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Diligence and Digiovanni: The Fourth Circuit's Interpretation of Investigatory Traffic Stop Reasonableness after Arizona v. Johnson

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Diligence and *Digiovanni*: The Fourth Circuit's Interpretation of Investigatory Traffic Stop Reasonableness After *Arizona v. Johnson*[*]

INTRODUCTION

Between 1986 and 2001, Operations Convoy and Pipeline, joint task forces between the Drug Enforcement Administration and state highway patrols, successfully seized over 2.9 million pounds of marijuana and $704 million in currency during routine traffic stops along major American interstates.[1] As the number of these seizures increased, drug enforcement officials became highly skilled at asking "key questions" to determine whether a person was transporting narcotics.[2] Counterbalancing the efficacy of the officers' questioning techniques was the Fourth Amendment's protection against "unreasonable searches and seizures."[3] The cornerstone of the Fourth Amendment has always been a fact-specific inquiry into the reasonableness of a search and seizure;[4] however, determining what constitutes reasonableness has not proven to be a simple inquiry. The traffic stop paradigm serves as an oft-litigated battleground for courts

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1. *See Operations Pipeline and Convoy*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/programs/pipecon.htm (last visited Aug. 17, 2012).

2. *Id.*

3. U.S. CONST. amend. IV.

4. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 8–9 (1968). The paradigmatic example of reasonableness under the Fourth Amendment is a search or seizure pursuant to a warrant. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967) (detailing the Court's warrant preference). *See generally* California v. Acevedo, 500 U.S. 565, 581–83 (1991) (Scalia, J., concurring) (chronicling the tension in Supreme Court jurisprudence between the warrant and reasonableness clauses); 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 10.01 (5th ed. 2010) (outlining the interaction between the warrant clause and the reasonableness clause); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 762, 762–63, 767–71 (1994) (detailing the different variations in the warrant requirement). The evolution of the "automobile exception" marks a significant deviation from the warrant preference. *See* 1 DRESSLER & MICHAELS, *supra* §§ 13.01-13.05. This Recent Development focuses on the subset of Fourth Amendment law surrounding the "automobile exception." This refers to the general rule that, given both the exigencies unique to vehicles rendering obtaining a warrant impractical and the reduced expectation of privacy in a vehicle, officers can search an automobile without a warrant if supported by probable cause of criminal activity. *See* Pennsylvania v. Lebron, 518 U.S. 938, 940 (1996) (exigencies); New York v. Class, 475 U.S. 106, 112–13 (1986) (reduced expectation of privacy); *Warrantless Searches and Seizures*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 37, 94–95 (2006).

to determine what constitutes reasonable conduct under the Fourth Amendment.[5]

Recent Supreme Court holdings in *Arizona v. Johnson*[6] and *Muehler v. Mena*[7] complicated the reasonableness inquiry under the Fourth Amendment by altering the traditional analytical framework set forth in the landmark decision of *Terry v. Ohio*.[8] Under the traditional *Terry* analysis, reasonableness of a traffic stop was embodied in two separate inquiries—the scope of the questioning and duration of the stop.[9] *Johnson* and *Muehler* cast a cloud of doubt concerning to what extent the two traditional prongs of the *Terry* analysis had survived.[10] The Fourth Circuit recently grappled with this issue in *United States v. Digiovanni*.[11]

The Fourth Circuit's holding in *Digiovanni* interpreted *Johnson* and *Muehler* as not eliminating the scope prong of the traditional *Terry* analysis altogether, but rather as combining the scope analysis within the duration analysis, forming a single diligence inquiry. This Recent Development argues that, in doing so, the Fourth Circuit correctly maintained the fact-specific nature logically underpinning Fourth Amendment reasonableness analysis. The Fourth Circuit's reasoning, while not clearly articulated, effectively sketched the outline of a workable framework for analyzing the reasonableness of investigatory traffic stops without contradicting recent Supreme Court precedent.

This Recent Development proceeds in four parts. Part I will provide a background concerning the analytical framework applied to traffic stops under *Terry* and its progeny. Part II provides the facts and holdings of *Digiovanni*. Part III analyzes the "diligence" standard applied by the Fourth Circuit in *Johnson*'s wake. Finally, Part IV articulates a workable framework to analyze investigatory traffic stops consistent with the Fourth Circuit's holding in *Digiovanni* and the Supreme Court's decision in *Johnson*.

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5. *See generally* 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.3 (4th ed. 2010) ("In recent years more Fourth Amendment battles have been fought about police activities incident to a stopping for a traffic infraction . . . than in any other context." (citation omitted)).

6. 555 U.S. 323 (2009).

7. 544 U.S. 93 (2005).

8. 392 U.S. 1 (1968).

9. Florida v. Royer, 460 U.S. 491, 500 (1983) (citing *Terry*, 392 U.S. at 19).

10. *See infra* Part I.D.

11. 650 F.3d 498 (4th Cir. 2011).

I. *TERRY* AS APPLIED TO TRAFFIC STOP ANALYSIS

A. Terry*'s Basics*

The logical starting point for any discussion of traffic stops is unquestionably *Terry v. Ohio*, the Supreme Court's landmark decision establishing an officer's ability to briefly detain an individual without a warrant to conduct a cursory frisk of the suspect's outer clothing if the officer possesses reasonable suspicion that criminal activity may be afoot.[12] *Terry* involved a stop and interrogation of men whose conduct attracted the attention of a police officer on patrol.[13] The officer suspected that the men were preparing to rob a nearby store.[14] Fearing that one of the men was armed, the officer performed a pat-down of Terry's outer clothing, revealing a concealed weapon.[15] The Supreme Court held that the officer's conduct did not violate Terry's Fourth Amendment rights, but explained that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[16] Although *Terry* dealt specifically with an officer's ability to stop-and-frisk a potentially armed suspect,[17] it became the model for traffic stop reasonableness analysis.[18]

Under the *Terry* analysis for a traffic stop, the first question is whether, at the onset of the stop, the "officer's action was justified at its inception."[19] In the traffic stop paradigm, this is rarely a point of contention.[20] A court must then determine if the investigation "was reasonably related in scope to the circumstances which justified the

12. *See Terry*, 392 U.S. at 27; *see also* DRESSLER & MICHAELS, *supra* note 4, § 17.04[B] (distinguishing arrests from "*Terry* stops" based on the length of detention).

