

Winter 1981

Fourth Amendment--Detention of Occupants During a Premises Search: The Winter of Discontent for Probable Cause

Jeffrey J. Vawrinek

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

Jeffrey J. Vawrinek, Fourth Amendment--Detention of Occupants During a Premises Search: The Winter of Discontent for Probable Cause, 72 J. Crim. L. & Criminology 1246 (1981)

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.

FOURTH AMENDMENT—DETENTION OF OCCUPANTS DURING A PREMISES SEARCH: THE WINTER OF DISCONTENT FOR PROBABLE CAUSE

Michigan v. Summers, 101 S. Ct. 2587 (1981).

The Supreme Court undertook a major dismantling of the probable cause requirement of the fourth amendment¹ by its recent decision in *Michigan v. Summers*.² In *Summers*, the Court held that a valid search warrant implicitly authorizes police to detain an occupant who has left the premises, even if the seizure lacks probable cause. The Court reasoned that the detention can be justified as "reasonable" because the government interests in crime prevention and officer safety outweigh the severity of the individual intrusion.³

In *Summers*, the Court widened the gap between the once equivalent fourth amendment terms of "reasonableness" and "probable cause." Previously, subject to two limited exceptions,⁴ a valid, hence, "reason-

¹ U.S. CONST. amend. IV provides:

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

² 101 S. Ct. 2587 (1981).

³ *Id.* at 2593.

⁴ The Supreme Court recognized two limited exceptions to the probable cause requirement. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court approved a frisk for weapons as a justifiable response to an officer's reasonable belief that he was dealing with a possibly armed and dangerous suspect. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court upheld brief stops of vehicles at international borders to question occupants about their citizenship. These two probable cause exceptions are not to be confused with other exceptions to the warrant requirement. *Terry* and *Brignoni-Ponce* involved encounters which were "less intrusive" than a traditional arrest. The traditional warrant exceptions, however, involve intrusions which often amount to full searches or seizures, *see* C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 4.03 at 108 (1980). These encounters are sanctioned by the courts in the interest of officer safety or judicial convenience. Traditional warrant exceptions include search and seizures incident to a valid arrest, *see, e.g.*, *Chimel v. California*, 395 U.S. 752 (1969); plain view seizures, *see, e.g.*, *Ker v. California*, 374 U.S. 23 (1963); searches or seizures while in hot pursuit, *see, e.g.*, *Warden v. Hayden*, 387 U.S. 294 (1967); and automobile searches and seizures, *see, e.g.*, *Carroll v. United States*, 267 U.S. 132 (1925). Administrative searches, another warrant exception, require prior judicial ap-

able" seizure⁵ could occur only when the officer had probable cause to believe that a felony had been committed by the person to be arrested. With *Summers*, the Court has shifted its "reasonableness" focus from the existence of probable cause to the intrusiveness of the detention.⁶ After *Summers*, seizures which are "less intrusive" than a traditional arrest will trigger a balancing test to determine their reasonableness, regardless of a possible lack of probable cause.⁷ The Court, however, failed to articulate, or even agree upon, a standard for determining a "less intrusive" seizure. This vagueness invites not only confusion and disparity among courts deciding the propriety of a seizure, but also abuse by police officers no longer restrained by the more stringent probable cause requirement. By expanding the scope of exceptions to the probable cause requirement, *Summers* harkens its further deterioration.

I. FACTS OF SUMMERS

On October 10, 1974, Detroit police officers were dispatched to execute a warrant to search a residence for heroin and any other narcotics or paraphernalia.⁸ The warrant did not name the owner of the premises. The only reference to a particular person in the warrant was the statement that a police informant had previously bought heroin at the address from a black male known as "George."⁹

Upon arriving at the residence, Officer Roger Lehman observed George Summers go out the front door of the building and proceed down the steps. Summers was stopped and asked to open the door. He informed the officers "that he could not because he had left his keys inside, but that he could ring someone over the intercom."¹⁰ Dwight Calhoun came to the door, but refused to admit the officers.¹¹ The of-

proval before the search can be conducted, but do not require that probable cause attach to each particular building or location in the scope of the search. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967). But see *South Dakota v. Opperman*, 428 U.S. 364 (1976) (warrantless inventory search, without probable cause, of automobile impounded by police after a parking violation held not "unreasonable"). For further discussion of the often confused area of warrant exceptions, see generally Haddad, *Well Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & C. 198 (1977).

⁵ In *Terry*, the Court stated:

It is quite plain that the Fourth Amendment governs "seizures" of persons which do not eventuate in a trip of the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

392 U.S. at 16.

⁶ 101 S. Ct. at 2593.

⁷ *Id.*

⁸ *People v. Summers*, 407 Mich. 440, 286 N.W.2d 226 (1979).

⁹ *Id.*

¹⁰ *Id.* at 441, 286 N.W.2d at 227.

