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Is the Fourth Circuit Starting to Hold Back?: Examining Possible Changes in How the Court Approaches Searches, Seizures, and Suppression

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**IS THE FOURTH CIRCUIT STARTING TO HOLD BACK?:
EXAMINING POSSIBLE CHANGES IN HOW THE COURT APPROACHES
SEARCHES, SEIZURES, AND SUPPRESSION**

Derek A. Shoemake*

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I. INTRODUCTION

The United States Court of Appeals for the Fourth Circuit has, on at least three recent and significant occasions, reversed a district court's order denying a criminal defendant's motion to suppress evidence and found that the underlying law enforcement action was constitutionally unreasonable.¹ Read together, these cases could provide insight into how a changing Fourth Circuit examines the constitutional reasonableness of law enforcement action when it reviews a motion to suppress.

It would be difficult to overstate the importance of a ruling on a motion to suppress evidence in a federal criminal proceeding. Such a ruling strikes at the very heart of the government's case—denial can help assure a conviction at trial or prompt a guilty plea to the charged offense, while suppression can weaken the government's case and result in a dismissal, acquittal, or a plea to some lesser

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1. See *United States v. Watson*, 703 F.3d 684 (4th Cir. 2013) (excluding incriminating statement made during three-hour detention); *United States v. Sowards*, 690 F.3d 583 (4th Cir. 2012) (reversing district court after finding police officer's visual speed estimate unreliable); *United States v. Edwards*, 666 F.3d 877 (4th Cir. 2011) (finding search unreasonable where police officer used knife to cut bag containing narcotics off defendant's penis).

charge.² The fact that the vast majority of motions to suppress are denied possibly explains why most federal criminal cases end in guilty pleas or convictions.³ Thus, any indication of a possible shift, however slight, in how a federal appellate court reviews a district court's ruling on a motion to suppress is significant, particularly when that shift indicates a more exacting analysis of the police conduct underlying the suppression motion.

In terms of court composition, the Fourth Circuit is surely changing. Once regarded as among the most conservative federal appellate courts in the country, the Fourth Circuit has recently been described as considerably more moderate.⁴ Of the fifteen active federal judges on the Fourth Circuit, ten are now the appointees of Democratic presidents.⁵ Six of those judges have been appointed

2. See M. Jackson Jones, *The Fourth Amendment and Search Warrant Presentment: Is a Man's House Always His Castle?*, 35 AM. J. TRIAL ADVOC. 525, 564 (2012) ("The motion to suppress is one, if not the most important, ex post protection available to citizens. . . . Once evidence is suppressed, the government's case becomes significantly more difficult to prove."); George C. Thomas III, *Judges Are Not Economists and Other Reasons to Be Skeptical of Contingent Suppression Orders: A Response to Professor Dripps*, 38 AM. CRIM. L. REV. 47, 51 (2001) ("In the fifteen percent or so of cases in which the defendant files and wins the motion to suppress, reliable evidence is lost and the defendant either walks free or a very favorable plea bargain will result.").

3. See, e.g., Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211, 212 n.9 (2010) (discussing the reluctance of "trial judges to suppress evidence in all but the most egregious cases"); Thomas, *supra* note 2, at 50–51 (citing Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 596) (explaining that most cases result in a plea bargain and that the government will win as much as ninety percent of the time on a motion to suppress).

4. See, e.g., Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative than Others?*, 45 LAW & SOC'Y REV. 171, 171, 189 (2011) (explaining that "the Fourth Circuit is often singled out as particularly conservative," but finding on the basis of a study that "popular political discourse over ideological circuits is overblown"); Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 405 n.155 (2011) (discussing how the Fourth Circuit, once considered the "most conservative" circuit, has "become more moderate").

5. A listing of all current and former Fourth Circuit judges, along with information regarding their appointment, is available on the Fourth Circuit's web site. See *Judges of the Fourth Circuit, Since 1801*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/pdf/HistoryJudges.pdf> (last visited Mar. 9, 2013). A listing of the current judges is also available. See *Fourth Circuit Judges*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/JudgesBio/judgesmain.htm> (last visited Mar. 9, 2013). Although the web site lists sixteen judges, Judge Hamilton is on senior status. See *Biographical Information: Senior Judge Clyde H. Hamilton*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, http://www.ca4.uscourts.gov/JudgesBio/CHH_bio.htm (last visited Mar. 9, 2013). The ten Democratic appointees include Judge Roger Gregory, who received a recess appointment from President Clinton on December 27, 2000. However, Judge Gregory was nominated to the same position by President Bush on May 9, 2001, after which he was confirmed by the Senate. See *Biographical Information: Judge Roger L. Gregory*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, http://www.ca4.uscourts.gov/JudgesBio/RLG_bio.htm (last visited Mar. 9, 2013).