13. *Terry*, 392 U.S. at 7.

14. *Id.* at 6–7.

15. *Id.* at 7.

16. *Id.* at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

17. *Id.* at 30.

18. *See, e.g.*, United States v. Rusher, 966 F.2d 868, 875 (4th Cir. 1992).

19. *Terry*, 392 U.S. at 20.

20. *See* Illinois v. Caballes, 543 U.S. 405, 407 (2005); 4 LAFAVE *supra* note 5, § 9.3 ("In the run-of-the-mill case, [justifying a traffic stop] presents no significant problem, for most traffic stops are made based upon the direct observations of unambiguous conduct or circumstances by the stopping officer."); *see also* Whren v. United States, 517 U.S. 806, 813 (1996) (holding that the subjective intent of the officer is irrelevant to the underlying reason for conducting a traffic stop, so long as at the outset of the stop "probable cause exists to believe that a traffic violation has occurred"); Richard S. Frase, *What Where They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 333 (2002) ("[*A*]*lmost every driver* violates some minor traffic law *every time he drives*.").

interference in the first place."[21] This language established the relationship of scope to the reasonableness standard. In *Berkemer v. McCarty*,[22] the Supreme Court held that "the usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest."[23] Since this declaration, *Terry* has been the starting point for traffic stop-related reasonableness inquiries.[24]

B. *Scope and Duration After* Terry

In *Florida v. Royer*,[25] the Supreme Court established two independent prongs of analysis to evaluate the reasonableness of a traffic stop—scope and duration.[26] Subsequent Court decisions revealed that a violation of one prong, independent of the other, would be sufficient to violate the Fourth Amendment.[27] With respect to the scope prong, the Supreme Court unanimously held in *Knowles v. Iowa* that an officer could not conduct a search of a car's passenger compartment incident to a citation for speeding.[28] The Court, with no mention of duration, found that this "search incident to citation" violated the original scope of issuing a speeding citation.[29]

Concerning the duration prong, the Supreme Court first hinted in a brief footnote that the prolongation of a traffic stop alone could constitute a reasonableness violation. The footnote, appearing at the conclusion of *Michigan v. Summers*,[30] explained that "a prolonged detention[] might lead to a different conclusion in an unusual case."[31] This footnote invited future Fourth Amendment challenges arising

21. *Terry*, 392 U.S. at 20.

22. 468 U.S. 420 (1984).

23. *Id.* at 439 (citing *Terry*, 392 U.S. 1).

24. *See* Arizona v. Johnson, 555 U.S. 323, 330 (2009); United States v. Sharpe, 470 U.S. 675, 682 (1985); United States v. Rusher, 966 F.2d 868, 875 (4th Cir. 1992) ("An ordinary traffic stop is, however, a limited seizure more like an investigative detention than a custodial arrest. We therefore employ the Supreme Court's analysis for investigative detention used in *Terry v. Ohio* to determine the limits of police conduct in routine traffic stops." (citations omitted)).

25. 460 U.S. 491 (1983).

26. *Id.* at 500 ("It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was reasonably limited in *scope and duration* to satisfy the conditions of an investigative seizure." (emphasis added)).

27. *See, e.g.*, Knowles v. Iowa, 525 U.S. 113, 118 (1998) (scope); *Sharpe*, 470 U.S. at 686 (duration).

28. *Knowles*, 525 U.S. at 118.

29. *Id.* ("Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.").

30. 452 U.S. 692 (1981).

31. *Id.* at 705 n.21.

from prolonged detentions alone. *United States v. Place*[32] gave credence to the possibility that prolonged detention alone could trigger a constitutional violation. In *Place*, federal agents seized a suspect's bag and held it for ninety minutes without probable cause.[33] The Court held that "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause."[34] With *Summers* and *Place* setting the foundation for reasonableness challenges to detentions based solely on prolongation, the concept was finally applied to the traffic stop paradigm in *United States v. Sharpe*.[35] In *Sharpe*, the Court found that a twenty minute detention did not constitute an unreasonable seizure.[36] However, the Court evaluated the diligence of the police in dispelling or confirming their suspicions as a crucial aspect of the duration analysis.[37] *Terry* and its progeny demonstrated that courts, when analyzing the reasonableness of a warrantless detention, would view the scope of an officer's questioning and the duration of the stop as independent inquiries under the Fourth Amendment.[38]

C. *The Weakening of the Scope Prong in* Illinois v. Caballes

In 2005, the Supreme Court created uncertainty regarding the two-pronged analysis set forth in *Royer* twenty-two years earlier with its decision in *Illinois v. Caballes*.[39] In *Caballes*, an Illinois state trooper pulled over Caballes for speeding on an interstate highway.[40] A narcotics-detection dog was immediately brought to the scene and alerted to the trunk of the car.[41] The subsequent search yielded marijuana, and the entire incident lasted under ten minutes.[42] The

32. 462 U.S. 696 (1983).

33. *Id.* at 699.

34. *Id.* at 709. The Court also noted that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *Id.*

35. 470 U.S. 675 (1985).

36. *Id.* at 687–88.

37. *Id.* at 686 ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." (citing Michigan v. Summers, 452 U.S. 692, 701 n.14 (1981))).

38. *See* 4 LAFAVE, *supra* note 5, § 9.3.

39. 543 U.S. 405 (2005).

40. *Id.* at 406.