¹¹ *Id.* at 441, 286 N.W.2d at 226-27.

ficers forced open the door. Once inside, Officer Lehman instructed Officer Anthony Conant to bring Summers, still on the porch, into the house.¹²

The eight occupants of the house were detained, and a subsequent search of the premises by the officers produced two plastic bags of suspected narcotics. After determining that Summers was the owner of the house, Officer Conant formally arrested him for violation of the Michigan Controlled Substances Act of 1971.¹³ A custodial search of Summers then revealed a plastic bag containing heroin in his jacket pocket. This heroin formed the basis for Summers' arrest.¹⁴

On November 19, 1974, the trial court, finding that the police lacked probable cause to arrest Summers, granted a motion to suppress the evidence and quashed the information. The Michigan Court of Appeals affirmed the trial court.¹⁵

The Supreme Court of Michigan also affirmed the trial court's judgment.¹⁶ It determined that Summers' detention amounted to a seizure under *Terry v. Ohio*.¹⁷ Citing *Dunaway v. New York*,¹⁸ the court emphasized that the general issue in determining the legality of a seizure-detention is whether the officer had probable cause to arrest, not whether the officer's actions were reasonable under the circumstances.¹⁹ Holding that the seizure of Summers on his porch, and his subsequent detention were not limited intrusions permissible under *Terry*,²⁰ the court rejected the use of a multi-factor balancing test to determine reasonableness.²¹ The United States Supreme Court granted certiorari to

¹² *Id.*

¹³ MICH. COMP. LAWS ANN. § 335.341(4)(a) (1971) (repealed 1978).

¹⁴ 407 Mich. at 453, 286 N.W.2d at 232.

¹⁵ 68 Mich. App. 571, 243 N.W.2d 689 (1976). Under Michigan law, the contraband found in Summers' basement would have been insufficient to support his conviction in light of the presence of eight other occupants in his house. *See* *People v. Davenport*, 39 Mich. App. 252, 197 N.W.2d 521 (1972). The Michigan Court of Appeals thus concluded that the officers did not have probable cause to arrest or search Summers. 68 Mich. App. at 580-82, 243 N.W.2d at 693.

¹⁶ *People v. Summers*, 407 Mich. at 450, 286 N.W.2d at 231.

¹⁷ *Id.* at 444, 286 N.W.2d at 227-28. The court stated that "the testimony of Officer Conant at the preliminary examination indicates that the defendant was not free to leave the front porch as the premises search warrant was executed, but was instead escorted into his house and deprived of his liberty. At that time, the initial inquiry and cooperative response terminated. This further detention of the defendant, by bringing him into the house, was a 'seizure' as defined by the United States Supreme Court" (citing *Terry v. Ohio*, 292 U.S. 1, 19 n.16).

¹⁸ 442 U.S. 200 (1979). For a further discussion of *Dunaway*, see text accompanying note 70 *infra*.

¹⁹ 407 Mich. 444, 286 N.W.2d at 228.

²⁰ *Id.* at 448, 286 N.W.2d at 230.

²¹ *Id.* at 448-49, 286 N.W.2d at 230. The majority, per Justice Moody, reasoned that "to sanction a further detaining of defendant without probable cause would in effect replace the

determine whether the initial detention of Summers violated his constitutional right to be protected from an unreasonable seizure of his person.²²

II. DECISION OF THE SUPREME COURT

The United States Supreme Court, per Justice Stevens, reversed the Michigan Supreme Court in a six to three decision.²³ It held that a valid search warrant implicitly authorized the detention of the occupants of the premises, without probable cause, while the search is conducted.²⁴ Justice Stewart, joined in dissent by Justices Brennan and Marshall, disagreed, arguing that such detention is not "reasonable" for fourth amendment purposes.²⁵

The *Summers* majority conceded that Summers had been seized without probable cause.²⁶ Although recognizing the general fourth amendment rule that every seizure having the essential attributes of a formal arrest is unreasonable if unsupported by probable cause, the majority held that in determining whether this general rule applies, both the character of the intrusion and its justification must first be examined.²⁷ The Court noted that some seizures without probable cause, significantly less intrusive than an arrest, are not violative of the reasonableness standard of the fourth amendment.²⁸ The majority found Summers' detention to be a significant restraint on his liberty, yet less intrusive than the search itself, and "substantially less intrusive" than an arrest.²⁹ Justice Stevens was especially influenced by the fact that the

fundamental and essential probable cause standard with a multi-factor balancing test specifically rejected by the United States Supreme Court in *Dunaway*." *Id.* Justice Williams, dissenting, suggested that a balancing test be used to determine the legality of the search. Four criteria would be considered: the existence of exigent circumstances, the necessity for public protection, whether or not the instruction upon the individual's privacy was reasonably related to the scope of the circumstances, and, finally, whether or not the seizure was reasonable in order to protect the officer's safety. *Id.* at 459-63, 286 N.W.2d at 235-37.

²² 449 U.S. 898 (1980).

²³ 101 S. Ct. at 2587.

²⁴ *Id.* at 2595.

²⁵ *Id.* (Stewart, J., dissenting).

²⁶ *Id.* at 2590.

²⁷ *Id.* at 2593.

²⁸ *Id.* Although acknowledging that in *Dunaway v. New York*, 442 U.S. 200, it had refused to allow a seizure exception that would swallow the general probable cause rule, the majority stressed that *Dunaway* recognized instances in which seizures that were substantially less intrusive than arrests withstood scrutiny under the reasonableness standard. 101 S. Ct. at 2591. It cited as examples *Terry v. Ohio*, 392 U.S. 1 (stop and frisk), *United States v. Brignoni-Ponce*, 422 U.S. 873 (vehicle "stops" near the border if articulable facts exist indicating that the vehicle contains illegal aliens), and *Adams v. Williams*, 407 U.S. 143 (1972) (seizure of gun without probable cause). 101 S. Ct. at 2591-92.

