

Winter 1978

Fourth Amendment--Stop and Frisk

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Fourth Amendment--Stop and Frisk, 69 J. Crim. L. & Criminology 464 (1978)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

The casenotes for this issue of the *Journal* were completed by the following members of the staff: William M. Engeln, Julius W. Weber, Beth Alison Stone, Patricia B. Carlson, Karla R. Spaulding, Lora Kreeger Sanberg, Mark P. Fitzsimmons, Julie C. Reynolds, Scott M. Lapins, Jonah Orlofsky, Linda K. Rubini, Dalius F. Vasy, Bobbie Carol McGee, Peter J. Wasserman and Theodore W. Grippo, Jr.

FOURTH AMENDMENT—STOP AND FRISK

Pennsylvania v. Mimms, 434 U.S. 106 (1977)

Just a decade ago, in *Terry v. Ohio*,¹ the Warren Court held that the legality of a policeman's warrantless² "stop and frisk"³ search for weapons depends on whether a reasonably prudent officer

¹ 392 U.S. 1 (1968).

² Any search carried out pursuant to a valid search warrant (that is, one issued by judicial authority "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person to be seized," U.S. CONST. amend. IV) is per se "reasonable." In the absence of a search warrant, a search or seizure is "reasonable" only in certain limited situations: when the search is made 1) incidental to a lawful "custodial arrest," *United States v. Robinson*, 414 U.S. 218 (1974) (a full body search may be conducted); 2) with the consent of the person searched, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (search is limited to the scope of the consent); or 3) where special circumstances justify a particular intrusion (limited according to the requirements of the special circumstances). The last category includes the following: a) "stop and frisk" searches (*see note 3 infra*); b) other emergency searches where there is compelling urgency to justify the failure to obtain a warrant, *Cupp v. Murphy*, 412 U.S. 291 (1973) (evidence would be lost or destroyed by delay); c) moving vehicle searches where the inherent mobility of the automobile creates an "exigent circumstance" of the removal or destruction of evidence while a warrant is obtained, *Carroll v. United States*, 267 U.S. 132 (1925) (warrantless search must be based on probable cause to believe that the vehicle contained something subject to seizure); *cf.*, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (real exigency must be shown to justify search of parked car without warrant); d) border searches which may be conducted without warrant at established checkpoints on the border, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), or the "functional equivalent" of the border, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *but see United States v. Ortiz*, 422 U.S. 891 (1975) (searches by "roving patrols" twenty miles from the border are not justified without warrant unless there is some ground to suspect illegal activity), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (the fact that occupants "looked Mexican" was not a sufficient basis for suspicion of illegality to justify warrantless stop of car on main highway leading from the border).

³ The "stop and frisk" search is one of the carefully

would be justified, given the circumstances of the case, in believing that his safety or that of others is endangered. The Court held that such a "stop and frisk" would be permissible regardless of whether the policeman has "probable cause"⁴ to arrest that individual for a crime or an absolute certainty that the individual is armed.⁵ During the most recent term, the Burger Court issued a brief but important per curiam decision, *Pennsylvania v. Mimms*⁶ (with three dissenting opinions⁷), which extends this *Terry* "stop and frisk" right of a police officer to routine traffic-violation situations. The Court in *Mimms* held that a police officer may order a traffic violator out of his vehicle even when the officer has no suspicion of danger in order to obtain more complete information about the driver. Furthermore, should the circumstances then raise a suspicion of danger, the officer may "frisk" the driver.⁸

limited warrantless searches permitted by the Court as an exception to the usual fourth amendment rule that "probable cause" is required as justification (*see note 4 infra*). The "stop and frisk" is based upon the special circumstance of apparent danger to the police officer or others and is limited to a pat down of the outer clothing for weapons which may be seized if discovered. Only after the person frisked has been placed under arrest may a more thorough search be conducted. *Adams v. Williams*, 407 U.S. 143 (1972); *Terry*, 392 U.S. at 29 (1968).

⁴ The normal fourth amendment rule is that warrantless searches are permitted by police officers only when there is "probable cause" (the same judicial standard under the fourth amendment for the issuance of a search warrant) to believe that 1) a crime had been committed; or 2) a crime was in the process of being committed; or 3) a crime was about to be committed. *Henry v. United States*, 361 U.S. 98 (1959). *See also Terry*, 392 U.S. at 35-39 (Douglas, J., dissenting).

⁵ 392 U.S. at 20-27.

⁶ 434 U.S. 106 (1977).

⁷ Justice Marshall dissented in a separate opinion, *id.* at 112; Justice Stevens dissented in an opinion joined by Justices Brennan and Marshall, *id.* at 115.

⁸ *Id.* at 110-12.

Because the facts of the *Mimms* case are analogous in many respects to those in *Terry*, the recent case makes possible an analysis of the current Burger Court's approach to constitutional questions of criminal law and procedure as contrasted with the approach of its immediate predecessor.⁹ The central question, then, is whether the decision in *Mimms* is consistent with that in *Terry* in both form and spirit. A secondary, but equally interesting, issue presented in *Mimms* is one that frequently arises in the area of criminal justice where federal constitutional principles control law which is primarily of state origin. It involves the question of the Court's jurisdiction to review state court opinions under both the Supreme Court's own long-established principles and the Burger Court's special concern for state court independence.¹⁰

In *Mimms*, the Supreme Court took the controversial step¹¹ of simultaneously granting the Commonwealth of Pennsylvania's request for certiorari and deciding the case on its merits.¹² In deciding the case, the Court reversed the Pennsylvania Supreme Court's judgment¹³ interpreting the fourth

amendment of the United States Constitution¹⁴ without giving the Pennsylvania court an opportunity to consider whether there were sufficient independent state grounds for its decision.¹⁵ The Court held that a policeman may, without violating the fourth amendment's prohibition of unreasonable searches and seizures, order a driver out of his car in conjunction with a routine traffic-violation stop, no matter how innocuous the violation and even though the officer has no reason to suspect danger. Once the driver has emerged, if a prudent officer would consider him dangerous, the driver may be subjected to a pat-down search.¹⁶

As a result of such a search, *Mimms* was convicted of carrying a concealed deadly weapon and a firearm without a license.¹⁷ At the state trial, the jury determined the facts¹⁸ to be these: Two Phil-

¹⁴ U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ." The fourth amendment is applicable to the states through the due process clause of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Ker v. California*, 374 U.S. 23 (1963).