41. *Id.*

42. *Id.*

Illinois Supreme Court reversed the appellate court and suppressed the evidence, declaring that "because the canine sniff was performed without any 'specific and articulable facts' to suggest drug activity, the use of the dog 'unjustifiably enlarge[ed] the scope of a routine traffic stop into a drug investigation.' "[43]

In analyzing the detention, the Supreme Court found the use of the drug detection dog justified, looking only at whether the stop was "prolonged beyond the time reasonably required to complete [its] mission."[44] The Court briefly disposed of the contention that the widening of the scope of the investigation—from a speeding citation to a narcotics search performed without reasonable suspicion of drug activity—violated the scope prong of *Terry*, concluding that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner."[45] As the dissent noted, "the Court diminishe[d] the Fourth Amendment's force by abandoning the second *Terry* inquiry (was the police action 'reasonably related in scope to the circumstances [justifying] the [initial] interference')."[46] While it was initially uncertain if the diminishment of the scope restriction would apply solely to narcotic searches performed by canines, the Court would soon expand this analysis to cover all traffic stops.

D. Johnson *and* Muehler *Cast Further Uncertainty onto the* Terry *Analysis*

Two months after the *Caballes* decision, the Supreme Court further diminished the application of the scope prong to *Terry*'s reasonableness analysis in *Muehler v. Mena*.[47] In *Muehler*, the police detained a suspect in handcuffs while executing a search warrant on the premises Mena occupied.[48] While being detained in handcuffs, police officers began questioning Mena about her immigration

43. *Id.* at 407 (alteration in original) (quoting People v. Caballes, 802 N.E.2d 202, 205 (Ill. 2003)).

44. *Id.*

45. *Id.* at 408.

46. *Id.* at 421 (Souter, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). Justice Souter also analyzed the search under the scope prong, concluding, "[t]he unwarranted and nonconsensual expansion of the seizure here from a routine traffic stop to a drug investigation *broadened the scope* of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment." *Id.* at 420–21 (emphasis added).

47. 544 U.S. 93 (2005).

48. *Id.* at 95–96.

status,[49] a line of questioning completely divorced from the search warrant's objective. The Court of Appeals for the Ninth Circuit found that the officers' inquiry into Mena's immigration status violated the Fourth Amendment.[50] The Supreme Court reversed, holding that the unrelated questioning of Mena, although outside the scope of the warrant, did not prolong the detention and therefore did not amount to a Fourth Amendment violation.[51] *Muehler* signified a radical departure from the traditional *Terry* analysis, symbolizing, to some commentators, the final interment of the scope prong.[52]

After *Muehler*, uncertainty persisted as to what extent the scope prong had survived, if at all, with respect to the traffic stop context.[53] In *Arizona v. Johnson*, the Supreme Court unanimously held that the officer's unrelated questioning into the detainee's gang affiliation during a traffic stop, accompanied by a subsequent pat-down, did not violate Johnson's Fourth Amendment rights.[54] The Court declared, "An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not *measurably extend the duration* of the stop."[55]

E. Questions After Johnson

The Court's interpretation of *Muehler* as presumably allowing an officer to inquire into *any* matters unrelated to the reason for the stop, coupled with the Court's announcement of a new analytical framework—whether questioning "measurably extends" a stop—called into question the traditional *Terry* framework for analyzing traffic stops.[56] Did the Court announce a bright-line rule declaring

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49. *Id.* at 96. The search warrant authorized a broad search of the house for deadly weapons and evidence of gang membership. *Id.* at 95–96.

50. *Id.* at 97.

51. *Id.* at 101–02 ("[T]he Court of Appeals did not find that the questioning extended the time Mena was detained . . . . [Therefore] the officers' questioning of Mena did not constitute an independent Fourth Amendment violation.").

52. *See, e.g.*, 4 LAFAVE, *supra* note 5, § 9.3(b) ("[B]y virtue of Caballes [sic] and its progeny the original Terry [sic] limitations of 'scope and duration' have been reduced by one (scope) . . . ." (citation omitted)); Reid M. Bolton, Comment, *The Legality of Prolonged Traffic Stops After* Herring*: Brief Delays as Isolated Negligence*, 76 U. CHI. L. REV. 1781, 1786–87 (2009) (noting that *Mena* signaled the end of investigative-scope scrutiny).

53. *See* 4 LAFAVE, *supra* note 5, § 9.3(d).

54. 555 U.S. 323, 329 (2009).

55. *Id.* at 333–34 (emphasis added) (citing *Muehler*, 544 U.S. at 100–01).

56. *See, e.g.*, United States v. Everett, 601 F.3d 484, 491 (6th Cir. 2010) ("The first decision we must make is whether to construe *Muehler* and *Johnson* as establishing a bright-line 'no prolongation' rule . . . .").

any prolongation of a detention, no matter how minimal, a constitutional violation? As long as an officer does not extend the length of the stop, may she inquire about any subject matter regardless of the relationship between the questioning and the justification of the detention? What is the correct framework going forward for lower courts to apply to detentions made incident to routine traffic stops? These were the exact issues facing the Fourth Circuit when it issued its opinion in *Digiovanni.*

II. *UNITED STATES V. DIGIOVANNI*

Just before noon on July 28, 2009, Maryland State Police Trooper Christopher Conner pulled over Stephen Gerard Digiovanni for following too closely to the car in front of him while traveling northbound on Interstate 95 in a rental car.[57] After collecting Digiovanni's driver's license and rental contract, Trooper Conner asked generic questions regarding Digiovanni's travel itinerary.[58] Three minutes into the search, Officer Conner redirected his line of questioning toward potential drug trafficking.[59] After approximately a minute and a half of questioning Digiovanni about drugs, Trooper Conner asked for Digiovanni's consent to search the car, to which Digiovanni responded, "[I]f you want to, that's not a problem."[60] Over the next three minutes, Digiovanni attempted to open the trunk of the car, but could not.[61] Trooper Conner found this "extremely suspicious" since, based on his experience, drug traffickers frequently disable the trunk-latch.[62] After Digiovanni was unable to open the trunk, almost nine minutes after initially being pulled over, Trooper Conner continued to ask Digiovanni about drugs.[63] Ten minutes after Digiovanni was stopped, Trooper Conner began processing Digiovanni's driver's license.[64]