²⁹ *Id.* at 2593. In the majority's view the fact that Summers was leaving the house as the officers arrived was not constitutionally significant. It maintained that the detention of Sum-

search warrant authorizing the substantial invasion of privacy was issued by a neutral magistrate.³⁰ He reasoned that since the detention was in Summers' residence, the detention added little to the public stigma³¹ associated with the actual search.³² Justice Stevens further maintained that the type of detention imposed upon Summers would have little potential for police exploitation, since the information the officers normally seek they could obtain through the search and not through the detention.³³

In determining the justification for the detention, the majority considered both the law enforcement interests and the "articulable facts" supporting the detention.³⁴ Justice Stevens noted that the most obvious law enforcement interest facilitated by such detention is the prevention of flight in the event that incriminating evidence is found.³⁵ Second, he recognized that an interest exists in minimizing the danger to police officers.³⁶ Finally, Justice Stevens suggested that an orderly search is facilitated if the occupants of the premises are present to assist in opening locked doors and containers in order to avoid delay and the unnecessary use of force.³⁷

The majority also considered the nature of the articulable and individualized suspicion on which the police based their seizure of Summers. It stressed that a neutral magistrate, rather than an officer in the field, had determined that the police should be authorized to invade the privacy of a home in order to search for contraband.³⁸ The majority rea-

mers on the sidewalk outside his residence was no more intrusive than the detention of those residents inside the house. *Id.* at 2594, n.16.

³⁰ *Id.* at 2593.

³¹ Justice Stevens appears here to be distinguishing between the public and private stigma attached to a seizure. However, a detention in one's residence, though never made public (thus creating no public stigma) might nevertheless be intrusive, or an invasion of privacy.

³² 101 S. Ct. at 2593.

³³ *Id.* In support of this rationale, Justice Stevens cited Professor LaFave, who has suggested that the reasonableness of a detention may be determined in part by "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or the other very soon. . . ." 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.2 at 40 (1978). However, Justice Stewart, in dissent, recognized that the logic of the majority's final argument is not immediately clear. 101 S. Ct. at 2598, n. 4 (Stewart, J., dissenting). See note 100 & accompanying text *infra*.

³⁴ *Id.* at 2594.

³⁵ *Id.*

³⁶ *Id.* Although finding no evidence of special danger to the officers in the record, the majority emphasized that warrants to search for narcotics often give rise to sudden violence or frantic attempts to destroy evidence. Thus, the danger to both police and the occupants of the searched premises is minimized if the officers are allowed to exercise unquestioned command of the situation. *Id.*

³⁷ *Id.*

³⁸ *Id.* The majority cited to Justice Jackson's discussion of the significance of such determination by a neutral judicial officer in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). 101 S. Ct. at 2594, n.18.

soned that the connection of Summers to the house specified on the search warrant gave the police a substantial, articulable basis for suspecting Summers' involvement with criminal activity, and therefore justified his detention.³⁹

The majority relied on the Court's decision in *Payton v. New York*⁴⁰ as the final basis for its holding. In *Payton*, the Court stated that in search and seizure cases the interposition of a magistrate's determination of probable cause between the zealous officer and the citizen is of prime importance. Far less significant is the distinction between search and arrest warrants.⁴¹ In *Summers*, the magistrate would have checked any initial over-zealous police activity. Thus, if evidence indicating that Summers' residence harbored contraband was sufficient to support the issuance of a warrant, then it is also constitutional to detain him while the search warrant is executed.⁴²

In his dissent, Justice Stewart expressed his belief that the majority had gone beyond the two limited exceptions to the general prohibition of seizures not based on probable cause.⁴³ He argued that *Terry* and *United States v. Brignoni-Ponce*⁴⁴ do not represent an "exemplary balancing test" for fourth amendment cases, but rather are two isolated, nar-

³⁹ 101 S. Ct. at 2594.

⁴⁰ 445 U.S. 573 (1980). In *Payton*, the Court held that police officers may not enter a private residence to make a routine felony arrest without first obtaining a warrant. In its holding, however, the *Payton* Court stated that for fourth amendment purposes "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspects lives when there is reason to believe the suspect is within." *Id.* at 602-03.

⁴¹ *Id.* at 602. The majority's position tends to blur the traditional dichotomy between the requirements needed for a search warrant and those needed for an arrest warrant. Professor LaFave notes that each requires a showing of probabilities about somewhat different facts and circumstances. For a search warrant to be valid, it must be supported by substantial evidence that the items sought are connected with criminal activity and are located in the place to be searched. A valid arrest warrant issues when the officer has "reasonable grounds to believe" that a felony has been committed by the person to be arrested. Obviously, there may be probable cause to search without probable cause to arrest, and vice versa. 1 W. LAFAVE, *supra* note 33 § 3.1 at 442, 443. The Court found this distinction to be crucial in *Stegald v. United States*, 101 S. Ct. 1642 (1981). In *Stegald*, the Court held that a valid arrest warrant does not authorize entrance into the residence of a third party not named on the warrant. The Court reasoned that an arrest warrant invoked as authority to enter into a third party's home suffers from the same infirmities as did the writs of assistance used in England and colonial America. *Id.* at 1651.

⁴² 101 S. Ct. at 2595.

