclusion (such as requiring all officers to remain silent if they cannot write tickets quickly enough while talking), the court could still admit the evidence under the isolated negligence test if it did not think the deterrence outweighed the costs. In the case of *Alcaraz-Arellano*, this test is most likely met.

In contrast to *Childs* and *Alcaraz-Arellano*, where it appears that the two-part test would lead to the same outcome as the holdings in those cases, the two-part test would have a potential impact on cases like *Turvin*. Looking at *Turvin*, a court applying the isolated negligence test would probably have excluded the evidence obtained from this search because the officer stopped writing the citation and turned on the tape recorder "solely for the purpose of asking Turvin about drugs and for … consent to search his vehicle."[149] In this case, it appears that the officer deliberately paused in order to ask unrelated questions and to delay the termination of the traffic stop. Furthermore, although exclusion would be costly, in this case excluding the evidence would have a net beneficial effect because it would deter police officers from stopping the ticket-writing in order to ask questions or otherwise delay the termination of the traffic stop. Therefore, applying the isolated negligence test, the court most likely would have found the brief delay unreasonable *and* suppressed the evidence. While there are costs asso-

147 *Alcaraz-Arellano*, 441 F3d at 1259.

148 See notes 36–39 and accompanying text.

149 517 F3d at 1101–04.

ciated with the exclusion of evidence, the benefits of deterring this type of conduct could be found to substantially outweigh these costs.[150]

Finally, as a further check on the suitability of the isolated negligence test, applying the two-part test to *Pruitt* demonstrates that the test would also catch those brief delays where the officer deliberately asks enough unrelated questions for a canine unit to arrive and inspect the car. Although under *Mena* such questions would not create an unreasonable expansion of scope, when a court establishes that the questions delayed the traffic stop, the court would then look to see whether this delay was due to negligence and whether such delays were deterrable. In this case, the "fishing expedition" was deliberate and we would expect a court to find that the delay was not attributable to isolated negligence. Therefore, a court under the two-part test would exclude the evidence just as the original court did.

Thus, *Turvin* and *Pruitt* demonstrate that the isolated negligence test would not always allow evidence from brief delays into court, particularly where the officers appear to be attempting to evade the legal requirement to "diligently pursue" their investigation.[151] The isolated negligence test would differentiate between those brief delays that result from off-hand or unintentional delays and delays that appear to have more sinister intentions, which is precisely the test's purpose according to Chief Justice Roberts.[152]

CONCLUSION

The circuit split over brief delays exposed a fundamental division between courts about whether brief delays can be reasonable, and more importantly, raised the question of how to deal with those delays that, while minor, have significant consequences on law enforcement officers, the judicial system, and citizens alike. Identifying a workable solution for these cases requires a system that incents the right behavior from

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150 While one "cost" taken into account by the balancing test is the gravity of the criminal charge that would have to be dropped for lack of evidence, courts appear to be most focused on the "cost" of allowing police to deliberately or recklessly deprive citizens of some right. See, for example, *United States v Groves*, 559 F3d 637, 639–43 (7th Cir 2009) (reasoning that because there was no evidence of recklessness on the part of the police, the exclusionary rule would be too "costly" to the truth-seeking and law enforcement objectives of the criminal justice system); *United States v Parson*, 599 F Supp 2d 592, 609 (WD Pa 2009) (finding that the "flagrant" violations of procedure justified exclusion).

151 See *Sharpe*, 470 US at 685.

152 As Chief Justice Roberts writes, the purpose of the exclusionary rule is to prevent deliberate actions by police officers trying to evade constitutional protections, not to free the criminal merely "because the constable has blundered." *Herring*, 129 S Ct at 704, quoting *People v Defore*, 242 NY 13, 21 (1926).

officers, prevents undue harassment of citizens, and provides for judicial flexibility in the face of tricky fact patterns.

In the end, this Comment has proposed a two-part test that maintains the traditional prolongation rule for traffic stops while also introducing a second part, developed in a related Supreme Court opinion, that can act as a safety valve under certain circumstances where the remedy for prolongation (exclusion of evidence) is far more harmful than the malady. The isolated negligence test allows courts to be flexible when addressing these brief delays while maintaining their vigilance in protecting citizens from unreasonable searches.