The dispatcher informed Trooper Conner that Digiovanni did not have any outstanding warrants.[65] Fifteen minutes after initially being pulled over, Trooper Conner returned to Digiovanni's rental car, issued Digiovanni a warning ticket, and told him, "[H]ere you go,

57. United States v. Digiovanni, 650 F.3d 498, 501 (4th Cir. 2011).
58. *Id.* at 502.
59. *Id.* at 503.
60. *Id.*
61. *Id.*
62. *Id.* (internal quotation marks omitted).
63. *See id.*
64. *Id.* at 504.
65. *Id.*

sir. You are free to go."[66] Immediately after Trooper Conner handed Digiovanni the warning ticket, he returned to the subject of drugs and informed Digiovanni that "we do have a bad problem out here, people smuggling drugs on the interstate."[67] Again Trooper Conner asked for permission to search the car; however, this time Trooper Conner had Digiovanni sign a written consent form.[68] The form was signed at 12:09 p.m., sixteen minutes after Digiovanni was initially pulled over.[69]

The ensuing search yielded 34,091 pills of Oxycodone and $1,450 of cash.[70] At trial, the district court granted Digiovanni's motion to suppress the evidence.[71] The district court concluded that "the stop lasted longer than necessary" to effectuate the purpose of the stop—issuing Digiovanni a simple warning ticket for a minor traffic infraction.[72] The district court found no reasonable suspicion to support the length of Digiovanni's detention.[73] The district court also disallowed the admission of Digiovanni's signed consent, noting that when Officer Conner instantaneously returned to the subject of drugs after he informed Digiovanni that he was free to go, Officer Conner falsely implied "that Digiovanni was bound by his earlier consent."[74] The government appealed the district court's holding.[75]

After quickly determining that the delay caused by Trooper Conner's questioning was not de minimis, the Fourth Circuit turned its attention to whether the Supreme Court's "measurably extend" language used in *Johnson* amounted to a bright-line rule prohibiting any prolongation of detentions.[76] The court determined it did not, explaining instead that "where a delay can be characterized as de minimis under the totality of the circumstances, it will not be recognized as a Fourth Amendment violation."[77] The Fourth Circuit's analysis delved specifically into whether the officer "diligently pursue[d] the investigation of the justification for the stop (usually a

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 505.
73. *Id.*
74. *Id.* at 510–11.
75. *Id.* at 510.
76. *Id.* at 510–11. The court characterized Trooper Conner's questioning as "extensive and time-consuming." *Id.* at 510.
77. *Id.* at 507.

traffic infraction)."[78] With respect to the duration of the detention, the Fourth Circuit affirmed the district court's finding of no reasonable suspicion sufficient to support the length of Digiovanni's detention.[79] The Fourth Circuit noted that the sustained investigation into the presence of drugs, instead of either writing the warning ticket or proceeding with the driver's license check, "bespeak[s] an utter lack of diligence."[80] Trooper Conner delayed ten minutes before he relayed Digiovanni's information to the dispatcher.[81] He proceeded with a line of questioning regarding the presence of drugs, attempted to have Digiovanni open his trunk, asked further questions concerning drugs, and radioed for back-up, all before taking a single action to effectuate the purpose of the stop: the issuance of a warning ticket.[82] The government argued, in part, that the total duration of the traffic stop was reasonable.[83] The Fourth Circuit disagreed, holding that "[u]nder the totality of the circumstances, . . . Trooper Conner did not diligently pursue the traditional purposes of a traffic stop."[84]

III. ANALYSIS

Forced to grapple with the numerous ambiguities left after *Johnson*, the Fourth Circuit correctly analyzed *Digiovanni* consistent with *Terry* and its progeny, while simultaneously not running afoul of recent Supreme Court precedent. The Fourth Circuit's refusal to interpret the "measurably extend" language as announcing a bright-line rule remained loyal to the fact-specific inquiry underpinning Fourth Amendment reasonableness. As the court noted, "[c]reating a rule that allows a police officer fifteen minutes to do as he pleases reduces the duration component to a bright-line rule."[85] Numerous prior holdings emphasized that the Supreme Court "ha[s] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."[86] Furthermore, reading

78. *Id.* at 509 (citing United States v. Sharpe, 470 U.S. 675, 686 (1985)).
79. *Id.*
80. *Id.* at 510.
81. *Id.*
82. *Id.*
83. *Id.* at 510–11.
84. *Id.* at 510.
85. *Id.* at 511; *see also* United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) ("The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision.").
86. Ohio v. Robinette, 519 U.S. 33, 39 (1996); *see also* Terry v. Ohio, 392 U.S. 1, 21 (1968) ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be

"measurable duration" to be synonymous with a "quantifiable duration" would have been wholly inconsistent with the Supreme Court's holding in *Caballes*. *Caballes* concluded there was no Fourth Amendment violation because the seizure was not "prolonged beyond the time *reasonably required* to complete that mission."[87] To read the "measurably extend" standard as introducing a rigid legal standard likening any prolongation of a stop, no matter how trivial, to a constitutional violation would cut strongly against a long history of fact-specific Fourth Amendment reasonableness jurisprudence.[88]

A second reason the Fourth Circuit's holding was correct centers around the practical limiting effect a no-prolongation standard would have on the protection the Fourth Amendment affords. It has been argued that a no-prolongation standard would serve as a barrier against pretextual police actions.[89] Under this line of reasoning, any "fishing expedition[s]"[90] conducted by officers unrelated to the purpose of the stop necessarily lengthen the detention beyond what is necessary to "effectuate the purpose of the stop."[91] However, this argument carries little merit. A police officer could easily circumvent the bright-line no-prolongation rule by simply delegating the routine traffic citation issuance to a second officer, leaving the first officer with free rein to ask any questions.[92] This effectively transforms the time it takes the first officer to issue the citation into the unilateral constraint. If the officer was without a secondary officer at the time of the traffic stop, she could easily skirt a bright-line no-prolongation