⁴³ *Id.* at 2595-96 (Stewart, J., dissenting). See note 4 *supra*. Justice Stewart noted that the majority had jumped to the "very broad idea that the courts may approve a wide variety of seizures not based on probable cause so long as the courts find, after balancing the law enforcement purposes of the police conduct against the severity of their intrusion, that the seizure appears 'reasonable'." *Id.* at 2596 (Stewart, J., dissenting).

⁴⁴ 422 U.S. 873 (1975).

row exceptions to the probable cause requirement.⁴⁵ In both cases, the Court had identified a governmental interest, independent of the ordinary interest in crime prevention, which overcame the presumptive constitutional restraints on police conduct.⁴⁶ In *Summers*, however, no special governmental or law enforcement interest justified the seizure of the respondent. The officer's interests in preventing flight and in the facilitation of an orderly search were no greater than the ordinary police interests of preventing crime and apprehending wrongdoers.⁴⁷ Justice Stewart noted that such traditional police activities are the very ones which the fourth amendment seeks to restrain.⁴⁸

Justice Stewart also questioned the majority's view that *Summers'* detention was of the limited, unintrusive type that permits the Court to engage in a "reasonableness" balancing test.⁴⁹ Stewart noted that searches may require several hours for completion,⁵⁰ a period of detention which could scarcely be deemed unintrusive.

III. PRIOR EXCEPTIONS TO THE PROBABLE CAUSE REQUIREMENT

Before *Terry v. Ohio*,⁵¹ the fourth amendment requirement of probable cause⁵² for seizures was treated as absolute.⁵³ Examining the pre-*Terry* era, the court in *Dunaway v. New York* stated:

The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment. The standard applied to all arrests, without the need to "balance" the interests and circumstances involved in particular

⁴⁵ 101 S. Ct. at 2595-96 (Stewart, J., dissenting).

⁴⁶ *Id.* Justice Stewart emphasized that in both cases an interest existed beyond that of ordinary crime prevention. In *Terry*, the government interest of officer safety justified an exception to the requirement of probable cause. 392 U.S. at 26. In *Brignoni-Ponce*, the unique governmental interest in preventing the entry of illegal aliens, whose presence might create significant social and economic problems, required the relaxation of the probable cause standard. 422 U.S. at 879.

⁴⁷ 101 S. Ct. at 2597 (Stewart, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 2598 n.3. Justice Stewart cited *Harris v. United States*, 331 U.S. 145 (1947), in which an FBI search of a one-bedroom apartment for burglar tools and two checks took five hours.

⁵¹ 392 U.S. 1.

⁵² "Probable cause exists when 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense [has been committed by the person to be arrested]." *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162.).

⁵³ *Dunaway v. New York*, 442 U.S. at 208, (citing *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975); *Ker v. California*, 374 U.S. 23 (1963)).

situations.⁵⁴

Thus, before *Terry*, the terms "reasonableness" and "probable cause" were synonymous for fourth amendment purposes. The probable cause requirement was seen as the only acceptable fulcrum between the opposing interests of freedom from intrusion and effective law enforcement.⁵⁵

The Supreme Court first recognized an exception to the requirement that fourth amendment seizures be based on probable cause in *Terry v. Ohio*.⁵⁶ In *Terry*, the Court held that a stop and frisk without probable cause may be "reasonable" when an officer has a reasonable suspicion that he is dealing with an armed and dangerous individual.⁵⁷ To assess "reasonableness" a court must determine whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the original interference.⁵⁸ Such determination is made by balancing the severity of the intrusion⁵⁹ against the opposing interests of crime prevention and officer

⁵⁴ 442 U.S. at 208.

⁵⁵ "The rule of probable cause is a practical nontechnical conception affording the best compromise that has been found for accommodating these opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

⁵⁶ 392 U.S. 1. In *Terry*, a police officer observed two men pacing alternately on an identical route, pausing to stare in the same store window. Each completion of the route was followed by a discussion by the two, who at one time were joined by a third man. The officer, suspecting that the three were planning a break-in, approached them and asked their names. After receiving a mumbled response, the officer patted down Terry's clothing. The officer found a pistol in Terry's jacket. Terry was charged with carrying a concealed weapon.

The Supreme Court upheld the lower court's denial of Terry's motion to suppress the weapon as evidence. It conceded that a stop and frisk constituted a "seizure" for fourth amendment purposes, but nevertheless maintained that such an intrusion was much less severe than that involved in a traditional arrest. The Court held that stop and frisks do not fall under the concept of arrest, hence exempting them from the general rule requiring probable cause. *Id.* at 1-7, 20, 26.

⁵⁷ When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officers or to others, it would appear clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24. To conduct a valid stop and frisk, an officer does not have to have probable cause. Rather, he must meet the less stringent requirement of having a "reasonable suspicion" that the suspect is armed and dangerous. *Id.* at 27.

⁵⁸ *Id.* at 21. In assessing "reasonableness," the Court stated that "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22.

⁵⁹ The Court stressed that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21 (footnote omitted).

safety.⁶⁰

Terry thus represented a departure from the traditional rule that for fourth amendment purposes, only the presence of probable cause could demonstrate "reasonableness."⁶¹ *Terry* defined a special, narrow category of seizures which were so unintrusive that courts could employ a balancing test to determine their reasonableness. After *Terry*, the Court carefully maintained the narrow scope of this exception.⁶² In such cases as *Adams v. Williams*,⁶³ and *Pennsylvania v. Mimms*,⁶⁴ the Court followed

⁶⁰ *Id.* at 21. The Court had first employed a balancing test for determining reasonableness under the fourth amendment in *Camara v. Municipal Court*, 387 U.S. 523 (1967). In *Camara*, the Court balanced the need to search against the intrusion which the search creates in approving a "watered-down" test for probable cause for housing inspection warrants. This same balancing approach was used by the *Terry* Court to assess the reasonableness of the stop and frisk. 392 U.S. at 21.