by President Obama within the last four years.⁶ In fact, the authoring judge of each of the three opinions discussed in this Essay was appointed in 2010.⁷

Certainly, three new cases decided by a court with several recently appointed members can hardly be called a shift in its own right. However, an examination of these cases in light of the new composition of the Fourth Circuit indicates the beginning of a *possible* shift wherein the Fourth Circuit may be more exacting when reviewing motions to suppress and examining whether the underlying conduct of law enforcement officers comports with the Fourth Amendment. At a minimum, the cases are instructive as they offer some insight into when a search or seizure reaches the outer bounds of constitutional reasonableness and could result in suppression of the resulting evidence.

II. REVIEWING A MOTION TO SUPPRESS: CLEAR ERROR AND DEFERENCE

Before examining the Fourth Circuit's recent reversals in suppression cases, it is important to briefly review the legal prism through which an appellate court reviews the denial of a motion to suppress on the basis of a Fourth Amendment violation.

"[T]he very text of the Fourth Amendment expressly imposes the requirement that all searches and seizures be reasonable."⁸ The existence of probable cause, which largely depends on the facts of a particular encounter, will typically satisfy the Fourth Amendment's reasonableness requirement.⁹ When there is no probable cause, whether the search or seizure is reasonable typically requires a court to balance the intrusion on the Fourth Amendment interest at issue against the promotion of legitimate government interests.¹⁰ If law enforcement officers perform a search or seizure in violation of the Fourth Amendment, a defendant may seek application of the exclusionary rule to suppress the ill-gotten fruits of the search or seizure.¹¹

6. See *Judges of the Fourth Circuit, Since 1801*, *supra* note 5.

7. See cases cited *supra* note 1 (Judge Kennan for *United States v. Watson* and *United States v. Edwards* and Judge Wynn for *United States v. Sowards*).

8. *United States v. Edwards*, 666 F.3d 877, 882 (4th Cir. 2011) (citing *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011)); see also 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 . . .").

9. See *United States v. Brown*, 701 F.3d 120, 126–27 (4th Cir. 2012) (discussing probable cause as it relates to seizures under the Fourth Amendment); *United States v. Davis*, 690 F.3d 226, 241–42 (4th Cir. 2012) (quoting *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2010)) (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Ry. Labor Excs. Ass'n*, 489 U.S. 602, 619 (1989); *Terry v. Ohio*, 392 U.S. 1, 9 (1968)) (analyzing the constitutionality of searches under the Fourth Amendment).

10. See *United States v. Watson*, 703 F.3d 684, 689–90 (4th Cir. 2013) (quoting *United States v. Stanfield*, 109 F.3d 976, 979 (4th Cir. 1997)); *Davis*, 690 F.3d at 247 (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)).

11. *Edwards*, 666 F.3d at 886. As the court in *Edwards* explained, "The 'sole purpose' of the exclusionary rule 'is to deter future Fourth Amendment violations.'" *Id.* (quoting *Davis v. United*

When a motion to suppress is filed, the district court reviews the reasonableness of the underlying search or seizure in the first instance. On appeal, although an appellate court reviews a district court's legal determinations *de novo*, it reviews the district court's factual findings only for clear error.¹² While not a "toothless" review, the clear error standard is deferential and requires that a district court's decision be affirmed unless a "careful review of the evidence has left [the appellate court] 'with the definite and firm conviction that a mistake has been committed.'"¹³ Moreover, when a district court denies a defendant's motion to suppress, an appellate court "reviews the evidence in the light *most favorable* to the government."¹⁴

III. *UNITED STATES V. EDWARDS*: CUTTING TO THE HEART OF REASONABLENESS

Under a rather interesting set of facts, the Fourth Circuit confronted the boundaries of what constitutes a reasonable search when it reversed a district court's denial of a motion to suppress drug evidence in *United States v. Edwards*.¹⁵

In *Edwards*, decided December 29, 2011, police had obtained an arrest warrant for the defendant based upon his alleged use of a gun in a domestic assault on his ex-girlfriend.¹⁶ After placing the defendant under arrest and handcuffing his hands behind his back, the arresting officer conducted a pat-down search of the defendant.¹⁷ The arresting officer did not find any contraband or weapons as a result of the pat-down.¹⁸

However, when other officers arrived with a police transport van, the defendant was again searched.¹⁹ The search took place in the street beside the van, and the area was partially illuminated by a street light.²⁰ During this second search, the officers, who were all male, pulled the defendant's pants approximately six inches away from his waist and shined a flashlight into the front and back of the defendant's underwear.²¹ The arresting officer spotted a

States, 131 S. Ct. 2419, 2426 (2011)). Therefore, "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Davis*, 131 S. Ct. at 2427.