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subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

87. Illinois v. Caballes, 543 U.S. 405, 407 (2005) (emphasis added).

88. *See, e.g.*, Michigan v. Chesternut, 486 U.S. 567, 572–73 (1988) (rejecting a proposed bright-line rule applicable to all investigatory stops, and rather adhering to the traditional contextual approach to the Fourth Amendment analyzing "all of the circumstances surrounding the incident in each individual case" (internal quotation marks omitted)); *see also* United States v. Mason, 628 F.3d 123, 131 (4th Cir. 2010) ("There is no support in Fourth Amendment jurisprudence for the notion that questioning unrelated to the purpose of a traffic stop requires reasonable suspicion, provided that the questioning occurs within the timeframe reasonably necessary to effectuate the traffic stop."). *But see* Bolton, *supra* note 52, at 1797 (arguing that all delays in traffic stops, no matter how brief, should be held in violation of the Fourth Amendment after *Johnson*).

89. *See* United States v. Everett, 601 F.3d 484, 491 (6th Cir. 2010).

90. United States v. Pruitt, 174 F.3d 1215, 1222 (11th Cir. 1999).

91. *Id.* at 1220 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)). Of course, a traffic detention may always be extended if (1) pursuant to consent or (2) supported by "reasonable and articulable suspicion illegal activity has occurred or is occurring." *Id.*

92. *Everett*, 601 F.3d at 492.

rule by writing the citation while simultaneously pursuing an unrelated avenue of questioning.[93]

Furthermore, the allowance of de minimis delays prevents counterintuitive results. For instance, finding a Fourth Amendment violation when an officer's inexperience caused a brief delay, in the genuine absence of subterfuge, would produce a counterintuitive result.[94] Because a bright-line rule prohibiting de minimis delays would fail to protect against pretextual police activities and run contrary to well-established Fourth Amendment precedent analyzing reasonableness in the totality of the circumstances, the Fourth Circuit properly rejected an interpretation of *Johnson* as announcing a ban on minimal prolongations resulting from suspicionless, unrelated questioning during a traffic stop.[95]

The Supreme Court's language in *Johnson* and *Muehler* created serious doubt as to the survival of the scope prong in the traditional *Terry* framework.[96] However, the Fourth Circuit clearly did not interpret those Supreme Court cases as eliminating the scope prong altogether.[97] The court explicitly rejected the government's argument, stating it "fail[ed] to recognize that investigative stops must be limited both in scope *and* duration."[98]

Although the court noted that both prongs—scope and duration—were still alive and well, the court's analysis of those two prongs in the post-*Johnson* world was more subtle. Instead of the traditional approach of viewing the two prongs as independent inquiries, a violation of either amounting to a constitutional

93. *Id.*

94. Had de minimis delays been disallowed, this would have been the exact outcome in *United States v. Farrior*, where a police officer who had just graduated from field training did not know how to issue warning tickets, causing a minimal delay in the duration of the detention. 535 F.3d 210, 219 (4th Cir. 2008).

95. Other circuits have interpreted the "measurably extend" language used in *Johnson* as not announcing a prohibition on de minimis delays. *See Everett*, 601 F.3d at 493–94; United States v. Chaney, 584 F.3d 20, 26 (1st Cir. 2009); United States v. Derverger, 337 F. App'x 34, 36 (2d Cir. 2009).

96. *See* Arizona v. Johnson, 555 U.S. 323, 333 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure . . . ."); Muehler v. Mena, 544 U.S. 93, 100–01 (2005) (holding that police questioning alone, without an increase in the length of the detention's duration, is not equivalent to a seizure); *see also* United States v. Digiovanni, 650 F.3d 498, 509 (4th Cir. 2011) (noting that there is debate about the survival of the scope component); Bolton, *supra* note 52, at 1786–87.

97. *Digiovanni*, 650 F.3d at 509 ("[T]he scope of a police officer's actions during a traffic stop still is relevant to the reasonableness analysis under the Fourth Amendment." (citing United States v. Mason, 628 F.3d 123, 132 (4th Cir. 2010))).

98. *Id.* at 511.

violation,[99] the Fourth Circuit combined the analysis of scope and duration into a single "diligence" inquiry. The court reasoned that the scope inquiry was still relevant to the reasonableness analysis since an officer's failure to "diligently pursue the investigation of the justification for the stop [would run afoul of] the duration component of *Terry* [and *Royer.*]"[100] In other words, if an officer's questioning exceeds the scope of the stop, the officer runs the risk of implicating the duration component of *Terry* as interpreted recently in *Johnson.* The court went on to note that this determination would require an examination of the "totality of the circumstances" surrounding the investigatory traffic stop.[101]

By combining the scope and duration analysis into a single "diligence" inquiry, viewed through the lens of the totality of the circumstances, the Fourth Circuit did not confine itself to a stringent position where any extraneous questioning constitutes a reasonableness violation.[102] However, the court did not go so far as to say that any line of questioning, no matter how irrelevant to effectuating the purpose of the stop, may be permissible.[103] By maintaining that a traffic stop should be viewed in light of the totality of the circumstances, the Fourth Circuit's "diligence" inquiry correctly allows the court flexibility in analyzing the "multitude of factors [that] can affect the length of a traffic stop."[104] More importantly, the "diligence" inquiry does not contradict the holdings in *Johnson* and *Muehler.* Rather, evaluating an officer's diligence—her "continual effort"[105] toward establishing if the alleged traffic violation occurred—potentially provides a workable standard in determining whether an officer's inquiries "measurably extend[ed] the duration of the stop."[106]

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99. *See* discussion *supra* Part I.B.