⁶¹ In a vigorous dissent, Justice Douglas decried the replacement of the probable cause requirement for the less stringent, less certain standard of "reasonable suspicion," even for a narrowly drawn exception as a stop and frisk. *Id.* at 35 (Douglas, J., dissenting). Noting that a judge can issue a warrant based only upon probable cause, Justice Douglas questioned the logic of giving the police greater authority to conduct a search or seizure than a judge has to authorize them. For Justice Douglas, the infringement of personal liberty can be "reasonable" under the fourth amendment only if such infringement is based on probable cause. *Id.* at 37-38. Justice Douglas warned that to give police greater power than a judge is to "take a long step down the totalitarian path." *Id.* at 38. "[I]f the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime." *Id.* at 39.

⁶² The *Terry* Court limited its decision to the sanctioning of "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual . . ." *Id.* at 27.

⁶³ In *Adams v. Williams*, 407 U.S. 143 (1972), a police officer, acting upon an informant's tip that an individual seated in his car was armed, asked the suspect to open his car door. When the suspect responded by lowering the window, the officer reached into the car and found a loaded handgun (which had not been visible from the outside) in the suspect's waistband. The suspect was arrested for unlawful possession of a handgun. The Supreme Court, per Justice Rehnquist, reversed the Court of Appeals' holding that the evidence used at trial resulting in respondent's conviction had been unlawfully obtained. The Court held that the officer's conduct conformed to the standard enunciated in *Terry*. It ruled that reasonable suspicion for a stop and frisk can be based on an informant's tip, as well as personal observation. *Id.* at 147.

In dissent, Justice Brennan, citing Judge Friendly's dissenting opinion below, *Williams v. Adams*, 436 F.2d 30, 39 (2d Cir. 1970) (Friendly, J., dissenting), expressed his fear that if *Terry* is to be extended to cases of possessory offenses, the "sluiceways [will have opened] for serious and unintended erosion of the protection of the Fourth Amendment." 407 U.S. at 153 (Brennan, J., dissenting).

⁶⁴ *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), involved a police stop of an automobile with expired license plates. *Mimms* complied with the officer's request to step out of the car. The officer thereupon spotted a bulge under *Mimms*' sportsjacket. A frisk revealed a loaded gun. *Mimms* was arrested and charged with carrying a concealed weapon and an unlicensed firearm. The Supreme Court, in a per curiam opinion, balanced the interest of freedom from intrusion and effective law enforcement and ruled that the order to step out of the car was "reasonable" for fourth amendment purposes. *Id.* at 111. It reasoned that once a car is lawfully detained for a traffic violation, the order to step out was only a de minimis intrusion.

Terry in permitting stops which involved questioning and pat downs of suspects believed to be armed and dangerous.

The Supreme Court delineated a second narrow exception to the requirement of probable cause in *United States v. Brignoni-Ponce*,⁶⁵ when it held that brief vehicle stops near our international borders to question occupants about their citizenship were reasonable under the fourth amendment.⁶⁶ In *Brignoni-Ponce*, the Court affirmed the Court of Appeals' ruling that the ancestry of the passengers alone was not enough to make the seizure reasonable under the fourth amendment.⁶⁷ The Court went on to rule, however, that roving border patrol stops based upon articulable facts⁶⁸ that reasonably warrant the suspicion that the vehicle may contain illegal aliens are "reasonable" under the fourth amendment, despite the lack of probable cause. The Court balanced the need for border stops to help stem the flow of illegal aliens against the modest intrusion⁶⁹ of the stop, and ruled that such intrusions were justified. The Court warned, however, that the officer must have probable cause to support any further search or detention beyond minimal questioning concerning citizenship or immigration status.⁷⁰

In *Dunaway v. New York*,⁷¹ the Court refused to extend the balancing test to a situation where a suspect was taken without probable cause to a police station for questioning.⁷² It held that Dunaway's custodial inter-

The Court held that once the bulge was observed in Mimms' jacket, any man of "reasonable caution" would have conducted the frisk. *Id.* at 112.

⁶⁵ 422 U.S. 873.

⁶⁶ In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court held that the fourth amendment prohibits the use of roving patrols to search vehicles removed from the border, or its functional equivalents, when no warrant or probable cause exists. In *United States v. Brignoni-Ponce*, members of the United States border patrol made a roving patrol stop of a vehicle near the California-Mexico border. The officer's decision to stop the vehicle was based solely on his observation that the three occupants appeared to be of Mexican descent. Questioning of the three revealed that the two passengers were aliens who had entered the country illegally. All three were arrested, and *Brignoni-Ponce* was charged with two counts of knowingly transporting illegal aliens, in violation of 8 U.S.C. § 1324(a)(2) (1976) 422 U.S. at 875.

⁶⁷ *Id.* at 885-86.

⁶⁸ "Articulable facts" would include information concerning illegal border crossings in the area, a driver's behavior, and the observation of people trying to hide. Citing *Terry*, the Court stated "[i]n all situations, the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." *Id.* at 885.