¹⁵ Justices Stevens and Marshall based their dissents (in part) on this fact as well as upon the fact that the case was not fully argued and briefed before the Court. 434 U.S. at 114-17. See text accompanying notes 41-60 *infra* for further discussion of their criticisms.

¹⁶ 434 U.S. at 110-12.

¹⁷ The incident occurred on Sept. 7, 1970, and *Mimms* was convicted in the Court of Common Pleas, Philadelphia County, on March 15, 1972. *Commonwealth v. Mimms*, 232 Pa. Super. Ct. 486, 488-92, 335 A.2d 516, 517-19 (1975).

¹⁸ The facts were "not in dispute" in the United States Supreme Court. 434 U.S. at 107. However, the Superior Court of Pennsylvania made it clear in its opinion that the accounts of the defendant and his companion (who pled guilty to a charge of carrying a concealed weapon) and those of the police officers as to the discovery of the weapons were completely at odds: "The appellant contended that the gun was found in the car, while the police testified that they took the gun from his person. It is evident that the jury believed the testimony of the Commonwealth." 232 Pa. Super. Ct. at 491-92, 335 A.2d at 519.

Incidentally, the jury's determination was tainted by the prosecutor's reference, in cross-examination of *Mimms's* companion, to the religious affiliation (Black Muslim) of *Mimms* and the companion in an attempt to discredit their testimony. Although the superior court majority held that such questioning was *not* reversible error, 232 Pa. Super. Ct. at 491, 335 A.2d at 518, this issue raised serious questions in the dissenting opinions in the superior court and in the concurring opinions in the Pennsylvania Supreme Court. See notes 23, 37 *infra*.

If the jury had believed *Mimms's* account of the discovery of the weapons inside the auto, that search would clearly have violated accepted rules under both the United States Constitution and Pennsylvania law. In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Supreme

⁹ Some change or adaptation by the Court was inevitable according to the late Alexander M. Bickel:

The true secret of the Court's survival is not, certainly, that in the universe of change it has been possessed of more permanent truth than other institutions, but rather that its authority, although asserted in absolute terms, is in practice limited and ambivalent, and with respect to any given enterprise or field of policy, temporary. In this accommodation, the Court endures. But only in this accommodation. For, by right, the idea of progress is common property.

A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 181 (1970).

¹⁰ This issue is phrased by Justice Marshall as the "institutional aspects of the Court's decision." 434 U.S. at 114 (Marshall, J., dissenting).

¹¹ Considerable controversy surrounds the Supreme Court practice of handling certiorari requests by summarily disposing of cases on the merits, in brief per curiam opinions. See 69 HARV. L. REV. 707 (1956), and Brown, *Foreword—The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77 (1958). While this procedure is controversial, it is by no means uncommon. A former law clerk to a Supreme Court justice has written that:

[S]ometimes when further argument would be of little assistance in deciding the merits, a petition is granted and the Court disposes of the merits in the same conference, foregoing oral argument and acting without the benefit of full briefs, provided a majority so votes and fewer than four believe the issue warrants plenary consideration.

Alsop, *A Policy Assessment of the National Court of Appeals*, 25 HAST. L. J. 1313, 1318 (1974).

¹² 434 U.S. at 112.

¹³ *Commonwealth v. Mimms*, 471 Pa. 546, 370 A.2d 1157 (1977).

adelphia police officers observed Mimms driving an automobile with an expired license plate and stopped the car to issue a traffic summons. As was his habit in every traffic stop, one of the officers (Kurtz) asked Mimms to get out of his car. Once Mimms was out of the car, Kurtz noticed a large bulge under Mimms' sports jacket, feared it might be a weapon, and frisked him. Thus Officer Kurtz discovered the evidence which convicted Mimms—a .38 caliber revolver with five rounds of ammunition.¹⁹

FIRST APPEAL IN PENNSYLVANIA

On his first appeal in Pennsylvania, Mimms' state jury conviction was affirmed on the grounds that his arrest situation was virtually identical to that of the defendant in *Terry v. Ohio* and that the *Terry* rule justifying a "stop and frisk" search to insure the safety of the officer should apply.²⁰ The Superior Court of Pennsylvania did not even address the issue of whether the officer should have been permitted to order the driver out of the car in the first place. Instead, this was almost assumed by the court to be a police prerogative:

[W]hen, as in the instant case, a police officer in the performance of his duty stops a car to enforce a traffic violation for failure to have a current license tag, and when requesting the driver to step out of the car and exhibit his owner's card and driver's license, he becomes aware of a situation that may prove dangerous to his person, his right to frisk to remove the danger, arises . . .