100. *Digiovanni*, 650 F.3d at 509.

101. *Id.*

102. *See id.*

103. *Id.* at 507 ("With regard to the scope component, 'the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.' " (quoting Florida v. Royer, 460 U.S. 491, 500 (1983))).

104. *Id.* at 511.

105. BLACK'S LAW DICTIONARY 522 (9th ed. 2009).

106. Arizona v. Johnson, 555 U.S. 323, 333 (2009); *see* United States v. Everett, 601 F.3d 484, 494 (6th Cir. 2010) (noting that when determining reasonableness of a traffic stop "the overarching consideration is *the officer's diligence*").

IV. FOURTH AMENDMENT REASONABLENESS ANALYSIS—A FRAMEWORK GOING FORWARD

As previously discussed, the *Digiovanni* holding correctly applies the uncertain standards set forth in *Johnson* and *Muehler*.[107] However, the analytical frameworks spelled out in cases relating to reasonableness in investigatory traffic stops generally have been an amalgamation of competing and, often times, inconsistent interests. For instance, courts must consider a myriad of factors including the important governmental interests at stake relative to the intrusiveness of the action,[108] the overall diligence of the officer,[109] the scope of the questioning,[110] the duration of the stop,[111] and the general considerations of the fundamental protections the Fourth Amendment offers to drivers detained without reasonable suspicion of criminal activity.[112] *Digiovanni*, although correctly decided, lacks clarity in pronouncing the analytical framework applied. This Section articulates a workable framework going forward to analyze the reasonableness of investigatory traffic stops consistent with the Fourth Circuit's holding in *Digiovanni*, the Supreme Court's holdings in *Johnson* and *Muehler*, and longstanding principles of Fourth Amendment jurisprudence.

A. *The Diligence Standard: Combining Scope and Duration into a Single Inquiry*

Fourth Amendment reasonableness in the traffic stop context should be analyzed under a diligence standard combining the scope of the questioning and the duration of the stop into a single inquiry.[113] Although not clearly articulated, this is the crux of the Fourth Circuit's reasoning in *Digiovanni*. The court held that the scope of an officer's questioning during a stop is still relevant to the

107. *See* discussion *supra* Part III.

108. *See, e.g.*, United States v. Holt, 264 F.3d 1215, 1221–22 (10th Cir. 2001) (weighing the government's strong interest in officer safety against the intrusiveness of asking a driver and passengers to exit a car). The war-on-drug considerations have also been recognized as a governmental interest worthy of allowing limited police probing without finding constitutional violations. *See* Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1874 (2004).

109. *See, e.g.*, United States v. Sharpe, 470 U.S. 675, 686 (1985).

110. *See* discussion *supra* Part III.

111. *See, e.g.*, *Johnson*, 553 U.S. at 333.

112. *See* LaFave, *supra* note 108, at 1904.

113. The Supreme Court initially used the diligence terminology with respect to the duration component of the traditional *Terry* analysis. *See Sharpe*, 470 U.S. at 686.

reasonableness analysis due to its potential implication of the duration prong if an officer is not "diligently pursu[ing] the investigation of the justification for the stop."[114] This treatment is also consistent with the Sixth Circuit's combination of scope and duration into a single diligence inquiry.[115]

The coalescing of scope and duration into a single "diligence" analysis for traffic stops is consistent with the Supreme Court's holding in *Johnson*. As discussed previously, the biggest question remaining after *Johnson* was how to interpret the "measurably extend" standard the Court announced. Using a diligence standard—"whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicion quickly"[116]—as a metric for determining whether an investigatory stop was "measurably extended" aligns with the *Johnson* standard. Viewing measurable extensions through the lens of an officer's diligence elucidates the ambiguous standard pronounced in *Johnson*.[117]

Analyzing diligence consistent with Fourth Amendment jurisprudence requires a fact-specific inquiry, not a bright-line rule (such as a no-prolongation standard). The only concrete standard embedded in the Fourth Amendment is reasonableness.[118] As has been repeatedly emphasized by courts, "The touchstone of our analysis under the Fourth Amendment *is always* the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."[119] Examining diligence as a single inquiry allows courts to weigh both the scope and the duration aspects of a stop and come to a nuanced decision viewed in the totality of the circumstances, rather than applying a stringent durational standard.

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114. United States v. Digiovanni, 650 F.3d 498, 509 (4th Cir. 2011).

115. *See* United States v. Everett, 601 F.3d 484, 494 (6th Cir. 2010) ("[T]he overarching consideration is *the officer's diligence* . . . .").

116. *Sharpe*, 470 U.S. at 686.

117. In fact, the use of "diligence" as a relevant inquiry after *Johnson* has not been limited to the Fourth Circuit. *See Everett*, 601 F.3d at 494; United States v. Pittman, No. 3:10cr0046, 2011 WL 3420624, at *17 n.12, *18 (M.D. Tenn. Aug 4, 2011) (applying the diligence standard, in light of the totality of the circumstances, to unrelated questioning during a traffic stop).

118. *See supra* note 4.

119. Pennsylvania v. Mimms, 434 U.S. 106, 108–09 (1977) (emphasis added) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)); *see also Terry*, 392 U.S. at 9 ("The question is whether in all the circumstances . . . his right to personal security was violated by an unreasonable search and seizure."); Elkins v. United States, 364 U.S. 206, 222 (1960) ("[For] what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.").

B. *Diligence's Operation Along a Continuum*

In order to apply the diligence standard, it is necessary to consider the interaction between scope and duration during an investigatory traffic stop. This Section argues that courts should view scope and duration as operating with an inverse correlation with one another along a diligence continuum. In other words, the broader the scope of questioning during an investigatory stop, the shorter the prolongation a court should tolerate before finding an officer in violation of the diligence standard. Conversely, the longer the duration of a detention, the more narrowly tailored the questioning should be to the justification of the stop to avoid running afoul of the diligence standard.