12. *Davis*, 690 F.3d at 233 (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Rusher*, 966 F.2d 868, 873 (4th Cir. 1992)).

13. *United States v. Wooden*, 693 F.3d 440, 452 (4th Cir. 2012) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

14. *Davis*, 690 F.3d at 233 (emphasis added) (citing *United States v. Seidman*, 156 F.3d 542, 547 (4th Cir. 1998)).

15. 666 F.3d 877.

16. *Id.* at 879–80.

17. *Id.* at 880.

18. *Id.*

19. *Id.*

20. *Id.* at 881.

21. *Id.* at 880.

plastic sandwich baggie tied in a knot around the defendant's penis, containing what appeared to be a controlled substance.²²

The arresting officer put on gloves, and while another officer held the defendant's pants open, the arresting officer used a knife to cut the sandwich baggie off the defendant's penis.²³ The arresting officer then reached into the defendant's pants and removed the baggie, which contained crack cocaine.²⁴ At the suppression hearing, the arresting officer gave several reasons for the second search, including his belief that a thorough search was important as defendants tend to hide items in their pants and that it would ensure the safety of the other officers and the driver of the transport van.²⁵

In his federal drug prosecution, the defendant moved to suppress the crack cocaine, arguing it was obtained pursuant to an unreasonable search of his person.²⁶ The district court denied the motion after an extensive hearing, and the defendant ultimately entered a conditional guilty plea.²⁷

On appeal, Judge Keenan, in writing the majority opinion for the three-judge panel in which Judge Motz joined, held that the officers conducted an unreasonable strip search "because the drugs were removed from [the defendant's] person in an unnecessarily dangerous, and thus unreasonable, manner."²⁸ In reaching its decision, the majority applied the Supreme Court's framework outlined in *Bell v. Wolfish*,²⁹ which requires the court to examine the reasonableness of a "sexually invasive search" considering the following factors: "1) the place in which the search was conducted; 2) the scope of the particular intrusion; 3) the manner in which the search was conducted; and 4) the justification for initiating the search."³⁰ The majority's holding rested on the last three *Bell* factors.³¹

The majority found that the scope and manner of the search were unreasonable because removing the baggie with a knife was "an act that could only cause fear and humiliation,"³² and it posed "a significant and an unnecessary risk of injury to [the defendant], transgressing well-settled standards of reasonableness."³³ It also rejected the government's proposed justification: because the arresting officer knew the defendant was being arrested for a handgun violation, the search was reasonable to ensure a weapon had not been

22. *Id.*

23. *Id.* at 881.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 884.

29. 441 U.S. 520 (1979).

30. *Edwards*, 666 F.3d at 883 (citing *Bell*, 441 U.S. at 559).

31. *Id.* at 883.

32. *Id.*

33. *Id.* at 885.

missed.³⁴ The majority seemed to indicate that although the officers may have had justification for searching inside the defendant's underwear, they did not have justification to obtain the contraband through the dangerous method used.³⁵ Although physical contact in such a situation is unavoidable, the court noted several alternatives to using a knife to remove the baggie, including "untying the baggie, removing it by hand, tearing the baggie, requesting that blunt scissors be brought to the scene to remove the baggie, or removing the baggie by other non-dangerous means in any private, well-lit area."³⁶ The majority further held that suppression was warranted as searches akin to the one at issue fell "plainly within the purposes of the exclusionary rule" because they were likely to recur and should be discouraged.³⁷

The dissent, authored by Judge Diaz, agreed that the officers had performed a strip search and applied the basic legal framework employed by the majority.³⁸ However, the dissent framed the action of the officers quite differently, summing up its disagreement with the majority's conclusion as follows:

[I]t singles out as constitutionally unreasonable the use of a knife by an officer to remove a drug baggie strapped to [the defendant's] penis, and discovered in plain view during an otherwise lawful search. I respectfully dissent—not to endorse the carte blanche use of a knife to remove contraband from a defendant's person—but because, on this record, I do not believe that use of the knife alone rendered the search unreasonable.³⁹

In determining that the search was reasonable, the dissent explained that the Fourth Circuit has long recognized that "context matters" and that the court should not ignore the fact that the defendant was the one who chose to hide the drugs, as the dissent delicately put it, "in a rather unconventional location."⁴⁰ Regarding the specific use of the knife, the dissent rejected the notion that the use of the knife was unnecessarily dangerous.⁴¹

In fact, the dissent posited that there was *no* satisfactory option for removing the bag.⁴² Three of the supposed alternatives offered by the majority involved handling the defendant's genitals.⁴³ "In [the dissent's] view, . . . a rule that directs officers to place their hands on a defendant's genitals as a first option for

34. *Id.*

35. *See id.*

36. *Id.* at 886.