The narrow basis of the frisk and search was strictly and solely for the officer's own protection. Such searches are encouraged by the Supreme Court of the United States for the protection of law enforcement officers. *Terry v. Ohio*, supra, *Adams v. Williams*, 407 U.S. 143 (1972)²¹

Judge Watkins, in the opinion for the superior court, noted that "the only reason that the car was stopped was the absence of a current license plate."²² Nonetheless, as long as the search itself was not "whimsical," nor the subject of an "ill-founded hunch" on the part of the officer, nor "harrassment in any sense" it could be justified

Court permitted a warrantless search of an auto at the place seized or back at the police station, *only* if there was probable cause to believe that the vehicle contained evidence of a crime. *Accord*, *Carroll v. United States*, 267 U.S. 132 (1925). For a similar Pennsylvania rule, see *Commonwealth v. Dussell*, 439 Pa. 392 (1972).

¹⁹ 434 U.S. at 107.

²⁰ 232 Pa. Super. Ct. at 489-90, 335 A.2d at 517-18.

²¹ *Id.* at 490, 335 A.2d at 518.

²² *Id.*

under the *Terry* "stop and frisk" doctrine.²³ The three dissenters in the superior court urged a new trial for Mimms based on unrelated grounds.²⁴

JUDGMENT OF THE PENNSYLVANIA SUPREME COURT

The Pennsylvania Supreme Court, unlike the superior court, seized upon the police officer's initial order to the driver to get out of the car. The court found this to be a questionable procedure in the absence of reasonable suspicion of danger. As the court noted:

The precise point of our inquiry must be whether Officer Kurtz's action was justified at its inception. [Citation to *Terry v. Ohio*.] . . . The initiation of Officer Kurtz's intrusive action was the order [to defendant] to get out of his car. If that order cannot be constitutionally justified, then the fruits of the resulting frisk were likewise unconstitutionally obtained.²⁵

According to this court, therefore, the frisking of Mimms after the officer noticed the bulge constituted a violation of his fourth amendment rights. Reversal of Mimms' conviction was thus required despite the similarity of his case to the "stop and frisk" situation of *Terry*.²⁶ The traffic violation did not supply the probable cause needed under federal constitutional rules to justify the search of the

²³ *Id.*

²⁴ *Id.* at 492-96, 335 A.2d at 519-21. Judge Hoffman, writing a dissenting opinion for himself and Judges Jacobs and Spaeth took issue with the majority's holding that the questioning of one of the witnesses regarding his religious affiliation did not constitute reversible error. See note 18 *supra*. The majority took the view that since Mimms' counsel had, on re-direct examination, made the point that adherents of the Black Muslim sect have an obligation to testify truthfully, the question was not fatal error. The dissenters, however, believed that any questioning of a witness concerning his religious beliefs violated the legislative provision that "no witness shall be questioned, in any judicial proceeding, concerning his religious belief; nor shall any evidence be heard upon the subject for the purpose of affecting either his competency or credibility." 28 PA. CONS. STAT. ANN. § 313 (Purdon 1958). Moreover, according to the dissenters, defense counsel's solicitation of the fact that Black Muslims are under an obligation to tell the truth "was only an attempt to minimize the effects of the Commonwealth's improper cross-examination." 232 Pa. Super. Ct. at 495 n.6, 335 A.2d at 520 n.6. The majority of the Pennsylvania Supreme Court reserved judgment on the issue, although two members of that court who disagreed with the majority's holding on the search and seizure issue, concurred in the majority's judgment on the basis of the prosecutor's improper examination. See note 38 *infra*.

²⁵ *Commonwealth v. Mimms*, 471 Pa. 546, 552, 380 A.2d 1157, 1160 (1977).

²⁶ *Id.* at 552, 370 A.2d at 1159.

occupants of the vehicle.²⁷ In fact, the court stated that only a nearly perfect fit to the *Terry* situation could justify the order out of the vehicle:

The exigencies of face-to-face street confrontations may require police response even when probable cause to search or to seize property is lacking. . . . The Court held [in *Terry*] . . . that such "carefully limited searches" are reasonable within the meaning of the Fourth Amendment in certain narrow circumstances. . . . The Court made it clear that "in justifying the particular intrusions the police officers must be able to point to specific and articulable facts which, taken together with rational inferences from these facts reasonably warrant the intrusion."²⁸

Applying this requirement to the police officer's order to Mimms, the state supreme court said: "The question before us, then, is whether Officer Kurtz has been able to point to such 'specific and articulable facts' . . . Certainly the fact that a weapon was discovered as a result of the search cannot serve as its justification."²⁹

At this point in its opinion, the court's argument weakened because of its reliance on a 1973 case, *Commonwealth v. Pollard*.³⁰ Justice Pomoroy, writing for the *Mimms* court, cited the *Pollard* case, in which the court held that a police officer did not have the right to order a *passenger* out of a car after it had been stopped for going through a red light. Justice Pomoroy used *Pollard* as the basis for his holding that the police officer likewise did not have the right to order the driver out, at least in the absence of "observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety."³¹ However, as Justice Nix noted in his concurring opinion,³² this use of *Pollard*:

²⁷ See note 18 *supra*.

²⁸ 471 Pa. at 550-51, 370 A.2d at 1159-60 (quoting *Terry*, 392 U.S. at 21).

²⁹ *Id.* at 552, 370 A.2d at 1160.

³⁰ 450 Pa. 138, 299 A.2d 233 (1973).

³¹ 471 Pa. at 552, 370 A.2d at 1160. As the majority noted:

Officer Kurtz could point to no such observable facts. He testified that he did not see the bulge under appellant's coat until after appellant had stepped out of the car, and that there was nothing unusual or suspicious about the behavior of Mimms or his passenger which led Kurtz to issue his order. Rather, the officer indicated that it is his practice to order *all* drivers out of their vehicles whenever he makes a stop for a traffic violation and that the order was issued to appellant solely because of this practice.

Id.