On one end of the spectrum, there will be those rare cases where an officer's questioning is far enough removed from the traffic stop's justification that courts should not tolerate the question's level of intrusiveness, no matter how brief the detention may be. For instance, inquiries into a detained individual's sexual orientation or political views are so flagrantly in violation of the scope prong that no matter how minimal the prolongation of the detention, it would be patently unreasonable to say that the officer was diligently pursuing the justification for the stop.[120] In such a case, the subject of the questioning is far enough divorced from any rationale justifying the stop that it cannot be reasonably concluded the officer is using any degree of diligence.[121]

At the other extreme, traffic stop detentions could potentially be long enough such that the duration alone renders the stop unreasonable. For example, it is difficult to imagine a line of questioning sufficiently narrow in scope enough to justify keeping a

120. It would be hard to imagine a court finding reasonableness if a police officer were to proceed down a line of questioning prying into sexual orientation after pulling a detainee over for speeding. *See generally* Amy L. Vazquez, Comment, *"Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?" What Questions Can a Police Officer Ask During a Traffic Stop?*, 76 TUL. L. REV. 211, 227 (2001) (noting that it would be "ridiculous" to suggest that an officer might ask a detainee during a routine traffic stop if he has any dead bodies in his car).

121. Such a case presents a unique issue given the holding in *Johnson*, where the Court concluded that "inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure." 555 U.S. 323, 333 (2009). If, for instance, one police officer was conducting the intrusive line of questioning (such as into sexual orientation) while another was writing the ticket, presumably the stop would not be extended any longer than if the officer had not uttered the question. This counterintuitive result suggests that applying a more flexible standard, such as diligence, is the correct interpretation of the curious "measurably extend" language employed by the Supreme Court.

suspect detained, without probable cause, for ninety minutes.[122] Of course, most of the common investigatory stops will not fall into one of these extremes; rather, they will have to be analyzed on an individualized basis to determine if the officer was acting diligently based on the inverse relationship between scope and duration.

C. Case Precedent and the Diligence Continuum

Under the diligence spectrum, considering minimal delays caused by unrelated questioning de minimis, given the totality of the circumstances, is wholly consistent with Fourth Circuit precedent.[123] In these cases, although the questioning is largely unrelated to the justification of the stop, the minimal impact on duration justifies its allowance under a diligence standard. Courts have noted that innocuous questioning about the motorist's destination or purpose of travel does not equate to a lack of diligence on the officer's behalf.[124] There is a key distinction to be drawn between these questions and the extremely intrusive line of questioning discussed in the previous Section. Whereas a line of questioning into sexual orientation is wholly divorced from the scope prong, leaving no leeway with regard to duration, questions about travel plans and travel history are sufficiently related to scope to justify a brief prolongation. As courts

122. *See* United States v. Place, 462 U.S. 696, 709–10 (1983). This is not intended to suggest that if a detainee's conduct causes the prolongation of the detention an officer will be bound by a ninety-minute time limit to conclude the stop. *See* United States v. Sharpe, 470 U.S. 675, 688 (1985) ("We reject the contention that a 20-minute stop is unreasonable when the police have acted diligently and a *suspect's actions contribute to the added delay* about which he complains." (emphasis added)).

123. *See* United States v. Mason, 628 F.3d 123, 131 (4th Cir. 2010) ("It has never been held that brief, incidental questioning about matters unrelated to the traffic violation violates the Constitution."); United States v. Farrior, 535 F.3d 210, 218–19 (4th Cir. 2008) (determining that, during a traffic stop, the voluntary response by a stopped driver to a few of the police officer's brief questions did not implicate the Fourth Amendment). The First Circuit has also taken this view. United States v. Chhien, 266 F.3d 1, 9 (1st Cir. 2001) ("Routine questioning [about the driver's itinerary], even when not directly related to the violations that induced the stop in the first place, is not uncommon during a highway stop.").

124. *See* Illinois v. Caballes, 543 U.S. 405, 408 (2005) ("[W]e accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic stop and the ordinary inquiries incident to such a stop."); United States v. Peralez, 526 F.3d 1115, 1119 (8th Cir. 2008) (noting that the usual tasks conducted by an officer during a routine traffic stop involve "inquiring about the occupants' destination, route, and purpose" (quoting United States v. Sanchez, 417 F.3d 971 (8th Cir. 2005)) (internal quotation marks omitted)); United States v. Martin, 422 F.3d 597, 601–02 (7th Cir. 2005) ("A traffic stop does not become unreasonable merely because the officer asks questions unrelated to the initial purpose for the stop, provided that those questions do not unreasonably extend the amount of time that the subject is delayed." (citing United States v. Childs, 277 F.3d 947, 953–54 (7th Cir. 2002))).

have noted, these questions help contextualize why the motorist was behaving in a way that warranted the stop.[125] As the Sixth Circuit has held, "[s]uch context-framing questions will rarely suggest a lack of diligence."[126]

Of course, the bulk of a court's work when analyzing the reasonableness of an investigatory traffic stop will be making the distinctions between what conduct is de minimis in the totality of the circumstances versus those situations warranting Fourth Amendment protection. This is not a simple inquiry. It requires a court to view the relationship of the questioning to the justification of the stop, the quantity of the unrelated questioning, and the prolongation that ensued due to the questioning. Courts have issued some guidance for resolving this difficult question. For instance, if "questions unrelated to the traffic violation constituted the bulk of the interaction between the trooper and the [motorist]," an officer would not be diligently pursuing the investigation.[127] When analyzing the scope of an officer's questioning, some inquiries will be contextually related to the justification of the stop, warranting the durational increase.[128] Others will be "far[ther] afield,"[129] "patroling [sic] the fourth amendment's [sic] outer frontier."[130] Although difficult decisions are bound to ensue at the margins, the framework's alignment with case precedent provides courts adequate guidance in deciding an officer's diligence in those cases falling within the spectrum's grey area.