37. *Id.* at 886–87.

38. *Id.* at 888 (Diaz, J., dissenting) (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

39. *Id.* at 887–88.

40. *Id.* at 888–89.

41. *Id.* at 889.

42. *Id.* at 890.

43. *Id.*

seizing contraband in a baggie that the defendant has chosen to strap to his penis seems no more attractive than the careful use of a knife.”⁴⁴

The dissent also found that, even assuming the method for removal was constitutionally unreasonable, “it is not clear that suppression is the proper remedy” because discovery of the evidence at issue was not *caused* by the use of the knife.⁴⁵ “As the Supreme Court has emphasized, ‘[s]uppression of evidence . . . has always been our last resort, not our first impulse.’”⁴⁶ “Put simply, the plainly visible contraband was already discovered before the officers determined to use a knife to remove it.”⁴⁷

IV. *UNITED STATES V. SOWARDS*: MEASURING TRUSTWORTHINESS

The Fourth Circuit turned its attention from searches to seizures in *United States v. Sowards*, decided June 26, 2012.⁴⁸ In a spirited back-and-forth with the dissent, the majority in *Sowards* found that a police officer’s visual estimate of a motorist’s speed was unreliable and could not support probable cause for a traffic stop.⁴⁹

The arresting officer in *Sowards* stopped the defendant for speeding based on his visual estimate that the defendant’s vehicle was travelling five miles per hour over the speed limit, or seventy-five miles per hour in a seventy-mile-per-hour zone.⁵⁰ The arresting officer testified, and the district court found, that he had been trained to visually estimate speeds.⁵¹ During the stop, the arresting officer used a drug dog to sniff the vehicle.⁵² After the dog indicated the presence of drugs, the arresting officer and other officers searched the vehicle and discovered a significant quantity of cocaine.⁵³ The defendant moved to suppress the drugs, arguing that the arresting officer did not have probable cause to stop his vehicle.⁵⁴ After the district court denied the motion to suppress, the

44. *Id.* (“Thus, while criticizing the officers’ use of the knife as unreasonable, the majority has failed to articulate a method of removal that is any more reasonable.”).

45. *Id.* at 891–92.

46. *Id.* at 891 (alteration in original) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

47. *Id.* at 892.

48. 690 F.3d at 583. This Essay discusses *Sowards*, and to a much lesser extent its progeny *Mubdi*, to showcase the Fourth Circuit’s recent decisions regarding the reasonableness of law enforcement actions in light of motions to suppress. However, the cases also discuss in great detail when a law enforcement officer may visually estimate the speed of a vehicle. See *United States v. Mubdi*, 691 F.3d 334 (4th Cir. 2012); *Sowards*, 690 F.3d 583 (4th Cir. 2012). For a comprehensive analysis of these cases for the latter proposition, see Justin M. Woodward, *Traffic Stops Based on Uncorroborated Visual Speed Estimates: More (Needed) than Meets the Eye*, 64 S.C. L. REV. 1101 (2013).

49. *Id.* at 585.

50. *Id.*

51. *Id.* at 586–87.

52. *Id.* at 585.

53. *Id.*

54. *Id.*

defendant entered a conditional guilty plea to possession with intent to distribute cocaine.⁵⁵

Both the majority and the dissent framed the legal standard in similar terms. Probable cause to stop a vehicle exists if, under the totality of the circumstances, the information known to the officer would warrant a prudent person in believing that the defendant committed a traffic violation.⁵⁶ Any agreement between the majority and the dissent appeared to end there. Both sides took quite a divergent approach in how they viewed the reasonableness of the arresting officer's conduct and whether a prudent person would believe the defendant committed a traffic violation.

The majority opinion, authored by Judge Wynn with Judge Gregory concurring, found no probable cause because the arresting officer, by using only a visual speed estimate to determine that the defendant's vehicle was travelling slightly over the speed limit, lacked "reasonably trustworthy information" to believe the defendant had been speeding.⁵⁷ Chief Judge Traxler, in his dissent, contended that the district court did not clearly err and argued that the majority opinion had the effect of invalidating numerous law enforcement training programs and prohibiting officers from pulling over vehicles that were breaking the law only slightly—"a distinction this circuit has never made for unlawful behavior."⁵⁸ The tension between the majority and the dissent in this case is best understood by briefly examining the three major points of debate in the case.