³² 471 Pa. at 555 n.1, 370 A.2d at 1161 n.1 (Nix, J., concurring). Justice O'Brien joined in Justice Nix's concurrence.

is tenuous at best. Our holding in that case was clearly limited to *passengers* occupying a vehicle. . . . The majority in the case at bar ignores this distinction and thus completely overlooks the question left open in *Pollard* of whether an operator's expectation of privacy differs from that of an occupant of a vehicle detained for a traffic violation.³³

Justice Nix differed from the majority in his view of the balance between the public interest and an individual's rights relating to whether the evidence obtained by the frisk was tainted by the police officer's order to the driver to get out of the car. According to Nix:

The application of . . . [the Supreme Court's] balancing test to the instant facts yields the conclusion that Officer Kurtz's action was reasonable. The intrusion occurred by requiring appellant to step out of the vehicle was minimal. Appellant had in fact already been "seized." He was properly detained by Officer Kurtz for a violation of the Motor Vehicle Code. Appellant's freedom of movement was thus lawfully restricted until the officer had finished his business. Requiring a motorist to leave his vehicle under the circumstances is, in my view, of no constitutional moment.³⁴

Justice Nix next cited *People v. Wolf*³⁵ to support his notion that *Mimms* involved a reasonable and "minimal" intrusion of the defendant's privacy. In *Wolf*, the Supreme Court of Illinois had upheld the introduction of evidence obtained by a state police officer who had opened the door of a vehicle detained because its license plate was fastened with wire. This "minimal"³⁶ intrusion was held not inconsistent with the fourth amendment. Since *Mimms* was detained for having an expired license plate, according to Justice Nix, Officer Kurtz would have been "justified in opening appellant's door to inspect the vehicle identification. In my view, the difference, if any, in the 'degree of intrusion' occasioned by this type of conduct and that instantly held invalid is constitutionally insignificant."³⁷ Justices Nix and O'Brien concurred with

³³ *Id.*

³⁴ *Id.* at 554, 370 A.2d at 1161 (Nix, J., concurring) (citing *United States v. Brignoni-Ponce*, 442 U.S. 873, 878 (1975)). See also *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). The balancing test which Justice Nix discusses is a United States Supreme Court doctrine.

³⁵ 60 Ill. 2d 230, 326 N.E.2d 766, *cert. denied*, 423 U.S. 946 (1975).

³⁶ 471 Pa. at 551 n.1, 370 A.2d at 1161 n.1 (Nix, J., concurring).

³⁷ *Id.*

the majority, however, on unrelated grounds.³⁸ Justice Jones dissented without a written opinion.³⁹

SUPREME COURT ISSUES AN APPARENT ADVISORY OPINION

Seemingly, the *Terry* decision is a very malleable instrument; several different Pennsylvania judges were able to see different things in that opinion to support their own approaches to the *Mimms* case. Perhaps a desire to clear up the uncertainties of *Terry* explains the alacrity with which the United States Supreme Court took and decided the *Mimms* case.⁴⁰ Justice Marshall, in his dissent, pointed out that the Court considered *Mimms* "solely on the basis of certiorari papers and in the process summarily reverse[d] the considered judgment of Pennsylvania's highest court," and that "[s]uch a disposition cannot engender respect for the work of this Court."⁴¹ More than just the lack of a complete hearing,⁴² however, is involved in the speed with which the Court acted in *Mimms*. As Justice Stevens⁴³ noted, there were three different jurisdictional reasons which made the grant of certiorari extremely questionable in this case. In its speed, Justice Stevens asserted, the Court disregarded the facts that the case "barely escapes mootness"⁴⁴

³⁸ *Id.* at 555-57, 370 A.2d at 1162-63 (Nix, J., concurring). Justices Nix and O'Brien agreed with Judges Hoffman, Jacobs, and Spaeth of the superior court that the prosecutor's questioning about the defendant's religious affiliation constituted prejudicial error requiring a new trial:

We have stated that no verdict which may have been brought about or even influenced by a litigant's religious affiliations should be permitted in a court of justice. [Citations omitted.] This is particularly so where, as here, the religious affiliation placed before the jury is that of a highly controversial and extensively publicized group like the Black Muslims.

Id. at 557, 370 A.2d at 1163.

³⁹ *Id.* at 553, 370 A.2d at 1161.

⁴⁰ The Pennsylvania Supreme Court decided the case on February 28, 1977; rehearing was denied before that court on March 28, 1977. The United States Supreme Court granted certiorari and decided the case on December 5, 1977.

⁴¹ 434 U.S. at 114 (Marshall, J., dissenting).

⁴² *Id.* at 114.

⁴³ *Id.* at 115-24. (Stevens, J., dissenting). He was joined by Justices Marshall and Brennan.

⁴⁴ *Id.* at 116 n.4. The Court discussed the mootness issue and pointed out that even though a sentence has been served, there is always the "possibility of a criminal defendant suffering 'collateral legal consequences' from a sentence already served permitting him to have his claims reviewed here on the merits." *Id.* at 108 n.3. Collateral legal consequences stem from repeat offender statutes and statutes which bar ex-convicts from certain

since *Mimms* had already served his sentence,⁴⁵ that *Mimms*' conviction might well be reversed on different grounds on remand to the Pennsylvania Supreme Court;⁴⁶ and that "the Pennsylvania Supreme Court may still construe *its own constitution* to prohibit what it described as the 'indiscriminate procedure' of ordering all traffic offenders out of their vehicles."⁴⁷

The jurisdictional points made by Justice Stevens and by Justice Marshall to dissent were probably the strongest arguments against the grant of certiorari in *Mimms*. The doctrine of "adequate state grounds" and the importance of maintaining comity in the federal system provide the basis for this argument. This doctrine was discussed by Justice Jackson for the Court in a much earlier case, where he recognized that:

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted.] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.⁴⁸

Was the Court's decision in *Mimms* an advisory opinion, that is, an "extrajudicial deciding [of a] question"?⁴⁹ State courts may prevent Supreme Court review of their cases by holding a contested state statute or procedure invalid under the state

employment. The *Mimms* case was therefore not considered moot.