D. Benefits and Criticisms of the Diligence Standard

Analyzing reasonableness as the inverse relationship between the scope of questioning and the duration of an investigatory stop (embodied in the single diligence inquiry) affords numerous benefits

125. *See, e.g.*, United States v. Holt, 264 F.3d 1215, 1221 (10th Cir. 2001) ("[A] motorist's travel history and travel plans may help explain, or put into context, why the motorist was weaving (if tired) or speeding (if there was an urgency to the travel).").

126. United States v. Everett, 601 F.3d 484, 494 (6th Cir. 2010).

127. *Peralez*, 526 F.3d at 1121.

128. *See, e.g.*, United States v. Branch, 537 F.3d 328, 337–38 (4th Cir. 2008) (noting that the bulk of the inquiries arising from the traffic stop revolved around the issuance of the traffic citation and verifying that the driver had permission to operate the vehicle after the driver lied about the location of the owner of the vehicle).

129. United States v. Chhien, 266 F.3d 1, 9 (1st Cir. 2001). For an example of police questioning straying substantially from the justification for the stop, see *People v. Goeking*, 780 N.E.2d 829, 830 (Ill. App. Ct. 2002) (where a police officer, after pulling a woman over for turning without a signal, asked if she had any "knives, guns, drugs, dead bodies, grenades, rocket launchers, [or] anything that shouldn't be in the vehicle").

130. LaFave, *supra* note 108, at 1846 (quoting United States v. Roberson, 6 F.3d 1088, 1092 (5th Cir. 1993)).

over a strict no-prolongation standard or a policy unilaterally scrutinizing duration. Most importantly, the diligence analysis stays true to the touchstone of the Fourth Amendment, "a fact-bound, context-dependent inquiry in each case."[131] Eliminating scope from the reasonableness inquiry reduces the analysis to a time-specific inquiry, which inherently fails to view the detention in light of "the totality of the circumstances."[132] Moreover, whereas a no-prolongation rule incentivizes (or at least allows) officers to exploit such a rule,[133] evaluating the officer's actions in relation to the totality of circumstances reduces an officer's ability to manipulate the rigid language of the rule. Encapsulating the reasonableness inquiry into a one dimensional durational analysis would strike a devastating blow to the fact-specific nature of inquiries at the heart of the Fourth Amendment.

From a fairness perspective, the flexible diligence framework diminishes the counterintuitive results[134] stemming from the simultaneous over- and under-inclusiveness of a bright-line rule.[135] Instead, it allows judges to compare and treat substantively analogous cases similarly.[136] A durational inquiry alone would suppress similarities in factually analogous cases, requiring judges to make decisions based on the length of detentions and not the factual context surrounding the scope of the questioning. Again, a rule diminishing the traditional "totality of circumstances" inquiry into a duration-centric analysis fundamentally (and adversely) affects the fairness of the protections afforded by the Fourth Amendment. When reasonableness is the only concrete standard embodied in the language of the Fourth Amendment,[137] adopting a rule that will

131. *Everett*, 601 F.3d at 493.

132. *See* United States v. Digiovanni, 650 F.3d 498, 509 (4th Cir. 2011).

133. *See* Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992). For a discussion of the ways a no-prolongation rule could be exploited by officers, see *supra* notes 92–93 and accompanying text.

134. *See supra* Part III.

135. Bright-line rules and strict standards strip a decision maker of his discretion. On the other hand, standards "spare individuals from being sacrificed on the altar of rules." Sullivan, *supra* note 133, at 66. For instance, a unilateral durational inquiry would be over-inclusive in finding a constitutional violation when a rookie officer delays a stop because he is uncertain how to issue a warning citation. *See* United States v. Farrior, 535 F.3d 210, 219 (4th Cir. 2008). It would be under-inclusive when no constitutional violation is found where a detainee is pulled over for speeding and while one officer is writing the citation, another officer is pursuing a line of questioning into the detainee's sexual orientation, and a third officer is circling the car with a narcotic-detecting dog.

136. *See* Sullivan, *supra* note 133, at 66.

137. *See supra* note 4.

produce unreasonable results is a conceptual fallacy that should not be systematically incorporated into Fourth Amendment jurisprudence.

Admittedly, the criticism of any flexible standard is the lack of predictability the standard can offer.[138] However, the sheer number of cases surrounding the investigatory stop paradigm would mitigate the uncertainty of what conduct will be tolerated during an investigatory stop. There will always be uncertainty in applying a flexible standard to marginal cases; however, this framework clearly articulates a standard, workable in any investigatory traffic stop situation, which aligns with case precedent and clarifies the "measurably extend" language set forth in *Johnson*.

CONCLUSION

In any given month, drivers in the United States account for approximately 240 billion miles of highway travel.[139] These same highways simultaneously serve as "the battleground in the war on drugs."[140] Given the combination of these two factors, it is no surprise that courts are often called upon in the traffic stop context to operate as independent arbitrators guarding the boundaries of the Fourth Amendment in disputes arising among police officers and citizens. Defining reasonableness under the Fourth Amendment proves a complex, fact-intensive analysis requiring the balancing of numerous competing interests. When the Supreme Court announces an ambiguous standard, the reasonableness analysis is further complicated. The Fourth Circuit's application of the diligence standard in *Digiovanni* offers a workable framework for determining when an investigatory traffic stop "measurably extends" a detention in violation of the Fourth Amendment and remains true to the individualized, contextual treatment fundamental to Fourth Amendment reasonableness jurisprudence.

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138. *See* Sullivan, *supra* note 133, at 59.

139. *See Traffic Volume Trends*, U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/policyinformation/travel_monitoring/tvt.cfm (last visited Aug. 17, 2012).

140. *See* LaFave, *supra* note 108, at 1844 n.8.