First, the court disagreed over the relevance and reliability of the arresting officer's training and experience. The arresting officer in *Sowards*, who had more than eight years of experience as a traffic enforcement officer in North Carolina, had on three prior occasions passed North Carolina's radar certification process.⁵⁹ This certification process entails having an officer estimate the speed of vehicles within a certain level of accuracy.⁶⁰ Judge Traxler explained the training as follows:

After training, candidates must pass a written test and a road-course test. To pass the road-course test, candidates observe twelve vehicles, 'estimate their speed, and then corroborate [the] visual calculations with the use of [the] radar,' all under the supervision of a certified instructor. The margin of error is a combined 42 mph, or an average of 3.5 mph per vehicle. However, the candidate will automatically fail if he varies more than 12 mph on any single vehicle. Deputy Elliott successfully passed the tests and received certification in May 1998, April 2000, and

55. *Id.* at 587.

56. *Id.* at 588, 601. The majority specifically imposed a requirement that the officer possess "reasonably trustworthy information." *Id.* at 588 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

57. *Id.* at 588.

58. *Id.* at 598 (Traxler, C.J., dissenting).

59. *Id.*

60. *Id.* at 598–99.

February 2004. His certification was current when he stopped [the defendant].⁶¹

In spite of this training, the majority held that it was “clear error” for the district court to find that the arresting officer was trained in estimating vehicle speeds.⁶² The opinion couched the officer’s certification as “train[ing] to use a radar unit,”⁶³ and explained that during that training the officer was simply “given the opportunity to ‘guess’ the speed of twelve vehicles.”⁶⁴ The majority specifically devoted an entire section of its opinion to expound upon this finding.⁶⁵ In this section, the majority held that while the training allowed an average margin of error of only 3.5 miles per hour per vehicle, the officer was allowed to be off up to twelve miles per hour on any one vehicle.⁶⁶ Further, the majority took issue with the test being performed on a public roadway, as opposed to a controlled test environment.⁶⁷

The dissent countered that the training specifically contained visual speed estimation as a component and pointed to North Carolina law, which does not allow radar use alone to support a conviction for speeding.⁶⁸ The dissent also gave more consideration to the fact that in order to pass the training at issue, the margin of error for an officer’s visual estimation of speed was 3.5 miles per hour per vehicle.⁶⁹ Additionally, the dissent noted that the training should be considered in light of the arresting officer’s experience: ten years on the police force, eight years of experience in traffic enforcement, and four years of experience monitoring traffic from the exact same stretch of the interstate where he stopped the defendant.⁷⁰

Second, while on the stand, the arresting officer had some apparent difficulty with certain measurement questions.⁷¹ During the hearing, the arresting officer was unable to correctly answer questions regarding the number of feet and inches in a yard.⁷² The majority found that it was clear error for the district judge to find that the officer’s difficulty with measurements was immaterial to

61. *Id.* at 599 (internal citations to the record omitted).

62. *Id.* at 588 (majority opinion).

63. *Id.*

64. *Id.*

65. *Id.* at 594–97 (citations omitted).

66. *Id.* at 595.

67. *Id.* The majority ended its opinion with a lengthy analogy to baseball, arguing that because it is difficult for any two machines in baseball to accurately measure the speed of a fast pitch, it is likely that the arresting officer would have at least as difficult a time, especially considering “there are even more absolutes [in baseball] than the facts presented in this case.” *Id.* at 596.

68. *Id.* at 598–99 (Traxler, C.J., dissenting) (quoting *State v. Jenkins*, 342 S.E.2d 550, 552 (N.C. Ct. App. 1986)).

69. *Id.*

70. *Id.*

71. *Id.* at 586 (majority opinion).

72. *Id.*

his estimate of speed.⁷³ According to the majority, the district court's "finding rings in the absurd because one cannot discern a *speed* of a vehicle measured in *miles-per-hour* without discerning both the increment of *distance* traveled and the increment of *time* passed."⁷⁴

The dissent pointed out that while the arresting officer did become confused on the stand, it could either be because he did not know the answers or because he became flustered under cross-examination and could not quickly do the measurement conversions in his head.⁷⁵ Further, in adopting a reasoning similar to the district court, the dissent argued that "there is no evidence that the reliability of an officer's visual estimation of speed is or should be tied to a specific or minimum distance or time."⁷⁶ The dissent said that, regardless of the mathematical formula for speed, as a practical matter police officers do not work in "a classroom or a laboratory" and it is perfectly acceptable for an officer to offer "an *estimate* of speed without knowing precisely the distance traveled and time elapsed."⁷⁷

Third, the overarching issue in this case appears to be when, and if, a visual speed estimate alone can ever constitute probable cause to initiate a traffic stop. In criticizing the majority opinion, the dissent argued that it gave no explanation as to how the district court's factual errors factored into the holding of the case.⁷⁸ The dissent argued that the case stands for the proposition that "as a matter of law, a police officer can *never* premise probable cause solely on his or her visual estimate of speed if the speed differential is 'slight.'"⁷⁹ This argument appears to be a fair interpretation, as the majority held that when a vehicle is only slightly exceeding the speed limit, "an officer's visual speed estimate requires additional indicia of reliability to support probable cause," including radar or pacing methods.⁸⁰