⁴⁵ *Id.* at 116 (Stevens, J., dissenting).

⁴⁶ "Two members of the [Pennsylvania Supreme] Court were persuaded that introducing testimony about *Mimms*' Muslim religious beliefs was prejudicial error, and three others specifically reserved the issue. *Commonwealth v. Mimms*, 370 A.2d 1157, 1158 n.2, and 1162-63." 434 U.S. at 116 n.5 (Stevens, J., dissenting). *See also id.* at 114 n.3 (Marshall, J., dissenting).

⁴⁷ *Id.* at 117 (Stevens, J., dissenting).

⁴⁸ *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

⁴⁹ John Jay, Chief Justice, United States Supreme Court, Letter to President Washington, 1793, *quoted in A. SAYE, CONSTITUTIONAL LAW: CASES AND COMMENTS* 29-30 (1965).

constitution⁶⁰ as well as under the federal constitution.⁶¹ Furthermore, the Court has noted that "a state is free as a matter of its own law to impose a greater restriction on police activity than those this Court holds to be necessary upon federal constitutional standards."⁶² Indeed, state courts have sometimes refused to follow Supreme Court decisions and applied *stricter* requirements as a matter of state constitutional law, thus avoiding review.⁶³ The California Supreme Court, for instance, recently reaffirmed "the independent nature of the California constitution and our responsibility to define separately and protect the rights of California citizens despite conflicting decisions of the United State Supreme Court interpreting the federal Constitution."⁶⁴

It seems fairly clear in *Mimms* that the Pennsylvania Supreme Court relied on the fourth amendment to the United States Constitution rather than upon its counterpart in the Pennsylvania constitution.⁶⁵ In fact, the state court's *Mimms* opinion did not mention the state's own constitution at all. But, suppose for the sake of argument that there was a question as to the grounds upon which the Pennsylvania court had relied. To resolve such a question the Supreme Court might have either relied on a certificate from the state court⁶⁶ or vacated and remanded the case to the state court

for determination of the basis for the decision.⁶⁷ In *Mimms*, the Supreme Court did neither. Hence, in its haste to clarify the *Terry* ruling, the Court appeared to violate its long-held canon against issuing advisory opinions.⁶⁸ Here, the impropriety of an advisory opinion is underscored by the necessity, in a federal system, of maintaining respect between state and federal judiciaries. It is somewhat ironic that *this* Court so quickly entered the fray here, given the Burger Court's concern in habeas corpus proceedings for restoring state court independence from federal interference.⁶⁹ In habeas proceedings, "considerations of comity and federalism"⁷⁰ are given great consideration. Other considerations of great import must, therefore, exist here for the Court to have so easily disregarded those considerations in *Mimms*, as well as its traditional self-imposed restriction against advisory opinions.

REASONING OF THE COURT

The overriding consideration which led the six-member majority in *Mimms* to take and decide a case involving a "stop and frisk" search in a traffic-violation situation was apparently "a legitimate concern about the safety of police officers throughout the Nation."⁷¹ Given the Pennsylvania Supreme Court's belief that *Terry* requires the exclusion of evidence⁷² obtained pursuant to a police officer's search of a seemingly harmless driver ordered out of his car during a routine traffic offense, the Court was presented with an opportunity to express its own view of the balance between the public interest and an individual's rights in the *Mimms* situation.⁷³ Indeed, the Court seized upon this case to demonstrate its concern for the police

⁶⁰ The Pennsylvania counterpart to the fourth amendment is PA. CONST. art. I, § 8:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

⁶¹ See, e.g., *Dept. of Motor Vehicles v. Rios*, 410 U.S. 425 (1973).

⁶² *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

⁶³ Justice Stevens, 434 U.S. at 117 n.6, noted the following case as an example: *State v. Opperman*, 228 N.W.2d 152 (S.D. 1975), *rev'd*, *South Dakota v. Opperman*, 428 U.S. 364 (1976), judgment reinstated under state constitution, *State v. Opperman*, 247 N.W.2d 673 (S.D.).

⁶⁴ *People v. Disbrow*, 16 Cal. 3d 101, 114-15, 545 P.2d 272, (1976). The California Supreme Court held that *Harris v. New York*, 401 U.S. 222 (1971) (holding that statements obtained in violation of the *Miranda* rule were admissible for purposes of impeachment) "is not persuasive authority in any state prosecution in California." *Id.* at 113, 545 P.2d at 272.

⁶⁵ See note 50 *supra*.

⁶⁶ See, e.g., *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 22 (1974), where the Court accepted as determinative of a similar issue a certificate by the chief justice of the state court.

⁵⁷ See, e.g., *Dept. of Motor Vehicles v. Rios*, 410 U.S. 425 (1973). See also Note, 62 COLUM. L. REV. 822 (1962).

⁶⁸ Ever since 1793 when Chief Justice John Jay and his associates informed President Washington that "in consideration of the lines of separation drawn by the Constitution between the three departments of Government and being judges of a court of last resort afford strong arguments against the propriety of extra-judicial deciding questions from executive or legislative branches," the Court has refused to give advisory opinions. Letter of John Jay is reprinted and discussed in A. SAYE, CONSTITUTIONAL LAW: CASES AND COMMENTS 29-30 (1965).