⁶⁹ Investigative stops usually consume "less than a minute." Brief for United States at 25, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). There is no search of the vehicle or occupants. Usually, all that is required is response to a few brief questions or the production of a document which affirms the individual's right to be in the United States. 422 U.S. at 880.

⁷⁰ *Id.* at 881-82.

⁷¹ 442 U.S. 200.

⁷² In *Dunaway*, Rochester, New York police received information implicating Dunaway in an attempted robbery and homicide. Although the tip was insufficient to establish probable

rogation was substantially different from the less intrusive seizures of *Terry* and its progeny.⁷³ It contended that, unlike the narrowly circumscribed seizures of *Terry* frisks, the detention of Dunaway was in many respects indistinguishable from a traditional arrest.⁷⁴ The Court stressed that any "exception" that could cover a seizure as intrusive as Dunaway's "would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause."⁷⁵

The *Dunaway* Court expressly refused to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures which do not amount to technical arrests. It expressed its fear that fourth amendment protections could disappear in the balancing of the numerous factors that would necessarily be involved in each case.⁷⁶ The Court stressed that a single, familiar standard is needed to guide police officers, who have only limited time and expertise to balance the social and individual interests involved in the specific circumstances they confront.⁷⁷ It maintained that, for all but narrowly defined intrusions, the requisite balance has been embodied in the principle that seizures are reasonable only if supported by probable cause.⁷⁸

IV. ANALYSIS

With its holding in *Michigan v. Summers*, the Supreme Court has shifted the focus of review for fourth amendment seizures from the existence of probable cause to the "intrusiveness" of the seizure. The intrusiveness of the seizure now becomes the principle for assessing its validity. The *Summers* Court failed, however, to articulate a working standard for "intrusiveness." This failure invites confusion among courts assessing the validity of a seizure, as well as abuse by police of-

cause, Dunaway was taken into custody and transported to police headquarters for questioning. Although Dunaway was not told he was under arrest, he would have been physically restrained had he attempted to leave. After being given proper *Miranda* warnings, Dunaway was interrogated by the officers. He eventually made statements and drew sketches that incriminated him in the crime. The trial court granted Dunaway's motion to suppress the statements and sketches due to the officer's lack of probable cause to effect the seizure. *Id.* at 203.

⁷³ *Id.* at 212.

⁷⁴ *Id.* Dunaway was not questioned briefly when found, but was taken to a police car, transported to the police station and placed in an interrogation room. He was not free to leave. *Id.*

⁷⁵ *Id.* at 213.

⁷⁶ *Id.* The Court feared that fourth amendment protections could disappear "in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime'" (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

⁷⁷ 442 U.S. at 213-14.

⁷⁸ *Id.* at 214.

ficers no longer guided by the more clearly defined standard of probable cause.

The *Summers* majority determined that before it could decide whether *Summers*' detention fell within the general rule requiring probable cause, it had to examine the character of the intrusion.⁷⁹ Under *Summers*, probable cause must still support an "intrusive" seizure. If, however, seizure is deemed "significantly less intrusive than an arrest," the Court will balance the intrusion upon the individual against the articulable law enforcement interests in order to determine reasonableness.⁸⁰ No longer is the objective presence of probable cause the pre-eminent factor in determining the validity of a fourth amendment seizure. Instead, the Court has invited uncertainty by allowing an unclear intrusiveness standard to trigger a balancing test. *Summers* goes far to confirm Justice Marshall's fear that the *Terry* balancing test would not be a narrowly defined exception, but a general rule to be applied in all instances.⁸¹

A. FAILURE TO ARTICULATE A STANDARD FOR "INTRUSIVENESS"

In *Summers*, the Court failed to articulate a definite standard for "intrusiveness." Indeed, the Justices were unable to agree among themselves as to whether *Summers*' detention was "significantly less intrusive" than a traditional arrest. Writing for the majority, Justice Stevens argued that *Summers*' detention, although a significant restraint on liberty, was "surely less intrusive than the search itself."⁸² He reasoned that most citizens would want to remain in order to observe the search of their possessions, unless they intended to flee to avoid arrest.⁸³ The majority provided no further explanation, however, to support its conclusion that *Summers*' detention was unintrusive.

Justice Stewart, in dissent, noted that the majority's holding,⁸⁴ could lead to a detention without probable cause of several hours if a

⁷⁹ 101 S. Ct. at 2593.

⁸⁰ *Id.* at 2594.

⁸¹ In his dissent in *Adams v. Williams*, Justice Marshall stated that:

In today's decision the Court ignores the fact that *Terry* begrudgingly accepted the necessity for creating an exception from the warrant requirement of the Fourth amendment and treats this case as if warrantless searches were the rule rather than the "narrowly drawn" exception. This decision betrays the careful balance that *Terry* sought to strike between a citizen's right to privacy and his government's responsibility for effective law enforcement and expands the concept of warrantless searches far beyond anything heretofore recognized as legitimate.

⁸² 407 U.S. 143, 154-55 (Marshall, J., dissenting).

⁸³ 101 S. Ct. at 2593 (footnote omitted).