However, less than two months after the Fourth Circuit decided *Sowards*, it had occasion to again discuss its holding in another published opinion. In *United States v. Mubdi*,⁸¹ the court held that the visual speed estimation by two officers, who had received training in North Carolina very much like the officer in *Sowards*, was enough to establish probable cause.⁸² In *Mubdi*, a majority panel applied a totality-of-the-circumstances approach and held that even if the defendant was travelling only slightly in excess of the speed limit, there were

73. *Id.* at 589.

74. *Id.*

75. *Id.* at 611 (Traxler, C.J., dissenting).

76. *Id.*

77. *Id.* at 611 n.11

78. *Id.* at 610.

79. *Id.*

80. *Id.* at 592 (majority opinion). The majority seemed to indicate that when a vehicle is speeding to a considerable degree, a visual estimate alone may constitute probable cause to initiate a stop. *See id.* at 591.

81. 691 F.3d 334 (4th Cir. 2012).

82. *Id.* at 340–41 (citing *Sowards*, 690 F.3d at 586–87, 589–94).

two trained officers who independently observed the defendant's vehicle and offered similar estimates, and there was no attack on the officers' ability to estimate speed.⁸³ Judge Davis concurred in part and in the judgment and argued that he could not "identify any material differences in the facts at hand that [would] support a difference in outcome between this case and the outcome in *Sowards* on the issue of uncorroborated visual speed estimates."⁸⁴

V. *UNITED STATES V. WATSON*: A SUPPRESSIVE WAIT

Like it did in *Sowards*, the Fourth Circuit found a law enforcement officer's seizure unreasonable in *United States v. Watson*.⁸⁵ In this recent case, decided January 2, 2013, Judge Keenan—joined by Judge Urbanski⁸⁶—wrote the majority opinion vacating the defendant's sentence on the grounds that the district court should have suppressed statements made by the defendant during a three-hour detention.⁸⁷

In *Watson*, law enforcement officers observed an individual, who appeared to be carrying a firearm, entering and exiting a building in Baltimore during a suspected drug transaction.⁸⁸ The first floor of the building was a convenience store, and three rooms on the second floor served as apparent living quarters.⁸⁹ The officers arrested the individual just outside the building, but they could not find a weapon.⁹⁰ Therefore, the officers decided to obtain a search warrant for the building.⁹¹

As one officer began preparing the application for the search warrant, other officers began to secure the building in accordance with established departmental procedure.⁹² Upon entering the convenient store on the building's first floor, officers encountered the defendant—an employee of the store who lived upstairs—and the store's owner.⁹³ The officers ordered them to sit down and read them their *Miranda*⁹⁴ rights.⁹⁵

It took three hours to process the search warrant application, during which time the officers kept the defendant, along with the store's owner, in a back room.⁹⁶ When the search warrant arrived, officers again read the defendant his

83. *Id.* at 341.

84. *Id.* at 349 (Davis, J. concurring).

85. 703 F.3d 684, 687.

86. Judge Urbanski, a United States District Judge for the Western District of Virginia, sat by designation on this panel. *Id.* at 686.

87. *Id.* at 687.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 687–88.

93. *Id.* at 688.

94. *Miranda v. Arizona*, 384 U.S. 436 (1966).

95. *Watson*, 703 F.3d at 688.

96. *Id.*

Miranda rights and searched upstairs, where they found a weapon in the defendant's room.⁹⁷ When asked about the weapon, the defendant, who had a felony conviction, made an incriminating statement that indicated ownership.⁹⁸ After the district court denied the defendant's motion to suppress the statement, the case proceeded to trial.⁹⁹ A jury convicted the defendant on two counts of being a felon in possession of a firearm.¹⁰⁰

All members of the three-judge panel appeared to agree that probable cause supported the search warrant for the building, that the officers properly entered the building to secure possible evidence in advance of the search warrant, that the officers lacked probable cause to specifically seize the defendant, and that the officers seized the defendant under the Fourth Amendment.¹⁰¹ Like both *Edwards* and *Sowards*, the disagreement between the majority and the dissent flowed not from any real dispute about what occurred but from how they framed the officers' conduct upon entering the building and whether that conduct was reasonable. As a telling example of their differences, the majority and the dissent each accused the other of advancing a new rule of law.¹⁰²