⁵⁹ See *Francis v. Henderson*, 425 U.S. 536 (1976).

⁶⁰ *Id.* at 541.

⁶¹ 434 U.S. at 117 (Stevens, J., dissenting).

⁶² 471 Pa. 546, 370 A.2d 1157. Evidence obtained by illegal search and seizure cannot be used in a criminal proceeding against the victim of the search and seizure. *Weeks v. United States*, 232 U.S. 383 (1914).

⁶³ See note 34 *supra*.

officer's safety, a concern that, for the majority, made the weighing of values very simple:

We think it too plain for argument that the state's proffered justification—the safety of the officer—is both legitimate and weighty. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. . . ." And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. . . . Indeed, it appears "that a significant percentage of murders of police officers occurs when the officers are making traffic stops."⁶⁴

Hence, for the Court, the safety factor sufficiently tips the balance against the individual motorist's privacy rights in favor of the police officer's right to order a driver out of his vehicle during a traffic-violation stop.

Addressing the contention of Pennsylvania's highest court that the officer's order to Mimms was an "impermissible" seizure because the "officer could not point to 'objective observable facts to support a suspicion that criminal activity was afoot or that the occupant of the vehicle posed a threat to police safety,'" the Court quite simply disagreed.⁶⁵ Such a result, according to the Court, would be "unreasonable" and, therefore, inconsistent with the *Terry* rationale that the fourth amendment's "touchstone" is the "reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."⁶⁶ Since Mimms was lawfully stopped for driving with expired license tags in violation of the Pennsylvania Motor Vehicle Code, the question of whether the police officer's order was legal hinged, according to the Court, on whether the "incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped"⁶⁷ could be justified as a "precautionary measure to afford a degree of protection to the officer."⁶⁸ For the Court, the answer to this question was obviously "yes." As the Court reasoned, ordering the driver out of the car "reduces the likelihood that the officer will be the victim of an assault."⁶⁹

In his dissent, Justice Stevens claimed that experts in the field of police science do not agree as to whether ordering a driver out of a car in a

traffic-violation stop is actually a safety measure at all. He noted that the Court's decision was based on "a factual assumption about police safety that is dubious at best."⁷⁰ Thus, the Court's major assumption underlying its weighting of the public interest in the fourth amendment balancing test was considered possibly fallacious. Moreover, Justice Stevens recognized that the Court's view of the balancing test in fourth amendment cases is illusory, since by the Court's standard the public interest would almost always outweigh the individual's interests. He claimed that:

I share that concern [for the safety of police officers] and am acutely aware that almost every decision of this Court holding that an individual's Fourth Amendment rights have been invaded makes law enforcement somewhat more difficult and hazardous. That, however, is not a sufficient reason for this Court to reach out to decide every new Fourth Amendment issue as promptly as possible.⁷¹

On the individual's side of the fourth amendment balance, the majority had considered the order to get out of the car as:

an additional intrusion [which] can only be decided as de minimus. . . . Not only is the insistence of the police [that the driver get out] . . . not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity. . . ." What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.⁷²

However, Justice Stevens noted in dissent that the Court's abstract model of the individual's rights is also not without problems. The establishment of a general rule to apply in all cases cannot take account of the millions of variations in individual traffic stops: "Whether viewed from the standpoint of the officer's interest in his own safety or of the citizen's interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of traffic stops that occur every year are not fungible."⁷³ Hence, according to Justice Stevens, what is required to legitimize a "stop and frisk" search (including the police order to get out of the car) in a traffic violation as in other situations is an "individualized inquiry into the reason for each intrusion or some comparable guarantee

⁶⁴ 434 U.S. at 110 (quoting *Terry*, 392 U.S. at 23, and *Adams v. Williams*, 407 U.S. at 234 n.5).

⁶⁵ 434 U.S. at 108.

⁶⁶ *Id.* (quoting *Terry*, 392 U.S. at 19).

⁶⁷ 434 U.S. at 108.

⁶⁸ *Id.* at 110.

⁶⁹ *Id.*

⁷⁰ *Id.* at 117 (Stevens, J., dissenting). See especially *id.* at 119–20 n.10.

⁷¹ *Id.* at 117 (Stevens, J., dissenting).

⁷² *Id.* at 111 (quoting *Terry*, 392 U.S. at 17).

⁷³ *Id.* at 121 (Stevens, J., dissenting).

against arbitrary harrassment."⁷⁴ This he contended had been the rule under the fourth amendment until the change instituted by the Court in *Mimms*. The biggest problem, according to Justice Stevens, with the *Mimms* Court's willingness to "leave police discretion utterly without limits"⁷⁵ is the discriminatory potential such unchecked power contains: "Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different colored skin—may escape it entirely."⁷⁶

Once the Court majority had dispensed with the difficulty over the policeman's order to the driver, the frisk itself could easily be justified: "We have as little doubt on this point as on the first; the answer is controlled by *Terry v. Ohio*. . . . There is little question that the officer was justified. . . . In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat-down.'"⁷⁷ But Justice Marshall, in his dissent, observed that the Court had created and justified a three-part "stop-order out of vehicle-and frisk" search on the authority of the *Terry* two-part "stop and frisk" search. Under the *Terry* rule both parts of the "stop and frisk" must be justified by "the probability, not only that a crime was about to be committed, but also that the crime 'would be likely to involve the use of weapons.'"⁷⁸ Yet, in *Mimms*, the Court permitted the initial "stop" to be one for an innocuous traffic violation and allowed an order to get out of the car which is not justified by observable suspicion of danger at all, an order then followed by the "frisk" which is, admittedly, triggered by a justifiable suspicion of danger. Under *Terry*, according to Justice Marshall, both the "stop" and the "frisk" must be justified by "individualized reason to fear" the person searched.⁷⁹ Since in *Mimms* "the officer did not have even the slightest hint, prior to ordering respondent out of the car, that [he] might have a gun," the *Mimms* "stop and frisk" was not justified under the *Terry* rule and the *Mimms* ruling is, therefore, a radical "depart[ure] from the teachings of *Terry v. Ohio*."⁸⁰ As noted by dissenting Justice Marshall:

Such a result cannot be explained by *Terry*, which limited the nature of the intrusion by reference to the reason for the stop. The Court held that "the

⁷⁴ *Id.*

⁷⁵ *Id.* at 122 (Stevens, J., dissenting).