⁸⁴ *Id.*

⁸⁴ Justice Stewart quoted the majority holding as follows: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is being conducted." *Id.* at 2595.

thorough, lengthy search was conducted.⁸⁵ Since the majority had provided little guidance for its intrusiveness standard, this obviously intrusive detention would nevertheless be authorized by the majority's holding. For Justice Stewart, the probable cause requirement continues to embody the best compromise for accommodating the competing interests of safeguarding individual privacy and enforcing the law.⁸⁶

The majority opinion failed to look beyond the factual circumstances of *Summers* and thus falls short of setting a workable standard for future determinations of intrusiveness. The majority did not provide the lower courts with a clear line of demarcation separating "intrusive" and "less intrusive" seizures. By failing to establish a workable standard, the Court has opened the door for confusion and disparity in the ascertainment of a "reasonable" seizure under the fourth amendment.

B. VIEWS CONCERNING A BALANCING OF INTERESTS

The Supreme Court has previously addressed the issue of balancing the opposing interests of freedom from intrusion and effective law enforcement.⁸⁷ Most recently, in *Dunaway v. New York*,⁸⁸ the Court expressly rejected the notion of extending the balancing test to all seizures not amounting to a technical arrest. It expressed fear that fourth amendment protections could easily disappear "in the balancing of multifarious circumstances presented by different cases . . ."⁸⁹ The *Summers* decision ignored this warning, and invites the dangers that a balancing approach can create.

Advocates of a balancing approach believe that justice might be better served by weighing the opposing interests involved. Many commentators deplore the fact that obviously guilty defendants are set free because of a comparatively minor police intrusion of privacy.⁹⁰ They contend that rigid fourth amendment standards often limit pre-arrest investigative techniques, and afford more protection to the law-breaker than to the law-abiding citizen.⁹¹ Under a balancing approach, standards would be flexible enough to make allowances for minor police

⁸⁵ *Id.* at 2598 (Stewart, J., dissenting).

⁸⁶ *Id.*

⁸⁷ *See, e.g.* *United States v. Brignoni-Ponce*, 422 U.S. 873; *Adams v. Williams*, 407 U.S. 143; *Terry v. Ohio*, 392 U.S. 1; *Camara v. Municipal Court of San Francisco*, 387 U.S. 523.

⁸⁸ 442 U.S. 200.

⁸⁹ *Id.* at 213 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

⁹⁰ *See* S. SCHLESINGER, EXCLUSIONARY INJUSTICE 60-61, (1977); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence*, 62 JUDICATURE 214 (1978); Comment, *Contempt of Court As An Alternative to the Exclusionary Rule*, 72 J. CRIM. L. & C. 993, 1019 (1981).

⁹¹ *See* Bartlett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 70-72.

intrusions in light of a pressing law enforcement interest.⁹²

The benefits of such a balancing test may be outweighed by the confusion and potential abuse which it invites. Commentators have expressed doubt whether a case-by-case balancing approach is the most practical for solving probable cause issues.⁹³ Professor Wayne LaFave noted that a balancing approach is of little help if the balancing is so difficult and unpredictable that police or judges are consistently unable to reach a proper conclusion.⁹⁴ Professor Anthony Amsterdam has also expressed concern over the confusion that adoption of a balancing approach would cause, suggesting that it would convert the fourth amendment into "one immense Rorschach blot."⁹⁵ For Professor Amsterdam, the varieties of police behavior and the occasions that call it forth are so innumerable that "their reflection in a general sliding scale approach would only produce more slide than scale."⁹⁶

A balancing test invites police abuse as well.⁹⁷ In his dissenting opinion in *Brinegar v. United States*,⁹⁸ Justice Jackson warned that any privilege of warrantless search and seizure sustained by the courts will

⁹² Professor Bartlett asks:

Would not the policy of the Fourth Amendment be better served by an approach which determines the reasonableness of each investigative technique by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved?

Id. at 63 (footnote omitted).

⁹³ See, e.g., 2 W. LAFAVE, *supra* note 33 § 3.2 at 451; Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388-95 (1974).

⁹⁴ If by a process of balancing a multitude of factors and considerations it can be said that the theoretically "correct" result regarding probable cause would be reached 100% of the time, but the test so construed is so difficult to comprehend and apply that officers and judges with the best of intentions will be able to apply it correctly only 75% of the time, it might well be argued that we are better off with a more crude probable cause rule that will produce the theoretically "correct" result 90% of the time but which is clear enough that the instances of good faith erroneous application will be extremely infrequent.

2 W. LAFAVE, *supra* note 33, § 3.2 at 451.

⁹⁵ Amsterdam, *supra* note 93, at 393. Professor Amsterdam believes that the current state of the law is a "paragon of simplicity" compared to what a graduated fourth amendment would produce. *Id.* Similar sentiments to those of Professor Amsterdam were expressed by Professor Bacigal: "Because of the complex valuation judgments involved, a court may find it nearly impossible to verbalize the balance of competing interests struck in any case." Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. F. 763, 781 (footnote omitted).

⁹⁶ Amsterdam, *supra* note 93, at 394.

⁹⁷ *Id.* Professor Amsterdam noted that "reasonableness" under a balancing approach would be decided in the first instance by the trial court. The result would be that appellate courts defer to the trial courts and the trial courts will defer to the police. He argues that if there are no clear rules defining police behavior, courts will seldom deem a policeman's conduct "unreasonable."