The majority opinion, looking to Supreme Court precedent, began by explaining that even if a detention is not supported by probable cause, a valid search warrant "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."¹⁰³ In one of the Supreme Court cases that the majority cited and on which the government relied—*Illinois v. McArthur*¹⁰⁴—the Court found the actions of law enforcement officers to be reasonable when they prevented a defendant from entering his home for approximately two hours while they obtained a search warrant.¹⁰⁵ However, the majority distinguished *McArthur* from the present case because the defendant in the case at bar was not suspected of a crime when he was detained, the officers did not have reason to believe the defendant would destroy contraband on the premises, and the restraint at issue was more restrictive in character and duration.¹⁰⁶

The majority turned to the overall circumstances of the present case and found the officers' action in detaining the defendant to be unreasonable.¹⁰⁷ "[I]n 'balanc[ing] the intrusion on [the defendant's] Fourth Amendment interests

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* (citing 18 U.S.C. § 922(g)(2006)).

101. *See id.* at 689, 703.

102. *Id.* at 694, 707.

103. *Id.* at 691 (quoting *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (internal quotation marks omitted)).

104. 531 U.S. 326 (2001).

105. *Watson*, 703 F.3d at 691 (citing *McArthur*, 531 U.S. at 328)).

106. *Id.*

107. *Id.* at 694.

against [the] promotion of legitimate governmental interests,”¹⁰⁸ the court found the evidence weighed “decisively” in the defendant’s favor.¹⁰⁹ The majority framed the circumstances of the defendant’s seizure as a three-hour detention of an occupant who had no direct connection to alleged criminal activity and whose detention lasted much longer than any “reasonable period” needed to ensure officer safety.¹¹⁰ The majority, therefore, held that the defendant’s statement of ownership during that detention should have been excluded as it was obtained by exploiting his illegal detention.¹¹¹

Judge Niemeyer, with “profound concern” over the majority’s “alarming” opinion, dissented.¹¹² As the dissent saw the case, because there was probable cause that contraband was in the building, that ongoing criminal activity was occurring there, and that there were exigent circumstances justifying a warrantless entry, the officers had a right “to secure the building and detain its occupants for the period reasonably necessary to obtain a warrant and search the building.”¹¹³

The dissent further relied on the Supreme Court’s decision in *Michigan v. Summers*¹¹⁴—also invoked extensively by the majority—to delineate the numerous law enforcement interests present in the case: a released occupant could destroy evidence in other locations; a released occupant could return and cause harm; a released occupant could warn others and frustrate the investigation; and the officer would be denied the assistance of a released occupant during the search.¹¹⁵ In responding to the dissent, the majority argued that *Summers* involved a detention *after* police had procured a search warrant.¹¹⁶ However, according to the dissent, “the principles enunciated in *Summers* . . . did not, in the end, hinge on the issuance of the warrant itself. Rather, the

108. *Id.* (quoting *Maryland v. Buie*, 494 U.S. 325, 331 (1990)).

109. *Id.*

110. *Id.* at 693. According to the dissent, the majority’s opinion inherently created a new rule requiring that, absent probable cause, an individual may only be detained during the initial protective sweep of a building. *Id.* at 707 (Niemeyer, J., dissenting). In answering this critique, the majority expounded that “[b]ecause our holding is based on the officers’ admission that the police had no information linking [the defendant] to criminal activity in the building, we need not reach, and do not consider, the level of suspicion required to detain an individual in these circumstances.” *Id.* at 694 (majority opinion).

111. *Id.* at 698. The majority rejected the argument that there was a break in the causal chain between the defendant’s unlawful detention and his incriminating statements. *Id.* at 697–98 (applying the factors set forth in *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)). The majority also held that it was not harmless error to admit the defendant’s statement at trial, and vacated the defendant’s conviction and remanded the case to the district court. *Id.* at 698.

112. *Id.* at 700 (Niemeyer, J., dissenting).

113. *Id.* at 703–04.

114. 452 U.S. 692 (1981).

115. *Watson*, 703 F.3d at 703 (Niemeyer, J., dissenting) (citing *Summers*, 452 U.S. at 702–03).

116. *Id.* at 695 (majority opinion) (citing *Summers*, 452 U.S. at 702).

culpability of the premises, the nature of the intrusion, and the law enforcement interests implicated by the situation justified the detention.”¹¹⁷

VI. CONCLUSION: ON A PRECIPICE?

On their face, *Edwards*, *Sowards*, and *Watson* would appear to have holdings that span not much further than in cases where contraband tied to a suspect’s genitals is cut off with a knife, where an officer visually estimates speed without radar, or where officers hold an individual for multiple hours while waiting on an arrest warrant.¹¹⁸ While the cases would be plainly germane under those circumstances, their holdings also reach into the core of how the Fourth Circuit reviews motions to suppress and evaluates whether the actions of law enforcement officers are reasonable.