⁷⁶ *Id.*

⁷⁷ *Id.* at 112.

⁷⁸ *Id.* at 113 (Marshall, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.*

officer's action [must be] reasonably related in scope to the circumstances which justified the interference in the first place." [Citation omitted.] In *Terry* there was an obvious connection emphasized by the Court . . . between the officer's suspicion that an armed robbery was being planned and his frisk for weapons. In the instant case . . . [t]here is simply no relation at all between that circumstance [an expired license tag] and the order to step out of the car.⁸¹

MIMMS AND TERRY COMPARED

Is Justice Marshall correct that the decision in *Mimms* is a great departure from the holding in *Terry*? And is Justice Stevens making "much ado about nothing" over the *Mimms* authorization of a police officer's order to a driver to get out of his car—an order Stevens refers to as "a major category of police seizures"?⁸² A brief review of the "stop and frisk" decisions of the Court and their relationship to *Mimms* may help to answer these questions. The initial and leading decision is, of course, *Terry v. Ohio*. The similarities and differences between the situations and the holdings in *Terry* and *Mimms* suggest that the two decisions are consistent in form (Justice Marshall's dissenting opinion in *Mimms* to the contrary notwithstanding) but poles apart in spirit (as Justice Stevens' dissenting opinion in *Mimms* implies).

The Court in *Terry* relied on the police officer's lengthy observation of suspicious activity⁸³ by the man he searched to justify both the "stop" and the "frisk."⁸⁴ In *Mimms*, the Court again required specific justification for each part of the "stop and frisk" which occurred. Here the "stop" (both the initial stop of the vehicle and the order out of the car) was justified by one occurrence (the traffic violation), and the "frisk" was justified by another (the observable bulge under the sport coat which would lead a prudent officer to suspect danger *even if he had not previously been suspicious* of the driver⁸⁵).

⁸¹ *Id.* at 113-14 (Marshall, J., dissenting) (quoting *Terry*, 392 U.S. at 20).

⁸² *Id.* at 116 (Stevens, J., dissenting) ("I question the need to eliminate the requirement of an articulable justification in each case and to authorize the *indiscriminate invasion of the liberty of every citizen* stopped for a traffic violation, no matter how petty." [Emphasis added] *Id.* at 123.)

⁸³ "[H]e suspected the two men of 'casing a job, a stick-up' and . . . he feared 'they may have a gun.'" 392 U.S. at 6.

⁸⁴ *Id.* at 28. In *Terry*, unlike *Mimms*, there was no observable "bulge" resembling a firearm protruding from the suspect's belt. 392 U.S. at 7.

⁸⁵ In *Terry*, unlike *Mimms*, the police officer actually had no certain knowledge of any violation of the law by the suspects. *Id.* at 7, 28.

Moreover, in both *Terry* and *Mimms*, the justification for the actual invasion of the individual's security was a legitimate concern for the safety of the police officer.⁸⁶ Finally, in both cases there is an emphasis on the need to limit the scope of the invasion to that required for the officer's safety. In *Terry*, what was permitted, given the justifiable suspicion of danger, was a confrontation and brief pat-down search;⁸⁷ in *Mimms*, what was permitted, given the actual traffic violation, was the stopping of the vehicle and ordering of the driver out, to be followed by a pat-down search only if, as in *Mimms*, there is observable danger. Hence, in form, the decisions are consistent.

However, the spirit in which the decisions were written is not nearly so compatible. In *Terry*, the Court refused to grant a general authorization to the police to conduct "stop and frisk" searches free from judicial scrutiny:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. [Emphasis added.]⁸⁸

Although the *Mimms* Court did not change this requirement of judicial scrutiny regarding the frisk "search," it was willing to establish a general rule permitting the police a discretionary "seizure" of any driver who has committed a traffic violation, although he is not arrested,⁸⁹ by ordering him out of his car. This change in attitude by the *Mimms* Court demonstrates confidence that the nation's

⁸⁶ "There is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23.

⁸⁷ *Id.* at 28.

⁸⁸ *Id.* at 21.

⁸⁹ 434 U.S. at 111. An interesting question arises from the fact that there is no right to search a motorist's person or car when a police officer issues a citation to appear in court. Would this encourage more custodial arrests for minor offenses? In practice, such a development has not been widespread. While there are no Supreme Court cases which assert any limitation on taking persons into custody for matters such as minor traffic offenses; evidence has been suppressed in lower federal courts upon a showing that a desire to seek such evidence was the motivation behind arrest for such minor crimes as vagrancy, *Green v. United States*, 386 F.2d 953 (10th Cir. 1967), or a traffic violation, *Gonzales v. United States*, 391 F.2d 308 (5th Cir. 1968).

police forces will not misuse their discretionary powers. At the same time, *Mimms* exhibits much less concern for individual rights than did *Terry*. The *Terry* Court stressed the importance of individual liberty in relation to "stop and frisk" searches even as they upheld a police search. As that Court noted, even a limited search "of the outer clothes for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."⁹⁰