⁹⁸ 338 U.S. 160 (1949).

be interpreted and pushed to the limit by police officers.⁹⁹ In *Summers*, the Court maintained that the type of detention imposed on Summers is not likely to be exploited or unduly prolonged by an officer because the information the officer normally seeks will be obtained through the search, not through the seizure.¹⁰⁰ This reasoning is rather opaque, for it suggests that the reason for detaining a suspect is the convenience of having him available for arrest. It ignores the temptation for police officers to use such detention as a back-up "secondary evidence source" in the event that the search is not fruitful.¹⁰¹ Police convenience, in any event, does not constitute a justifiable rationale for detaining an individual, possibly for hours, without probable cause.

The probable cause test is an objective one.¹⁰² Probable cause cannot be established by a policeman's subjective belief that he has grounds for his action.¹⁰³ Rather, the detached, neutral magistrate must evaluate the reasonableness of a proposed search or seizure in light of its particular circumstances before probable cause is adjudged to be present.¹⁰⁴ The adoption and maintenance of this safeguard to civil liberties was a reaction to the tyranny experienced in colonial times.¹⁰⁵ When the Court in *Terry* and *Brignoni-Ponce* saw need to allow exceptions to the probable cause requirement, they were careful to limit the exception to a narrow scope of circumstances. As noted by Justice Stewart in his *Summers* dissent, the unusual law enforcement interest justifying the exceptions provided a limiting principle insuring the narrowness of police action.¹⁰⁶ In *Summers*, the nature of the law enforcement interest is not

⁹⁹ *Id.* at 182 (Jackson, J., dissenting).

¹⁰⁰ 101 S. Ct. at 2593. In *Summers*, however, Summers was charged with possession of the heroin found on his person, and was not charged with possession of the heroin found in his house during the initial search.

¹⁰¹ As Justice Stewart noted in dissent, the majority's view begs the question whether the duration of the search threatens the person with a lengthy detention. *Id.* at 2598, n.4 (Stewart, J., dissenting).

¹⁰² 2 W. LAFAVE, *supra* note 33 § 3.2 at 459. See also C. WHITEBREAD, *supra* note 4, at 113.

¹⁰³ 2 W. LAFAVE, *supra* note 33 § 3.2 at 459.

¹⁰⁴ *Id.*

¹⁰⁵ As explained by the Court in *Henry v. United States*, 361 U.S. 98 (1959):

The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against that practice . . .

That philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that has survived to this day.

Id. at 100-01 (footnotes omitted).

¹⁰⁶ 101 S. Ct. at 2596-97 (Stewart, J., dissenting).

unusual, but, rather, represents the ordinary police interest in preventing crime. *Summers* does not provide a limited situation or narrow law enforcement interest which would minimize the possibilities of arbitrary and unlawful detention. In failing to do so, *Summers* places in serious jeopardy the protective wall of probable cause.

C. APPLICATION OF THE BALANCING TEST IN MICHIGAN V. SUMMERS

The *Summers* decision demonstrates how improper application of a balancing test could erode fourth amendment protections. In "balancing test" cases such as *Terry* and *Brignoni-Ponce*,¹⁰⁷ narrow exceptions were granted only in light of a greater governmental interest than the ordinary interest in investigating crime.¹⁰⁸ In its balance of competing interests, the *Summers* majority justified the detention of Summers with three separate law enforcement interests: the prevention of flight in the event that incriminating evidence is found, the facilitation of the search by having the occupants available for needed assistance, and the minimization of the risk of harm to officers.¹⁰⁹ The first two interests would appear to be common law enforcement interests present in every seizure situation.

Almost every police-suspect encounter creates the possibility that the suspect will flee. Few searches could not be facilitated by the presence of the homeowner. To allow these interests to justify a probable cause exception would sanction the total demise of the requirement. Rarely would police be unable to use these factors as a justification for ignoring the requirement of probable cause.

The minimization of risk to police officers was not an interest which could logically justify the detention of Summers, and, in fact, the *Summers* majority conceded that the record suggested no such danger in *Summers*.¹¹⁰ It maintained, nevertheless, that a search warrant for narcotics is the type that may give rise to sudden violence.¹¹¹ This danger, however, is present in many other areas of police work as well. Moreover, the danger was far less substantial than in the *Terry* situation, where the officer has a reasonable suspicion that the suspect is armed and dangerous.¹¹² *Summers* would appear to exempt from the probable cause requirement all police conduct related to narcotics, and conceivably, any

¹⁰⁷ See note 4 *supra*.

¹⁰⁸ In *Terry*, the independent interest was the protection of police officers. 392 U.S. at 23. In *Brignoni-Ponce*, the social and economic need to reduce the flow of illegal immigration justified making a narrow exception to the probable cause requirement. 422 U.S. at 878-79.

¹⁰⁹ 101 S. Ct. at 2594.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 392 U.S. at 28.

other police activity in which the possibility of sudden violence exists. This creates a gaping hole in the probable cause requirement, a gap which swallows the narrowly drawn exceptions for weapon frisks and border searches.

V. CONCLUSION

In *Michigan v. Summers*, the Supreme Court has gone well beyond the spirit of the limited exceptions to the probable cause requirement. The *Summers* decision places the focus on the intrusiveness of the seizure, rather than the existence of probable cause. The Court has opened the door for confusion and abuse, however, by failing to define what constitutes "intrusiveness" in triggering a balancing test for the opposing interests of freedom from intrusion and law enforcement. In turn, the *Summers* Court's actual application of the balancing test demonstrates the real possibility that fourth amendment protections may be lost in the process of assessing the weights of various opposing interests. The *Summers* decision makes more unclear the already murky waters of the fourth amendment.

JEFFREY J. VAWRINEK