In each of these cases, how the court frames the conduct appears to be a central indicator as to whether the court will find that the conduct is reasonable. As Judge Diaz explained in his dissent in *Edwards*, this is not a new observation.¹¹⁹ To quote Fourth Circuit Judge Agee, “[p]ut simply, context matters.”¹²⁰ Consider, for example, that the majority in *Watson* focused on its view that the detention lasted considerably longer than the time needed to perform a protective sweep to ensure officer safety.¹²¹ The dissent, on the other hand, viewed the detention as no longer than necessary to secure a warrant and, in part, to ensure that a released occupant could not cause harm by returning or by alerting others to the police presence.¹²²

This framing is of specific interest in light of the deferential standard of review the Fourth Circuit employs when considering a district court’s denial of a motion to suppress.¹²³ The Fourth Circuit reviews the district court’s factual findings for clear error and examines the evidence in the government’s favor.¹²⁴ It seems rather paradoxical that throughout each of these three cases, a panel of

117. *Id.* at 706 (Niemeyer, J., dissenting). The majority argued that the dissent’s view would create a new rule of law “allowing the police to detain citizens for a substantial amount of time, despite the absence of a search warrant or the absence of any information connecting those citizens to participation in criminal activity.” *Id.* at 694 (majority opinion).

118. See *supra* text accompanying notes 23, 50, 95.

119. *United States v. Edwards*, 666 F.3d 877, 888–89 (4th Cir. 2011) (Diaz, J., dissenting).

120. Stephen Wills Murphy, *Qualified Immunity, Mistaken Shootings, and the Persistent Importance of Perspective*: *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011) (*en banc*), 63 S.C. L. REV. 1057, 1062 (2011) (quoting *Henry v. Purnell*, 619 F.3d 323, 337 (4th Cir. 2010), *rev’d en banc*, 652 F.3d 524 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 781 (2011)). The *en banc* majority opinion in *Henry* also found that a law enforcement officer’s actions were unreasonable under the Fourth Amendment. See *Henry*, 652 F.3d at 533.

121. *Watson*, 703 F.3d at 693.

122. *Id.* at 706–07 (Niemeyer, J., dissenting).

123. See *United States v. Wooden*, 693 F.3d 440, 452 (4th Cir. 2012).

124. *United States v. Davis*, 690 F.3d 226, 233 (4th Cir. 2012).

federal appellate court judges could not agree on how to view the evidence, yet the court found against the government and reversed the district court.¹²⁵

For example, in *Edwards*, there was a dearth of evidence in the record describing the knife that the arresting officer used.¹²⁶ It was entirely possible that the knife used to remove the baggie from the defendant's penis was small, or blunt.¹²⁷ Yet the majority made what appears to be the factual finding that the knife "manifestly" posed a risk of injury to the defendant, while it also held that a blunt pair of scissors would have been acceptable and without problematic risks.¹²⁸

In *Sowards*, the majority specifically found that the district court had clearly erred in determining that the record indicated that the arresting officer was trained to estimate speeds.¹²⁹ However, the dissent found the officer *was* trained to estimate speeds based on the same record.¹³⁰ Arguably, such a disagreement inherently showcases "two permissible views of the evidence," which, as noted by Judge Traxler's dissent in the case, means "the factfinder's choice between them cannot be clearly erroneous."¹³¹

Do these cases, then, show that the Fourth Circuit is on the precipice of an analytical shift? It is a matter of historical fact that the face of the Fourth Circuit is changing.¹³² To what extent this change will impact the ideology of the court, if at all, is a far more subtle and difficult question.¹³³ *Edwards*, *Sowards*, and *Watson* seem to indicate that the court is beginning to more thoroughly examine the reasonableness of law enforcement conduct and, thus, district court decisions denying motions to suppress. However, only time will tell whether these three cases are the vanguard of a philosophical transformation or are simply three decisions that offer some additional guidance on the Fourth Amendment's sometimes-murky reasonableness standard.

125. See *supra* Parts III–V.

126. See *United States v. Edwards*, 666 F.3d 877, 890 (4th Cir. 2011) (Diaz, J., dissenting).

127. *Id.*

128. See *id.* at 886 (majority opinion).

129. *United States v. Sowards*, 690 F.3d 583, 588 (4th Cir. 2012).

130. *Id.* at 599, 602 (Traxler, C.J., dissenting).

131. *Id.* at 610 (quoting *Walker v. Kelly*, 589 F.3d 127, 141 (4th Cir. 2009)).

132. See *supra* note 5 and accompanying text.

133. See, e.g., Broscheid, *supra* note 4, at 189 (arguing that discussions regarding the ideological makeup of particular courts are "overblown").

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