The *Mimms* Court, on the other hand, emphasized the "de minimus" nature of the intrusion caused by ordering a driver out of his car. While one may accept the fact that such an intrusion is necessary for the safety of police officers who confront harmful as well as harmless individuals each day, this change in attitude regarding the possibility of police violation of individual rights must be noted with misgiving as the greatest difference between the Warren Court's decision in *Terry* and the Burger Court's decision in *Mimms*.⁹¹

Adams v. Williams,⁹² the transitional "stop and frisk" case between *Terry* and *Mimms*, was decided during the early years of the Burger Court. Written by Justice Rehnquist, this decision for the first time carried over the "stop and frisk" rationale to vehicle stops and gave a good indication of the direction which the Court would take in this area of the law. In *Adams*, a police officer acting on an informant's tip approached the occupant of a vehicle and requested the driver to get out. Instead, the occupant rolled down the window and the officer conducted a frisk through the window, uncovering a weapon where the informant had said it would be.⁹³ The defendant's argument that only personal

⁹⁰ 392 U.S. at 24-25.

⁹¹ *Cf.*, *Sibron v. New York*, 392 U.S. 41 (1968). In this companion case to *Terry v. Ohio*, the Supreme Court consolidated two *Terry*-like situations where the "stop and frisk" resulted in evidence used to convict appellants. In one case, a police officer had observed one of the defendants in conversation with known narcotics addicts over a long period of time. However, the officer saw nothing pass between the men and did not overhear their conversations. His warrantless search through defendant's pockets based on this observation alone was held to constitute an unreasonable search and seizure under the fourth amendment. In the second case, a police officer had observed several individuals (unknown to him) acting suspiciously inside his apartment building. His pat-down search resulted in the discovery of burglar tools and was held by the Court to be a valid "stop and frisk" based on justifiable suspicion of criminal activity.

⁹² 407 U.S. 143 (1972).

⁹³ *Id.* at 145.

observation could legitimize the "stop and frisk" was rejected by the Court. As the Court maintained: "We reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person."⁹⁴

The *Mimms* decision followed *Adams* by five years and did not significantly alter that holding. Once the *Adams* Court had permitted a police officer to stop a vehicle and make a frisk search based on an informant's tip alone, it would not be difficult to carry that logic (at least that part encompassing the police officer's order that the driver get out of the vehicle) over to every traffic-violation stop which is potentially just as dangerous to the officer.

DEVELOPMENTS AFTER *MIMMS*

What does the *Mimms* decision mean for the future development of the law of warrantless "stop and frisk" searches and seizures? Several narrow questions remain. These include questions such as whether a police officer would be entitled to order other occupants besides the driver out of a stopped vehicle, or whether police officers may order drivers out of their vehicles in the absence of a traffic violation. Regarding the former question, Justice Stevens' argument in dissent is convincing that

the Court's logic necessarily [also] encompasses the passenger. This is true even though the passenger has committed no traffic offense. . . . [W]hen the justification rests on nothing more than an assumption about the danger associated with every stop—no matter how trivial the offense—the new rule must apply to the passenger as well as to the driver.⁹⁵

If this *Mimms* ruling could be applied to an occupant who has not committed a traffic violation, might not the order be applied to drivers even in the absence of a traffic violation? In a recent case,⁹⁶ one federal court of appeals relied on *Mimms* to justify a police officer's order that two persons

get out of their car so that the officer could question them about their activities.⁹⁷ Another possible ramification of *Mimms* involves the question of permitting frisks of drivers even in the absence of observable justification for a suspicion of danger. *Mimms* still requires such observable justification prior to the frisk though not prior to the order out of the car. However, Justice Stevens noted in his *Mimms* dissent that the safety rationale might be used to carry the officer's right even this far.⁹⁸

CONCLUSION

The *Mimms* decision fits almost perfectly the form if not the spirit of the *Terry* decision, and it follows the trend set by the Burger Court in the area of warrantless stop and frisk searches. That trend is to enlarge the rights of the police officer to interfere with a driver's privacy rights. Since the requirement of personal observation of suspicious activity had been eliminated by the Court in the *Adams* case, every potentially dangerous traffic stop now presents a situation where the officer may order the driver out of his vehicle, under the *Mimms* rationale, for the officer's protection. While this trend was not logically precluded by the Warren Court's decision in the *Terry* case, it does represent a considerably different view of the balance between the public interest and the individual's rights involved in fourth amendment cases specifically and criminal justice cases generally. Despite *Mimms*, one hopes the Court will still continue to recognize the imperative need of striking a fair and reasonable balance between these interests.

⁹⁷ "Most narrowly, the Court has simply held that whenever an officer has occasion to speak with the driver of a vehicle, he may also order the driver out of the car." 434 U.S. at 122 (Stevens, J., dissenting). *But see id.* at 111 n.6 where the majority refutes this implication of *Mimms*.

⁹⁸ According to Stevens:

If this new rule is truly predicated on a safety rationale, . . . it should also justify a search for weapons, or at least an order directing the driver to lean on the hood of the car with legs and arms spread out. For unless such precautionary measures are also taken, the added safety—if any—in having the driver out of the car is of no value when a truly dangerous offender happens to be caught. 434 U.S. at 123 (Stevens, J., dissenting).

⁹⁴ *Id.* at 147.

⁹⁵ 434 U.S. at 122-23 (Stevens, J., dissenting).

⁹⁶ *Government of the Canal Zone v. Bender*, 573 F.2d 1329, 1331 (5th Cir. 1978). Although the court said that the order out of the vehicle was proper, they did not admit evidence obtained from a search of the vehicle.